Legal Aspects Of EC External Trade Relations With Taiwan

Der-Chin, Horng

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Abstract

This thesis will examine legal problems brought about by the EC trade policies towards Taiwan. The concentration is on the external dimension of EC trade protective measures regarding the Common Agricultural Policy and the textiles sector. The reciprocity clause contained in the Second Banking Directive of 15 December 1989 (89/646/EEC) will also be discussed.

The EC has never recognized Taiwan and has therefore never maintained formal trade relations, nor relations using other diplomatic channels. For many years the EC has governed its trade relations with Taiwan on an unilateral basis. Moreover, Taiwan has been always excluded from the EC generalized system of preferences. In many areas, Taiwan’s exports such as preserved mushrooms, textiles and other manufacturai products are then negatively affected in the EC market. Taiwan feels discriminated against particularly in comparison with its main competitors: other newly industrialized countries. The enforcement of reciprocity is on an arbitrary basis by the EC. The EC considered that EC banking institutions only enjoy a limited degree of market access in Taiwan. Therefore, reciprocity may be applied as a means by the EC to open up Taiwan’s banking market.

This thesis will comprise one Introduction and six Chapters. Introduction gives a general review of EC-Taiwan trade relations. Chapter 1 investigates the nature of international trade and the evolution of international trading system. It also examines Taiwan’s economic development and the interplays between Taiwan and the GATT. Chapter 2 reviews EC trade policy and its external impacts on third countries in general and on Taiwan in particular. Chapters 3 to 5 concentrate on legal issues of EC trade relations with Taiwan. Chapter 3 discusses EC Common Agricultural Policy with special reference to Taiwan’s export of preserved mushrooms to the EC. Chapter 4 goes into the EC textiles policy and its effects on Taiwan. Chapter 5 is devoted to EC-Taiwan trade in banking services. Chapter 6, the concluding part of the thesis, proposes possible changes to EC trade policies. In conclusion the candidate refers to the GATT multilateralism for EC-Taiwan trade cooperation.
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Abbreviations

BISD    Basic Instruments and Selected Documents
Bull. EC Bulletin of the European Community
Bull. EU Bulletin of the European Union
CAP     Common Agricultural Policy
CCP     Common Commercial Policy
CCT     Common Customs Tariff
CMLR    Common Market Law Reports
CMLRev  Common Market Law Review
COM     Commission Document
Dec     Decision
Dir     Directive
DG      Director General (of the EC Commission)
EC      European Community/Communities
ECR     European Court Reports
ECSC    European Coal and Steel Community
EEA     European Economic Area
EEC     European Economic Community
EFTA    European Free Trade Association
EU      European Union
Euratom European Atomic Energy Community
FA      Final Act (of the GATT Uruguay Round)
F.T.    Financial Times
GATS    General Agreement on Trade in Services
GATT    General Agreement on Tariffs and Trade
GSP     Generalised System of Preferences
IBRD    International Bank for Restructure and Development
ICJ     International Court of Justice
ICLQ    International and Comparative Law Quarterly
ILM     International Legal Material
IMF     International Monetary Fund
JCMS    Journal of Common Market Studies
JWT     Journal of World Trade
JWTL    Journal of World Trade Law
LIEI    Legal Issues of European Integration
MFA     Multifibre Arrangements
M.f.n.  Most favoured nation
OECD    Organization of Economic Cooperation and Development
OJ      Official Journal (of the European Community)
op. cit. opere citato (in the work quoted)
Reg     Regulation
ROC     Republic of China
SEC     Secretariat-General (of the EC Commission)
UNTS    United Nations Treaty Series
UNCTAD United Nations Conference on Trade and Development
VERs   Voluntary Export Restraint Agreements
WTO     World Trade Organization
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Introduction

The Republic of China on Taiwan (hereinafter refers to Taiwan), is a large island province of China located approximately 100 miles off the southeast coast of the Chinese mainland. Taiwan is 13,735 square miles in size. It is only slightly smaller than the Netherlands and is the 37th largest island in the world. The population of Taiwan is about 20 million (1990 statistics). Overall, the population density in Taiwan is the second highest in the world, ranking behind only Bangladesh. Arable land in Taiwan is more scarce than in many other countries. However, being an island country, Taiwan has free access to the sea, providing the basis for shipping, fisheries and several other maritime activities and easing transport links with trading partners. Taiwan's geographical location helps it to develop global trade relationships. Taiwan Strait is also of strategic security importance as a deterrent against invasion from China.

The Cairo Declaration of 26 November 1943, signed by General Chiang Kai-shek, President F. D. Roosevelt and Prime Minister W. Churchill, stipulated among other things, that Taiwan should be restored to China. The Potsdam Proclamation of 26 July 1945 further asserted that the terms of the Cairo Declaration shall be carried out. Japan accepted the provision of the Potsdam Proclamation on 2 September 1945, which resulted in the return of Taiwan to China in 1945. The United States and the other Allied Powers have also accepted the exercise of Chinese authority over the Island after 1945. A civil war followed between the Communists led by Mao Tse-tung, and the Nationalist government led by General Chiang after the Second World War. At the conclusion of the...
civil war in 1949, the government of Republic of China (ROC) moved its seat to Taipei from Nanking, and the Communists established a new regime the People's Republic of China (hereinafter refers to China) in Peking on 1 October 1949. Since then China has found herself with two rival governments, each claiming to be the sole legitimate government of the whole country.

Taiwan has a special position in the international society. The sovereignty and territorial integrity of Taiwan is not recognized by China. China has not yet waived military invasion as a means for the unification of Taiwan with China. China has declared that the invasion could come about if: Taiwan were to make nuclear weapons, become independent or invade the mainland China. But more importantly, as a result of UN Resolution 2758 (XXVI), Taiwan has been forced to quit the United Nation from 26 October 1971 - on which China has a permanent Security Council seat and a corresponding measure of international influence. Consequently, Taiwan has also been constrained in establishing diplomatic relations with other nations. Today, Taiwan has diplomatic relations with no more than 30 countries, of which about half maintain embassies in Taipei. Taiwan’s foreign strategy has, therefore, been to concentrate on economic and trade relations with other countries.

Taiwan is fully autonomous in the conduct of its external trade relations. The success of this strategy has helped Taiwan to achieve outstanding international trading relevance and economic success in a relatively short period. Indeed, it is claimed that further economic growth would have been attained but for Taiwan’s need to maintain a large defense structure against the threat from China. Taiwan’s confidence in her international trading standing is certainly justified. Taiwan is now one of the 15 largest
trading nations of the world. Taiwan maintains trade relations with more than 150 countries around the world. A significant number of these countries are member states of the European Community. It is the trade relations Taiwan maintains with the EC and its member states that is the focus of this thesis.

The EC is one of Taiwan’s main trading partner. Trade between Taiwan and the EC has significantly grown in recent years. Total trade between Taiwan and the EC has grown from 24 million ECU in 1958, 7165 million ECU in 1986, to 16563 million ECU in 1991. It shows an increase of some 231% between 1986 and 1991. The trade balance was 2238 million ECU and 4467 million ECU in Taiwan’s favour in 1986 and 1992 respectively. Before 1980, the preserved mushrooms and other canned food, and textiles made a big contribution to Taiwan’s trade surplus with the EC. Before 1970, the demand for canned food by West Germany, the Netherlands, and Belgium contributed an average of 50% or more to Taiwan’s total exports to the EC market. From 1970 to 1979, Taiwan generated an average of US $ 70 million in revenue each year in exporting canned-food products to the EC. In the textiles sector, Taiwan’s main consumers are West Germany, the United Kingdom, the Netherlands and Italy. Their demand for textiles products in the late 1960s ranged from US $ 6 to 15 million. In the 1970s, this demand soared to an average of US $ 439 million. Therefore, the preserved mushrooms and textiles played a crucial role in early Taiwan-EC trade relations. The study of preserved mushrooms and textiles can also provide the striking examples for understanding of EC sectoral protectionism.

The EC has never maintained formal trade relations with Taiwan. For many years the EC has governed its trade relations with Taiwan on an unilateral basis. The EC recognized China as the sole legal Government not only of mainland China but also of

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11 In 1992 world merchandise trade, Taiwan ranked as the 12th exporter and 14th importer. See GATT 98 Focus (April 1993), at 2.


13 Wu, Chung-lih. ‘Trade Relations Between the ROC and European Communities in the Twentieth Century’, in LXIV Industry of Free China (1985), at 10.
the territory of Taiwan, in 1975.14 This China-EC diplomatic tie precludes the EC from maintaining official relations or agreements with Taiwan.15 The EC-China trade relations is further developed by the conclusion in 1978 of a trade agreement16 and in 1985 of a trade and economic cooperation agreement17. Many of Taiwan's exports such as the preserved mushrooms were even negatively affected by the shift of EC policy in favour of China's exports.18 The EC-Taiwan trade relation is also influenced by a number of other issues. These include the EC's Internal Market, Taiwan's accession to the General Agreement on Tariffs and Trade (GATT), and the development GATT after Uruguay Round. The Internal Market has its external dimensions. The results of the GATT Uruguay Round19 has profound impacts on international trading system. Taiwan's accession to the GATT will inevitably reshape EC-Taiwan trade relations.

### Taiwan Trade with EC

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<td>33</td>
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<td>Total Trade</td>
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<td>1232</td>
<td>2239</td>
<td>4242</td>
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14 Bull. EC. 5-1975, point 1.2.03. China asked for the similar requirement as the sole legitimate Government on the occasion when it established diplomatic relations with the EC Member States: Denmark (11 May 1950); U.K. (17 June 1954); Netherlands (19 November 1954); France (27 January 1964); Italy (6 November 1970); Belgium (25 October 1971); Greece (5 June 1972); Germany (11 October 1972); Luxembourg (16 November 1972); Spain (9 March 1973); Portugal (8 February 1979); and Ireland (22 June 1979).

15 Interviews with EC Commission official (DG I - External Relations) and Taiwan's Trade Office's official (Far East Trade Services Inc., Taiwan, Branch Office in Belgium) regarding the issue 'Taiwan-EC trade relations', on 17 and 22 December 1993 respectively.


19 GATT. Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations. MTN/FA.
Taiwan-EC trade has a big potential for further development. Without actually asking for the establishment of official relations, Taiwan would like to see the EC take a number of steps in this direction without jeopardising relations with China. Despite the increasing trade flow between Taiwan and the EC, the development of these exchanges is nevertheless unsatisfactory to both sides. This is partly because the EC in the early days neglected Taiwan as a potential outlet for the EC exports. Taiwan’s market is therefore been dominated by products from the United States and Japan. However, in view of the importance of trade flows between Taiwan and the EC, the Community does, from time to time, have informal contacts with Taiwan through such bodies as the Brussels office of the Far East Trade Services Inc., Taiwan. These contacts concern exclusively economic questions. During the informal consultations, both sides exchanged the list of trade barriers intended to be removed. Trade concessions were made during these bilateral discussions. The main issues raised by Taiwan in the recent consultations are, among other things, support for Taiwan’s accession to the GATT and the lifting of the EC’s autonomous trade policy on Taiwan. The other EC trade policy areas affecting Taiwan’s export are: anti-dumping measures; non-tariff barriers in agricultural sector; and the absence of mutual recognition of technical standards. The main concern of the EC is non-discriminatory treatment towards EC citizens and products. The EC, in particular, wanted treatment comparable to that offered to the United States. Other issues of concern the Community are: protection of intellectual property; and market access to financial services.

Exports of preserved mushrooms and textiles are acknowledged to have been

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20 Interviews with the EC Commission official and Taiwan Trade Office's official at Brussels on 17 and 22 December 1993 respectively.

21 Interview with Taiwan Trade Office's official at Brussels on 22 December 1993.

22 Interviews with EC Commission official (DG I - External Relations) on 17 December 1993. The following informal consultations between Taiwan and the EC have been held: London (Dec. 1981); Singapore (Mar.1982); London (Oct.1984); Belgium (Oct.1986); Singapore (Mar.1987); London (May 1988); Bangkok (Jul.1989); London (Jan.1991); and Taipei (May 1992).

23 Interviews with the EC Commission official (DG I - External Relations), on 17th December 1993.

24 Interviews with Taiwan's Trade Office's official at Brussels on 22 December 1993.

25 Interview with the EC Commission official on 17 December 1993.
substantially contributed to Taiwan's economic development including job creation and trade surplus. Significantly, they also fall within the agriculture and textiles trade sectors for which the EC reserves its "hard core" measures. The EC has traditionally maintained a very strict protective policy in these sectors. The importance of banking services to national economy and international trade is well recognized by both Taiwan and the EC. In fact, regulation of banking services and the management of trade in the agriculture and textiles sectors are among the main issues of the Uruguay Round. The GATT will extend more effective rules or disciplines in these sectors.

This thesis sets Taiwan as an example to emphasize the external implications of EC trade policy on third countries. The review of EC trade policies will be based on the GATT approach. Understanding the impact of EC trade measures is of considerable policy relevance. Thus, economic and political analyses are also used to facilitate legal discussions. Such a contextual approach is helpful to achieve a better understanding of the external significance of EC trade policy. Viewed against this background, the thesis has the main purposes of examination the external dimension of EC trade policy in a GATT context, by focuses on Taiwan and EC trade relations. The following issues will be examined: (1) The international trade rules in agricultural products, textiles and banking services; (2) The EC legal framework for preserved mushrooms, textiles and banking services and the way in which their operation in practice have affected Taiwan trade with the EC; (3) The necessary reform of the EC trade policy in these three areas from the standpoint of the EC's external relations with its trading partners; and (4) Taiwan’s potential accession to the GATT and its impact on EC-Taiwan trade relations.

26 Wu, Huang Sophia. 'Structural Change in Taiwan's Agricultural Economy', in 42 Economic Development and Cultural Change (1993), at 49; and Solter, Myron. 'Impact of Taiwan Textile and Mushroom Exports on U.S. Producers', in 35 Industry of Free China (1971), at 8 and 9.


Chapter 1: Taiwan and International Trading System

International trade plays an important role in both national and world economy. It is generally agreed that international trade is a main factor in spurring Taiwan's economic development. After the second World War, the GATT has become the main international trading system for trade cooperation. This Chapter will discuss the relative position of Taiwan in the international trading system, and from this account to justify the case for a system of international trade cooperation that should not exclude Taiwan.

A. Trade Relations in a Changing World

1. The Role of International Trade

International trade involves the exchange of goods and services and the movement of factors of production among countries. The cause of international trade is the pursuit of individual profit and national interest. In the Wealth of Nations, Adam Smith explained why international trade might occur when one country has a cost advantage in production of some products, but not all products. Some goods can be bought more cheaply from outside than they can produced domestically. Therefore, nations should specialize in what they could do best so that they could become wealthy. Ricardo further developed the basic idea into the principle of comparative advantage. Comparative advantage is the basic determinant of the direction of trade and of the gains from trade among countries. Nations export the good they can produce relatively cheaply and import goods that are relatively more costly to produce at home. Therefore, the flow of trade among countries is determined by the relative (not absolute) costs of the goods produced. The international division of labour is based on comparative costs, and countries will tend to specialize in those products whose costs are relatively lowest. Consequently, international division of labour will enable all countries to gain from trade.

Comparative advantage explains the source of mutual gains to countries from

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2Smith, Adam., op. cit., at 447.

international trade. In particular, international trade shows that a nation can gain from trade even if it is at an absolute disadvantage in all productive activities. The principle of comparative advantage, however, does not suggest that every nation will be equally made better off by trade. Actual trade flows are determined by international competitiveness, of which comparative advantage is just one element, along with exchange rates and other economic policies. Comparative advantage is a reliable predictor for international trade when the influence of trade-distorting policies is minor. Therefore, the benefits of trade may be shared unequally among countries. Other factors affecting the trade gains distribution include country size, economic sources, economic and industrial development, product competitiveness, market structure, technology gap, administrative efficiency, economic liberal degree etc.4

The main advantage of international trade is economic efficiency through production specialization. Production gains result from a more efficient employment of factors of production. Other benefits derived from international trade include the creation of national wealth, the improvement of productivity, competition, and consumer's welfare. The discovery of the Americas and of a passage to the East Indies were even regarded as a result of search for national wealth by international trade.5 Today, international trade is an important mechanism for introducing new technology and for innovation of new products for potential users.6 All in all, international trade helps national governments lead to a more efficient allocation of resources and a rekindling of long-term economic growth.7

International trade has a close link with economic power and wealth which are essential elements to national interests.8 Power and wealth are relative. The relationship between power and wealth could be described in the following: (1) wealth is an absolutely

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5Smith, Adam. op. cit., at 446-448.


8Smith, Adam. op. cit., at 450-51.
essential means to power, whether for security or for aggression; (2) power is essential or valuable as a means to the acquisition or retention of wealth; (3) wealth and power are each proper ultimate ends of national policy; and (4) there is long-run harmony between these ends, although in particular circumstances it may be necessary for a time to make economic sacrifices in the interest of military security and therefore also of long-run prosperity. Economic issues have become far more salient in international relations both because of their increased importance in their own right and because of the decline in concerns about survival and the traditional forms of security. This trend implies a possible change in national goals from power to wealth. International relations then will be increasingly dominated by economic issues. Countries may also aim to secure or maintain political influence through economic power. The U.S. has gradually lost the leverage in negotiations with its main trading partners as a result of the end of cold war. Therefore, the rising economic powers such as the EC and Japan will play an increasing role in international relations. Taiwan, as an emerging regional economic power, can also benefit from international trade to make a breakthrough in its diplomatic dilemma.

International trade provides a common ground for countries to pursue their national interests. International trade then binds international society together: 'intercourse tends to unite the most distant nations as well as to improve them; and... their mutual interests leads them to endeavour to become serviceable to one another'. International trade would also be helpful for the creation of a stable world order. John Stuart Mill observed


12 Bergsten, C. Fred. ' The Primacy of Economics ', in 87 Foreign Policy (1992), at 4, 5 and 21.


Commerce first taught nations to seek with good will the wealth and prosperity of one another. Before, the patriot, unless sufficiently advanced in culture to feel the world his country, wishes all countries weak, poor and ill-governed, but his own; he now sees in their wealth and progress a direct source of wealth and progress to his own country. It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. And it may be said without exaggeration that the great extent and rapid increase of international trade in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions and the character of the human race.'

2. The Significance of Economic Interdependence

The concept of interdependence is regarded as 'the fact or condition of depending each upon the other; mutual dependence'. From the aspect of world politics, interdependence is referred to 'situations characterized by reciprocal effects among countries ....' Economic interdependence is regarded as a consequence of rapid development of trade, communication, and technology based on the principle of comparative advantage. Adam Smith illustrated more or less the same point in his famous 'pinmaking' example through which he suggested that specialization may create dependency. Consumers depend on factories to produce pins. Factories depend on access to pin markets, and pin markets depend on the demand for their specialized skills. Similarly, economic interdependence can be reflected by the degree of internationalization of the national economy and the proportion of foreign trade in its GNP. The link between national policies and international relations has greatly grown by the development of economic interdependence. This development was considered as a process of 'diffusion,
spill-over, or escalation.\footnote{Frankel, J. International Relations in a Changing World (1990), 4th ed., at 219 and 220.}

In a world of economic interdependence, national economic sovereignty may be limited by international commitments.\footnote{Panic, Milivoje. National Management of the International Economy (1988), at 56.} However, national policies also have possible external effects on third countries.\footnote{Kuznets, S. Economic Change: Selected Essays in Business Cycles, National Income, and Economic Growth (1953), at 308.} For instance, the interdependence of financial markets is not only wide and deep, but also truly international. The innovation of globalization of financial markets is developed by the deregulation of domestic financial markets which leads to a trend of financial liberalization at national, regional and international levels.\footnote{Khourg, Sarkis J. The Deregulation of the World Financial Markets (1990), at 30.} The globalization of financial markets further leads to the growing similarity between the institutional structures and trading practices in the main financial markets.\footnote{Moran, M. The Politics of the Financial Services Revolution (1991), at 8 and 9.} In the long run, economic interdependence may even have the impacts on all areas of national and international systems. Karl Marx clearly depicts this impact caused by market process as following:\footnote{Manifesto of the Communist Party. Marx, K. and F. Engels. Basic Writings on Politics and Philosophy (1959), L. S. Feuer (ed), at 11.}

\begin{quote}
The bourgeoisie, by the rapid movement of all instruments of production, by the immediately facilitated means of communication, draws all, even the worst barbarian, nations into civilization. The cheap prices of its commodities are the heavy artillery with which it batters down all Chinese walls, with which it forces the barbarians’ intensely obstinate hatred of foreigners to capitulate. It compels all nations, on pain of extinction, to accept the bourgeois mode of production; it compels them to introduce what it calls civilization into their midst, i.e., to become bourgeois themselves. In one word, it creates a world after its own image.
\end{quote}

In many areas, such as nuclear weapon and environmental pollution, States face the same common crises. All kinds of disasters can become worldwide once a chain of events is set on course. Failure to cooperate in the areas of common crisis may imply a positive harm to all. It is an issue even described as ‘beyond interdependence’.\footnote{MacNeill, J., P. Winsemius and T. Yakushiji. Beyond Interdependence (1991).} Every country
is then concerned about environment, population, drugs, terrorism, AIDS, immigration, economic stagnation, and trade protectionism. And these issues cannot be dealt with effectively by an inward-looking strategy. For example, trade protectionism will not be resolved without an effective attack on both economic stagnation in developed countries and economic development in developing-country. There is interdependence among countries. There is also interdependence among issues. These two types of interdependence make forceful pursuit of a multilateral approach to issues more important than ever. The institutionalization of international cooperation is also regarded as a response to increasing interdependence among States. The complexity of international economic relations makes it necessary for governments to carry on their relations on a well-organized international regime.

3. Institutionalization of International Economic Cooperation

The Preamble of the UN Charter calls for the employment of international institutions to promote the economic and social advancement of all peoples. The UN does also intend, as provided in Article 1 UN Charter, to be a centre for harmonizing the actions of nations in the attainment of international cooperation in solving international problems of an economic character. Articles 55 and 56 explicitly oblige member States to take joint and separate actions in cooperation with the UN in solving international and domestic problems in the economic fields. The UN has a special relation with its special agencies and the GATT for international economic cooperation. The institutionalization of international economic cooperation under the UN framework provides an effective means for resolving international economic problems which then contributes to international peace and security.

The foundation of international institutions is generally based on the international

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30 Bokor, Szego Hanna. The Role of the United Nations in International Legislation (1978), at 86.
31 The specialized agency system has its origin in Chapter IX of the UN Charter, particularly in Articles 55-57.
32 Cassese, A. International Law in A Divided World (1986), at 151.
agreement. International agreement is essentially founded on the consent of States, which is the main obligation of international law. The nature and force of international obligation in the international agreement is derived from the general principle ‘pacta sunt servanda’. The Vienna Convention on the Law of Treaties has given due place to this principle in Article 26 which is headed pacta sunt servanda and states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’. The Convention, provided in paragraph 3 of its Preamble, also notes that ‘the principles of free consent and good faith and the pacta sunt servanda rule are universally recognized’. In this view, a treaty should be enforced in a way that fulfils the purposes of the joint understanding, including the exchange of reciprocal rights and obligations.

With the growing interdependence of states, the rule of good faith has become an even more important tool for international cooperation.

The institutionalization of international economic cooperation is also influenced by the concept of functionalism. Functionalism aims to assure peace and well-being for the people. The basic assumption underlying traditional functionalism is that politics and economy are separate functions of the States and that peace can be achieved through economic and social internationalization without disturbing national sovereignty. The integration proceeds from economic areas, which contribute to common interest among participants. The economic gains can promote further cooperation. Therefore, the interests of all States would be gradually integrated. This process was referred to as ‘federation in instalments’. Functionalism has contributed to the development of peaceful means for international cooperation. In many areas, the international system has shifted from a power-politics oriented to an institutional-rule oriented regime after the Second World War. There is a growing trend that national governments entrust the cooperation of those


34 UN Doc. A/CONF. 39/27, 23 May 1969. See also in 8 ILM (1969), at 679 to 735.


technical and political neutral tasks to the international institutions.  

Neo-functionalism emphasizes the dynamic in the integration itself. In other words, the economic integration managed by the central institutions will automatically lead to a political integration. The spill-over effect inherent in the economic integration process promotes further cooperation in all directions and leads ultimately to the formation of a new political community. The neofunctionalism concentrates on the development of collective decision-making through institutional level. It also recognizes the different nature and degree of interdependence in various part of the world. Therefore, neofunctionalism is more interested on the specific regional integration rather than on the international level at large. This is a main difference to functionalism based on a global approach. In addition, neo-functionalism recognizes that economic integration has its limitations. Therefore, the attainment of a higher level of economic integration is still necessarily supported by a degree of political integration. Hass' definition of integration as a dynamic process, and strategic importance which he attributed to the central institutions, have been widely accepted. From the Schuman Plan of 1950, which proposed the establishment of a supranational institution and of a common market for coal and steel, the EC has evidenced of spill-over effect to all economic activities and even to political integration. Regional cooperation therefore becomes a phenomena in the international economic relation after the Second World War.

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41 Hass, E.B. ' The United of Europe and the Uniting of Latin American ', in 5 JCMS (1967), at 327.


B. The General Agreement on Tariffs and Trade

1. The Background of the GATT

The lack of an open world economy during the 1930s was considered a main cause of the Second World War. Well before the end of the war, the United States, with the British cooperation, decided to take the lead in establishing a liberal regime for the post-war world economy. The post-war era then witnessed a far-reaching reorganization of the world economy through the Bretton Woods system. The Bretton Woods Agreement of 1944 resulted in the establishment of two important international organizations in the economic fields, namely, the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF). The first was designed to promote and organize long-term capital movement and international investment, the second to ensure stability of exchange rates and the adoption by member countries of the appropriate monetary and foreign exchange policies. In the field of international trade, the initial U.S. proposal was the International Trade Organization (ITO) based on the Havana Charter. The General Agreement on Tariffs and Trade (GATT), based on the commercial policy provisions in the Havana Charter, had been agreed in 1947 in order to provide a framework for tariff negotiations. After the failure of the U.S. Congress to ratify the Havana Charter, the GATT assumed the commercial policy role designed for the ITO. The GATT is governed by a protocol of provisional application. When the ITO failed to appear, GATT emerged as the main international regime for international trade relations.

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47 The Agreement of IBRD and of IMF of 1945, see 2 UNTS 134 (1945) and 2 UNTS 39 (1945) respectively.


49 The GATT and the Protocol of Provisional Application was signed on 30 October 1947, see 55 UNTS 188 and 194. The text of GATT also see GATT, BISD, vol.IV (1969), at 1-78.

50 Jackson, J.H. Restructuring the GATT System (1990), at 1 and 15-17.
GATT was completed in October 1947 and entered into force in January 1948. By June 1994 the GATT has 123 contracting parties. GATT also covers more than 90% of the world trade. The main objectives of GATT are to liberalize international trade and place it on a secure basis, thereby contributing to the economic growth, development, efficiency and welfare of its contracting parties. It further provides a foundation of peace for international economic relations. A variety of approaches have been applied by GATT contributing to these objectives, including: (1) a set of international trade rules, in particular the m.f.n. treatment and the national treatment, for international trade relations; (2) a framework of institutions for coordinating national policies on international trade matters; (3) a series of multilateral trade negotiations for trade liberalization by the reduction of trade barriers and the elimination of discriminatory treatment; and (4) the procedure of dispute settlement for international trade consultation and cooperation.

51 GATT. 108 Focus (June 1994), at 8.
53 The Preamble GATT.
56 Other main GATT rules include: anti-dumping and countervailing duties (Art.VI); rule of origin (Art.IX); transparency policy (Art.X); general elimination of quantitative restrictions (Art.XI); subsidies (Art.XVI); state trading enterprises (Art.XVII); dispute settlement (Art.XXII and XXIII); customs union and free-trade area (Art.XXIV); waiver (Art.XXXV); trade and development (Part IV); and trade negotiations (Art.XXVIII bis). The Final Act of the Uruguay Round further extended the GATT rules to trade related investment, services, and intellectual property rights. See the General Agreement and the Final Act of the Uruguay Round.
57 The GATT institutions include: the Contracting Parties; the Council of Representative; Consultative Group of Eighteen; Committee; Working Parties; Panel; and the Secretariat. See GATT. BISD 12S/10 (1964); 9S/8 (1961); and 26S/289(1980).
58 Art.XXXVIII bis GATT envisages the holding of trade negotiations " from time to time ". Eight trade negotiations have been held: Geneva (1947); Annecy (1949); Torgauy (1950); Geneva (1956); the Dillion Round (1960-61); the Kennedy Round (1964-67); the Tokyo Round (1973-79); and the Uruguay Round (1986-93).
2. The Most Favoured Nation Treatment

Article I of GATT regarding the unconditional most-favoured-nation treatment is generally considered as the cornerstone of the GATT.\(^{60}\) Article I (1) provides that any trade concession made by any contracting party to any other government is directly obligated to grant immediately and unconditionally the same concession to all other GATT members. The function of the m.f.n. clause is to secure the benefits of multilateral trade through reciprocal and mutually advantageous arrangements.\(^{61}\) The m.f.n. also contributes to the elimination of discriminatory trade practices and thus reduces the conflict of interests among countries.\(^{62}\) A main reason why GATT depends so much on m.f.n. is that 'equal treatment is the engine of substantial multilateralism'.\(^{63}\) The International Court of Justice has also said that the intention of the m.f.n. clause is to 'establish and maintain at all times fundamental equality without discrimination among all of the countries concerned'.\(^{64}\) The m.f.n. is also an economic approach for trade liberalization, which would effectively avoid duplicate negotiations with other members. Moreover, the m.f.n. concession also ensures a more stable trade relations for its members. For a member to back out of its nondiscriminatory obligations would threaten other countries concerned. Article XXVIII GATT prescribes a cumbersome procedure for the modification of tariffs concession. This clause is not as easily and automatically a floating device as a bilateral clause in general. Therefore, it is practically impossible to arbitrarily abolish the bilateral concessions.\(^{65}\) The function of m.f.n., however, is limited by many exceptions provided in the GATT or granted by the contracting parties, in particular the 'grandfather clause' preference (Art.I:2), safeguard clause (Art.XIX), customs union and free-trade areas (Art.XXIV), waivers authorizing discriminatory treatment (Art.XXV:5) and the GSP.


\(^{64}\) The United States Nationals in Morocco case. I.C.J. Reports (1952), at 192.

\(^{65}\) Curzon, G. Multilateral Commercial Diplomacy (1965), at 62.
granted by contracting parties (the Decision of 25 June 1971 (BISD, 18S/24), and the Enabling clause (BISD, 26S/203).66

From the establishment of GATT down to world economic recession of 1970s world trade was largely conducted on the principle of m.f.n. During this period, which also saw the heyday of free trade, the m.f.n. clause served to provide the framework for the liberalization and expansion of world trade. Under the approaches of m.f.n. and overall reciprocity, the world economy could clearly reap the benefits of market economy.67 Tariff barriers had been substantially reduced following a series of multilateral trade negotiations. The average tariff has fallen from almost 40% when the GATT was founded to 4.7% now - and will be as little as 3% after implementation of the Uruguay Round commitments.68 The non-tariff trade barriers, however, remain as a main obstacle to world trade.69 Because of high unemployment, low economic growth and heightened international competition, one country after another was constrained to take protective measures.70 The GATT exception provisions have been frequently abused for obligation evasion. Countries also have sought trade advantages by taking measures not adequately dealt with in normal trade negotiations or covered by the rules of GATT.71 Many countries, therefore, have turned to other alternatives such as bilateral or regional

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66 Other exceptions in the GATT include: anti-dumping and countervailing duties (Art.VI: 2 and 3); retaliation for discriminatory application of quantitative restrictions (Art.VII: 4(c) and (d) and Art.XVIII: 12(c) and (d) and XVIII:21); exceptions to the rule of non-discrimination in the administrative of quantitative restrictions (Art.XIV:1); security regulations (Art.XXI); nullification or impairment (Art.XXI); frontier traffic (Art.XXII); and non-application of the GATT between particular contracting parties (Art.XXXV). See the General Agreement.


69 Trade barriers are those measures applied to imports and exports and other measures directly affecting trade. They can be divided into two groups: tariff, and non-tariff barrier. Non-tariff barriers can include: quota and quantitative restrictions, including VERs and OMAs; tariff quotas and surcharges; licensing and mixing requirements; variable levies; customs valuation; rules of origin; government procurement; technical barriers; safeguard actions; anti-dumping actions; countervailing actions; export subsidies, tax exemptions and concessionary export financing; export restrictions, including VERs and OMAs; other government assistance, including subsidies, tax exemptions; free-trade zones, including in-bond manufacturing; role of state-trading enterprises; foreign exchange control relating trade; government-managed countertrade; and any other measures covered by the GATT, its annexes and its Protocols. See GATT. BISD, 36S/409. The Final Act of the Uruguay Round also extend rules in order to remove trade barriers in: phytosanitary measures; technical barriers to trade; counterfeit goods; and regulatory barriers.


approaches for trade liberalization. A formal world trade organization has become ever more necessary.

3. The Agreement Establishing the World Trade Organization
On 15 December 1993, the Trade Negotiations Committee of the Uruguay Round adopted by consensus the texts in the Final Act embodying the results of the Round. The Final Act consists the Final Act itself; the Agreement establishing the World Trade Organization (the WTO) and agreements annexed to it; and additional Ministerial decisions and declarations. The WTO Agreement establishes a new World Trade Organization as "the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement." The WTO Agreement has four Annexes. Annex 1 includes substantive trade agreements on trade in goods (Annex 1A), the new General Agreement on Trade in Services (GATS, in Annex 1B), and the new Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C). Annex 2 consists of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Annex 3 provides for the Trade Policy Review Mechanism, a process of multilateral surveillance of national trade policies. The Agreements in Annexes 1, 2, and 3 which are integral parts of the WTO Agreement and binding on all Member of the WTO. The WTO thus has the tasks of implementing the WTO Agreement; providing the framework for implementation and dispute settlement; providing the forum for negotiations among Members; and cooperating as appropriate with the IMF and the World Bank.

The WTO is to have a multilateral structure with many bodies. There is to be a biennial Ministerial Conference with overarching authority. The General Council will carry out the Ministerial Conference’s functions between meetings, as well as specific functions such as approval of the budget and financial regulations. Under the General Council will separate Councils for Trade in Goods, Trade in Services and Trade-Related Aspects of Intellectual Property Rights, which may create subsidiary bodies. The General Council will convene as appropriate to discharge the responsibilities of the Dispute

Settlement Body and the Trade Policy Review Body provided for in Annexes 2 and 3 respectively. Almost every one of the agreements annexed to the WTO Agreement creates a committee to oversee that agreement’s implementation.

Annex 1A includes the General Agreement on Tariffs and Trade 1994 (GATT 1994). A general note provides that in the event of conflict between GATT 1994 and a provision of another Annex 1A agreement, the provision of the other agreement shall take precedence to the extent of the conflict. Annex 1A includes some agreements that are entirely new, such as the Agreement on Agriculture or the Agreement on Trade-Related Investment Measures. Article II:4 of the WTO Agreement provides that the GATT 1994 is legally distinct from the GATT 1947. Thus, the WTO will not be a successor agreement to GATT; insofar as governments accept the WTO Agreement and do not simultaneously withdraw their provisional application of the GATT 1947 under the Protocol of Provisional Application (which provides for withdrawal on 60 days’ notice), they will be bound by two separate m.f.n. clauses applying to different sets of commitments and countries. Members of the WTO will apply the GATT 1994 definitively; provisions relating to provisional application are not incorporated into the GATT 1994. The United States, the EC and certain other participants have already indicated their intention not to continue provisional application of GATT 1947 under the WTO system.

Dispute settlement is based on the Understanding on Rules and Procedures Governing the Settlement of disputes. The Understanding will be administered by a Dispute Settlement Body (DSB) which will make decisions solely by consensus. Dispute will be considered by a panel of three experts and may be appealed to a new seven-member standing Appellate Body. The report of the panel or the Appellate Body will be adopted, unless the DSB decides by consensus otherwise. Similarly, in case of non-compliance with panel recommendations and rulings, requests for suspension of concessions which are consistent with the requirements of paragraph 22 will be approved unless the DSB decides by consensus to reject a request. Effective implementation of the WTO dispute settlement is likely to reduce those unilateral measures adopted by some.

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developed countries. It will then contribute to the credibility of the WTO as a whole.\textsuperscript{75} The importance of the WTO is essentially to promote trade cooperation and liberalization under a more effective trading system. However, uncertainties remain concerning the implementation of the Final Act by its signaturing participants.\textsuperscript{76}

\textbf{C. Economic Development in Taiwan}

\textbf{1. The Growth of Economy}

Taiwan's economic development has four general objectives as other countries: economic growth; economic stability; full employment; and equitable distribution of income. The economic growth in Taiwan over the past four decades is very impressive. It is regarded as one of the world’s most successful economies.\textsuperscript{77} Between 1951 and 1987 the Taiwan economy grew at an annual rate of 8.9\%, far faster than the under 4.0\% growth achieved by the industrial countries and the under 5.0\% rate of developing countries during the same period.\textsuperscript{79} The Economic growth of Taiwan showed a rate of 7.3\% and 5.3\% in 1989 and 1990 respectively. In the 1990s, the economy of Taiwan is expected to remain well-run and fundamentally sound with high growth, low inflation and unemployment, and large foreign exchange reserves.\textsuperscript{80} Taiwan's Gross National Product (GNP) has grown from U.S. $1.2 billion in 1951 to U.S. $161.7 billion in 1990. Its per capita GNP has increased from U.S. $145 in 1951 to U.S. $7,997 in 1990, ranking Taiwan 25th in the world. It is anticipated that the figure of per capita GNP will reach U.S. $

\begin{itemize}
  \item \textsuperscript{75} Kohona, Palitha T.B. ' Dispute Resolution under the World Trade Organization: An Overview ', in 28 JWT (1994), at 47.
  \item \textsuperscript{76} F.T. ' Greater wealth of nations ', editorial comment, December 16, 1993, p.19.
  \item \textsuperscript{78} The Economist. ' Taiwan's huge savings ', March 14th 1992, vol.322, No.7750, at 117.
  \item \textsuperscript{79} Li, K.T. Economic Transformation of Taiwan, ROC. (1988), at xii.
  \item \textsuperscript{80} The Economist. The World in 1993 (1992), at 80.
\end{itemize}
20,000 by the turn of this century.\textsuperscript{81} Taiwan's economic growth is also characterized by a rapid increase in trade activities. Taiwan is emerging as a major trading nation in developing countries. Its trade exports in 1993 ranked 12th in the world, and imports 15th. The total trade value of Taiwan was U.S. $162 billion with a 8 billion surplus in 1993.\textsuperscript{82} Taiwan intends to transfer its economic structure into a fully developed industrial society by the year of 2000.\textsuperscript{83}

Capital movement has become a new driving force of the world economy.\textsuperscript{84} A relatively large capital will have a comparative advantage in the production and exportation of services.\textsuperscript{85} Capital can serve important functions as purchasing power and credit power. Capital can equally be used to purchase commodities, including gold and securities, or to discharge debts by it.\textsuperscript{86} Capital is also important for a State's financial credit and foreign-investment confidence.\textsuperscript{87} Many developing countries now facing a worsening shortage of capital are also experiencing declining foreign direct investment and economic development.\textsuperscript{88} Taiwan's foreign reserves were once over $82 billion in 1992. Consequently, Taiwan has one of the world's largest accumulations of financial assets.\textsuperscript{89} Thus high savings and huge foreign reserves should improve Taiwan's credit

\textsuperscript{81}Memorandum on Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu submitted by the Republic of China to the General Agreement on Tariffs and Trade (January 1, 1990) and (January 17, 1992 revision), reprinted in Chiu, Hungdah (ed), Chinese Yearbook of International Law and Affairs vol.9 (1989-90), at 224-76; and vol.10 (1990-91), at 206-270.

\textsuperscript{82}GATT. 108 GATT Focus (1994), at 2.

\textsuperscript{83}See generally Council For Economic Planning And Development (ROC). Perspective of the Taiwan Economy up to the Year 2000 (1986).

\textsuperscript{84}Drucker, Peter F. 'The changed world economy', 64 foreign Affairs (1986), at 768.

\textsuperscript{85}Hindley, B. and Alasdair, S. 'Comparative Advantage and Trade in Services', in 7 World Economy (1984), at 386 and 387.

\textsuperscript{86}Mann, F.A. The Legal Aspect of Money (1992), 5th ed., at 28-30.


\textsuperscript{89}The Economist. 'Taiwan's huge savings', op. cit., at 117.
Taiwan's market will become more attractive to foreign firms and products as a direct consequence of its increasing capacity of consumption. As a whole, the large foreign reserves would help Taiwan upgrade its economy by importing technology and services from the US, Japan and the EC.

2. The Importance of Trade

International trade has played a crucial role in Taiwan's economic development. Taiwan has carried out a series of economic plans to meet its economic development at different stages. In implementing this strategy, international trade has been seen as an important driving force for Taiwan's economic growth. The Taiwan's small geographical area, large population and limited natural resources suggest that Taiwan must develop foreign trade to survive. According to one observation, 52% of the industrial growth in the 1961-71 period originated from increased exports of manufacture while 81% of the growth in the 1971-76 period was related directly or indirectly to manufacturing export activities. Equally, the continuation of trade growth is inevitably tied to the expansion of Taiwan's relations with other countries. Taiwan has had to substitute economic and trade relations for conventional diplomatic ties. The need of security has imparted to Taiwan's foreign trade relations a special political function that other countries can better afford to ignore. The reasoning is that close external trade relations with third countries would attract their interests in Taiwan. This in turn should create a degree of detente to avoid the military attack on Taiwan by China.

International trade also has a close link with the recent political reforms and

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90 Taiwan's sovereign debt risk was rated AA in 1989, just one notch below the AAA rating given to Japan and Germany. See Standard & Poor's International Creditweek, 26 June 1989, at 29, 38 and 52.
91 Morishima, M. Capital and Credit (1992), at 22.
92 Li, K.T. op. cit., at 107.
democracy in Taiwan.\textsuperscript{96} Taiwan is willing to allow its economy to be based mainly on market forces. Moreover, Taiwan's experience further shows its willingness to accept the political consequences of economic growth.\textsuperscript{97} This economic free-choice in turn generates political freedom and democracy.\textsuperscript{98} Today, the interdependence between economic freedom and political freedom has gained even more relevance.\textsuperscript{99} With the adoption of export-led trade policy, government controls became less and less important because price, distribution, and other restrictions make little sense to bureaucrats when private sectors' outputs are mainly addressed to foreign markets.\textsuperscript{100} The success of economic development in Taiwan not only fosters political reform but also ensures a stable democracy.\textsuperscript{101} Taiwan has initiated a notable step for political reform in recent years. This has resulted in the lifting of martial law, the formation of opposition parties, and the liberalization of mass-media control.\textsuperscript{102} Taiwan lifted the Martial Law on 15 July 1987. The leading opposition party, The Democratic Progressive Party, was established on 28 September 1986. It formally received legal status in January 1989. Taiwan's first fully democratic general election was held on 19 December 1992. The Democratic Progressive Party won one third of the Parliamentary seats (i.e. 50 against 150). The ruling party, Kuomintang, admitted that Taiwan is breaking new ground on the road to a bipartisan democracy.\textsuperscript{103} The political reform has created a more liberal environment for the contention of rival interests. It thus helps in establishing a stable democracy.

\textsuperscript{99} Friedman, Milton. Capitalism and Freedom (1982), at 8.
\textsuperscript{101} Li, K.T. 'The Taiwan Experience and Taiwan's Political and Economic Prospects', in 76 Industry of Free China (1991), at 28.
\textsuperscript{102} Yeh, Jiun-Kong. 'Changing Forces of Constitutional And Regulatory Reform In Taiwan', in 4 Journal of Chinese Law (1990), at 84.
\textsuperscript{103} The Economist. 'Taiwan breaks the mould', Vol.326, No.7792, December 26th 1992 - January 8th 1993, at 77 and 78.
democracy and building public confidence.\textsuperscript{104}

International trade has led Taiwan’s effort to integrate its economy into the international trading system. Taiwan has adopted a liberal trade policy since 1962. Taiwan’s confidence for a liberal trade policy is derived from the success of the prior economic performance, in particular the land reform and the export-led trade policy.\textsuperscript{105} The trade liberalization movement in Taiwan has profound implications. Internally, liberalization essentially refers to the removal of trade barriers and other kinds of government controls. Externally, liberalization implies a trend of internationalization. This means that Taiwan intends to open up its market to foreign competition and to integrate its economy with the world economy. In both dimensions, liberalization implies a greater role for market forces and less resort to government intervention.\textsuperscript{106} By 1992, the effective duty rate in Taiwan was reduced to 3.5%, the average in the developed countries. Trade liberalization in Taiwan shows a continuing trend, as most developed countries move in the opposite direction.\textsuperscript{107} Trade liberalization will increase imports which in turn will create a more balanced two-way trade between Taiwan and its trading partners including the EC.

3. The Main Trading Partners
Traditionally, Taiwan has a strong trade link with both United States and Japan. American and Japanese capital, technology, and management know-how have made a great contribution to Taiwan’s economic development.\textsuperscript{108} Moreover, U.S. military and economic aids might have played a stabilizing role in the early Taiwan’s economic growth. US economic aids to Taiwan was at first largely justified by the security

\textsuperscript{104} Chien, Fredrick F. 'The Republic of China under the New International Order in the Post-Cold War Era', in 10 Chinese Yearbook of International Law and Affairs. 1990-91. (1992), at 3.


\textsuperscript{106} Li, K.T. The Evolution of Policy Behind Taiwan’s Development Success (1988), at 133.


\textsuperscript{108} Bagchi, Amiya Kumar. The Political Economy of Underdevelopment. (1982), at 199.
consideration to prevent the island’s occupation by China.109 In the period between 1953 and 1964, the United States provided Taiwan economic aids an average of US $100 million a year. These aids were used to import large quantities of daily necessities, agricultural and industrial raw materials, and plant and equipment. US aid, in fact, made up more than 90% of the deficit in Taiwan’s international balance of payments, and provided fully one-third of Taiwan’s capital investments during the period. On the whole, US aid did help Taiwan to diminish inflation pressure and to promote economic growth in its early economic development.110 In July 1965, the United States began to phase out its economic aid to Taiwan. The United States considered that Taiwan was on its way to becoming economically autonomous. Taiwan was regarded as one of the most outstanding examples in the effective use of US aid. The importance of US aid probably ensured the very survival of Taiwan as an independent country after the transfer of ROC government to Taiwan.111 Another important consequence was the creation of a booming private enterprise system by the U.S. influence. The private sector became the main force of Taiwan’s economy and its exports.112 After 1965, international trade becomes a crucial factor for Taiwan’s economic growth. Taiwan was fortunate enough to begin export promotion at a time of rapid expansion in world trade during the 1960s. In many areas, free trade was accepted as an optimal economic policy by developed countries.113 In particular, the United States provided a relatively open market for Taiwan’s exports, which significantly contributed to Taiwan’s trade development. Taiwan’s trade with the United States shifted from a deficit to a surplus in 1968 and remained so through the 1980s.114


110 Li, K. T. Economic Transformation of Taiwan, ROC (1988), at 162.


Taiwan’s strong trade link with Japan reflects the historical factor. The agricultural industry and export sector had already been partially developed before 1945. The Japanese legacies of well-developed infrastructure facilities and education system provided a healthy basis for Taiwan’s economic development after 1945. The success of Japanese economy also provides a good example for Taiwan to follow. Internally, the Japanese government plays an important role for Japan’s economic development. In the fields of industry and trade, Japan’s government has helped to facilitate and accelerate the workings of the market, to speed the process of reduction of declining sectors, and to clear the way for market forces to have full play in emerging growth sectors. Japan’s government has also been a critical force in providing the social infrastructure, in providing supportive fiscal and monetary policy and in providing general directions for the business enterprises. Japan’s government policy has generally been supported and implemented by the private sector. This reflects Japanese traditional cultural background of national ethos. Japan’s strategy and experience must be acknowledged as a general solution for economic growth. In particular, Japan provides a mode for the mobilization of national economy and the development of technology.

Externally, Japan’s initial participation in international economic organizations was largely to avoid isolation in the international economic system and to secure export

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116 Ho, S.P.S. Economic Development of Taiwan (1978), at 86.


122 Funabashi, Yoichi. ' Japan and America: Global Partners ', in 86 Foreign Policy (1992), at 39.
markets around the world.\textsuperscript{123} Japan joined IMF and the World Bank in 1952, and the GATT in 1955. Japan signed article 8 of the IMF in 1964, which prohibits Japan from restricting imports on the basis of trade-balance difficulties. In the same year, Japan also joined the OECD. Japan then committed not only to trade liberalization but also to a liberal economy.\textsuperscript{124} These developments contributed to Japan being recognized as a developed country from the mid-1960.\textsuperscript{125} During the GATT Kennedy Round trade negotiations (1964-67), Japan for the first time, participated as a major actor.\textsuperscript{126} Japan is fully committed to the multilateral trading system which is sustained by the GATT.\textsuperscript{127} Today, Japan has become the second largest economy in the world. Japan produces about 14\% of the global output with about 2\% of world population.\textsuperscript{128}

The US and Japan provide a relatively more open market for Taiwanese exports. Both governments generally conduct their trade relations with Taiwan on a m.f.n. basis. Thus, trade concessions made by both governments during the GATT multilateral trade negotiations could also be extended to Taiwan.\textsuperscript{129} Moreover, Taiwan also qualified for the GSP treatments in Japan and the US markets (which has since been graduated in the US market from 1 January 1989). Japan also does not impose quantitative restrictions on Taiwan's exports of textiles products. Taiwan was not a GATT member, these market-access opportunities were very fatal for Taiwan's economic success before 1990.\textsuperscript{130}


\textsuperscript{124} Johnson, Chalmers. MITI and the Japanese Miracle (1982), at 263.


\textsuperscript{127} GATT. Trade Policy Review: Japan. (1990), at 269.

\textsuperscript{128} GATT. Trade Policy Review: Japan. (1990), at 139.

\textsuperscript{129} For instance, the US concessions to Taiwan's exports are based on the " Treaty of Friendship, Commerce and Navigation with Accompanying Protocol, November 1946 " (before 1979), and the " Exchange of Letters between the Coordination Council for North American Affairs and the American Institute in Taiwan Concerning an Agreement on MTN Consultations, October 1979 " (after 1980) respectively. The US withdrew its diplomatic recognition from the ROC on 1 January 1979.

\textsuperscript{130} F.T. ' The Painful road to capitalism ', September 30, 1993, p.18.
Taiwan has recently intended to promote its trade relations with the EC. Taiwan expressed its wish to seek a better equilibrium in its trade relations with its trade partners. The reasons are to avoid an excessive dependence on the markets of the United States, Japan, and possibly in due course, China. A global approach to trade diversification is then emerging. Taiwan has achieved some good results with its recent policy of diversification, especially its trade relations with EC Member States. This reflects the increasing importance of the EC market in the world economy. It also shows Taiwan's concerns to develop trade relations with as many countries as possible.

D. Taiwan and the GATT

1. Historical Background

China (ROC) is a signatory to the Final Act of the United Nations Conference on Trade and Employment, generally known as the Havana Charter, and is also a member of the Interim Commission for International Trade Organization (ITO), responsible for putting the Havana Charter into operation. While the ITO did not come into effect, the GATT contained in Chapter IV was applied provisionally. China is one of the 23 original members of the GATT which signed on 30 October 1947. China deposited its Instrument of Acceptance of the Protocol of Provisional Application of the GATT on 21 April 1948. But because the establishment of communist regimes in China, the ROC notified the UN Secretary General of its decision to withdraw from the GATT on 8 March 1950. Though the ROC has rejoined the GATT as an observer since 1965, the observership eventually lapsed in 1971 when Taiwan left the United Nations. The UN Resolution

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131 The total trade between Taiwan and China rose from $4 billion in 1990 to $14.4 billion in 1993, equal to some 10% of total trade in 1993. Taiwan worried the increasing trade dependence on China that could jeopardise to its 'indirect trade' policy with China. See The Economist. 'Trading across the Taiwan Strait', vol. 324, No.7770, August 1st 1992, at 54; and The Economist. 'Taiwan: The Outsider', vol.332, No.7870, July 2nd 1994, at 18 and 19.

132 See GATT Doc. ICITO/EC. 1/2.

133 GATT. Doc.CP/54, (8 March 1950).


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2758 (XXVI) has resulted in Taiwan leaving not just its seat on the U.N. but also all other organizations affiliated with it. The GATT even though it is not a specialized agency of the United Nations, also accepted and implemented the UN Resolution that forced Taiwan’s international diplomatic isolation.136

Although absent from the GATT, Taiwan actually applies the GATT rules on a de facto basis. As the Tokyo Round entered its final stage, Taiwan concluded a bilateral trade agreement with the United States in 1979.137 Under this agreement, Taiwan agreed to reduce its tariffs on a wide scale. Equally important, all these tariff concessions were applied by Taiwan to all of its trading partners under the m.f.n. principle. Under pressure from the United States, Taiwan has reduced its tariff to an average level similar to that of most developed countries. However, Taiwan’s unilateral application of the m.f.n. principle could not guarantee it reciprocal m.f.n. treatment from its trading partners. Moreover, the sprouting of numerous regional trade blocs pose potential threats to non-member countries. To cope with these unfair conditions and the changes in domestic and world economy, Taiwan argued that the full GATT membership will be the best solution for Taiwan’s future in the world economy. Taiwan, as a small country, particularly needs to be part of a global system if it is to better protect its own national interests.138 GATT membership should place Taiwan on an equal footing with its partners, avoid unfair foreign trade pressure and to defend its lawful national interests.139 Taiwan, therefore, formally applied for admission to the GATT on 1 January 1990.140

2. Issues Relating to GATT Membership
The primary difficulty with Taiwan’s application for GATT membership has, however, been linked up with political issues. China had also applied to join GATT on 10 july

136GATT. Doc. SR. 27/1, (19 November 1971).
139Tamamoto, Masaru. ‘Japan’s Search for a World Role’, in Bienen, Henry (ed), op. cit., at 247.
140F.T. ‘Taiwan’s bid to join Gatt set to raise political storm’, January 5, 1990, p.3.
China argued that Taiwan's application can be dealt with only after China's accession and under its approval. Many GATT members are reluctant to endorse Taiwan's application without compromising with China's application. China's main objection was that it is impossible for GATT to contain two Chinas. China would not tolerate Taiwan's use of the name of the Republic of China, or any other name that implies the existence of two Chinas. Taiwan therefore made its application as a separate customs territory under the name 'Taiwan, Penghu, Kinmen and Matsu'. Taiwan has clearly avoided claiming either the status of another China or that of an independent state of Taiwan by applying as a 'Customs Territory'. This alternative indicates that Taiwan has no intention to provoke or antagonize China through its application, and no such intention should be read into Taiwan's application. GATT agreed on 29 September 1992 to set up a working party to consider Taiwan's application. Taiwan took its observer seat in the name 'Chinese Taipei' at the GATT Council meeting of November 1992. Observer status is typically an early step in eventual accession to the GATT.

Taiwan is required to accede to the GATT on the status of a developed country. Although per capita income in Taiwan is less than many developed countries, Taiwan has faith that its economic development will eventually allow it to enter the ranks of developed country. The status of developed country means that Taiwan must bear
a higher price than anticipated for agreeing to GATT commitments.\textsuperscript{150} The tariff rate will have to be reduced to similar level as in developed countries. Taiwan will also have to contract to the Final Act of the Uruguay Round. Many members view Taiwan’s entry to GATT as dependent on the opening up of its agricultural product market, further progress on the protection of intellectual property rights and greater access to the service sector (covering industries such as banking, insurance, stock markets and inland transport).

The US plays a leading role in Taiwan’s application for GATT membership. Most GATT members are willing to support Taiwan’s accession to the GATT, but are hesitant to take the lead. However, in 1990, the U.S. issued the following statement: " Given Taiwan’s importance in the global trading system, we look forward to eventual inclusion of Taiwan, on appropriate terms of membership, in the GATT. GATT contracting parties will need to consult closely on the issue since any action regarding GATT membership, by GATT rules, must be based on a collective decision." Moreover, " We want eventual accession for both China and Taiwan on meaningful terms agreed upon by GATT members."\textsuperscript{151} In principle, therefore, the U.S. endorses Taiwan’s accession to the GATT. The U.S. Senate also adopted a resolution urging the U.S. Government to fully support Taiwan’s application.\textsuperscript{152} The various U.S. inter-agency meetings held in Washington, especially the Trade Policy Review Group (TPRG), have positively supported Taiwan’s application. However, because of the political implications linking with China’s case, the issue would have to be discussed in the Political Coordination Committee (PCC) and later in the National Security Council. Eventually, the decision would have to be finalised by the U.S. President. It seemed that, the discussions held in both TPRG and PCC were not centred on whether Taiwan should be in the GATT, but focused on " how " to include Taiwan in the GATT. With the support from President Bush, the U.S. then took the lead in consulting other major players in 1991.\textsuperscript{153}

\textsuperscript{150}F.T. \textquoteleft Pressure mounts on Taiwan over tariffs \textquoteright, November 30, 1993, p.6. Taiwan’s nominal industrial tariff was reduced from 24.4% in 1986 to 6.5% in 1992. Tariff for farm goods were reduced from 34.8% to 21.6%.

\textsuperscript{151}Office of the Assistant Secretary/Spokesman, U.S. Department of State. \textquoteleft Position on China/Taiwan GATT Membership \textquoteright, Press Release of February 15, 1990.

\textsuperscript{152}U.S. Congressional Record - Senate S 7604; Senate Resolution 296 - Relative to Taiwan’s membership in the General Agreement on Tariffs and Trade.

\textsuperscript{153}Interview with Taipei Trade Office’s official at Geneva on 24 June 1993.
The EC is also a major player in the GATT. In principle, the EC offers conditional support for Taiwan's accession to the GATT. The EC supports Taiwan's accession to the GATT. But, it insists that Taiwan's application must be considered on the following bases: Firstly, Taiwan's position must be considered as a developed country. Secondly, Taiwan must adopt trade liberalization policies consistent with that of a developed country. Thirdly, Taiwan must endorse non-discrimination and other GATT rules as binding on it. Lastly, Taiwan must commit itself to accept the results of Uruguay Round. In 1984, the European Parliament had adopted a resolution in favour of Taiwan's accession to the GATT. However, European Parliament resolution has little effect on the EC's decision-making procedures. Although Taiwan's case was discussed in the so-called Article 113 Committee, the positive position of the EC in favour of Taiwan's accession was not adopted until the U.S. had made its decision.

The GATT membership needs a two third majority from its members. In practice, the GATT decisions are based on "consensus". In 1982, the tradition of consensus for GATT's decision and dispute settlement was reaffirmed by the GATT. The World Trade Organization established by the Uruguay Round will also operate on the basis of consensus. If one or few countries are against the consensus, these countries are often placed under severe pressure from other contracting parties, particularly the leading trading countries, to change their positions. Only in rare cases, will the GATT resort to voting as it will cause a split of GATT system. In most cases, dissenting countries might

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154 Interview with the EC Commission official (DG I - External Relations) on 17 December 1993.

155 The European Parliament, Doc. 2-1756/84, Resolution on trade with Taiwan, OJ 1984, C229/108.


157 Article 113 Committee is a subordinate Body of the Council of Ministers. While the role of the Article 113 Committee is normally advisory, in practice this Committee, consisting of officials with detailed knowledge of the issues and the aims of their representative ministers, is an important link in the EC trade policy-making process. See Hayes, J.P. Making Trade Policy in the European Community. (1993), at 39, and 128-130.

158 Interview with Taiwan's Trade Office's official at Brussels on 22 December 1993.

159 Rules governing the procedure of the GATT Contracting Parties, see GATT BISD 12S/10 (1964).


161 F.T. 'WTO - a new name heralds new powers', December 16, 1993, p.5. The main exception to the consensus decision under the WTO is dispute settlement where offending countries will no longer be able to block adoption of Panel reports.
just "disassociate themselves with the consensus" and opt not to block a decision. The GATT practice implies that: (1) it is up the Contracting Parties to make the decision, not China which is not yet a contracting party; and (2) the decision should be made according to GATT rules, so other issues under international politics should not be linked to Taiwan's application.

3. Legal Aspects of Taiwan's Accession

GATT does not require its members to be sovereign states. GATT members are defined as 'governments', and not as 'states' or 'nations' found in the United Nations and many other international organizations. Thus, a GATT contracting party is not necessarily a government of a sovereign state. In fact, three of the 23 original GATT members (Burma, Ceylon and Southern Rhodesia) were not independent nations at the time the GATT was drafted.¹⁶² The qualification for GATT membership can be mainly divided into three accession procedures¹⁶³: (1) Parties to the Protocol of Provisional Application: These include the 23 original GATT members; (2) Parties to Protocols of accession: This is Article XXXIII procedure for states or governments the route to GATT membership. This procedure is via a protocol of accession accompanied by a schedule of concessions. The terms are negotiated with the Contracting Parties, and a decision on entry is taken by a two-third majority. The protocol is concluded between the new member, and the individual contracting party, but to come into effect the protocol needs only the Contracting Parties' decision and the signature of the new member; and (3) Previously dependent territories: This is Article XXVI:5(c) procedure for ex-colonies of existing contracting parties to obtain membership.

Taiwan referred to Article XXXIII of the GATT for its application.¹⁶⁴ Article XXXIII states that

'A government not party to this Agreement, or 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, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the Contracting Parties. Decision of the Contracting Parties ... shall be taken by a two-third majority.'

The government of the ROC acts on behalf of a separate customs territory of Taiwan's areas ' possessing full autonomy in the conduct of its external commercial relations '. It may accede to the GATT on terms to be agreed by existing GATT members. This accession procedure is to avoid China's request for its sponsorship under Article XXVI:5(c) of the GATT. China's arguments referred to Hong Kong joining GATT through UK recommendation. Hong Kong became the 91st member of the GATT on 23 April 1986. Article XXVI:5(c) procedure is usually applied to a colony. The request for Article XXVI:5(c) is clearly not the case for Taiwan. It would also violate the China (PRC) policy of anti-colonialism. In this connection, Article XXXIII is feasible to allow Taiwan to have separate representation in the GATT. Taiwan's application is being considered by the GATT Working Party on the basis of Article XXXIII. It should be noted that the WTO Agreement reiterates the concept of "separate customs territory" for new accession to the WTO in order to sidestep the contentious issue of state sovereignty.

The GATT decision for its membership should avoid political consideration. The admission of Taiwan into GATT does not necessarily imply recognition of Taiwan by individual GATT members. Accession of a State or a government to the GATT, according to Article XXXIII, is clearly determined by a collective act of two-thirds of the contracting parties to the GATT. Since, therefore, recognition is an individual act, and

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166 Jacobson, Harold K and M. Oksenberg. China's Participation in the IMF, the World Bank, and GATT. (1990), at 102. See also Penelope, Hartland-Thunberg. China, Hong Kong, Taiwan and the World Trading System (1990), at 159; and Qui, Ya. ' GATT Membership For Taiwan ', in 24 JILP (1992), at 1096.


168 Art.XII(l) of the WTO Agreement states that ' Any state or separate customs territory possessing full autonomy in the conduct of its external Government relations and of the other matters provided in this Agreement and the Multilateral Trade Agreement may accede to this Agreement...'.

admission to GATT membership is a collective act. It would be inappropriate to link Taiwan's application with individual diplomatic recognition. The United Nations has therefore made clear that: ' (1) A member could properly vote to accept a representative of a government which it did not recognize, or with which it had no diplomatic relations, and (2) Such a vote did not imply recognition or a readiness to assume diplomatic relations.'\(^{170}\) The GATT also adopted this opinion that representation in an international organization was distinct from the question of recognition of a government by other members of that organization.\(^{171}\) Czechoslovakia made a protest against the accession of West Germany and South Korea based on Article XXXIII procedure during the GATT Torquay Round negotiations in 1950. In spite of its protest, Czechoslovakia clearly recognized the distinction between accession and recognition. Under these circumstances, Czechoslovakia was still a signature of the Final Act of Torquay and of the Torquay Protocol to the General Agreement.\(^{172}\) The Torquay Protocol to the General Agreement contained five countries for accession and about twenty Protocols of accession of individual countries including West Germany.

The particular eligibility requirements of a GATT member are determined by the objectives and nature of the GATT. The essence of the GATT lies in the willingness of the applicant to fulfill the GATT obligations. This accession requirement can be derived by analogy from Article 4 of the U.N. Charter. This Article requires that an applicant for membership of the United Nations must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out by governments which in fact possess the power to do so. Taiwan actually possesses fully autonomy in the conduct of its external trade relations. Taiwan is also able and willing to carry out the GATT obligations. Actually, Taiwan even shows its willingness to adhere to the Tokyo Round Codes on the same terms as developed countries.\(^{173}\) According to Article XXXIII of the


\(^{171}\) GATT. Doc. SR.22/3, (March 16, 1965), at 3.

\(^{172}\) GATT. BISD, vol.11, May 1952, at 158 and 159.

\(^{173}\) Memorandum on Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and matsu (1990), in Chiu, Hungdah (ed), op. cit., vol.9 (1989-90), at 227.
GATT, it would seem to be appropriate for the GATT, through their collective action, to accord Taiwan membership, even though individual members may refuse, and may continue to refuse, to accord Taiwan recognition as the lawful government for reasons which are valid under their national policies.

Taiwan's case is unique in the history of the GATT, not because it involves a revolutionary change of government, but because it is the first in which two rival governments exist. It has been demonstrated that the principle of numerical preponderance of recognition is inappropriate. It is necessary to note that China has confirmed the separate GATT membership of Hong Kong and Macau after 1 July 1997 and 20 December 1999 respectively. Their separate membership is based on a separate customs territory to meet the GATT requirements. In essence, Hong Kong and Macau will possess full autonomy in conduct of their external commercial relations even after they are restored to China. As far as GATT is concerned, it should regard that the four separate governments (of China, Taiwan, Hong Kong and Macao) are in fact in a position to employ the resources and direct Chinese people in fulfilment of the GATT obligations before the final unification of all Chinese territories and the transformation of China economy to one system.

E. Conclusion
Trade and economy play an ever increasing role in the post cold war era. Changes in international economic relations also necessitate structural adjustments and economic reforms for national governments. A basic element of such reforms is to increase the competitiveness of domestic industry at international market place. At the same time,
there is a world-wide trend towards regional trading blocs as a means for trade liberalization.\(^{178}\) Taiwan has recently undergone a series of economic reforms in response to the changing circumstances.\(^{179}\) These reforms are in a liberal direction with the purpose of upgrading its economy and boosting its international standing.\(^ {180}\) Taiwan is a small country, the trade reforms therefore help it improve trade cooperation.\(^ {181}\) In this context, it is natural for Taiwan to promote its trade relations with the EC. Taiwan ranked the 8th fast-growth market for EC exports during the 1980s.\(^ {182}\) In 1991, Taiwan was the EC’s 10th largest supplier and 22nd largest export market.\(^ {183}\) Therefore, it is also in the EC’s interest not to ignore the market opportunities in Taiwan. However, the bilateral approach could provide a piecemeal, selective and uncertain trade relations for Taiwan. Therefore, it is important for Taiwan to join the GATT to secure a predictable international trading environment. In the EC-Taiwan relations, considerations should therefore be given as how to integrate Taiwan into the international economic system.\(^ {184}\) It is also important to ensure that regional trade arrangements are part of the global trend towards openness and trade liberalization under the GATT auspice to benefit the world economy as a whole.\(^ {185}\)

The EC is one of the success stories of the later half of the 20th century. The EC represents, alongside the United States and Japan, one of the three pillars on which the global system of pluralist democracy and market economy is built. As the dynamics of European integration thrust forward, the Community is consolidating its economic power


\(^{180}\) F.T. ‘ Taiwan’s Gatt entry may depend on trade reforms ’, October 1, 1992, p.8.


\(^{182}\) EC Commission. The European Community as a World Partner. (1993), at 7.


through the 1992 single market programme and the creation of an economic and monetary union. It is also strengthening its political dimension through a parallel project for political union. This new inner strength can only add to the Community's international standing, bringing with it new responsibilities and new challenges. The EC's international role is therefore expanding as it deepens its relations with traditional partners and assumes new responsibilities with new partners in Eastern Europe and elsewhere. There would be no question that the strong EC would promote peace and prosperity around the world. For this reason the EC, founded to preserve peace and prosperity, should lend its influence to support Taiwan's efforts to link its economy with the EC and the GATT. Trade and economic cooperation appears necessary for the attainment of the aims of the Community in the sphere of external economic relations. Trade therefore provides a common ground for the EC to promote its relations with Taiwan.

Chapter 2: The Law and Policies of EC External Trade Relations

As the world’s largest trading power, EC trade policies have profound external impacts. The common commercial policy is a main part of EC external relations. Many autonomous legal measures may be used under the common commercial policy. The EC-Taiwan trade relations are largely based on the autonomous trade policy. This chapter reviews the main elements characterizing the EC trade policy and their impacts on third countries in general and on Taiwan in particular.

A. EC and GATT

1. GATT and Regional Trade Arrangements

The regional trade arrangement is an important exception to the m.f.n. principle. GATT, in Article XXIV:4, recognizes ‘the desirability of increasing freedom of trade’ through regional arrangements. GATT also views regional arrangement as a useful instrument for developing countries to promote their economic growth and development. Therefore, GATT does not prevent, as between the territories of contracting parties, the formation of a custom union or a free-trade area. To prevent the possible harmful effects, Article XXIV lays down certain substantive and procedural conditions for the establishment of regional arrangements. Article XXIV was designed with the view that regional arrangements should contribute, on the whole, to an expansion of world trade and to eventually extend their benefits to third countries. The purpose of economic integration should be to help internal trade among member states and not to raise external barriers for third countries. Accordingly, the duties and other trade measures imposed by the regional arrangements ‘shall not as a whole be higher or more restrictive’ than before.

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1 GATT. The Activities of GATT:1959/60 (1960), at 18.

2 The definitions of custom union and free-trade area are provided in Art.XXIV:8 GATT. Both are required to eliminate all internal trade barriers between the members. The difference between the two arrangements lies in the fact that the constituents of a free-trade area is under no obligation to adopt a uniform tariff system against third countries.


4 Art.XXIV:5(a) and (b) GATT. However, the Contracting Parties, according to Art.XXIV:10, may approve, by a two-thirds majority, proposals for the formation of a regional arrangement which does not fully comply with the requirement of these substantial obligations.
No agreed methodology, however, exists for the application of the requirements laid down in Article XXIV:5. One controversy is whether an assessment of Article XXIV:5 should be based on a country-by-country and product-by-product approach or simply on a comparison of the coverage, overall tariff rates before and after the formation or enlargement of the regional arrangement. The regional blocs usually refer to an overall approach to avoid a strict enforcement of GATT obligations.\(^5\)

The procedural requirement, provided in Article XXIV:7(a), indicates that the formation of a regional arrangement shall promptly notify and provide relative information to GATT. In 1972 the GATT Council took a decision to provide for the notification of agreements under Article XXIV.\(^6\) In practice, Working Parties have been established by the GATT Council to examine the agreements which have been notified. In many cases, the Working Parties often reach no consensus and the Contracting Parties take no action, withholding judgement rather than granting approval or disapproval regarding trade impacts of such an arrangement or its consistency in the GATT rules.\(^7\) In the case regarding the establishment of EEC in 1957, GATT also indicated 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 Article XXIV of the General Agreement'.\(^8\) As a consequence, Article XXIV obligations are often ignored by regional economic arrangements.\(^9\)

2. Effects of GATT under EC Law

The legal effect of the GATT in the EC legal order is a very controversial issue. According to Article XXIV(8) of the GATT, the EC must be regarded as a single customs territory because according to Article 9 of the EEC Treaty it is based on the principle of

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\(^7\)GATT. GATT Activities 1984 (1985), at 38.

\(^8\)GATT. 'The Treaty Establishing the European Economic Community', BISD 7S/69, at 70.

a customs union.\textsuperscript{10} In the \textit{International Fruit Company} case, the Court ruled that ‘in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community’.\textsuperscript{11} As far as fulfilment of the commitments provided for by GATT is concerned, the EC has replaced the Member States, reference must therefore be made to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal system.\textsuperscript{12} However, in the light of the great flexibility of GATT provisions, the Court further ruled that GATT cannot be treated as conferring rights on EC citizens which they could invoke before the national courts. Accordingly, the validity of Community regulations cannot be affected by the GATT.\textsuperscript{13} In other words, the GATT has no direct applicability inside the Community unless that is transformed into Community legislation.

In \textit{SITO}, the Court also stated that ‘the rules contained in GATT are governed only by the Community’s relations with the other contracting parties and cannot be applied within the Community itself’.\textsuperscript{14}

All twelve EC Member States were already GATT members when they concluded or subsequently acceded to the EC.\textsuperscript{15} The EC has also participated in the GATT activities since the Dillon Round.\textsuperscript{16} Therefore, the GATT must be implemented in good faith by the Community as well as its Member States.\textsuperscript{17} However, the Community responded negatively to those agreements concluded by Member States previous to the Treaty of

\begin{itemize}
\item \textsuperscript{10} Case 266/81, SITO v Ministero Dello Finanze, [1983] ECR 731, at 776, para.12.
\item \textsuperscript{11} Cases 21-24/72, International Fruit Company v Produ Tschap voor Groenten en Fruit, [1972] ECR 1219, at 1227, para.18.
\item \textsuperscript{12} Case 38/75, Nederlandse Spoorwegen v Inspecteur Der Inveerrechten en Accijzen, [1975] ECR 1439, at 1450, para.16.
\item \textsuperscript{13} [1972] ECR 1219, at 1228, para.27.
\item \textsuperscript{14} Case 266/81 [1983] ECR 731, at 776, para.12.
\item \textsuperscript{15} Belgium, France, Luxembourg, the Netherlands and the U.K. joined the GATT since 1 January 1948; Denmark, Greece and Italy in 1950; Germany in 1951; Portugal in 1962; Spain in 1963 and Ireland in 1967.
\item \textsuperscript{16} 5th General Report EEC, point 206.
\item \textsuperscript{17} Waelbroeck, M. ‘Effect of GATT within the legal order of the EEC’, JWTL (1974), at 623.
\end{itemize}
Rome. In *International Fruit Company*, the Court declared that the GATT provisions cannot be self-executing within the Community, and cannot confer on individuals a right which they can invoke before the national courts. It may be felt that the Court applied the GATT in a flexible manner to allow the EC Commission maximum latitude in conducting its external trade relations. Moreover, many GATT obligations such as m.f.n. are precise and unconditional. The GATT thus should not be applied in different way. It should be noted that the Final Act and the WTO Agreement were signed by representatives of the Member States and - on behalf of the Community - by Mr Theodoros Pangalos, President of the Council, and Sir Leon Brittan, Vice-President of the Commission. The EC will become the original member of the WTO. On 15 April 1994, the Commission proposed a Council Decision concerning the conclusion of the results of the Uruguay Rounds of the Multilateral Trade Negotiations. International agreements concluded by the EC are binding on the EC (Art.228:2 EEC). Thus, the Final Act and the WTO Agreement should have direct applicability in the EC legal order once implemented by the EC.

3. Interrelations Between EC and GATT

Despite the global framework offered by GATT, European economic integration is pulling in a very different direction. In particular, the establishment of the European Economic Community (EEC) in 1957 has significantly altered the structure of the world trading system. The Community also creates a new order in international system. Unlike other regional organizations, the EC is formed not only for cooperation among its Member States but also for its own sake. Article 1 of the EEC Treaty states that 'By this Treaty,

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20 Bull. EU, 3/1994, point 1.3.76.

21 Art.XI(1) of the WTO Agreement.


the High Contracting Parties establish among themselves a European Economic Community'. Article 1 implies that the EEC is an entity separate and apart from the Member States. The Court has emphasized the 'separateness' of the Community, and its legal order. The Court justified the independent nature of the Community law and referred to the establishment of 'a Community of unlimited duration, having its own institutions, personality, legal capacity and capacity of representation on the international phase...'. In many areas, such as common agricultural policy, common commercial policy, and competition policy, the EC can exercise sovereign rights on its own behalf. Its main legislation also has direct effect and supremacy among its member States. The EC thus constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. The EC has the powers to conduct its external trade relations. Article 210 contains the legal personality for the Community. Legal personality means that international organization is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claim.

The EC, by virtue of Article 113 of the Treaty, assumed most of the functions relating to matters within the provisions of the GATT. The EC and its Member States as a rule take part in international organizations jointly, or the latter appear alone but with the cooperation of the EC. The fullest part played by the Community appears to be its participation in GATT. The substitution of the Community for its Member States in relation to commitments under GATT took place on 1 July 1968, following the

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25 Direct applicability means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and so long as they continue enforce. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law. See Case 50/76, Amsterdam Bulb v Produktschap voor Siergewassen, [1977] ECR 137, at 146. The supremacy of Community law means that a directly effective provision of Community laws always prevails over a provision of national law. See Case 106/77, Amministrazione Delle Finanze Dello Stato v Simmenthal, [1978] ECR 629, at 643.

26 [1963] ECR 1, at 12.


introduction of the common customs tariff. It was at that time that the Community assumed its full powers in relation to the sphere covered by GATT. The EC became a party to the Tokyo Round negotiation to a series of multilateral trade agreements which provided for the establishment, in the form of 'Signatory Committees', of institutions responsible for overseeing the implementation of the agreements' provisions and for helping to settle any disputes which might arise between parties.29

The customs union is a discriminatory arrangement in favour of its member states. Generally, the impacts of customs union depend on its trade effects: (1) trade creation which is promoted by the elimination of protection of domestic producers against their counterparts in member countries; and (2) trade diversion resulting from preferential access granted to member states vis-a-vis more efficient foreign producers.30 Customs union may also create other dynamic effects such as economics of scale; specialization; technological innovation; and external economies.31 The European economic integration has gone far beyond the customs union stage. The positive effects derived from recent EC integration include: larger internal market, economies of scale, economic efficiency, healthier competition, improving productivity, better consumer choice, and an external negotiating position.32 Consequently, the trend of intra-EC trade is consistently on the increase. Many European countries also show strong interest in accession to the EC. The EC enlargement will further widen its trade impacts on third countries.33 The success of European integration also encourages the emergence of similar regional arrangements elsewhere.34 This trend, however, has potential negative effects to fragment the multilateral trading system. GATT, therefore, is currently challenged by the surge of

29The text of these agreements see Decision 80/271 (OJ 1980, L71/1).
30Viner, Jacob. The Customs Union Issue. (1950), Chapter IV.
31Balassa, Bela. The Theory of Economic Integration. (1961), at Part II.
regional approaches.  

B. The EC Trade Policies

1. The Common Commercial Policy

The common commercial policy (CCP) plays a core part of the EC's external relations. The EEC Treaty enumerates the elements considered necessary for establishing the CCP. The Treaty does not contain a definition of the term 'commercial policy'. However, in Article 3(b) of the Treaty, the term 'common commercial policy' refers to a Community policy toward third countries in matters relating to trade and commerce. Article 113 only indicates that the common commercial policy 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'. The listing is illustrative rather than exhaustive. The CCP must be given a broad interpretation and must include all measures destined to regulate commercial relations with third countries.  

By establishing a common market, according to Article 110 of the EEC Treaty, the EC adopts a common customs tariff and a common commercial policy to promote its common interests and to contribute to international trade growth. The Common Customs Tariff (CCT) is very important to the EC's common trade policy. The CCT is a uniform external tariff for all Member States of the Community. The EC's institutions alone have jurisdiction to interpret the CCT. Individual Member States can neither modify nor interpret the custom tariffs they levy on goods entering the Community. Any amendments to the CCT must pass through the Council and any customs negotiations with third countries must be conducted by the Commission on behalf of the Community in

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The CCT was among the first tangible signs of the Community. In the International Fruit Company case, the Court ruled that the substitution of the Community for the Member States in relation to commitments under GATT took place on 1 July 1968, following the introduction of the CCT. The EC then assumed its full powers in relation to the sphere covered by GATT. The CCT is thus vital to the EC's identity. It allows the Community to speak with one voice in international trade relations and to act as a single negotiator. This promotes the EC's position in its external relations. In addition, the CCT also contributes to the EC's financial resources. Council Decision 70/243 (JO 1970, L94/19) phased out national contributions and substituted 'own resources'. The customs union has also had a central role in the process of European integration. Custom duties and agricultural levies constitute the main EC's own resources; they were supplemented in 1970 by (1%) and in 1988 (1.4%) of Member States' VAT revenue.

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41 Williams, David W. 'A Wider European Customs Union', in Intertax (1993/3), at 123.


45 Art.4(1) of Dec.70/243 of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, OJ 1970, L94/19 (English Special Edition, 1970, p.224). The system of the Communities' own resources had raised to 1.4% of the Member States' VAT revenue, see Art.2(4)(a) of Decision 88/376 on the system of the Communities' own resources, OJ 1988, L185/24.
2. Quantitative Restrictions and Safeguard Measures

In implementation of the CCP, the EC also adopted extensive autonomous measures based on Article 113. Two major categories of quantitative import restrictions are in place in the EC. First, there are the residual restrictions of Member States on the basis of Reg.288/82\(^46\), as amended. These restrictions may either be generally or specifically confined to individual trading partner or country groups. Secondly, specific restrictions exist for import from state trading countries, including China, under Regulation 3420/83\(^47\), as amended. In addition, export restraint arrangements are also applicable under the EC trade policy.\(^48\) Safeguards can be introduced where imports cause, or threaten to cause, substantial injury to EC industry. Article 115 of the EEC Treaty provides safeguard measures for the Community and its Member States. The duration of Article 115 measures are decided on a case-by-case basis, ranging from two months up to one year. However, by way of subsequent authorizations these measures may be prolonged over several years. For example, Article 115 measures have been in place for TV sets and radios since 1974 (France, Italy), for cars since 1981 (Italy) or 1986 (Spain) and for motorcycles since 1986 (Italy and Portugal).\(^49\) The extension of Article 115 measures is actually inconsistent with Decision 87/433\(^50\), provided in Article 3:2, which stressed that national protective measures should be applied 'only for a limited period and where the gravity of the situation so warrants'. Moreover, Article 115 can serve to spread national barriers from one member country to another and thereby raise national protection. When Article 115 measures in one country lead to shifting exports, other member countries concerned may require further Article 115 protection for their own markets. Article 115 thus is a good indicator of EC trade protection towards third


\(^{47}\)Reg.3420/83 on import arrangements for products originating in state-trading countries, not liberalized at Community level, OJ 1983, L346/6; as latest amend by Reg.519/94 on common rules for imports from third countries and repealing Regulations 1765/82, 1766/82 and 3420/83, (OJ 1994, L67/89).


\(^{50}\)OJ 1987, L238/26.
countries. It also reflects a departure from the Common Commercial Policy which provides free movement for import products once their legitimate import from one member state.\(^51\) The completion of internal market will have major implications for the maintenance of national quantitative restrictions. Article 115 measures must be abolished from 1 January 1993.\(^52\) National restriction based Article 115 will be either abolished or transformed into EC-wide measures.\(^53\) The EC-wide protective measures can still be seen in many sensitive products such as bananas, vehicles, textiles and clothing, consumer electronics, footwear, and so on.\(^54\) In March 1994, the EC adopted a further series of new regulations in order to achieve greater uniformity in the rules for imports.\(^55\) These Regulations have abolished most residual national restrictions (excluding textiles), but there still remain a limited number of quantitative restrictions against China.\(^56\) It should be noted that the EC quantitative restrictions may also applied in the case of high technology sector such as cars.

The residual restriction in the car sector, was applied by France, Italy, Spain, Portugal and United Kingdom against Japanese exports. For instance, France negotiated an agreement with Japan in 1977 limiting the imports of Japanese cars to a 3% volume share of French market. National trade restrictions are incompatible with the purpose of internal market. National restrictions on Japanese cars were therefore then replaced by a Community-wide restriction from 1 January 1993. To allow the creation of a single market for cars without market disruption, the EC and Japan reached a solution in July 1991 - the Elements of Consensus. Under the terms of this controversial Consensus, there were to be "no restrictions on Japanese investments or on the free circulation of its


\(^{52}\) COM (85) 310 final, “Completing the Internal Market”, at 11; see also 24th General Report EC, (1991), at 67.


\(^{54}\) F.T. 'Gatt sounds warning over EC preferential trading ', May 19, 1993, p.8.


\(^{56}\) F.T. 'EU quotas will backfire, Beijing warns ', July 5, 1994, p.6.
products in the Community " . At the same time, however, Tokyo undertook to avoid " market disruption by exports from Japan, and to monitor the level of its exports for seven years to the end of 1999. The seven-year transitional period was to allow EC car-makers to adjust " towards adequate levels of international competitiveness." The Elements of Consensus contains forecasts of exports in 1999, linked to assumptions about demand in that year. The forecasts for the intervening years would be worked out through regular consultations between the European Commission and the Japanese Government. The level of Japanese exports to the EC was limited to 1.202 million for the year of 1992. This approach is essentially an managed-trade arrangement, based on the concept of market share rather than market force.58

The Consensus would ease pressure on European car makers at a time of economic recession. However, it will not necessarily resolve long-term tensions between the EC and Japan, as EC car makers face a growing burden of internal overcapacity and import competition.59 In addition, the Community-wide restriction on Japanese cars now covers those EC local markets which had no national restriction against Japanese cars before 1993. There are potential losses for consumers in those countries due to the resulting decrease in competition.60 The Consensus also faces practical problems in operation, as the demand side of EC car market cannot be forecast with precision in advance. Consequently, it will be subject to changes and frequent negotiations. For instance, the EC Commission has come under intense pressure from EC car industry to re-negotiate and further cut in Japanese car quotas for 1993 as a result of EC economic recession in 1993. The 1992 April accord for 1993 quota was based on a forecast that EC demand in the car sector would fall by 9.4% in 1993; the new deal reached in September 1993 was based on a fall of some 17.6% below the 1992 level. In the 1993 September accord, Japan has agreed on a limit of 980,000 cars entering the EC in 1993, less than the 1992 April accord

for 1993 quota.\textsuperscript{61} Under these situations, Japanese carmakers have suffered a heavy loss of market share in the EC market in the first half year of 1994.\textsuperscript{62} In the Japanese car case, the EC appears to continue regional safeguard measures against specific non-EC suppliers.

Article XI of the GATT prohibits the use of quotas or measures other than duties to restrict imports. Residual restrictions maintained by EC member countries were considered an infringement of GATT obligations under Article XI. In a panel decision on "EEC-Quantitative Restrictions against Imports of Certain Products from Hong Kong"\textsuperscript{63}, which involved residual restrictions established as early as in 1944 by France and maintained with the consent of the EC, the GATT rejected the EC argument for residual restrictions based on social and economic considerations. Moreover, the fact that for historical reasons residual restrictions had been maintained for a long time without Article XI:1 or XIII being invoked by Hong Kong did not alter the obligations of the GATT. Despite this GATT obligation, the use of quantitative restrictions are very often by national governments. In practice, quota may be applied in a more restrictive form, such as licensing procedure or tariff quota. Quantitative restriction then may be abused as a substitute to tariff protection.\textsuperscript{64}

3. Anti-dumping Measures
The common commercial policy, in Article 113, covers anti-dumping and anti-subsidy measures. The anti-dumping law of the EC is seen as one of the most important instruments of the CCP. The first EC anti-dumping regulation was enacted in 1968\textsuperscript{65} as

\textsuperscript{61}F.T. ' Japanese agree to further cut in cars for EC ', Sep. 6, 1993, p.6.

\textsuperscript{62}F.T. ' Japanese cars lose ground in Europe ', July 14, 1994, p.2. The overall sales of car in the EC market have risen by 6.8% to 6.5m from 6.08m in the first half year of 1994. However, sales by Japanese carmakers, by contrast, have fallen by 5.8% to an estimated 712,000 depressing their share to 11% from 12.4% a year ago in the EC market.

\textsuperscript{63}GATT. BISD 30S/129.


\textsuperscript{65}Reg.459/68 on protection against dumping of the granting of bounties or subsidies, by countries which are not members of the European Economic Community, OJ 1968, L93/1 (English Special Edition, 1968, p.80); as replaced by Reg.3017/79, OJ 1979, L339/1.
amended through Regulation 2423/88 of 11 July 1988\textsuperscript{66}, as partly amended.\textsuperscript{67} In recent years, the relevant anti-dumping law and its practice has been subject to controversial public debates and external concerns.\textsuperscript{68}

Dumping is a form of price discrimination. Dumping is considered as the export price of a product less its normal value.\textsuperscript{69} Under GATT rules, dumping is not illegal as such. Article VI of the GATT condemns dumping only 'if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of domestic industry'. In such cases, the contracting party may impose an anti-dumping duty. In accordance with GATT provisions, both the imposition of provisional duties and of definitive duties are contingent upon the establishment of dumping and of injury caused thereby. In other words, EC anti-dumping policy takes care to impose duties only to the level adequate to remove the injury. This level is usually lower than the full dumping margin. Dumping margins are defined as the difference by which the normal value of the product concerned (for example, in the export's domestic market) exceeds the export prices. There is no substantial difference in the methods of calculation of normal value contained in the earlier basic Regulation 2176/84 governing anti-dumping procedures, and the present basic Regulation 2423/88.\textsuperscript{70} A constructed value can be taken in cases where no domestic normal value can compare. The constructed value includes all production cost, 'a reasonable amount' for selling, administrative and other general expenses, plus the average profit realized by the producer or exporter on the profitable sales of like products on the domestic market. With respect to state-trading countries, normal value is based on actual prices or constructed value of

\textsuperscript{66}Reg.2423/88 on protection against dumped or subsidized imports from not members of the European Economic Community, OJ 1988, L209/1.


\textsuperscript{68}The Commission submits regularly an annual Report to the European Parliament following the Resolution of 16 December 1981 on the Community's anti-dumping activities, see OJ 1982, C11/37. The Annual Report were given in COM (83) 519 final/2; Com (84) 721 final; COM (86) 308 final; COM (87) 178 final; COM (88) 92 final; COM (89) 106 final; COM (90) 229 final; SEC (91) 92 final; SEC (91) 974 final; SEC (92) 716 final; and COM (93) 156 final.

\textsuperscript{69}Art.VI GATT.

\textsuperscript{70}OJ 1991, C145/6.
like products in a third market-economy country. As regards export prices, Regulation 2423/88 provides either for the use of actual prices or of constructed prices. The latter may be established when no export prices exist, when exporters and importers are associated, or when actual prices are considered unreliable for other reasons. In general, prices are constructed on the basis at which the products are first re-sold to an independent buyer.

Anti-dumping has become an important EC trade policy. Article 15 of Regulation 2176/84 contains a five years expiry requirement to prevent measures from remaining in force longer than necessary. However, this so-called sunset clause was amended by Regulation 2423/88. Under the amended provisions a notice of the impending expiry of the measure is still published within a period of six months prior to the end of the five year period and there is still a requirement to inform the relevant Community industry of the impending expiry. Where an interested party is subsequently able to demonstrate that the expiry of the measure would lead again to injury or the threat of injury, then for the purpose of greater legal certainty the Commission is required to publish, before the end of the five year period, a notice of intention to carry out a review of the measure. The measure then remains in force pending the outcome of the review. This amendment actually creates uncertainty for foreign exporters and possibly leads to a protectionist use.\textsuperscript{71} The change for a quick decision-making procedure on 7 March 1994 for anti-dumping action has further confirmed this impression. The ‘qualified majority’ for an anti-dumping measure provided in Article 11(6) and 12(1) and (2)(a) of Regulation 2423/88 was amended to a ‘simple majority’ to speed up anti-dumping decision making.\textsuperscript{72}

C. The Hierarchy of Preferential Arrangements

The EC operates a complicated "trade preferences" system in its external relations. The EC has built up over years a complex network of multilateral, regional and bilateral

\textsuperscript{71} Waer, Paul and Edwin Vennuist. 'EC Anti-Dumping Law and Practice after the Uruguay Round - A New Lease of Life?', 28 JWT (1994), No.2, at 20 and 21.

\textsuperscript{72} Art.1 Reg.522/94.
trading relationships. Many of the EC’s external agreements, particularly with the developing countries, cover financial and technical cooperation, as well as trade relations. Specific relationships have developed because of geographic proximity (agreements with the EFTA countries, the Eastern-Europe countries, and the Mediterranean region), or through formal colonial ties (the Lomé Convention). These preferential arrangements include free-trade agreements, association agreements, cooperation agreements, and the generalized system of preferences.

1. Free-trade Area Agreement

In parallel to the accession of Denmark, Ireland and the United Kingdom to the EC, the Community concluded trade agreements with the remaining members of the European Free Trade Association (EFTA) on 19 December 1972. The aim of these agreements was to establish a free trade area between the EC and EFTA. All customs duties between the EC and EFTA countries, with the exception of Finland, Iceland and Portugal, have been eliminated as 1 January 1984. Relations between the EC and EFTA have been improved and intensified under these free trade area agreements. On 2 May 1992, the EC further concluded a European Economic Area (EEA) agreement with the EFTA. The EEA Treaty is concerned with the application of rules on free trade and competition in economic and commercial relations between EC and EFTA. The free movement of industrial goods and processed food products from the EFTA countries is subject to simplified rules of origin, as well as mutual recognition and harmonization of technical standards. Decision 90/518 of 24 September 1990 for the procedure of exchange of information in the field of technical regulations between the EC and the EFTA is no longer valid. The EEA surveillance Authority will be responsible for applying Article 11

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75 Reg.2836/72 (Austria); Reg.2838/72 (Sweden); Reg.2840/72 (Swiss and Liechtenstein); Reg.2842/72 (Iceland); and Reg.2844/72 (Portugal). See OJ English Special Edition, 31 December 1972, pp. 3, 98, 190; and pp.3, 166.
76 Dec.90/518 concerning the conclusion of an Agreement between the European Economic Community, on the one hand, and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, on the other hand, laying down a procedure for the exchange of information in the field of technical regulations, OJ 1990, L291/1.
et seq. of the EEA Agreement, including the elimination of technical barriers. The EC and EFTA countries are also committed not to impose anti-dumping actions vis-à-vis each other. Regulation 5/94 of 22 December 1993 provides the basis for the suspension of anti-dumping measures against EFTA countries on the entry into force of the EEA Agreement from 1 January 1994. Consequently, the benefits of the internal market are extended to EFTA countries. The European context of EC preferential trade policy has impacts on other third countries. This policy clearly places the EFTA countries at the priority of EC preferential trade regime. The exports of EFTA countries could be trading on an unrestricted free trade term. Under this circumstance, the exports of developing countries are difficult to have a reasonable chance of competing in the EC market.

Third countries are very concerned about the extension of the CAP and of reciprocity approach in the wider European market through either new accession or free trade arrangements.

2. Association Agreements

Association is designed to establish a bilateral relationship between the EC and a third country or a group of third countries. Article 238:1 of the EEC Treaty provides that 'The Community may conclude with a third State, a union of States or an international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'. Association extends beyond mere trade or economic cooperation which mainly involve reciprocal rights and obligations. Association implies common action and an institutional framework. However, association is based on the hierarchy of preferential arrangements. The priority in turn is the EFTA countries, the other European countries, the Mediterranean region, and the ACP countries.

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Thus, a country, with its interest to promote economic and trade cooperation with the EC, is not necessarily eligible for association. Under these circumstances, the very existence of the association agreements could increase the difficulties of other third countries in the EC market. In other words, the EC provides the association countries better access to its market than is available to other third countries. Thus, the association countries will increase their product competition in the EC market.\(^2\)

The EC has recently concluded the Europe Agreement with Hungary, Poland and the CSFR on 16 December 1991.\(^3\) Generally, the EC rules on state-trading countries placed the countries of Eastern Europe at the bottom of the EC’s hierarchy of trade preference until the late 1980s. The Association Agreements aim at the establishment of a free trade area and freedom of movement, as well as at economic and financial cooperation, with a view to ever-closer relations with the countries concerned. The free trade area is to be established at the end of a transitional period, of a maximum duration of 10 years, starting from March 1992. Therefore, the Agreements lay down the ground for the complete removal of all trade obstacles by the end of the transitional period. Moreover, the trade provisions involve the immediate removal of all quotas, while import tariffs will be progressively eliminated over a period ranging between 2 and 5 years. Eastern European countries are now also eligible for the EC’s GSP treatment.\(^4\) In some sensitive sectors such as textile products, the EC also provides more favourable treatment (i.e. more high annual growth rate) to those countries.\(^5\) Improved access to the EC market for the Eastern European countries means that in certain sectors these countries now have, or will have preference over other developing countries. On 7 March 1994, the EC further adopted Regulation 519/94 for imports from Eastern European countries. In principle, imports into the EC shall take place freely and so shall not be subject to any quantitative restrictions (Art.1:2). Eastern European countries will benefit most for the new EC trade regime.

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\(^3\) Interim Agreements with Hungary, Poland and the CSFR, see OJ 1992, L114/1, L115/1, and L116/1 respectively.

\(^4\) Reg.3917/92, OJ 1992, L396/1.

3. Lomé Convention and the Generalized System of Preferences

Pursuant to the Part Four of the Treaty, certain overseas countries and territories which had special relations with four of the former six Member States (Belgium, France, Italy and the Netherlands) were associated with the Community. By reason of these special economic and political connections, the association was intended, under Article 131 of the Treaty, to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire. The Implementing Convention for the association of overseas countries and territories had advanced towards political independence, the Yaoudé Convention was concluded on 20 July 1963 in order to maintain the association between 18 independent African States and Madagascar (AASM) and the Community.\textsuperscript{86}

Initially, the Community embarked on a selective development policy based on the following considerations: underdevelopment is not uniform throughout the world, the special links shaped by geography and by history, and the means of actions which it could deploy were limited.\textsuperscript{87} Subsequently, the Community extended its relations to the African, Caribbean and Pacific (ACP) states since mid-1970s. Relations between ACP and the Community have been regulated by a series of Convention known as Lomé. The First Lomé Convention was signed in 1975, and the Fourth Lomé Convention in December 1989.\textsuperscript{88} The Lomé Convention is the cornerstone of the EC's relations with developing countries. The Lomé Convention represents a continuation of experience under previous Yaoundé Conventions. It contains new elements resulting from changes in the position of developing countries and the will of the Community to respond as far as possible to such changes.\textsuperscript{89} It also reflects the fact that 'the Community is able to make major achievements and breakthroughs in the area of development policy'.\textsuperscript{90} The policy of

\textsuperscript{86} The text of the two Yaoundé Convention, see Decision 64/349 (JO 1964, P.1430), and Decision 549/70 (OJ English Special Edition (Second Series, 1 External Relations (2))

\textsuperscript{87} EC Commission. Memorandum on a Community Policy on Development Cooperation (1972), at 16.

\textsuperscript{88} The text of the First and the Fourth Lomé Conventions see Reg.199/76 (OJ 1976, L25/1) and Dec.91/400 (OJ 1991, L229/1) respectively.

\textsuperscript{89} GATT. BISD, 235/47.

\textsuperscript{90} Rhein, Eberhard. 'The Lomé Agreement: Political and Juridical Aspects of the Community Policy Towards LDCs', 12 CML Rev. (1975), at 388.
cooperation being pursued by the Community and its Member States with the ACP countries was described as 'exemplary, original and irreplaceable'. There are now 69 ACP countries belonging to the Fourth Lomé Convention.

The instruments for ACP-EEC cooperation include: technical and financial cooperation; commercial policy; food aid; and economic and social policy. On the trade side, the EC grants preferential treatment to the ACP countries. This is undoubtedly a contested feature of the Lomé Convention. The ACP countries, however, consider the EEC preference to be insufficient. The effect of EC preference is also being reduced progressively by the EC's association with other countries, in particular in the form of free-trade areas. In addition, the preferential effect under the Lomé is also affected by the grant of GSP to all developing countries. Moreover, a number of agricultural products do not enjoy, as a rule, more than a modest degree of preference, as the Community is for understandable reasons not in a position to include the ACP in its agricultural market organization, and consequently to lift the barriers to such trade in the same way that it has done between the Member States.

From the perspective of the non-ACP developing countries, the Lomé Conventions create discrimination in preferential treatment among developing countries. The GATT considered the association agreements did not conform to Article XXIV, but constituted an extension of existing preferential systems contrary to Article I:2 of the GATT relating to m.f.n. obligation. The product coverage is substantially larger and the rule of origin is more liberal under the Lomé Conventions when compared to the GSP. Thus, the developing countries in competition with ACP countries feel themselves at a disadvantage. It also reflects the difficulties for the EC to pursue a balanced cooperation policy towards developing countries as a whole. It was pointed out that measures intended to promote the economic expansion of those association countries certainly deserved the greatest sympathy, but the steps taken to implement such measures should not become detrimental.

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91 GATT. BISD, 355/322.


to other third countries.\(^95\)

In addition to the Lomé Convention, the Community also operates a scheme of generalized system of preference (GSP) to all developing countries.\(^96\) The non-reciprocal GSP is to assist developing countries in improving the market access to developed countries, and in achieving their long term development aspirations. The EC was the first group of developed countries to implement the 'Agreed Conclusion' of the UNCTAD after the GATT Decision of 25 June 1971 decided to waive the provisions of Article 1 of GATT for a period of 10 years to the extent necessary to permit developed countries to accord preferential tariff treatment to products originating from developing countries and territories.\(^97\)

The GSP products covered include mainly manufactures and semi-manufactures falling within chapters 25 - 99 of the Customs, Cooperation Council Nomenclature (CCCN) but with important exceptions, such as textiles, leather and petroleum products. Agricultural products in CCCN chapters 1 - 24 are included only to a limited extent. In general, manufactured products covered by the schemes enjoy duty-free treatment, while eligible agricultural products enjoy various tariff cuts. The operation of GSP may create pressures to weak and uncompetitive EC industries which previously sheltered behind tariff or other trade barriers. Hence, there were internal requirements to introduce new safeguard measures against 'market disruption'.

Preferential imports into the EC are subject to safeguard mechanisms in the form of tariff quotas, ceilings and maximum country amounts. The Community's 'a priori limitations' involves restrictions on the volume of the GSP beneficiary's products. A priori limitations can be generally divided into collective limitations and individual limitations. The first type is known as ceilings and tariff quotas, and it applies to imports from all beneficiaries combined. The second type applies to imports from individual beneficiaries, and is known as maximum amount limitations. The maximum amount limitations restrict preferential import of any product from individual beneficiaries to 5,

\(^{95}\) GATT. BISD 6S/68, at 93.

\(^{96}\) The latest EC's GSP legislation and policy see RegJ917/92, OJ 1992, L396/1; and COM (94) 212: 'Integration of developing countries in the international trading system: Role of the GSP 1995-2004'.

\(^{97}\) Decision of 25 June 1971 (L/3545) see in GATT. BISD, 18S/24; The legal basis for further extension of GSP is by the 'Enabling Clause', see in GATT. BISD, 26S/203.
10, 15, 40, and 50% of the ceiling. The restrictive element in the maximum amount limitations was described as 'a quota within a quota'. The safeguard measures applied by the Community significantly limit the function of the GSP scheme. For many products the minor beneficiaries are unable to fully utilize that portion of the ceiling reserved for them. After the exclusion of principal suppliers, there were no other beneficiaries in a position to take advantage of GSP. In addition, the GSP began to bear the brunt of the erosion of preferential margins resulting from the Tokyo round tariff liberalization, and more important, of the policy of graduation which has caused a significant retrenchment of its benefits. Therefore, as long as the product coverage of the GSP is not extended, and the various safeguard measures, ceilings, rules of origin, etc. are not improved, the beneficial effects of the GSP to developing countries will be limited.

D. The EC Autonomous Trade Policy Towards Taiwan

1. The Concept of the Autonomous Trade Policy
The EC operates an autonomous trade policy towards Taiwan. Taiwan was subject to Regulation 1439/74 on common rules on imports (OJ 1974, L159/1), as amended by Regulations 288/82 and 518/94. Because Taiwan is not a GATT member, the EC can unilaterally decide its trade policies towards Taiwan. Originally, the EC autonomous import regime applied largely towards products from the state-trading countries. By reason of the economic structure of state-trading countries, the EC adopted the autonomous trade policy in conduct its relations with those countries. Based on Article 113 of the EEC Treaty, the EC adopted Regulation 109/70 of 19 December 1969

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98 Reg.3155/78 opening and providing for the administration of preferential Community tariff ceilings for certain products originating in developing countries, OJ 1978, L375/15.


102 Interview with EC Commission official, DG I - External Relations, on 17 December 1993 at Brussels.

establishing common rules for imports from state-trading countries.\textsuperscript{104} Protective
measures under this Regulation included surveillance (Art.6); import licence system
(Art.7(1)); regional quota (Art.8(2)); and national protective measures (Art.9(1)). On 27
March 1975, the EC further adopted Decision 75/210 on unilateral import arrangements
in respect of state-trading countries.\textsuperscript{105} According to Article 4(4) of the Regulation,
protective measures taken by Member States may be on an unilateral basis without subject
to negotiations.

Member States of the EC retained national restrictions against Eastern European
exports. These special safeguard measures were arranged during the GATT’s accession
by Poland, Romanian, and Hungary.\textsuperscript{106} The bilateral trade agreements between
individual EC Member States and individual Eastern European countries usually contained
lists of import quotas on sensitive products. Rather than trying to harmonize these
restrictions national restrictions were often incorporated and remained virtually unchanged
into Community legislation.\textsuperscript{107} Each year actual levels of imports were examined to see
how far quotas have been used and where concessions could be made. Concessions
entailed either abolishing restrictions, enlarging quotas, or introducing quotas for imports
which were prevailing non-liberalized.\textsuperscript{108} Liberalization list often excluded the so-called
hard-core sectors such as agricultural products or textiles which were important to Eastern
European countries. In addition, trade liberalization through bilateral arrangements
between individual EC and Eastern country was also obviously contrary to GATT’s spirit
of multilateralism.\textsuperscript{109} They could maintain the autonomous trade policy because Eastern
European countries had no effective means to push the EC for change. The GATT also
provided little help when Poland complained through the GATT’s dispute settlement

\textsuperscript{105} OJ 1975, L99/7.
\textsuperscript{106} The Protocol of Accession: Poland (BISD, 15S/46); Romanian (BISD, 18S/5); and Hungary (BISD, 20S/3).
\textsuperscript{107} Susan, Senior Nello. Recent Developments in Relations Between the EC and Eastern Europe. (1989), EUI Working
Paper No. 89/381, at 16.
\textsuperscript{108} Maslen, John. ‘ The European Community’s Relations with the State Trading Countries 1981-1983 ‘, 3 Yearbook of
European Law (1983), at 327.
\textsuperscript{109} Kostecki, M.M. East-West Trade and the GATT System. (1979), at 121 and 123.
Strict protectionist measures are often used by the EC to meet specific difficulties in its trade relations with Taiwan. The target sectors are textiles, footwear, consumer electronics and other miscellaneous products. In 1988, there were 26 Article 115 cases against Taiwan exports, comparably higher than other developed countries (Japan, 19) and developing countries (South Korea, 15).\textsuperscript{111} The autonomous trade policy provides a shield for the EC's Member States. Individual Member State could avoid direct trade tension with Taiwan in the use of protective measures.\textsuperscript{112} Taiwan therefore find it very difficult to challenge the national protective measures adopted by the EC countries. The autonomous trade policy clearly puts a 'Community label' on existing national protective measures.\textsuperscript{113} Under the autonomous trade policy, the annual growth rate is relatively lower than other national quotas. There are also no flexible transfer permits. For instance, the allocation of carry-over and advance drawing of quota shares as between one year and another is limited to 10% in the case of Taiwan. There are no permits for adjustment of quota between different Member States.\textsuperscript{114} The adjustment rate was even lower than the margin of 20% offered to the Eastern European countries before 1988, the same autonomous trade policy applied to those countries.\textsuperscript{115} Under these situations, the autonomous trade policy towards Taiwan is more strict than state-trading countries.\textsuperscript{116}

In practice, national quotas are operated by a dual control system in order to avoid the concentration of Taiwan's exports in one Member State.\textsuperscript{117} The quota should be

\begin{itemize}
  \item \textsuperscript{110}GATT. 'Report by the Working Party on the Trade with Poland', adopted on 25 October 1972, BISD 19S/109, at 114-115 and 120.
  \item \textsuperscript{111} Schuknecht, Ludger. Trade Protection In The European Community. (1992), at 78 and 79.
  \item \textsuperscript{112} Messerlin, P.A. 'Trade Policies in France', in Salvatore, D. (ed.) National Trade Policies (1992), at 166.
  \item \textsuperscript{113} Marsh, Peter. 'The Development of Relations between the EEC and CMEA', in Shlaim, A. and G.N. Yannopoulos. (eds.) The EEC and Eastern Europe. (1978), at 50.
  \item \textsuperscript{114} Art.2 Reg.1849/75 allocating quantitative quotas in respect of imports into the Community of certain textile products originating in Taiwan, OJ 1975, L189/24.
  \item \textsuperscript{115} Art.6(2) and (3) of Decision on Unilateral import arrangements in respect of state-trading countries, OJ 1975, L99/7.
  \item \textsuperscript{116} Susan, Senior Nello. The New Europe (1991), at 33.
  \item \textsuperscript{117} Interview with Taiwan trade official, Far East Services Inc., Branch Office in Belgium, on 22 December 1993, at Brussels.
\end{itemize}
made subject to production of an export and an import document satisfying uniform criteria. These documents must, on declaration or application by the exporter and the importer, be issued by the authorities of Taiwan and the importing country within a certain period. In the EC common rules for imports, a quota is only subject to control by the importing country.\textsuperscript{118} The dual control system places an extra burden on Taiwan.

There is no formal trade consultations for Taiwan under the autonomous trade policy. Article 14 of Regulations 4136/86 on common rules for imports of certain textile products originating in third countries\textsuperscript{119} provides the ground for bilateral consultations between the Commission and supplier country. But, Taiwan was not included in Annex II of this Regulation. The result is that Taiwan was not consulted on any Commission's decision which may affect Taiwan's interests. Besides not affording Taiwan any opportunity for formal negotiations, there is no other legal remedy for Taiwan. Consequently, no legal mechanism can exercise control in respect of the following issues: (1) whether the procedural rules have been correctly observed when the EC applied in the case of other third countries; (2) whether the facts for protective measures have been accurately stated; (3) whether the reason for the protective measures was adequate; (4) whether there was a violation of any provisions of the EC Treaties or a fundamental principle of Community law; and (5) whether there has been an appraisal or a compensation for misuse of powers.

2. The Impacts of the Autonomous Trade Policy

The autonomous trade policy is essentially unilateral in nature. Only the EC can decide whether, on balance, Taiwan's exports are beneficial or harmful to its interests. Only the EC can decide how much competition, if any, Taiwan's product has caused, and what action, if any, is appropriate to eliminate it. Only the EC could impose a protective measure which is appropriate to the conditions in its particular market. Only the EC could satisfactorily monitor the implementation of the protective measures and then decide how to amend those measures. Under the autonomous trade policy, the Commission can more

\textsuperscript{118} See Reg.288/82, OJ 1982, L35/1.

\textsuperscript{119} OJ 1986, L387/42.
easily attract EC interest group for protective measures.\textsuperscript{120}

The autonomous trade policy is applied in a protective manner. This policy often arbitrarily reduces Taiwan’s exports through administrative intervention. The quotas, licensing system and other protective measures are frequently used. The considerations for such protective measures are not necessarily linked with unfair trade practice by Taiwan. Rather, they are often used for protective purposes. It generates a high degree of unpredictability for businessmen on both sides.\textsuperscript{121} It also places an unnecessary strain on normal trade flows.\textsuperscript{122} The absence of transparency in autonomous trade policy increases the problems which they have engendered. It is generally recognized that transparency could provide for public scrutiny of protection and promote domestic understanding of their effects.\textsuperscript{123} The autonomous trade policy is often operated in great secrecy. The EC Commission has a great amount of flexibility in conducting this policy. As the Commission is subject to internal pressure, it seems likely that the interest of the EC producers may be given special consideration. The right to discriminate is seen as an important bargaining counter in EC-Taiwan trade relations. The impacts of autonomous policy on potential trade, or trade which would take place in the absence of such restrictions cannot be under-estimated.

3. Taiwan and the Internal Market
The EC-Taiwan trade has been affected by the EC Internal Market programme. The Internal Market has substantially reduced internal trade barriers which, in turn, stimulate intra-EC trade. Such progress will affect foreign competition in the EC market. But, this trade effect could be compensated by EC’s unilateral concessions to specific third countries. Accordingly, other non-EC European countries can also benefit from the Internal Market under the EEA Agreement or the European Agreement. Other developed

\begin{itemize}
\item \textsuperscript{121} GATT. " EEC-Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables ", BISD 25S/68, at 97.
\item \textsuperscript{122} Petersmann, E-U. op. cit., at 26.
\item \textsuperscript{123} Long, Olivier. Public Scrutiny of Protection. (1989), at xx and xxi.
\end{itemize}
countries such as the United States and Japan can safeguard their positions through extensive investment in the EC, or to take appropriate measures to combat EC import restrictions. Taiwan has always excluded from EC GSP treatment. Taiwan is thus at the bottom of EC’s external trade regime. In comparison, Taiwan has little influence in the EC trade decision-making procedure. Changes in the EC trade policies towards Taiwan is still a matter for the EC to unilaterally decide.

The EC will continue the quota system against Taiwan’s exports in many sensitive sectors after 1992. Even where the quota ceiling is increased, other barriers such as surveillance, technical standard, or anti-dumping procedures may still be remained. These non-tariff barriers are unlikely to be willingly renounced even after Taiwan’s accession to the GATT. The EC-wide quota against Taiwan’s footwear export actually was used by the EC from 1990. The main purposes of this EC-wide quota was to replace the residual restriction applied by Italy and France in 1988. In August 1988, the EC initiated a safeguards investigation for the whole EC affecting 1/2 billion ECU worth of shoes imported from South Korea and Taiwan. In addition to the injury test, causation of injury and the Community interest were also investigated. The result was that the imports caused serious injury to EC producers. The South Korea and Taiwan governments offered a VER starting on July 1st, 1990, which was accepted by the Commission. This was later supplemented by EC-wide surveillance.

The EC-wide quota system has negative effects on both Taiwan’s exporters and EC’s consumers. The residual restrictions used by Italy and France reduced Taiwan’s export to the EC market and increased output locally. Therefore, the EC-wide quota will lower the EC consumer welfare in general. In other words, the EC-wide quota will benefit the main local producers (Italy and France) at the expense of EC-wide consumers. Therefore, the EC-wide quota was strongly criticized by many EC importers. It also creates uncertainty for local EC importers. The EC-wide quota system is so harsh that importers may rush for application before the quota is used up. This may lead to an

124 See Reg.561/88 (Italy), OJ 1988, L54/59; and Reg.1857/88 (France), OJ 1988, L166/6 respectively.

125 Reg.1735/90 introducing prior Community surveillance of imports of certain types of footwear originating in South Korea and Taiwan, OJ 1990, L161/12.

oversubscription for licences to import products from existing licence-holders who wanted to be sure of obtaining a large enough number of products. The exporting country will suffer loss if the licence-holders do not use up their quotas. Therefore, the EC-wide quota actually represents a more severe restriction than residual protection.\textsuperscript{127}

Taiwan's exports cannot benefit fully from the elimination of EC internal technical barriers, caused by the lack of a mutual recognition system.\textsuperscript{128} The EC's harmonization of technical standards and regulations in various fields is mostly viewed positively in EC and non-EC countries. Once the individual exporter has adjusted to the uniform standards and regulations, it can extend its operations throughout the EC without legal problems and special formalities. In this respect the Internal Market gives countries the advantage of being able to follow a uniform approach throughout the EC. This harmonization benefits all exporters to the EC market. Moreover, the harmonization of technical norms allows the production and marketing of goods on a large scale, which can result in considerable cost savings.\textsuperscript{129} However, Taiwan first needs the recognition of its technical standard by the EC. Agreement on mutual recognition of certificate and testing will be based on Article 113 of the EEC Treaty.\textsuperscript{130} The EC is still reluctant to conclude such agreements with Taiwan before Taiwan's accession to the GATT. Moreover, the trade restrictive effects of technical barriers have long been recognized. The technical standards could even be used as a protective means against Taiwan after 1992.\textsuperscript{131}

Anti-dumping actions have been increasingly used by the EC against Taiwan's exports in recent years. Definitive anti-dumping duties were imposed on the following Taiwanese products: magnetic disks\textsuperscript{132} and certain polyester yarns (man-made staple

\textsuperscript{127} F.T. ' UK prepares for Chinese import licence scramble ', April 25, 1994, p.5.

\textsuperscript{128} Interview with Taiwan official, Far East Services Inc., Taiwan, Branch Office in Belgium, on 22 December 1993.


\textsuperscript{130} Resolution on a global approach to conformity assessment, OJ 1989, C 10/1.

\textsuperscript{131} Eckhout, Piet. ' The External Dimension of the Internal Market and the Scope and Context of a Modern Commercial Policy ', in Maresceau, M. (ed.) The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe. (1989), at 87 and 88.

fibre)\(^{133}\). In certain cases such as monosodium glutamate\(^{134}\), the undertakings (that is, the voluntary maintenance of minimum sales prices by exporters) were accepted by the Commission. Many cases\(^{135}\) were also investigated, but did not lead to protective measures, by the Commission. Under this situation, the anti-dumping was then terminated. Because of a general prejudice against the system of price formation in developing countries, anti-dumping actions may be abused by the developed countries.\(^{136}\) Even if these anti-dumping tests did not confirm any breach of practice, there was no compensation for exporters. For instance, Regulation 550/93\(^{137}\) imposed a provisional anti-dumping measure on imports of Taiwan's bicycles. The Dumping margin was subsequently considered negligible and the anti-dumping proceeding against Taiwan was consequently terminated.\(^{138}\) However, there was no compensation for Taiwan's loss caused by this proceeding and by the provisional anti-dumping measure imposed from 11 March 1993 to 6 September 1993. Foreign exporters also face problems concerning commercial confidentiality and business uncertainty caused by the anti-dumping actions. Taiwan's exporters sometimes were not invited to the anti-dumping investigations. This further places Taiwan's exporters in a very disadvantageous position to defend their interests. In many cases, EC anti-dumping measures were also maintained for a long period. For instance, Regulation 2464/77\(^{139}\) imposed a special duty on imports of certain nuts of iron or steel originating in Taiwan. It was finally repealed by Regulation 1948/92\(^{140}\) after it had been in force for 15 years. All these show little changes in the EC's autonomous trade policy towards Taiwan. Taiwan's accession to the GATT is then

\(^{133}\) Reg.830/92. OJ 1992, L88/1.

\(^{134}\) Reg.2455/93. OJ 1993, L225/1.

\(^{135}\) Compact dis players (Dec.93/413. OJ 1993, L185/51); bicycles (Dec.93/485. OJ 1993, L227/21); and certain types of nuts of iron or steel (Reg.1948/92. OJ 1992, L197/1).


\(^{137}\) OJ 1993, L58/12.


\(^{139}\) OJ 1977, L286/7.

\(^{140}\) OJ 1992, L197/1.
crucial for Taiwan-EC trade cooperation. In particular, this new trade relations will be conducted on a non-discriminatory basis.

E. Conclusion

One fundamental principle of EC trade policy is that of "enlightened self-interest". The President of the EC Commission Jacques Delors pointed out that "... the goal is a unified and strong Europe." Different trade policies are adopted for each stage with the aim of easing the transition from one stage to another. The priority of EC trade policy is to nourish and support the development of EC industries. Only when the EC has successfully surmounted all the obstacles to internal trade and has a complement of well-established industries should trade policy gradually revert to one of free trade to avoid the idle habit of EC citizens. The gradual approach for economic integration is clearly influenced by F. List's "stage of industrial development" theory. List considered that industrial or economic policy must be adjusted according to the development of economy. Different stages of development need the adoption of different economic policy. Protection is necessary to establish national industries. But, it should gradually lead to the promotion of the ultimate general freedom of trade. Thus, the benefits of EC integration will be mainly taken by its Member States. For the EC countries, the issues and impacts of the EC integration are more immediate. Thus, EC countries appear to be devoting first priority to efforts on internal integration rather than extra-EC trade relations. Moreover, the adjustment pressure caused by the internal trade liberalization could make EC and its Member States less willing to liberalize external barriers, in particular during the

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141 Interviews with the EC Commission’s official (DG I - External Relations) and Taiwan Trade Office’s official at Brussels on 17 and 22 December 1993 respectively.


beginning of each stage of integration. Protective measures are thus often used by the EC against import competition from third countries. The protective policy may even be justified by the EC to pressure on third countries to grant reciprocal concessions or to change their trade practices.

The EC also intends to extend its internal trade liberalization measures on to the international stage. In many sectors such as banking services, the EC market is more liberal and competitive in comparison to other countries. Therefore, third countries could benefit from the internal market if the elimination of barriers inside the EC were accompanied by a similar lowering of external barriers. However, the results of the Uruguay Round will be blocked if EC trade policy moves in the direction of protectionism or disregards GATT rules. The EC is one of the rule-makers in the new international economic order. It exerts a significant influence on global trends in trade policy, for instance towards bilateralism or multilateralism, towards sectoral arrangements or overall trade liberalization, towards a rule-oriented or a power-oriented trade relations. It is suggested that the leading role of the EC requires that its internal trade liberalization be matched by a parallel lifting of external trade barriers and closer adherence to the GATT. In particular, the EC trade policy areas in agriculture, textiles and banking services should be in line with the GATT rules.


Chapter 3: Taiwan and EC Trade in the Preserved Mushrooms

Trade in preserved mushrooms is a very sensitive issue in the EC. This product is subject to a very strict protection under the Common Agricultural Policy. The EC protective measures include high tariffs, import licences, surveillance, quotas, and voluntary export restraint arrangements (VERs). In the absence of a VER, the EC unilaterally reduced more than 90% of Taiwan’s preserved mushroom exports to the EC market in 1979. The ECJ has also recognized the validity of VERs in the EC legal order. The CAP and VERs are, of course, inconsistent with the GATT obligations in many respects. This Chapter will examine the background of the EC preserved mushrooms regime, the Common Agricultural Policy, the related EC case-law, the VERs, and their impacts on Taiwan.

A. Introduction

Agriculture is within the category of primary products defined in Article XVI:2 of the GATT as "any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing ...". This category of primary products was further limited in respect of the Subsidies Code by the footnote to its Article 9, which deletes the words "or any mineral" from the above text. Annex 1 of the GATT Agreement on Agriculture further defines the scope of agricultural product. Agricultural products provided in Article 38 of the EEC Treaty means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.

Agriculture is a sensitive issue in international trade. Agricultural products are, generally, essential to life, and their production and consumption are of vital importance in any society. The production of agricultural goods is affected by different climatic conditions and availability of arable land in different parts of the world. Trade in

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agriculture is also influenced by the world population growth and the technological progress. With a constantly rising world population, world food demand must also rise. In addition, the increased mechanization and use of fertilizers and pesticides have profoundly affected the productivity of agriculture. Modern technology and reduced transport costs have made it possible to trade in a wide variety of agricultural products.3

Generally, agricultural trade is influenced by many non-economic factors. It is vulnerable for a nation to rely mainly upon imports to feed its own population. National policies based on food security, food independence, and social considerations have been introduced in many countries.4 Agriculture also can be used as an instrument of foreign policy, such as the food aid.5 Thus, there is a strong pressure for government intervention in the agricultural sector.6 Protection then forms a main part of national agricultural policy.7 Trade barriers in the agricultural sector are commonly divided into tariff and non-tariff measures. Tariffs are common border measures, including specific charges and ad valorem; customs valuations based on fraction minimum or reference prices rather than actual invoices; and fixed or variable levies. Non-tariff measures include domestic support programmes, import restrictions, sanitary or administrative regulations, export incentives, and other grey area measures. Finally, state trading organizations play a role in managing the agricultural trade and in implementing protectionist policies.8 Pervasive government intervention is seen as the fundamental cause of the current disarray in world agricultural markets.9 It becomes an object of political controversy within and between nations.10 In

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6 Brown, W. The United States and the Restoration of World Trade (1950), at 24-25.
the early 1960s, the GATT has pointed out that failure to press forward in agricultural liberalization could seriously affect GATT objective for trade liberalization and cooperation as a whole.11

B. Agriculture in GATT
1. The GATT Rules
GATT rules on agriculture are specifically mentioned in Articles XI, XVI, and XX. In principle, GATT rules all apply to agriculture with only a few specific exceptions. These exceptions can be found in quantitative restrictions, subsidies to agricultural products, and waivers add to these exceptions. Protective measures in agriculture is a consequence of these exceptions in many countries. One reason for protective policy is to exclude domestic agricultural measures from international surveillance. Waivers are frequently sought to exempt particular policy actions from GATT obligations. General elimination of quantitative restrictions is required by Article XI of the GATT. However, this rule can be relaxed in certain circumstances as provided in Article XI:2 as following: (a) Article XI:2(a): Temporary export restrictions may be introduced to prevent or relieve critical shortages of foodstuffs or other essential products; (b) Article XI:2(b): Import and export restrictions may be used if necessary for the application of standards of commodity classification, grading, or marketing; (c) Article XI:2(c): Import restrictions on any agricultural or fisheries product necessary to the enforcement of governmental measures including (i) to the enforcement of domestic marketing or production control programmes; (ii) to remove a temporary domestic surpluses; or (iii) to support the development of domestic animal product production.

For a country to apply the exception under Article XI:2(c) it must give public notice 'of the total quantity or value of the product permitted...during a specific future period.' In principle, imports may not be restricted unless domestic products are also restricted. Moreover, domestic products must be restricted to approximately the same degree as imported products. This requirement is necessary to prevent countries from applying their restrictions to boost domestic sales by cutting down on imports. Those

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exceptions provided in Article XI:2 offer countries an important opportunity of GATT obligation evasion. Article XI:2(c) establishes a requirement of "the minimum access" condition to the introduction or continued maintenance of restrictions under Article XI:2(c)(i). A major difficulty with these provisions is that the point of reference for determining the appropriate ratio is a hypothetical one. Overall, it is difficult to see how the minimum access provisions could be made more operationally effective otherwise than through negotiations on the basis of guidelines which stipulate that the aim should be to increase access levels and that in no case should access be less than a given ratio. The ambiguous definition of Article XI:2 adds to the abuse of these exceptions.

Subsidy is a controversial issue in international trade law. It involves the intrinsic problem of defining the notion of subsidy. The GATT negotiations on this problem bear witness of this. Subsidy is a 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, the granting country. GATT adopted a broad definition of subsidy including any form of income or price support. Article XVI:3 requires countries to avoid the use of subsidies on the export of agricultural products. However, this provision is not very strict. A country is still permitted to grant a subsidy to increase the export of any agricultural product if 'such subsidy shall not be applied in manner which results in that contracting party having more than an equitable share of world export trade in that product.' In assessing the 'equitable share', account should be 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.

A nation's equitable share is referred to the world market and not to any individual market. It is also necessary, in determining 'equitable share', to take into account economic factors. This is with the view to facilitate the satisfaction of world requirements


15 GATT. *French Assistance to Exports of Wheat and Wheat Flour*, BISD 75/46, at 52-63.
of the agricultural product concerned in the most effective and economic manner. During the Tokyo Round, the United States made an effort to further restrain the spreading use of trade-related subsidies. A Subsidy Code was added to the GATT. This Code widened the definition of 'more than an equitable share' of the world market to cover the displacement of exporters in third country markets. A dispute settlement mechanism was put in place for the effective enforcement of the Code.

GATT rules have not always been found to give clear guidance for export subsidies on agriculture. Article XVI:3 contains a number of words relating to their scope or practical application: not only subsidy and primary product, but also equitable share, world export trade, representative period and special factors. The interpretation of these words has engendered new concepts whose meanings must be determined as well, such as market, displacement, and price undercutting. In practice, it is not always possible to prove causality between the subsidy and the increased share. Consequently, a number of disputes involving the concept of "more than an equitable share" have not found a satisfactory solution and in some situations have provoked retaliatory measures. In addition, the notification obligation provided in Article XVI:1 is also neglected by GATT members. A lack of consensus on the interpretation of the concept of subsidy has given rise to numerous disputes among the signatories. Although the Subsidy Code relates to all trade, most of the disputes have occurred in agriculture.

Today, domestic production subsidies play an increasing role in agricultural trade. These kind of subsidies may nullify or impair market access in an indirect way, other than through border protection. For instance, in early 1986 the United States brought a

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16 GATT. * Other Barriers to Trade *, BISD 3S/226.

17 Agreement on Implementation and Application of Article VI, XVI and XXIII of the General Agreement on Tariffs and Trade. See GATT. BISD 26S/56, Part II.

18 Arts. 12 and 13 the Subsidy Code GATT.

19 The notification requirements are detailed and extensive and apply to all contracting parties. See GATT. "Review pursuant to Article XVI:5", BISD 9S/188, and "Subsidies and State Trading: Procedures for Notification and Reviews", BISD 11S/58.


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GATT suit against EC regarding production subsidies by the EC to soybeans and other oilseeds.\(^{22}\) The EC oilseeds regime is based on Regulation 136/66 of 26 July 1966 on the establishment of a common organization of the market in oils and fats.\(^{23}\) In 1978, the EC further initiated an oilseed policy specifically intended to encourage the production of oilseeds to displace imports.\(^{24}\) The policy was achieved by payments to oilseed processors to compensate them for paying EC producer prices that were well above world prices. In response to high support prices, EC oilseed production has risen sharply, with a consequent decline in imports of seeds for crushing. The EC oilseed support programme has also led to higher export availability. These subsidies were considered by the U.S. to be a GATT violation because they have effectively nullified or impaired the zero-tariff concessions the U.S. received from the EC on these products during the Dillon Round.\(^{25}\) The subsequent introduction or increase of a domestic subsidy then may cause undue disturbance to normal trading interests of other countries under the GATT.\(^{26}\) The GATT upheld the US argument that the EC oilseed regime providing for payments to products is inconsistent with Article III:4 of the GATT.\(^{27}\) There has also been little compensation for countries whose trade interests under the GATT were harmed.

The EC adopted Regulation 3766/91\(^{28}\) of 12 December 1991 with the intention of eliminating any inconsistency with Article III:4 of the GATT. However, the discontinuation of payments to processors provided in Regulation 3766/91 is conditional on the purchase of domestic oilseeds. Therefore, the GATT found that benefits accruing

\(^{22}\) GATT. "European Economic Community Payments and Subsidies Paid to Processors and Producers of Oil Seeds and Related Animal-Feed Proteins ", BISD 37S/86, at 132.

\(^{23}\) OJ 1966, English Special Edition., p.221.

\(^{24}\) Reg. 1119/78 (OJ 1978, L142/8) introduced a system of support for peas and field beans for use in the manufacture of animal feed.

\(^{25}\) The duty free treatment accorded by the EC to imports of soybeans, rapeseed, sunflower seed and oilcakes or meals is provided for in the 1962 Schedule of Concessions of the Community (Schedule LXXX-EEC ). See GATT. BISD, 37S/88.

\(^{26}\) GATT. "Other Barriers to Trade: Article XVI - Subsidies ", BISD 3S/224, as reconfirmed in "Subsidies: operation of the provisions of Article XVI ", BISD 10S/209.

\(^{27}\) GATT. BISD 37S/86, at 132.

\(^{28}\) Reg. 3766/91 establishing a support system for producers of soya beans, rape seed and colza seed and sunflower seed. OJ 1991, L356/17.
to the U.S. in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions continue to be impaired by the subsidy scheme provided for in Regulation 3766/91. Regulation 3766/91 is actually a reaction to the European Court’s judgement regarding the fact that Regulation 136/66 is intended as a guarantee for seed growers and not oil millers. EC farmers still benefited from the subsidy scheme under Regulation 3766/91. Therefore, Regulation 3766/91 is not necessarily a positive response to the GATT’s decision. In this context, it is fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports.

2. The U.S. Waiver

Agricultural protectionism is caused partly by the unwillingness of many countries to place their agricultural policy under GATT surveillance. The waiver of US obligations relating to agriculture under GATT provides a good example. The section 22 of the U.S. Agricultural Adjustment Act of 1933 provided a legal cover for U.S. import restriction, including import fees and quotas, on a variety of agricultural products. Section 22 amended in 1951 specifies that ‘no trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section.’ This provision clearly constitutes a breach of the U.S. obligations under the Articles II and XI of the GATT law. The United States then applied to GATT for a waiver to prevent a conflict between its


31 GATT. "Review Pursuant to Article XVI:5", BISD 9S/188, at 191.


33 7 USC 624.

34 65 Stat. 75.
domestic law and the GATT.\textsuperscript{35} Given the political reality, the GATT members had very little choice but to accept the waiver to avoid the withdrawal of the United States from the GATT.\textsuperscript{36} This waiver, however, has a very harmful effect on the GATT. It 'establishes a precedent for the major trading partner of GATT to escape from GATT obligations on an important sector of economy, making it more difficult to constrain similar actions by other nations, with or without the benefit of a waiver.'\textsuperscript{37} Consequently, the EC protective measures under the Common Agricultural Policy (CAP) were tolerated by the United States in the 1960s. This was why the GATT panel hearing the complaint by Uruguay regarding the conformity of the EC's Common Agricultural Policy with GATT had been unable to come to a decision.\textsuperscript{38} The waiver granted in Section 22 of the US Agricultural Adjustment Act poses a difficulty for international trade liberalization in the agricultural sector. The implications of the waiver went far beyond the imposition of import restrictions in respect of a number of agricultural products. As early as in 1962, the GATT had urged the United States in dismantling the remaining Section 22 controls maintained under the waiver. The GATT considered that such progress would be an encouragement to other countries to take similar action and would have positive effects on international trade generally.\textsuperscript{39} Without the support for a liberal policy by the major trading partners, little progress was achieved in the previous agricultural negotiations. Moreover, conflicting interest even leads to a degree of trade tension among countries. Agriculture has become a main source of dispute in the international trade relations.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{35}\textit{GATT. ' Decision of 5 March 1955: Waiver Granted to the United States in Connection With Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), as Amended '}, BISD 3S/32.
\item \textsuperscript{36}Jackson, J.H. World Trade and the Law of GATT (1969), at 735.
\item \textsuperscript{37}Jackson, J.H. Legal Problems of International Economic Relations (1977), at 985.
\item \textsuperscript{38}\textit{GATT. ' Uruguayan Recourse to Article XXIII '}, BISD 11S/100-101; and 13S/48-49.
\end{itemize}
3. The GATT Agreement on Agriculture

The GATT Agreement on Agriculture aims to establish a fair and market-oriented agricultural trading system. The Agreement thus provides for commitments in the area of market access, domestic support and export competition. In the area of market access, non-tariff border measures are replaced by tariffs that provide substantially the same level of protection. Tariffs resulting from this "tariffication" process, as well as other tariffs on agricultural products, are to be reduced by an average 36% in the case of developed countries and 24% in the case of developing countries, with minimum reductions for each tariff line being required. Reductions are to be undertaken over six years in the case of developed and over ten years in the case of developing countries. Least-developed countries are not required to reduce their tariffs.

The Agreement applies the Total Aggregate Measurement of Support (Total AMS) to regulate domestic subsidy. According to Article 1 of the Agreement, AMS means the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general. The Total AMS covers all support provided on either a product-specific or non-product-specific basis that qualifies for exemption and is to be reduced by 20% (13.3% for developing countries with no reduction for least-developed countries) during the implementation period. Article 7 also provides the "green box" policies to exclude some domestic support measures, that have a minimal impact on trade, from reduction commitments. Such policies include general government services, for example in the areas of research, disease control, infrastructure and food security. It also includes direct payments to producers, certain income support, structural adjustment assistance, direct payments under environmental programmes and under regional assistance programmes. However, the legitimation of some domestic support under the green-box policies will become a controversial issue. Deciding whether a domestic subsidy is allowed by GATT will be difficult. At its worst, domestic subsidy can be used as a substitute for export subsidy or other protective purposes.

According to Article 9, members of the WTO are required to reduce the value of

41GATT. MTN/FA II-A1A-3.

mainly direct export subsidies to a level 36% below the 1986-90 base period level over the six-year implementation period, and the quantity of subsided exports by 21% over the same period. In the case of developing countries, the reductions are two-thirds those of developed countries over a ten-year period (with no reductions applying to the least-developed countries) and subject to certain conditions, there are no commitments on subsidies to reduce the costs of marketing exports of agricultural products or internal transport and freight charges on export shipments. Agricultural subsidies have increased since the 1990-94 period. Reduction commitments based on the 1986-90 base will bring very limited contribution. For instance, the EC budget expenditure on the CAP had increased from 25,992 million ECU in 1990 to 36,417 million ECU in 1992, which represented a 38.37% growth in two years period. In addition, export subsidies may still be replaced by other substitutes such as domestic subsidies for protective purposes. Article 9 calls for the 21% export volume curbs to be made evenly, at about 3.5% a year, over the six years. But, the Agreement on Agriculture does not indicate how to implement that commitments. It then opens to discretionary powers of WTO members. Some members may want to be able to shift the cuts to the end of the timetable, in the hope they will not have to be made at all. To avoid controversy, it will be more meaningful to fix an annual cut rate over the implementation period, such as the case in the Agreement on Textile and Clothing for MFA phase-out.

Overall, the Agreement provides a framework for the long-term reform of agricultural trade and domestic policies over the years to come. Article 17 of the Agreement also sets up a Committee on Agriculture that will monitor the implementation of commitments. It makes a decisive move towards the objective of increased market orientation in agricultural trade. The rules governing agricultural trade are strengthened which will lead to improved predictability and stability for importing and exporting countries alike.

43 F.T. * Gatt jigsaw starts to fall into place *, December 6, 1993, p.3.


C. The Common Agricultural Policy

1. Objectives of the CAP

The bases of the Common Agricultural Policy (CAP) are to be found in Articles 38 and 39 of the EEC Treaty. Article 38 lays down the basic framework for the introduction of a common market in agricultural products and provides for the further introduction of a common agricultural policy. The main objectives of the CAP, as defined in Article 39, are to increase agricultural productivity, to ensure a fair standard of living for the agricultural community, to stabilize markets, and to ensure that supplies are available to consumers at reasonable prices. These objectives may not all be simultaneously and fully attained.\(^{46}\)

In many cases, the simultaneous pursuit of all these objectives may inevitably lead to conflicts. In Balkan v Hauptzollamt Berlin-Packhof, the ECJ held that the EC institutions are allowed to decide the priority of Article 39 objectives in order to satisfy the demands of economic factors or conditions.\(^{47}\) Deciding on the priority of objectives often involves a complicated decision-making procedure. The ranking of the objectives in particular situations is, therefore, usually a result of compromise between Member States and the EC institutions.\(^{48}\)

In general, the EC has recognized the priority of the interests of producers over those of consumers. The Commission has described the CAP as 'a system of support of farmers’ income mainly through the support of market prices'.\(^{49}\) The Court has also confirmed that the price structure is directed primarily at the income of the producers rather than of others in the food chain.\(^{50}\) The priority of the support of farmer’s incomes over other considerations is sometimes based on a social goal. For instance, Directive 75/268\(^{51}\) recognizes the need to provide farmers with a minimum standard of living. It is based on the considerations not only for economic reasons but also in order


\(^{47}\) *Case 5/73, Balkan-Import-Export v Hauptzollamt Berlin-Packhof, [1973] ECR 1091 at 1112.*

\(^{48}\) *Case 29/77, Roquette v France, [1977] ECR 1835 at 1844.*

\(^{49}\) *COM (80) 800 final (1980), at 3.*

\(^{50}\) *Case 2/75, Einfuhr-und Vorratsstelle Getreide v Mackprang, [1975] ECR 607 at 616.*

\(^{51}\) *Dir.75/268 on mountain and hill farming and farming in certain less-farmed areas. OJ 1975, L128/1.*
to maintain a social fabric in rural areas, which will preserve the environment and maintain the balance of land use.\textsuperscript{52}

The CAP, according to Article 38:1, shall extend to trade in agricultural products. Article 38:2 provides that 'Save as otherwise provided in Article 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products'. It follows from this provision that the CAP has precedence, in case of any discrepancy, over the other rules relating to the establishment of the common market.\textsuperscript{53} This confirmed that the CAP has precedence over other EC policy areas. The EC must give more favourable consideration to the implementation of the CAP even under international commitments undertaken by the EC itself.\textsuperscript{54} The aim of CAP is to achieve not only self-sufficiency but also a proper balance in its trade with the rest of the world. In line with the Common Commercial Policy (CCP), the CAP has profound effects on world markets in agricultural products.\textsuperscript{55}

2. The Operation of the CAP

The CAP is a very complicated system involving a wide range of EC institutions and policy procedures.\textsuperscript{56} The core of the CAP consists of the common organizations of markets and the price system. Agricultural policy in the Community is generally formulated by the Agricultural Council, comprising of the Ministers of Agriculture. The Council determines the broad thrust of policies on the basis of Commission proposals. According to Article 43:2, most Council legislation could be passed by a qualified majority. However, since the CAP affects important national interests of Member States, voting in the Council is rare. In practice, decisions tend to be made as part of

\textsuperscript{52} EC Commission, Our Farming Future. (1993), at 6.

\textsuperscript{53} Case 83/78 Pig Marketing Board v Redmond [1978] ECR 2347 at 2368. The Court ruled that 'It follows from Article 38(2) of the EEC Treaty that the provisions of the Treaty relating to the common agricultural policy have precedence, in case of any discrepancy, over the other rules relating to the establishment of the Common Market.'.

\textsuperscript{54} Case 131/73 Grosoli [1973] ECR 1555 at 1565 and 1566.

\textsuperscript{55} Trapman, Christopher. 'The EEC's common agricultural policy and imports from third countries', in Overseas Development Institute. Britain, the EEC and Third World. (1972), at 70.

compromises during the annual agricultural price review. Generally, consensus is actually
the foundation of CAP decisions. In the management of markets, the Commission
closely cooperates with agricultural specialists from Member States within the framework
of management committees. Member States - with their marked differences in agricultural
structures - can either seek to enforce specific priorities by influencing common decisions
or by setting up support programmes of their own, subject to the provisions of Articles
92 and 93 of the Treaty. The complexity of the decision-making procedures negatively
affects the transparency of CAP. For third countries, the operation of CAP by the EC is
probably the single most controversial issue in their trade relations with the EC.

The common organization of the markets was achieved progressively on a product
by product basis. By the end of 1968, however, common price and marketing
arrangements had been applied to almost all major agricultural products. By 1970 some
87% of agricultural production was subject to common rules and by 1986 this figure had
risen to 91%. The actual management of these common markets on a day-to-day basis
involves the adoption of an endless stream of implementing legislation, designed both to
administer the complex series of price support mechanisms and to adjust them in response
to fluctuation in costs, monetary values and other market forces. Hundreds of
administrative Regulations are made each year by the Commission using decision-making
powers delegated to it by the Council, with the help by a series of Management
Committees. The day to day operation of the CAP is carried out mainly by the
Commission. The Commission and the Management Committee enjoy a wide measure of
discretion in the operation of the CAP. In some occasions, the Commission’s powers
to manage the CAP have also been exercised in relation to companies incorporated in a

57 Harris Simon, Alan Swinbank, and Guy Wilkinson. The Food and Farm Policies of the European Community. (1983),
at 12, 19 and 20.

58 Harris Simon, Alan Swinbank, and Guy Wilkinson. op. cit., at 253.


The market organizations are essentially based on three principles: the single market, Community preference and financial solidarity. The 'single market' means the free movement of agricultural products within the Community for EC Member States. Community preference is to protect the Community market from cheap imports and from fluctuation of the world market. It is achieved by import measures, such as levies and customs duties, and by export measures such as export aid or refunds. Levies put up an automatic protective shield against the sometimes very marked price variations on the world market. Levies can also be imposed on exports to prevent shortage and thus protect the Community markets. Financial solidarity is to finance any necessary expenditure on the CAP by all EC Member States. In 1962, Member States set up the European Agricultural Guidance and Guarantee Fund (the EAGGF). The EAGGF takes common financial responsibility for intervention expenditure on the internal market or on export refunds. Regulation 17/64 divided the Guarantee Section to finance marketing and Guidance Section to finance agricultural structure.

In the Pig Marketing Board v Redmond case, the Court held that the common organization of the market in pigmeat, like the other common organizations, is based on the concept of an "open market" to which every producer has free access and the functioning of which is regulated solely by the instruments provided for by that organization. Thus, the CAP prices are not determined by the sole factor of market forces as in a free market. They are actually the results of negotiations and administration.

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64 Case 113/78, Schouten v Hoofdproduktschap voor Akkerbouwprodukten, [1979] ECR 695 at 704.


The CAP represents a greater degree of intervention than any other EC sectors. Therefore, the CAP is essentially a managed trade.

The EC intervention in the agricultural trade has impacts on external trade. The prices fixed under the common organization of the market are to be determined on the one hand by the implementation of the various measures of intervention in the market, and on the other hand by adjusting the level of levies and refunds applicable in trade with non-EC countries. Export refunds are largely to permit EC agricultural products to effectively compete in world markets. On many occasions, the Community also uses and relies upon import and export licensing systems to control the volume of trade in agricultural products. The operation of the CAP implies that non-EC agricultural products may not receive more favourable treatment than equivalent Community products.

The CAP is thus a strict protective sector.

3. External Impacts of the CAP
In many respects, the CAP has gone a long way towards achieving its objectives. Having regard to the general measures, the CAP has successfully achieved the objectives of developing agricultural growth with a view to improving the structure of Community productivity and competition as a whole. The EC is by far the world's biggest importer and second biggest exporter in agricultural products. Today, the Community is more than self-sufficient in most important agricultural products. Since 1973 the annual increase
in the Community's exports of agricultural products has been greater than its imports.\textsuperscript{77} The achievements of the CAP, however, are at a high cost. The CAP has led to surpluses in agricultural production at the cost of other sectors. The CAP has attracted most of EC resources and has caused wide-spread conflicts both within the EC and between the Community and third countries. There is the cost to consumers of paying higher prices, and to taxpayers for paying farm subsidies.\textsuperscript{78} Surpluses depress prices so that they can only be sold at high cost to the EC budget.\textsuperscript{79} The farm expenditure has been, and still is, very substantial in EC budget: 63.2\% in 1988 and 58.2\% in 1992.\textsuperscript{80} The problem of financing has been an important political issue since the operation of the CAP.\textsuperscript{81}

In 1957, GATT examined the agricultural provisions of the Rome Treaty in relation to the GATT.\textsuperscript{82} GATT considered that the application of minimum prices could result in a displacement of trade with third countries. In other words, ' if there is an increase in demand, there is no assurance that outside suppliers will share in that increase, and, if there is no increase in demand, it is quite possible that imports from outside would decline '. In addition, ' if minimum prices are applied to trading among the Six, it could become necessary, depending on the level of prices established, to apply to imports quotas, which would not be consistent with the GATT provisions, or, if imports would be subject to minimum prices plus an external tariff, this could in effect seriously restrict and perhaps even prevent imports '. The GATT further pointed out that minimum import price system was a restriction " other than duties, tax or other charges " within the meaning of Article XI:1 of the GATT. Therefore, this system was inconsistent with the obligation of

\begin{itemize}
\item \textsuperscript{77}EC Commission. A Common Agricultural Policy for the 1990s (1989), at 37.
\item \textsuperscript{78}EC Commission. Our Farming Future. (1993), at 15.
\item \textsuperscript{79}EC Commission. Plan Mansholt. COM (68) 1000. 21 December 1968. Brussels, at 34 and 35.
\item \textsuperscript{80}EC Commission. Our Farming Future. (1993), at 23.
\item \textsuperscript{81}Melchior, Michel. ' The common organization of agricultural markets ', in EC Commission. Thirty Years of Community Law. (1983), at 463.
\item \textsuperscript{82}GATT. " The Treaties Establishing the European Economic Community and the European Atomic Energy Community ", BISD 65/68, at 81-89.
\end{itemize}
the EC under Article XI. The GATT also considered that a system which fixed domestic prices to producers at above the world price level might be considered as a subsidy in the meaning of Article XVI of the GATT. A system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss was also regarded as a subsidy by the GATT.\textsuperscript{84}

The EC subsidy for agricultural products is usually in the form of export refund. In the " European Communities - Refunds on Exports of Sugar " case\textsuperscript{85}, the GATT Panel held that ' the Community system for granting refunds on export of sugar must be considered to be a form of subsidy and thus subject to the provisions of Article XVI ( of the GATT regarding subsidy ).\textsuperscript{86} The EC's subsidies thus constitute export-promotion, price-undercutting, and market-share-increasing measures in aid of EC agricultural products. They also bear harmful effects of sale-opportunities-reducing, market displacement, and export-earning-diminishing for third countries, in particular developing countries. The GATT Panel considered that ' the quantity of Community sugar made available for export with maximum refunds and the non-limited funds available to finance export refunds on sugar had contributed to depress sugar prices in world market, and that this constituted a serious prejudice to Brazilian interests, in term of Article XVI(1) '.\textsuperscript{87} In addition, the Panel also held that ' the Community system and its application constituted a permanent source of uncertainty in world sugar markets and therefore constituted a threat of serious prejudice in terms of Article XVI(1)'\textsuperscript{88} The CAP is therefore inconsistent with GATT obligations in many respects.

\textsuperscript{83} GATT. " EEC-Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables ", BISD, 25S/68.

\textsuperscript{84} GATT. " Review Pursuant to Article XVI:5 ", BISD 95/188, at 191.

\textsuperscript{85} GATT. BISD, 27S/69.

\textsuperscript{86} GATT. BISD, 27S/96.

\textsuperscript{87} GATT. BISD, 27S/97.

\textsuperscript{88} GATT. BISD, 27S/97.
D. Taiwan and EC Trade in the Preserved Mushrooms

1. EC Preserved Mushroom Regime Towards Taiwan

The EC preserved mushroom regime is a complicated issue relating to the CAP and the trade policy. The main concern of this regime is to protect the EC producers. Germany is the largest consumer market of preserved mushroom in the Community. The preserved mushrooms regime therefore involves the conflicts of interests between the German traders, who favour imports from Taiwan, South Korea and China, and French and Dutch producers, who seek to expand their exports to the German market. The EC concluded a trade agreement with the People's Republic of China on 3 April 1978.\(^9\) With the change of EC trade policy, the mushroom regime was also designed to develop more favourable relations with China. Taiwan's export of preserved mushrooms to the Community was substantially reduced by this regime after 1979.

Preserved mushrooms fall under subheading 20.02 of the Common Customs Tariff,\(^9\) being "vegetables prepared or preserved otherwise than by vinegar or acetic acid", and come within the common organization of the market in products processed from fruit and vegetables established by Regulation 865/68.\(^9\) Regulation 865/68 is to protect EC producers as regarding production and marketing. Article 9(1) of the Regulation provided that the Common Customs Tariff shall be applied to preserved mushrooms. The EC also applies an import levy (Art.2(1)) and the refund system (Art.3(1)) for the interests of EC producers. According to Article 14, a Management Committee (the 'Committee') for Products Processed from Fruit and Vegetables was established to manage the processed-product regime. The Committee consists of representatives of Member States and is presided over by a representative of the Commission. Within the Committee the votes of the Member States shall be weighted in accordance with Article 148(2) of the EEC Treaty. Article 7 of Regulation 865/68 also confers on the Council the power to adopt rules concerning the system of trade with third countries.

\(^9\) OJ 1978, L123/2.

\(^9\) Art.1 of Reg.2107/74 laying down protective measures applicable to imports of preserved mushrooms, (OJ 1974, L218/54); and Art.1 and Annex IV of Reg. 516/77 on the common organization of the market in products processed from fruit and vegetables, (OJ 1977, L73/1).

Regulation 1427/71\textsuperscript{92} further allow the Community to take proper protective measures in the implementation of the preserved mushrooms regime. The conditions for applying Regulation 1427/71 were laid down by Council in Regulation 1428/71\textsuperscript{93}. The protective measures which can be taken by the Commission are enumerated in Article 2(1) including: (a) The total or partial suspension of imports or exports; and (b) a system of minimum prices. Regulation 2107/74\textsuperscript{94} further set up machinery for restricting imports of preserved mushrooms by means of a system of import licences. According to Article 2 (2) of the Regulation, the Commission is responsible for assessing the situation and for deciding on the quantities of producers for which import licences are to be issued, fixing a percentage to be applied to each applicant's reference quantity. For this purpose, the reference period should be either the month of 1973 for which applications are lodged or the average of the corresponding months from 1971 to 1973 if this average exceeds the quantity percentage applicable to imports of preserved mushrooms from third countries.

Regulation 1927/75\textsuperscript{95}, contained in Article 7:1, the possibility of protective measures ' if, ... the Community market ' in the preserved mushrooms, ' is or is likely to be exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty '. Article 1 of Regulation 1428/71 lays down the conditions to measure the concept of ' serious disturbance ' or ' threat of serious disturbance ': (a) the extent of the imports effected or foreseen, (b) the disposable amounts of the produce on the market, (c) the price of the domestic produce, and (d) those of the imported produce. In Schroeder v Germany, the Court further held that the concept of 'serious disturbance' or ' threat of serious disturbance ' is to be considered in the light of the objectives of the CAP enumerated in Article 39 of the EEC Treaty. The Commission is therefore given a broad discretionary powers to take protective measures, even based on the " possible "


\textsuperscript{93}Reg.1428/71 defining the condition for the implementation of protective measures for products processed from fruit and vegetables, OJ 1971, L151/6 (English Special Edition, 1965-72, p.36).

\textsuperscript{94}OJ 1974, L218/54.

\textsuperscript{95}Regulation 1927/75 concerning the system of trade with third countries in the market in products processed from fruits and vegetables. OJ 1975, L198/7.
effects caused by imports. Consequently, the EC preserved mushroom regime may become more restrictive in operation. Regulation 1927/75 was supplemented by Regulation 1928/75. Article 1 thereof defines the criteria which the Commission must take particular account of in order to determine, whether, at a given moment, the market is experiencing or threatened with the serious disturbance required by Regulation 1927/75. The factors include import volume, the situation of the Community market, the price for Community products on the Community market, and the level and trend of prices obtaining on the Community market for product from third countries. Article 2:1 defines the protective measures which may be taken for certain products, including preserved mushrooms, which are subject to the system of import certificates. Protective measures may include 'the total or partial discontinuation of the issue of new certificates' and 'the rejection of all or some of the applications for the issue of certificates which are being examined'.

Under the powers conferred upon it by the Council in those regulations, the Commission adopted for the first time in 1974 Regulation 2107/74 which made all imports of preserved mushrooms from non-member countries subject to an import license. Article 1:1 of Regulation 2107/74 institutes a system of import licenses, from 26 August 1974, for all import into the Community from third countries. Article 1:2 provides that the license is to be issued for imports to be effected during the quarter in respect of which it was drawn up. In other words, the import licenses are to be issued in advance and are to be valid for a period of three months. Article 1:4 expressly excluded from that reference system imports from third countries which stated their willingness to give certain guarantees, in particular that they would observe a certain minimum level of prices and that they would prevent any deflection of trade. Regulation 2107/74 was adopted in order to combat massive imports at low prices of preserved mushrooms from the Far East. That protective system was not abolished until 1 January 1977 as a result of Article 1 of Regulation 3096/76, which introduced a more flexible system of import certificates.

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96 Case 40/72 [1973] ECR 125 at 141.

97 Reg.1928/75 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables. OJ 1975, L198/11.

Taiwan, which in 1973 had sent to the Community 25544.6 tonnes of preserved mushrooms, was still able, under the system of reference quantities provided in Regulation 2107/74, to export to the Community 15808.5 tonnes in 1974, 18174 tonnes in 1975 and 7830.8 tonnes in 1976. The protective measures were relaxed with effect from 1 January 1977 by Regulation 3096/76. Following the relaxation of those measures, Taiwan was able to export to the Community in 1977 10353.9 tonnes of preserved mushrooms. On 25 May 1978 the Commission, using the powers delegated to it by Regulation 516/77 on the common organization of the market in products processed from fruit and vegetables, adopted Regulation 1102/78 laying down fresh protective measures including a complete suspension of imports from third countries. The EC entered into a trade agreement with China on 3 April 1978. Under this agreement, the contracting parties intended to make every effort to foster the harmonious expansion of their reciprocal trade. Under these circumstances, the EC preserved mushroom regime led to a deflection in patterns of trade in favour of China. The Community accorded China a quantity of 20000 tonnes in 1979. China became the almost exclusive supplier of preserved mushrooms in the Community. On the contrary, the Commission granted Taiwan a quantity of 1000 tonnes in 1979. Taiwan refused to voluntarily restrain its exports to this quota. Consequently, the Commission suspended all licenses for imports of preserved mushrooms from Taiwan. In 1980, after finding that the Commission did not intend to allow it to export the Community more than 1000 tonnes of preserved mushrooms, Taiwan agreed to restrict its exports to the Community to that quantity.

In respect of the preserved mushroom, Taiwan had maintained close trade relations with Germany before 1977. Traditionally, Taiwan was one of the three non-EC supplying countries in the German market. The interests of Taiwan's exporters and German importer had been maintained since 1961. Coercive actions by the Commission thus had very harmful impacts on Taiwan. From 1975, the Commission restored protective measures on several occasions and since May 1978, has made constant use of them, adopting, over a period of two and a half years, 18 regulations which set limits on the imposition of preserved mushrooms from third countries. The measures taken until 28 December 1980

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99 OJ 1977, L73/1.

100 Reg.1102/78 adopting protective measures applicable to imports of preserved mushrooms, OJ 1978, L139/26.
always dealt with the restriction or suspension of the issue of import certificates and varied according to the country exporting the goods to which the measures applied, account being taken of the fact of the conclusion of a VER. In 1978 and 1979, Taiwan refused to conclude further VERs with the Commission. Consequently, the import certificates in respect of preserved mushroom originating in Taiwan were suspended by the Commission in pursuance of Regulation 1102/78.

2. Assessment of the Preserved Mushrooms Regime
The main concern of the preserved mushrooms regime, like other agricultural regimes, is to protect the Community market. Regulation 2107/74 effectively reduced the import of preserved mushrooms to the German market from 44140 tonnes in 1974 to 37340 tonnes in 1975, and 26797 tonnes in 1976. The legality of EC preserved mushrooms regime, in particular as regards the difference in treatment of third countries, was the subject of three cases brought before the Court. The Faust v Commission case, concerned an action for damages brought by a German import agency - Faust. Faust carried on its business in Germany for the distribution and marketing of Taiwan’s preserved mushrooms. Faust suffered a loss by the reduction of Taiwan’s quota based on Regulations 3096/76, 1102/78 and 1449/78. The legality of the import licence system provided in Article 1 of Regulation 2107/74 against Taiwan’s exports was also questioned by another German importer - Wünsche in the case Wünsche v Germany. In the Edeka v Germany case, Regulation 1102/78 was challenged by a German importer - Edeka. The question in this case was whether there was unlawful discrimination against Taiwan and thereby against importers who shipped goods from Taiwan.

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103 Case 52/81 [1982] ECR 3745.


In Edeka, the Court held that the fact that the Commission’s regulations gave rise to a deflection in the flow of imports from Taiwan and South Korea towards the People’s Republic China did not provide any ground for criticism. It followed that the Commission was justified, when adopting protective measures, in taking account of whether or not a third country is ready to accept a voluntary restriction of its exports to the Community. It cannot therefore be said that it exceeded the limits of its discretionary power by almost totally prohibiting imports from Taiwan and South Korea, countries which did not agree to such VERs, in favour of imports originating from China, which did accept VERs, even if this results in a deflection in the flow of imports from Taiwan and South Korea to China. The Commission’s actions, therefore, were held by the Court to be lawful in the EC internal legal order.\textsuperscript{107}

It is recognized that Community institutions have a wide discretion in the sphere of commercial policy.\textsuperscript{108} In addition, the Court ruled that ‘the Treaty contains no general principle which may be relied upon by traders, compelling the Community in its external relations to accord equal treatment in all respects to non-member countries.’\textsuperscript{109} In Edeka, however, it seemed that the Court’s decision was based on the judgement that only China and not Taiwan or South Korea agreed voluntarily to restrict its exports to the Community.\textsuperscript{110} In these circumstances, the Court’s judgement did not answer to the objective of Regulation 1102/78 for the needs of the EC market in respect of both 1978 and 1979. In particular, the Court did not consider whether the quantities of imports proposed by the Commission to Taiwan, South Korea and China as the basis for VERs were in accordance with the needs of the Community market. The Court actually did point out that the import ban on Taiwan and South Korea was as a result of EC-China Trade Agreement.\textsuperscript{111} Therefore, the shift of Commission actions in favour of China was

\textsuperscript{107}Case 245/81 [1982] ECR 2745 at 2756.

\textsuperscript{108}Case 55/77, Balkan v Hauptzollamt, [1976] ECR 19 at 27. The ECJ stated that ‘As the evolution of a complex economic situation is involved, the Commission and the Management Committee enjoy, in this respect, a wide measure of discretion.’ (para.8).

\textsuperscript{109}[1976] ECR 19 at 31 and 32.

\textsuperscript{110}[1982] ECR 2745 at 2757.

\textsuperscript{111}[1982] ECR 2745 at 2758.
arbitrary and based a political consideration. It was clear that the Commission’s actions
did not confirm with the objective of Regulation 1102/78 to protect the EC market.

In Faust, the Court considered that Taiwan clearly appears to have been treated by
the Commission less favourably than certain third countries. Regulation 1213/78 of
5 June 1978, in which the Commission stated that Taiwan was also able to ensure that
its exports to the Community could not exceed the level agreed by the Commission, was
replaced very shortly afterwards by Regulation 1449/78 of 28 June 1978. The very short
lapse of time between the two regulations alone demonstrates that the Commission did not
act on the basis of a detailed consideration of the market situations, as required in
Regulation 865/68, but that political consideration alone prompted the decision which
banned all imports from Taiwan. The overriding reason for the change in the regulations,
which favoured imports from China, was to establish trade relations on a larger scale with
China. The development of the EC preserved mushrooms regime between 1974 and
1980 was manifestly not to tackle the problem posed by the pressure exerted on the
market by constantly fluctuating imports and to eliminate the disturbances brought about
by the phenomenon.

The reorientation in the Community’s trade policy favoured trade with China. The
EC offered China the largest part of its global quota of preserved mushrooms. The result
was that there was not much left for other third countries. The offers made to Taiwan in
1979 and 1980 were only 1000 tonnes, which represented a 90% cut-back in its exports
in comparison with previous years. In fact, Taiwan had exported more than 10000 tonnes
yearly to the Community since 1960s, except 1976. The figures set out raise doubts
as to whether Taiwan was fairly and reasonably treated by the Commission, even
assuming that China was to be given the largest share. It was not enough merely to say
that no voluntary export restraint agreement was reached. The justification for Taiwan not
accepting such an agreement may depend in part on the figures decided arbitrarily by the
Commission, and in particular the percentage of the total market offered when set against
the percentage previously enjoyed by Taiwan. The shift of EC policy regarding a 90% cut

\[112^1[1982] ECR 3745 at 3762.\]
\[113^1 OJ 1978, L150/5.\]
\[114^1[1982] ECR 2745 at 2769.\]
of Taiwan's exports also took little account of " traditional trade flows " of Taiwan exports before 1978.

Regulation 1928/75 contains a requirement of proportionality for the rejection of import licenses. Article 2:2 states that protective measures ' may be taken only to such extent and for such length of time as is strictly necessary '. This provision implies the applicability of the principle of proportionality in the preserved mushrooms regime. Therefore, the EC institutions may not impose obligations on a EC citizen except where its actions are strictly necessary in the public interest to attain the purpose of these measures.\textsuperscript{115} If the measures imposed are clearly out of proportion to the objective in view, they will be annulled.\textsuperscript{116} Given the strict nature of safeguard and other protective measures, Article 115:3 of the Treaty provides that ' In selection of such measures, priority shall be given to those which cause the least disturbance to the functioning of the common market and which taken into account the need to expedite, as far as possible, the introduction of the common customs tariff '. In \textit{International Fruit Company}, the Court also held that ' Since the Commission was entitled to take protective measures leading to a complete suspension of imports from third countries, it was, \textit{a fortiori}, entitled to adopt less restrictive measures '.\textsuperscript{117} With a reference quantity system, the Commission could effectively protect its own market and give each importer a fair chance. By excluding total imports from Taiwan, the Commission imposed an excessive and unnecessary burden on EC importers having trade relations with Taiwan. For those EC importers, the EC measures actually exceed what is appropriate and necessary to attain the objective pursued to protect the EC market. Therefore, the EC decision against Taiwan products is inconsistent with the principle of proportionality for EC importers.\textsuperscript{118}

Protective measures adopted in 1970s still remain in force today.\textsuperscript{119} This is


\textsuperscript{116} Case 5/73, Balkan - Import - Export v Hauptzollamt Berlin-Packhof, [1973] ECR 1091 at 1112.

\textsuperscript{117} Joined Cases 41 to 44/70, International Fruit Company v Commission, [1971] ECR 411 at 427.


\textsuperscript{119} Reg.1707/90 of 22 June 1990 laying down detailed rules for application of Reg.1796/81 on import of preserved mushrooms from third countries. See OJ 1990, L158/34.
contrary to Article 2 (2) of Regulation 1428/71 which requires that protective measures may be taken 'only to the extent of the period which are absolutely necessary'. This provision does not impose an obligation to fix in advance how long the protective measures will remain in force. As a result, protective measures may be used for an unlimited duration. Imports from non-member countries over the same period declined steadily owing to the constant protective measures adopted by the Commission. In the face of perfectly normal development of the EC market, the EC mushrooms regime was in no way designed to forestall disturbances, which was not in prospect, but rather to achieve a protection for EC producers - especially French and Netherlands producers - who were therefore able to gain a firm hold on virtually the whole of the largest consumer market, namely the German market. According to Article 6 of Regulation 2107/74, the import licence is transferable. Therefore, the reference quota tends to protect existing importers. The small or new importers will not be treated fairly under the quota system.

The Allocation of Quota of the Preserved Mushrooms by the EC

<table>
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<th>Country \ Year</th>
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Sources: Reg.1449/78; Art.3 of Reg.1769/81; Art.1 Reg.3433/81; and Annex I of Reg.1707/90.

n: not be available.

VER is applicable as a protective measure in the EC preserved mushrooms regime. The lawfulness of VERs has also not been called in question in the EC legal order. VER is a bilateral-type arrangement between governments or industries providing for...


121 Case 112/80, Dürbeck v Hauptzollamt Frankfurt Am Main-Flughafen, [1981] ECR 1095 at 1118, para.39; The ECJ stated that 'The Commission's attempt to secure the agreement of the exporting countries to a voluntary restriction of their exports to the Community... cannot be regarded as unacceptable under Community law...'.

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quantitative limitations, surveillance systems, price undertakings or export forecasts.\(^{122}\)

The EC has actively sought VERs as a response to import competition in some selective sectors such as textile, steel, preserved mushrooms, sheepmeat and manioc.\(^{123}\) The basis of a VER involves the fact that the Commission arbitrarily fixed the import quota to each third country in accordance with the need of the Community market.\(^{124}\) VER is usually applied to a selective number of main supplier countries rather than restricting import from all sources generally.\(^{125}\) VERs, therefore, may lead to discriminatory treatment against a specific country.\(^{126}\) Selectivity clearly offers considerable practical conveniences for the Community in dealing with its internal market pressures and external trade policies.\(^{127}\)

VER actions differ from safeguard actions taken under specific GATT provisions. There is a lack of transparency in the operation of VERs.\(^{128}\) VERs are also contrary to the GATT safeguard actions based on non-discrimination, temporary and exceptional requirements.\(^{129}\) In some areas, VERs then reveal the power-oriented diplomacy for trade policies by economic powers.\(^{130}\) The VER exporting countries may also try to divert its trade surplus to other countries, thereby, putting pressure on the domestic producers of these countries. As a consequence, other importing countries may also adopt

\(^{122}\) GATT. BISD, 30S/216.

\(^{123}\) Written Question No. 214/85, OJ 1985, C341/5.


\(^{126}\) Patterson, Gardenr. 'The European Community as a Threat to the System' in Cline, W.R. (ed) op. cit., at 234 and 236.


protective measures to prevent a diversion of exports from the restrained country. VER action, like other protective actions, has an inherent tendency to proliferate once it was taken. The danger of proliferation is particularly great in VERs because of the lack of indication for the elimination of such VER actions by the EC. The existence of VERs and its cumulative effect poses a serious controversy and uncertainty to the GATT.

3. The CAP Reform

The pressure for the CAP reform comes from overproduction leading to the build-up of surpluses which are frequently dumped at high cost on the world market, internal concern about the environmental consequences of intensive agricultural systems, and the problems of agricultural support to improve the incomes of farmers. Moreover, the EC Commission concluded that "the contrast between on the one hand such a rapidly growing budget and on the other hand agricultural income growing very slowly, as well as agricultural population in decline, shows clearly that the mechanisms of the CAP as currently applied are no longer in a position to attain certain objectives prescribed for the agricultural policy under Article 39 of the Treaty of Rome." The continuing high rate of CAP expenditure also ignores the needs of policies in areas such as transport and environment.

On 1st February 1991, the Commission further published a 'Reflections' paper on the development and future of the CAP, which represents probably the most serious attempt at fundamental reform of the CAP since its inception. On 21 May 1992, the

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132 GATT. BISD 36S/219 and 220.


134 COM (85) 333: Reform of the Common Agricultural Policy.


136 COM (91) 100 final: The Development and Future of the CAP - Reflections Paper of the Commission.
Council approved a number of measures redirecting agriculture in the Community.\footnote{OJ L180 and L181, 1.7.1992; OJ L215, 30.7.1992; and OJ L221, 6.8.1992.} The reform package approved by the Council is to be applied over a three-year period from 1993-94 onward. The reform decision resulted from a long period of political discussion and reflection regarding the domestic and international costs of EC farm support.\footnote{GATT. Trade Policy Review: European Communities. vol.I, (1993), at 128.} The aim of CAP reform is to improve market balance and ensure greater stability in farm incomes, at the same time providing the agricultural sector with more stable conditions generally and a clear picture of future prospects.\footnote{27th General Report EC. (1994), point 513.}

The CAP reform is largely based on the classic aims of managing the supply and demand of agricultural products and providing support for farmers’ incomes.\footnote{Snyder, F. ‘The Common Agricultural Policy in the Single European Market’, in Academy of European Law (ed.), Collected Courses of the Academy of European Law, vol.II, Book 1, pp.303-336, at 335.} The EC also strongly argued that the CAP reform must be underpinned by traditional principles: "a single market, Community preferences, and financial solidarity".\footnote{COM (91) 100 final, at 13.} Accordingly, the CAP reform still relies on the existence of a common price mechanism, a common external protection, and intervention buying by public bodies.\footnote{EC Commission. The European Community as a world trade partner. European Economy, No.52. (1993), at 200.} Price reductions under the CAP were not large enough to encourage farmers to remove a significant amount of land from production.\footnote{Scenario A: Moderate Support Reductions of 50-33-33 with Expenditure Discipline on Export Subsidies. Implications of a GATT Agreement for World Commodity Market, 1991-2000, (Jan.1991), at 37 and 38.} Whether the CAP reform package is sufficient to resolve production surpluses problem is still questionable. Moreover, there are wide differences in the structure of support schemes between products areas. Change in agricultural policy is likely to change the division of interests between the Member States and their farmers.\footnote{Neville-Rolfe, Edmund. The Politics of Agriculture in the European Community. (1984), at 488.} Whereas the importance of the CAP reform is generally recognized, differences exist over the extent of price cuts. The main resistance of CAP reform is often...
from the EC’s member countries, particularly their large-scale producers. The CAP reform will not be easy and cannot be achieved without changing significant vested interests. Market force is still not readily allowed to play the main role in the CAP reform. The CAP reform is still not in line with the GATT objective to establish a fair and market-oriented agricultural trading system. Protective measures under the CAP are likely to continue and not to be substantially affected by the CAP reform. The EC banana regime provides a good example for this protective trend.

The EC banana regime is one of the most difficult and contentious sector-specific issues in the Internal Market context, both among the Member States and with affected trading partners. Traditionally, France, Italy and the United Kingdom operated quantitative restrictions on some 17 Latin American countries (the so-called "dollar-Zone") giving additional protection to preferential imports from the ACP suppliers. Under Lomé IV (Section II.5 (iv)), the EC assured the ACP countries of the continuity of such preferential treatment after 1992. Costa Rica, Colombia, Guatemala, Nicaragua and Venezuela lodged a complaint before the GATT against this EC banana regime. The GATT panel ruled that the residual restrictions on banana maintained by some EC countries against Latin America exporters and the EC tariff preference to imports of bananas in favour of the ACP countries were inconsistent with GATT rules. The panel report was presented to the GATT Council in June 1993. However, the adoption of the report was blocked by the EC and the ACP countries. Moreover, the EC banana

149 F.T. 'EU leaves banana offer on the table', January 20, 1994, at 3.
151 GATT. 100 Focus (1993), at 2 and 3.
152 GATT. 102 Focus (1993), at 5.
regime was reinforced by a EC-wide quota system in July 1993.\footnote{Reg.404/93, on the common organization of market in banana, OJ 1993, L47/1; as amended be Reg.J518/93, OJ 1993, L320/15.}

The new banana regime continues to discriminate against non-ACP exports. The new regime provides duty-free access for traditional ACP deliveries and a tariff quota of 2 million tonnes on third-country shipments and non-traditional ACP countries combines for 1993. In-quota imports from non-ACP sources are assessed a levy of 100 ECU per tonne. Additional shipments of non-ACP country bananas are further subject to levy of 850 ECU per tonne. Moreover, an import licence system is operated in respect of imports from the non-ACP countries. A condition for accepting the EC's offer of an import ceiling of 2.1 million tonnes for 1994 would be for the Latin Americans to drop their GATT complaint.\footnote{F.T. ' Costa Rica seeks EU banana comprise ', February 4, 1994, at 5.} The GATT panel considered that the new EC banana regime was still inconsistent with GATT rules regarding non-discrimination and elimination of quantitative restrictions.\footnote{F.T. ' EU leaves banana offer on the table ', January 20, 1994, at 3.}

The EC banana regime, in many respects, illustrates a power-oriented diplomacy. On 11 February 1994, the EC withdrew its improved offer after further complaint by the Latin Americans before the GATT.\footnote{F.T. ' EU withdraws offer to open up banana trade ', February 12/February 13, 1994, at 4.} Ironically, now that the EC and Latin Americans have failed to reach agreement on improved access, the banana regime implemented in 1 July 1993 will remain in place. In addition, the EC offer, if accepted by the Latin American countries will push those countries to operate under an illegal system under the GATT regime. It is also agreed that the credibility of World Trade Organization as an effective regime will stand or fall on the success of its new dispute settlement system.\footnote{F.T. ' Gatt's successor to be given real clout ', April 7, 1994, at 6.} Since the measures examined by the GATT panel were no longer being supported by the EC, the United States found it will be very doubtful for the EC to implement the GATT's new dispute settlement.\footnote{GATT. 103 Focus (1993), at 6.} Regulation 2257/94\footnote{F.T. ' EU withdrawal offer ', January 20, 1994, at 4.} further lays down quality standards for
banana originating in third countries at the stage of release for free circulation. At its worst, this new requirement may be used for protective purposes. The banana regime indicates that traditional CAP's measures such as import levies, quota, import licensing system, and trade preferential treatment have remained dormant. It is clear from this context that the protective nature of the CAP still continues.

E. Conclusion

The preserved mushroom is a sensitive issue in the Community. The implementation of the preserved mushroom regime is basically a question of interest involving a wide range of EC institutions. It has attracted concerns from EC Member States and other third countries. Therefore, the preserved mushroom regime, like other agricultural products under the CAP, has been strongly influenced by political pressure for a balance of interests among Member States. It is an issue concerning political unity of the Community. The attempt to balance this situation often dominates the Community political agenda. The enlargement of EC further adds to the complexity of divergent national interests. The CAP has played a pioneering role in European integration. The European Court also clearly supported the CAP as a main pillar for European integration. Its great importance is reflected by both its share of EC budget and the


162 Hallstein, W. Europe in the Making (1972), at 178.

163 Camps, M. Britain and the European Community (1964), at 64. See also Marsh John and Christopher Riston. Agricultural Policy and the Common Market. (1971), at 50.


numerous political crises it has caused between Member States.\(^{167}\) The distortion of resource allocation was seen as the main defect of the CAP.\(^{168}\) The CAP has also developed into a burden on the EC's external relations.\(^{169}\)

The preserved mushrooms regime provides an example of CAP protectionism. However, the bilateral negotiations proved that it was not a useful means to modify the CAP. The EC maintains the view that the CAP cannot be challenged by third countries.\(^{170}\) Multilateral trade negotiations, then, could possibly provide the best opportunities to force the EC to change its protective agricultural policy.\(^{171}\) The experience of GATT multilateral trade negotiations reflects the fact that any negotiations in the agricultural sector in order to have any real significance should concern all aspects of national policy such as production, prices, and prices support measures, etc.\(^{172}\) In addition to general EC price support mechanisms, Member States of the EC may operate their own schemes, subject to Community approval.\(^{173}\) National agricultural policies of the EC Member States thus play an increasing role against import competition.\(^{174}\) To achieve a meaningful CAP reform, these national support schemes should also be


\(^{169}\) Preeg, Ernest H. Traders and Diplomats (1970), at 147.

\(^{170}\) GATT. BISD, 28S/85; also see F.T. ' Fresh row on farm subsidies threatens Gatt deadline ', December 23, 1993, at 1 and 12.

\(^{171}\) Gorbet, Hugh. ' Multilateral Negotiations on Agricultural Trade ', in Brian Davey, T.E. Josling, and Alister Mcfarquhar (eds.). Agriculture and the State, British Policy in a World Context. (1976), at 25.

\(^{172}\) Casadio, Gian Paolo. Transatlantic trade USA-EEC Confrontation in the GATT Negotiations (1973), at 180.


regulated by the GATT surveillance. The CAP will extend to new Member States after their accession to the EC. Third countries are also concerned that the result of EC enlargement will be more negative than positive in overall agricultural trade with those countries. To provide compensation for the loss suffered by third countries, the EC should reduce the protective effect of CAP, for instance the increase of EC-wide import quota.

The EC recognizes the existence of international economic interdependence and accepts its responsibilities as the leading trading partner in the international trading system. Accordingly, it is important to integrate the EC’s agricultural sector with the world market. The Agreement on Agriculture provides a more strict and effective control over protective measures. Sanitary measures sometimes may lead to a trade barrier. To avoid discriminatory quotas and to reinforce the Agreement on Agriculture, the agricultural liberalization should be set in line with the GATT 1994 and Agreement on Sanitary and Phytosanitary Measures, Agreement on Subsidies and Countervailing Measures, and Agreement on Safeguards. The GATT 1994 also provides a new framework for dispute settlement. This will bring agricultural disputes within a more effective discipline and then induce public support for further agricultural trade liberalization.


177 GATT. ‘Accession of Greece to European Communities’, BISD 305/168, at 181.

178 COM (91) 100 final, at 11.


180 GATT. MTN/FA 1; and MTN/FA II-A1A-4, 13 and 14.

Chapter 4: Taiwan and EC Trade in Textiles

The textiles and clothing sector has been an exception to normal GATT disciplines for a long time. International trade in textiles is currently subject to bilateral quotas under the Multifibre Arrangement (MFA). Accordingly, the EC has concluded many bilateral agreements with developing countries. There is no formal textiles agreement between the EC and Taiwan. The EC therefore applies an autonomous policy for Taiwan’s exports of textile products to the EC. Trade in textiles and clothing is subject to a variety of restrictions under this policy. Taiwan’s exports of textiles has also been affected by the accession of Spain and Portugal to the EC. This Chapter will review the legal problems brought about by the EC textiles and clothing policy and its effects on Taiwan. The legal discussion of trade in textiles will refer to the MFA and its phase-out required by the Agreement on Textile and Clothing\(^1\) concluded during the GATT Uruguay Round.

A. Introduction

The importance of the textiles and clothing industry to both national and world economy has long been recognized. Apart from meeting the basic human need for clothing, the industry also has a close link with other home furnishing industries (such as carpet). Textile products consist of natural and man-made fibres. This industry covers not only the production of these fibres, it also includes their conversion into apparel, home furnishings and individual goods. The production and conversion processes are, because of their nature, inevitably labour intensive. Cotton production, for example, comprises an array of processes that can be characterized broadly as spinning, weaving and finishing. The production of yarn involves several preparatory processes before the final spinning stage. These processes are opening and cleaning, the formation of laps of clean cotton, carding, drawing, and roving. Weaving involves interlacing lengthwise yarns (warp) and crosswise filling yarns (weft) and is carried out on a loom. Finishing, the third stage, includes the printing or dyeing of woven cloth.\(^2\)

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\(^1\)GATT. MTN/FA II-A1A-5, (15 December, 1993).

The textile industry is among the larger industrial sectors in terms of employment, gross national product, and export earnings. In fact, virtually every country has a textile industry, and textile is among the first industry developed by a country. Due to the Industrial Revolution, the British textiles industry became a model of wider industrial and economic growth for many countries. British textile industry provides the most striking example in European history of the combination of extensive division of labour, the use of rural worker’s household, and commercially organized production for foreign markets. Total textiles output is estimated to have accounted for about 14% of the UK national income in the 1820s. Textiles represented a significant share of the British total exports. At the outset of the 18th century cloth exports accounted for around 70% of British exports; 70 years later the proportion was still well over half. The textiles trade further involved the diffusion of textile technology from Britain to other European countries. These processes include the flows of technological information, capital equipment, management, and other business activities, etc. The sequence of coal, metals, textiles, and mechanical engineering based on the ‘British model’ was considered as a predominant feature of European industrialization in the early 19th century.

The development of economic liberalism and international trade regulation is also closely linked with the textile trade. Textiles was among the first commercialized production sector after the Industrial Revolution. The British textile and cloth sectors was an export-oriented industry in the 19th century. The British liberal trade policy was largely

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a response to the desire of textile manufacturers for an open world market for their competitive products.\textsuperscript{11} The adoption of free trade as official policy was expressed in the abolition of the Corn Laws in 1846 and in the repeal in 1849 of the Navigation Act of 1651. These developments taken together initiated the modern era of world trade. Moreover, the increasingly rapid international diffusion of technology has resulted in increased foreign competition for European firms in both domestic and foreign markets. Consequently, European countries began to sense that international regulation was required if the opportunities created by new technologies were to be exploited to their fullest extent. The instrument available for such regulation was the multilateral treaty. The Cobden Treaty of 23 January 1860\textsuperscript{12}, influenced by the idea of laissez-faire, contributed to the idea of free trade. In this treaty Great Britain and France reduced their tariffs very substantially, abolished import restrictions and granted each other the unconditional most favoured nation (m.f.n.) treatment. The designation of the m.f.n. clause for free trade was seen as 'the corner-stone of all modern commercial treaties'.\textsuperscript{13}

After the Second World War, textiles was the first major manufacturing industry to emerge in the developing countries. Supported by governments textile industries were readily established because of their relatively labour-intensive nature, small capital requirements, and no significant technological barriers to entry.\textsuperscript{14} Government intervention in the textile industry, based on the infant industry protection argument, is considerable in developing countries. Import substitution policies, industrial development assistance and export subsidies are among the many policies and actions of developing countries. The dominant position of developed countries in textile sector faced vigorous challenges from import competition. Consequently, government interventions of a protective nature were frequently applied by developed countries to safeguard their textile industry and employment. Developing countries were faced with strong pressure to

\begin{itemize}
  \item \textsuperscript{11}Saxonhouse, G and G. Wright (eds). Technique, Spirit and Form in the Making of Modern Economies (1984), at 272.
  \item \textsuperscript{12}British and Foreign State Papers, vol.50, at 13.
  \item \textsuperscript{13}Hornbeck, S. K. 'The Most-Favoured-Nation Clause', in 3 AJIL (1909), at 395.
  \item \textsuperscript{14}Toyne, Brian et. al., The Global Textile Industry. (1984), at 110.
\end{itemize}
voluntarily limit their exports to developed countries. From 1 January 1974, developed countries further developed an international regime - the Multifibre Arrangement (the MFA) - to regulate textile trade. Textile was then managed outside the GATT rules for a long time.

B. Textiles in GATT
1. The GATT Rules
GATT, in certain circumstances, allows contracting parties to take protective measures. Article XIX which generally considered to be the 'safeguard clause', is in fact a device for members to escape GATT obligations. Article XIX:1(a) provides that certain protective action can be taken

'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 products in that territory of like or directly competitive products...'.

Article XIX therefore allows contracting parties, subject to specific conditions, to reimpose trade barriers otherwise prohibited by the GATT. The basic remedy granted by Article XIX for the safeguard action is to suspend the obligation in whole or in part or to withdraw or modify any relevant concession. The withdrawal should be only 'to the extent and for such time as may be necessary to prevent or remedy such injury'. Moreover, the withdrawal or suspension shall be on a non-discriminatory m.f.n. basis.

The use of Article XIX has significantly declined as more safeguard actions are taken without reference to GATT rules. Many countries have concluded bilateral arrangements outside the GATT disciplines. These arrangements are largely based on the new concept of 'market disruption'. Under the concept of market disruption, the injury


16GATT. BISD 215/3.

17GATT. Doc. L/76 (1953).
test required is not so strict. The operation of these arrangements caused concerns to many exporting countries. The GATT, on 19 November 1960, then adopted the following definition of market disruption:\(^\text{18}\)

" (a) In a number of countries situations occur or threaten to occur which have been described as 'market disruption'.
(b) These situations generally contain the following elements in combination:
(i) a sharp and substantial increase or potential increase of import of particular products from particular sources;
(ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of importing country;
(iii) there is serious damage to domestic producers or threat thereof; and
(iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices.
In some situations other elements are also present and the enumeration above is not, therefore, intended as an exhaustive definition of 'market disruption'." 

Early in 1961 the United States further proposed a conference to seek means for simultaneously encouraging international trade in textiles and clothing and avoiding undue disruption of established industries in the importing countries. The Short-Term Arrangement Regarding International Trade on Cotton Textiles (the STA) then emerged under the auspices of the GATT.\(^\text{19}\) The STA was to last for a year beginning in October 1961, and a Provisional Cotton Textiles Committee was established to work out a longer term solution to the perceived problems. By February of 1962, the text of the Long-Term Arrangement Regarding International Trade in Cotton Textiles (the LTA) was completed.\(^\text{20}\) The STA adopted the Decision on Market Disruption as its basis, and outlined three goals: to increase significantly access to markets that were then restricted, to maintain orderly access to markets that were relatively open, and to secure a measure of restraint on the part of the exporting countries in order to avoid disruption. As with the STA, the LTA also contained provisions for liberalizing existing restrictions as well as for


\(^{19}\) GATT. "Arrangements Regarding International Trade: Cotton Textiles ", BISD 10S/18.

imposing new ones.\textsuperscript{21}

The LTA was the first important instance in which the GATT rule of non-discrimination was formally set aside for reasons regarded as pragmatic.\textsuperscript{22} The LTA legitimized bilateral agreements, even in the forms of voluntary export restraints. This inevitably led to discriminatory actions against a specific country, which is contrary to Article XIX based on a non-discriminatory requirement. Moreover, the description of market disruption based on 'low-priced product' solely restricted the imports from developing countries.\textsuperscript{23} Development in the 1960s gradually brought countries to the view that the LTA was no longer adequate for regulating international trade in textiles and clothing. Pressure developed for the imposition of new restrictions on non-cotton products such as synthetic fibres. This led to the conclusion of the Multifibre Arrangement (the MFA).\textsuperscript{24}

2. The Multifibre Arrangement

The Multifibre Arrangement (MFA)\textsuperscript{25} is modelled on the lines of the LTA, with numerous refinements and a few significant innovation. The basic objectives of the MFA are "to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries." (Art.1(2)). There are two sets of balanced rights and obligations in the MFA. First, while participants are permitted to employ its safeguard mechanisms in certain defined circumstances, they are at the same time required to pursue appropriate policies to encourage structural adjustment. Second, the right of the importing countries

\textsuperscript{21} Article 3 the LTA.


\textsuperscript{23} GATT. Textiles and Clothing in the World Economy (1984), at 65.

\textsuperscript{24} GATT. BISD 21S/3.

\textsuperscript{25} Arrangement Regarding International Trade in Textiles (MFA I, 1974), GATT BISD 21S/3; MFA II (24S/5); MFA III (28S/3); MFA IV (33S/7); and 36S/8); and Protocol Maintaining in Force the Arrangement Regarding International Trade in Textiles (38S/113 and 39S/4).
to impose restrictions is balanced by the obligation to respect the provisions of Annex B dealing with base levels, annual growth rates and flexibility of the quotas. (Art.3)

The product coverage was enlarged to include textiles and clothing made of wool and man-made fibres, as well as cotton, and blends thereof. The MFA I had a larger product coverage in comparison with the LTA. It covered not only cotton textiles but also man-made fibres and wool. MFA IV further contained provisions in paragraph 24 for the extension of the product coverage to silk blends and certain textiles made from vegetable fibres (para.24 of Protocol of Extension). The expansion of product coverage was seen as evidence of protective tendency of the MFA. Quota is the main protective means used by developed countries against low-price textile imports. The use of quota restrictions are set out in Articles 2, 3 and 4 of the MFA. Article 3 covers situations of actual market disruption, and can - in the event that a mutually agreed solution is not possible - involve the unilateral imposition of import restrictions. Article 4 deals with situations involving a real risk of market disruption. From the viewpoint of the MFA, bilateral agreements are possible only under Article 4. In other words, claims of ‘real risk’ of disruption to justify a unilateral restraint would fall outside the scope of the MFA.

In situations of market disruption, the importing country is required to consult with the exporting country. The MFA spells out in more detail, than did the LTA, the system of bilateral restraint arrangements that are permitted when risk of market disruption is claimed. The MFA requires them to be more liberal on overall terms than the measures meant for situations of disruption. The situation of market disruption was directly related to the existence, or threat, of serious damage to the domestic industry which could be assessed by examination of various factors such as sales, market share, profits, employment, and production. The damage must be clearly connected with a sharp and substantial increase in imports from particular sources, and/or at prices lower than that those prevailing in the market for similar products from domestic as well as other import sources. A principal aim of MFA was the economic development of the developing countries and a substantial increase in their earnings from trade in textiles and clothing. It is therefore stipulated that the economic interests of the exporting countries should be

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26 Art.12 MFA I.

taken into account when determining whether a situation of market disruption exists.

Article 1:4 of the MFA I contains a provision for structural adjustment. The importance of structural adjustment in textiles trade was recognized by the GATT:28

' the fundamental issue is structural adjustment, that is, the way in which economies respond to the pressures for changes in the patterns of production and trade that are inherent in the process of economic growth. In many respects, the structural adjustment problem confronting the textiles and clothing industries in the developed countries is the prototype for structural adjustment in general. Future policy decisions regarding these two industries will be a key test of the developed countries’ approach to structural adjustment.'

The EC considered the adjustment ' will be far more complex in the textile industry than in others, but, if successful, will ensure that this industry, which has been in the forefront of industrial development for centuries, will retain all its importance to industry and society and produce a series of innovatory solutions.29 Article 1:4 of the MFA I lacks substantial obligations. Different views then exist among GATT members on the use of adjustment measures. Consequently, autonomous adjustment has not yet played an crucial role in the international textiles regime.30

3. Agreement on Textiles and Clothing

The main purpose of the Agreement on Textiles and Clothing31 is to secure the eventual integration of the textile and clothing sector into the GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade. According to Article 3 of the Agreement, Members of the GATT maintaining restrictions on textiles and clothing products shall (a) notify them in detail to the Textile Monitor Body (TMB), or (b) provide to the TMB notifications with respect to them which have been submitted to any other World Trade Organization body. All restrictions, except those justified under a GATT 1994 provision (e.g. safeguard clause), shall be either: (a) brought into conformity with the GATT 1994 within one year

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30 GATT. BISD 315/138-56.

31 GATT. MTN/FA II - A1A - 5.
following the entry into force of this Agreement, and be notified to the TMB for its information; or (b) phased out progressively according to a programme to be presented to the TMB by the Member maintaining the restrictions not later than six months after the date of entry into force of this Agreement.

Article 2(13) and (14) of the Agreement provides a three-stage plan for MFA phase-out before 2005. First, from 1 January 1995 to 31 December 1997; each party would integrate into the GATT products from the specific list in the Agreement which accounted for not less than 16% of its total volume of imports in 1990. The annual growth rate for stage 2 (1.1.1998 - 31.12.2001) and stage 3 (1.1.2002 - 31.12.2004) is 25% and 27% respectively, with previous stage as the reference base. Therefore, integration means that trade in this sector will be governed by the general rules of the GATT. From 1 January 2005, this sector shall stand integrated into GATT 1994 and all restrictions under the Textile Agreement shall have been eliminated. In addition, any unilateral measure taken under Article 3 of MFA prior to 1 January 1995 may remain in effect for the duration specified therein, but not exceeding 12 months, if it has been reviewed by the TMB. Moreover, no new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.

Safeguard action under the GATT is permitted only in exceptional circumstances, but the MFA-type quota tends to be as a general rule. Under Article 4 of the MFA, no existence or actual threat of an emergency situation is required. Article 4 of the MFA in fact enables importing countries to obtain long-term protection against import from developing countries. The MFA was to a large extent a codification of protective and discriminatory practices in textiles and clothing sector. It is a "loop-hole" in the GATT framework. The demand for textiles and clothing products tends to be more elastic than for other goods. This reduces bargaining power of exporting countries in textile trade. Consequently, textile trade is strongly influenced by importing countries.


This regime can be regarded as a power-oriented trade relations outside the GATT rules. It affects not only the interests of developing countries but also the credibility of the GATT. The MFA has been remained for a long time more than its original expectation. It remains to be seen whether the Agreement on Textile and Clothing will be fully implemented by the developed countries.

C. Textiles and the EC

1. EC Industry Policy and Regional Policy on Textiles

The textile and clothing sector occupies an important position in the EC's industrial base. In 1992, this industry had a turnover of 180 billion ECU and a workforce of some 2.7 million. With different regional structures and levels of developments, this industry is particularly importance to Greece, Portugal, Spain and Italy. The EC policies and structure adjustment thus have serious consequences on economic activity and employment in these regions. For instance, the EC market took 75% of all Portugal's exports of textiles and clothing (3 billion ECU out of 4 billion ECU) in 1992. This sector also accounts for approximately 25% of all industrial employment in Portugal and 30% of its exports of goods. Any structural adjustment thus has serious consequences on economic activity and employment in these regions. In spite of the restructuring under way, the industry still faces many problems mainly arising from current conditions of international competition, the demands of modernization and the impacts of completion of the internal market. These difficulties have led to standing protective policy to avoid further job losses in the Community. Moreover, with completion of the internal market and the much more transnational way in which the industry operates, solutions to problems of industrial competitiveness will be sought increasingly at the Community level.

Specific sectoral subsidies at Community level are applicable under EC industrial

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35 Aggarwal, Vinod K. op. cit., at 12, 13 and 46.


37 Com (93) 525 final, at 54.

38 Resolution 178 on the textile and clothing industry. OJ 1992, C178/3.

The specific sectoral aid to the textile and clothing industry was first defined in a communication from the Commission to the Member States on aid to the textile industry in 1971 and later in greater detail, in a 1977 letter. Research and Development (R&D) is an area in which the Commission is favourably disposed to aids. The pursuit of regional policy is generally justified on moral and on economic grounds, also called the equity and efficiency arguments. At present 34 regions characterized by a high concentration of the textile and clothing industry and by high level of unemployment benefit from a specific Community regional development measure regarding the textile and clothing industry in the framework of the non-quota section of the European Regional Development Fund. In addition, state aids by Member States are also applicable to the textile sector. The Commission has generally shown a positive attitude towards regional aids. There are many possibilities for the Commission to authorize state aids under Article 92(3) of the EEC Treaty. In 1990, there were 429 notifications of state aids and only 12 cases were rejected by the Commission. Thus, it appears that the EC's state aid control is actually quite lenient. The EC regional aid and state aid then may be used as a protectionist instrument for textile and clothing sector.

44Reg.219/84 instituting a specific Community regional development measure contributing to overcoming constraints on the development of new economic activities in certain zones adversely affected by restructuring of the textile and clothing industry. OJ 1984, L27/22.
4620th Report on Competition Policy (1990), at 135.
2. The Application of the MFA by the EC

The MFA is the most important trade policy for the Community on the textile and clothing sector. The Community signed the MFA in 1974.\(^{49}\) The management of the MFA is based on Regulation 3059/78 on common rules for imports of certain textile products originating in third countries.\(^{50}\) Regulation 3059/78 provides rules for the supervision of quotas, the levels of various quotas, the internal procedure for withdrawal from the basket, more stringent rules for prevention of fraud, the treatment of flexibility request from third countries and also criteria for the division of the quotas between the Member States. Regulation 369/92\(^{51}\) contains more stringent rules for the prevention of fraud. A theoretical economic spread of imports ' burden sharing ' was agreed upon by the Member States. Quotas, were fixed by country, to take account of this economic spread. The burden-sharing formula is Germany 25.5%; UK 21%; France 16.5%; Italy 13.5%; Benelux 9.5%; Spain 7.5%; Denmark 2.7%; Greece 1.5%; Portugal 1.5% and Ireland 0.8%. The Community quota, divided into national sub-quotas, is therefore more often seen as an effective instrument of protection for twelve national markets separately and operated accordingly. However, national or regional quotas run the risk of segmentation of EC market.

According to Regulation 3059/78, the distribution of imports among supplier countries is based on five criteria: (1) imports achieved in 1976; (2) quotas fixed for 1976; (3) the penetration rate on the Community market; (4) the economic situation in the supplier country; and (5) preferential links that may exist with the Community. The first two criteria served as the basic level for fixing the quotas. The third criteria was used to make certain adjustments slanted against the major suppliers (Hong Kong, South Korea) to ensure a more equitable distribution of quotas. In case of certain highly sensitive products, these suppliers had to accept a number of reductions in the 1978 quota compared to the 1976 level. The criteria of the economic situation in the supplier country


was clearly applied in favour of the poorest countries which were treated more flexibility. Such special treatment was allowed under Article 6 of the MFA IV. However, the Article could permit certain countries, which would not normally be competitive in textiles and clothing sector, to obtain a share of markets in importing countries. It therefore encourages a shift in imports from high competitive textiles to low competitive products. It also created a positive discrimination among exporting countries.

The determination of sensitivity of textile products is also a main objective in the implementation of MFA by the Community. The first group comprises extra-sensitive products. Their penetration rate is extremely high and attempts have been made to stabilize it in order to protect the corresponding European industry which is seriously threatened. In other words, the annual quota growth rate was calculated in such a way that the import growth rate of these products overall did not exceed that of domestic consumption; this was fixed at between 1-2%. This Group I has been divided into eight categories: cotton yarns, cotton fabrics, fabrics of synthetic fibres, T-shirts, pullovers, trousers and ladies’ and men’s shirts. The Community has fixed import quantities within the global ceiling. Group II also comprises products that are very sensitive having a penetration rate of over 20%; the growth rates for the whole of this group was fixed at around 4%. The growth rates for Group III and IV are between 5% and 6%. In this connection, the total average growth rate fixed by the Community is actually far below 6% prescribed by Annex B of the MFA.\(^{52}\)

Under the MFA III\(^{53}\), the Community concluded 27 separate bilateral agreements and one with China, which were essentially all similar in context.\(^{54}\) In 1986 some 70% of Community imports of textiles and clothing from third countries were covered by these bilateral textiles agreements. All the bilateral agreements negotiated under the MFA in 1993 will remain in force until the end of 1994, with the option of automatic renewal for


\(^{53}\)Dec.82/179 concerning the conclusion of the Protocol extending the Arrangement regarding international trade in textiles, OJ 1982, L83/8.

\(^{54}\)The Agreement with China see Reg.2072/84 on Common rules for imports of certain textile products originating in the People’s Republic of China, OJ 1984, L198/1.
In 1993, the EC concluded bilateral agreements with the following countries: Argentina, Bangladesh, Brazil, China, Columbia, Guatemala, Hong Kong, India, Indonesia, Macao, Malaysia, Mexico, Pakistan, Peru, Philippines, Singapore, South Korea, Sri Lanka, Thailand, and Uruguay. The EC also concluded the agreement with Viet Nam and the textiles protocols to the Europe Agreements with Poland and Hungary. New agreements have concluded in 1994 with 12 Independent States of the former Soviet Union (Belarus, Ukraine, Moldova, Uzbekistan, Russia, Tadjikistan, Armenia, Azerbaijan, Kyrgyzstan, Turkmenistan, Georgin and Kazakhstan), and with Latvia, Lithuania, Albania, Mongolia and Slovenia.

The EC textile regime is essentially a managed trade and involves a complex administrative system. Regulation 3059/78 establishes a textile committee which is responsible for the administration of textile regime and is composed of representatives of the Member States, under the chairmanship of the Commission. The Textile Committee meets once a week and constitutes the framework for the regular examination with experts from the Member States of the various problems arisen from management of the bilateral agreements. The administration involves the establishment and rapid transfer of statistical data; constant monitoring of quotas, licences, the product origin and classification; examination of Member States' request for new restrictions and subsequent negotiations; and examination of requests from third countries for transfers or quota modifications and subsequent negotiations. Moreover, a system of dual control, by both the EC and exporting countries, was established. This further places an extra burden on exporting countries to manage their textile exports.

Article XIX of the GATT and Article 115:3 of the EEC Treaty allow the use of tariff as a means of trade protection. In practice, the EC safeguard actions rely mainly on quantitative restrictions. GATT safeguard measures are required on a temporary and non-discriminatory basis. The MFA, however, enables the EC to manage trade in textile bilaterally or even unilaterally. The vast majority of the EC textiles restrictions then is

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55 27th General Report EC. point 890.


applied to some selective developing countries. Regulation 3589/82 introduced the anti-surge clause by the EC to prevent an excessively sharp increase in imports. The anti-surge procedure would deny access rights, and mean nothing but cutbacks. It was incompatible with Article 5 of the MFA which referred specially to full utilization of quotas. By creating uncertainty in access rights this anti-surge procedure would have disruptive effects on exporting countries. It was negative to the objectives of the MFA. The EC argued that many developing countries have apparently benefited from increased export possibilities under the MFA bilateral agreements. This increase, however, was criticized as only to be decided on an unilateral basis by the EC and not in the MFA as a right. The operation of the textile regime by the EC has therefore tended to be more restrictive.

3. The EC Textiles Regime and Common Commercial Policy

Article 9:2 of the EEC Treaty provides that 'The provisions of Chapter 1, Section 1, and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.' Accordingly, the rule of free movement of goods is also applicable to products from third countries once they are in free circulation in a Member State. The Court also ruled that, as regards free circulation of goods within the Community, products in free circulation are definitively and wholly assimilated to products originating in Member States. Whilst a total Community quota may be divided into national subquotas, such a division cannot hinder the free movement of the goods subject to the quota once they have been

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58 GATT. "Trade in Textiles", in BISD 29S/158-191, at 170-172.
60 GATT. BISD 29S/180.
61 GATT. "Trade in Textiles", BISD 33S/252.
63 Case 119/78, Peureux v Services Fiscaux De La Haute-Saone Et Du Territoire De Belfort, [1979] ECR 975 at 987, para.32(b).
released into free circulation in the territory of one of the Member States. In this connection, once textile products originating in countries which are parties to the MFA are imported and released into free circulation in one Member State, they must be able to circulate freely in any other Member States. However, the Court considered that under the system of the Treaty the full application of the principle of free movement to goods imported from non-EC countries is conditional upon the establishment of a common commercial policy. In Tezi, the Court further upheld this position and stated that national protective measures could be applicable before the completion of the common commercial policy. The Court recognized that the incompleteness of the common commercial policy, together with other circumstances, was likely to maintain differences in commercial policy between the Member States. In addition, the EC intended to apply a gradual approach for MFA phase-out. In the Tezi case, the Court also ruled that Regulation 3589/82 merely maintains existing disparities to a certain extent, but with the intention of reducing them gradually and then abolishing them.

With the completion of the internal market for textiles from 1 January 1993, quantitative restrictions previously negotiated on a bilateral basis are now set exclusively at Community level. The national restrictions imposed in bilateral agreements were either abolished or, in a limited number of cases, transformed into Community quotas. However, completion of the internal market for textiles does not mean a major change in the procedures for the administration of bilateral agreements. It is desirable that the management and decision-making procedures should be those traditionally provided for in the textiles and clothing sector. On 12 October 1993 the Council adopted Regulation 3030/93 updating the rules governing imports of textiles under the MFA or preferential arrangements. The administrative procedures associated with the previous system of

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67 Case 242/84, Tezi BV v Minister For Economic Affairs, [1986] ECR 933 at 943.


69 27th General Report EC, point 884.

national quotas were abolished in favour of centralized quota administration, made possible by the coming on stream of an integrated licensing system which provides computerized control of import licences issues by the Member States. The new Regulation also confirmed the role of the Textile Committee set up in 1978 under Regulation 3059/78 to help the Commission administer Community quota. For those non-MFA countries, the EC decision-making procedures are based on Regulation 517/94. Therefore, textile trade continues subjecting to a complicated administration after 1993.

Owing to the sensitivity of the EC textile sector, quantitative restrictions and surveillance measures are still applicable at Community level based on Regulation 517/94 of 7 March 1994.\(^1\) The EC-wide surveillance and safeguard measures for specific textile products may be used at the request of a Member State or at the initiative of the Commission. In addition, protective measures may still be imposed for those textile products already liberalized at Community level. The consideration for such measures may simply be based on the claims that ‘the economic interests of the Community so require’; no mention need be made about real threat to cause injury to the EC textile production.\(^2\) Moreover, national prohibitions, quantitative restrictions or surveillance measures can still be applied 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’.\(^3\) In this context, the protective nature of EC textile regime does not change much even with the completion of internal market.\(^4\)

\(^{1}\)Reg.517/94 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community rules, OJ 1994, L67/1.

\(^{2}\)Art.11(2) Reg.517/94.

\(^{3}\)Art.26(2)(a) Reg.517/94.

\(^{4}\)Davenport, Michail W.S., 'The External Policy of the Community and its Effects upon the Manufactured Export of the Developing Countries', in 29 JCMS (1990), at 199.
D. EC and Taiwan Trade in Textiles

1. The Autonomous Textiles Policy

Taiwan is not a member to the GATT and the MFA. The EC therefore applies an autonomous textile regime towards Taiwan. This regime is essentially based on unilateral restrictions in a MFA-type framework. Imports of textiles products from non-MFA countries is generally governed by Regulation 1025/70 concerning common rules for imports from third countries.\(^75\) Article 3:1 of Regulation 1025/70 provides that 'Member States shall notify the Commission of any danger resulting from trends in imports which appear to call for protective measures.' Surveillance and other protective measures are contained in Articles 7 and 10 respectively. Such protective measures may be limited to imports intended for certain regions of the Community. In other words, regional quota and national quota are also applicable against import competition. The procedure for administering quantitative quotas is based on Regulation 1023/70.\(^76\) EC-Taiwan trade in textile is now based on Regulation 517/94 of 7 March 1994 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community import rules.\(^77\)

With respect to Taiwan, the first autonomous textiles regime was to be found in Council Regulation 1783/75\(^78\) and Regulation 1849/75\(^79\). These regulations have laid down the arrangements for imports into the Community of the textile products from Taiwan. Importation into the Community of the Taiwan textile products is subject to Community quotas and national quotas.\(^80\) The Community quotas shall be allocated, in accordance with the procedure set out in Article 11 of Regulation 1023/70. Moreover, the


\(^77\)OJ 1994, L67/1.


\(^79\)Reg.1849/75 on allocating quantitative quotas in respect of imports into the Community of certain textile products originating in Taiwan. OJ 1975, L189/24.

\(^80\)Art.1:1 Reg.1783/75.
allocation was fixed on the basis of the volume of imports admitted under the conditions
applied by the Member States in 1974. For the years 1975 to 1977 the size of these
quotas was fixed in such a way as to allow a very low annual growth rate. For instance,
the Community quotas for other woven fabrics of cotton (CCT heading No.55.09) imported from Taiwan was fixed at 10670 metric tons for 1975, 11410 tons for 1976 and 12210 tons for 1977. It represented only a very low annual growth rate with 0.069% for 1976 and 0.066% for 1977. Moreover, the reference quota of 1975 was arbitrarily reduced to 50% of the volume of 1974. In Regulation 3032/77, the Community quotas was still fixed at an low annual growth rate: 0.2% for Group I products; 1% for Group II; and 3% for the Group III, IV, V or VI. Regulation 4134/86 slightly increased the Community quotas: 0.4% for Group I products; 2% for Group II and 6% for Group III. However, the annual growth rate is still much lower than 6% provided by the MFA.

In Regulation 1025/70 establishing common rules for imports from third countries, protective measures against a country which is a contracting party to the GATT may be considered only if the product in question is imported into the Community in such greatly increased quantities and on such terms or conditions as to cause, or threaten to cause, substantial injury to EC producers of like or directly competing products. The injury test is not required in Regulation 1783/75 on rules for imports of textile products from Taiwan. Moreover, market disruption, bilateral consultation, and bilateral agreements provided in Articles 3 and 4 of the MFA is not mandatory in Regulation 1783/75. The size of Community quotas and national quotas are unilaterally decided by the Community and its Member States. These decisions were also not subject to GATT surveillance. The unilateral cut-back in Community quotas and low annual growth rates did show the

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81 Art.1:3 Reg.1783/75.
82 Annex I Reg.1783/75.
83 Art.1:2 Reg.1783/75.
84 Annex B of the MFA contains rules for the levels of import restrictions. The minimum annual growth of the quotas is 6%. See Decision 74/214, OJ 1974, L118/1.
85 Art.10 Reg.1025/70.
86 Arts.1:2 and 2:2 Reg.1783/75.
discriminatory nature of the autonomous textiles regime.

National quotas are also applicable in the EC autonomous textile regime. Article 2 of Regulation 1783/75 provides that 'Implementation of the products...originating in Taiwan is hereby made subject to quantitative quotas in the Member States...'. Importation of textile products, from Taiwan shall be subject to Community surveillance in accordance with rules laid down in Articles 8 and 11 of Regulation 1439/74. Article 8:1 states that 'products under Community surveillance may be put into free circulation only on production of an import document. Such document shall be issued or endorsed by Member States,...'. The national quotas are opened and administered in accordance with the provisions applicable in the Member States concerned. Because of the considerable disparities between the sensitivity of textile industry to some Community regions, national protective measures are actually more strict in operation by Member States.

In the implementation of the MFA I, the Community was under extremely strong internal pressures from interest groups to protect EC textile industry against import competition. In particular, the European Clothing Industries Association, the Coordinating Committee of the Textile Industries of the European Community (Comitextil) and the European Trade Union Committee published a protectionist plea in May 1976, entitled The European Textile and Clothing Industries and the International Division of Labour. Internal pressures contributed to a more strict textile policy adopted by the Community in order to avoid unilateral action taken by Member States. Under these circumstances, Taiwan's quota suffered a sharp decrease in 1976. Taiwan also had other problems for its exports of textile products in the EC market. Where restrictions were set up for developing countries under Article 4 of the MFA, the quota increases offered were more generous than to Taiwan. Thus for Hong Kong, the EC's 1976 quotas for fabrics were 46% higher than trade in 1973, while for clothing the quotas were 29% higher. For South Korea, the corresponding increases were 110% and 73%. Moreover, Taiwan was not allowed for regional transfer. Apart from Taiwan, the Asian countries have therefore been

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87 See EC Commission. The European Community and the Textile Arrangements (1979), at 21-3.
88 Keesing, Donald B and Martin Wolf. Textile Quotas against Developing Countries (1980), at 60 and 61.
89 See the report of the Textiles Surveillance Body to the GATT Textiles Committee, COM. TEX/SB/196 of 5 November 1976, at 13 and 15.
able to sell more to countries such as Germany and France by taking advantage of unused MFA quotas with countries such as Greece, Portugal, Spain, or Italy.

Regulations 3591/92\textsuperscript{90} is the current arrangement for the import of textile products from Taiwan. This Regulation applies from 1 January 1993 to 31 December 1995.\textsuperscript{91} It constitutes a part of the revision of the Community's overall Commercial policy on textile products and the realization of the internal market as from 1 January 1993. Under this Regulation, textile products will still be subject to import authorization on presentation of an export document issued by the Taiwan Textile Federation.\textsuperscript{92} Article 2(4) of the Regulation provides a new system for administering Community quotas which will be based on the principle of a common commercial policy. National subquotas will be based on a system of licences issued by Member States in line with quantitative criteria established at Community level. In this connection, Taiwan's export is still subject to a double-check system. Moreover, surveillance or safeguard measures confined to one or more regimes rather than the whole of the Community may also be applicable to limit free circulation of Taiwan's textile products within the whole EC market. In other words, regional restrictions are still applicable for EC Member States in the case of Taiwan. Article 3(3) of Regulation 3951/92 states that 'where it emerges that the conditions for the adoption of quantitative limits are met in one or more regions of the Community, the Commission, after having examined alternative solutions, may exceptionally authorize the application of surveillance or of quantitative measures limited to the regions concerned if it considers that such measures are more appropriate than measures applied throughout the Community.' Article 16 of Regulation 517/94 of 7 March 1994 further confirms this regional restriction. Therefore, the current EC textile regime towards Taiwan is still very strict even with the completion of the internal market after 1992.

The accession of Spain and Portugal to the EC also had strong impacts on Taiwan. The EC enlargement involved changes in the application of the Community's textiles policy. Specially, import quotas had to be modified and reestablished. In the case of


\textsuperscript{91}Art.11 Reg.3951/92.

\textsuperscript{92}Art.2:3.
Greece’s accession, the EC decided that the framework of its textile trade policy would remain intact, and that the interests of the supplier countries be basically maintained. Greece’s theoretical economic burden was fixed at 2% of the total Community burden, excluding Greece. In other words, the figures in future were to reflect the theoretical economic burden of the Member States in relation to a total of 102%. The economic interest of the supplier countries was not be adversely affected by the accession of Greece. This planned adaption was also to be applicable to Taiwan. Article 3:2 of Regulation 3587/82 fixed the total Community quotas at 102% for Taiwan. The burden sharing among Member States is as following: Germany 28.5%; Benelux 10.5%; France 18.5%; Italy 15%; Denmark 3%; Ireland 1%; UK 23.5%; and Greece 2%. This adaption formula is total different in the accession of Spain and Portugal.

Regulation 3787/85 amended Regulation 3587/82 on account of the accession of Spain and Portugal. Article 1:1(a) of Regulation 3787/85 fixed the burden sharing for the new two Member States at Spain 7.5% and Portugal 1.5%. However, the total Community quotas reflected a figure of 100%. The burden sharing for Member States was modified to Germany 25.5%; Benelux 9.5%; France 16.5%; Italy 13.5%; Denmark 2.7%; Ireland 0.8%; UK 21%; Greece 1.5%; Spain 7.5%; and Portugal 1.5%. Spain and Portugal are two important textile production and export countries. Therefore, it is very difficult for third countries to take full use of the national sub-quota provided by Spain and Portugal. At the same time, third countries decreased their export size in traditional market caused by the reallocation of national quotas. It actually represents a sharp cut of up to 11% of the total Community quotas (Spain 7.5%, Portugal 1.5% and Greece extra 2%). Moreover, Spain and Portugal can promote their exports to the EC market by the elimination of trade barriers. The EC enlargement involves not only free movement of goods but also free movement of person, services and capital. Therefore, Spain and Portugal may also improve their competitive position by access to European

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93 Reg.3787/85 amending, on account of the accession of Spain and Portugal, Regulation 3587/82 on common rules for imports of certain textile products originating in Taiwan, OJ 1985, L366/43.

94 Art.3:2 Reg.4134/86.
technology, management, and other resources.\textsuperscript{95} The interests of third countries is then adversely affected by the accession of Spain and Portugal. For instance, the increase rate of Portugal exports of textile and clothing to the EC is much higher than non-EC countries. Between 1988 and 1992 Portugal's sales rose substantially by an average of 9.5\% per year in the case of textiles and 14.3\% for clothing.\textsuperscript{96} Taiwan's export of textile fibres (code 26, other than wool tops and other combed wool) experienced a sharp decrease from 4287000 ECU in 1985 to 2459000 ECU in 1986; 1035000 ECU in 1987; 601000 ECU in 1988; 2542000 ECU in 1989; and 775000 ECU in 1990.\textsuperscript{97} In 1988, Taiwan still ranked the 10th largest supplier of textiles (2.8\% by value) and clothing (2.0\%) in the EC market. However, Taiwan was excluded from the top 10 supplier\textsuperscript{98} in 1992. As far as textiles is concerned, the enlargement of EC market from 10 to 12 members is not necessarily beneficial to Taiwan.

The establishment of a free trade area between the EC and the EFTA led to phasing out trade barriers in non-agricultural products in the 1970s. The EFTA then become a leading supplier of textile and clothing products to the EC market. There is little doubt that this free trade area gave a big boost to intra-area trade in textile and clothing. The intra-area trade between 1962-82 period indicates that it expanded far more rapidly than the United States trade with the two areas.\textsuperscript{99} The free trade area represents the most favourable treatment to non-EC countries. It also differs in a fundamental way from other EC preferential schemes in that quantitative restraints on imports cannot be used in the case of free trade area. The EC provides the EFTA countries unlimited duty-free access to the EC market. The benefited countries then have a significant advantage on the level of trade in textiles and clothing sector in the EC market.

The EC has changed its autonomous textile policy towards Central and Eastern

\textsuperscript{95}Vaitos, Constantine. 'Conclusion: Economic Effects of the Second Enlargement', in Seers Dudley and Constantine Vaitos. (eds.) op. cit., at 268; see also Sharp, Margaret. 'Technology and the dynamics of integration', in Wallace, William. (ed.) The Dynamics of European Integration. (1990), at 65.

\textsuperscript{96}COM (93) 525 final, at 54.


\textsuperscript{98}COM (93) 525, at 67 and 70.

\textsuperscript{99}GATT. Textiles and Clothing in the World Economy (1984), at 146 and 147.
European countries. Accordingly, trade in textile and clothing between the EC and this area has grown extremely dynamically since 1988. Up to 1992 exports of textiles from the EC rose by an average of 22% per year (in terms of quantity) and export of clothing by 41%. Imports of textiles rose by 13% and of clothing 21%. The EC’s balance of trade with these countries showed a surplus of 48,000 tonnes for textiles and a deficit of 93,000 tonnes for clothing.\(^{100}\) Moreover, the EC has significantly increased the Outward Processing Traffic (OPT) quotas for those countries.\(^{101}\) The EC firms are also keen to take advantage of lower costs in Central and Eastern European countries. The increasing EC investment in these countries also promote EC exports of textile for local making-up operations and subsequent re-importation into the EC market. Decision 94/277\(^{102}\) further set out a new textile regime towards Eastern European countries. In principle, exports of textile products from those countries to the EC shall be free from quantitative limits. In exceptional circumstances, quantitative limits may be introduced. However, the annual growth rate is still relatively higher than other third countries.\(^{103}\) The change of protective EC textile regime seems to have only a European dimension.

2. EC Anti-dumping Measures

Anti-dumping action is an important feature of EC trade policy. The Commission has a broad discretionary power in the operation of anti-dumping actions. The MFA-type quota is mainly against imports of textile from those "low-cost" countries. However, many developing countries also face higher labour cost due to currency appreciation and a tight labour market.\(^{104}\) The EC’s practice also tends to construct export price with special

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\(^{100}\) COM (93) 525 final, at 53.

\(^{101}\) Conditions for products of outward processing traffic set out in Reg.636/82 establishing economic outward processing arrangements applicable to certain textile and clothing products reimported into the Community after working or processing in certain third countries, OJ 1982, L76/1.

\(^{102}\) OJ 1994, L123/1.

\(^{103}\) i.e. The annual growth rate to Albania is 1.25%, 6.25% and 12.5% for Group I, II, and III to V products respectively. See OJ 1994, L123/3.

considerations of EC industry conditions. For instance, Regulation 2904/91\textsuperscript{105} imposed a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan and some other developing countries. The product concerned falls within CN codes 5508 01 11, 5509 21 10, 5509 21 90, 5509 22 10, 5509 22 90, 5509 51 00 and 5509 53 00. The anti-dumping proceeding was initiated as a result of a complaint lobbied by the Committee of the Cotton and Allied Textile Industries of the EEC (Eurocoton) on behalf of producers whose collective output constituted substantially all Community production of the polyester yarns concerns. The injury test was not based on the export price being lower than the domestic price of exporting countries, but on the specific EC textile industry's conditions.

In assessing the situations of the EC industry concerned, the EC has taken into account the fact that the manufacture of the product concerned is a capital intensive business in which low capacity utilization becomes generally more costly to maintain than high capacity utilization. In view of this characteristic of the industry, EC producers decided to maintain capacity utilization as high as possible in an attempt to avoid greater deterioration of profitability. Consequently, economic indicators such as production, sales, stocks and market share did not show, for these producers, the negative trends experienced by the EC industry as a whole.\textsuperscript{106} These indicators did not clearly reflect, in all cases, the difficult market conditions in which the Community industry has had to operate. Injury, then, in these circumstances, could be assessed mainly, on the basis of other parameters such as prices, profitability and employment. The price erosion, the deterioration of the financial situation with insufficient profitability or even losses, and the reduction in employment affecting practically all the Community producers, all led the Commission to conclude that the EC industry has been suffering material injury within the terms of Article 4:1 of Regulation 2423/88. Dumping based on the 'profitability' test will go far beyond the normal commercial practice. It is very uncommon for the exporter to guarantee profitability for the producers in the importing countries.

\textsuperscript{105}Reg.2904/91 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, OJ 1991, L276/15, D. Injury.

\textsuperscript{106}Reg.2904/91: D.Injury.
Polyester yarn is a capital-intensive industry. As technological change and structural adjustment progresses, trade policies originally intend to 'protect jobs' become more and more policies that 'protect machines' or 'protect investment' instead. Regulation 2904/91 shows the fact that the EC has further extended its protective policy to capital-intensive textiles products. The EC did not grant Taiwan a hearing during the proceeding of investigation.\textsuperscript{107} Anti-dumping duty is different between the so-called cooperating exporters and non-cooperating exporters. In the case of Taiwan, the rate of anti-dumping duty applicable to non-cooperating exporters is 24.5%, while only 2.2% for cooperating exporters such as the Chung Shing Textile Company Ltd.\textsuperscript{108} Dumping margins based on 'cooperation with the Commission' is essentially a subjective judgement. The definitive duty against Taiwan has been maintained for more than five years. However, the EC textile industry still lodged a request for a review of Regulation 3905/88 with the intention to further extend such anti-dumping measures.\textsuperscript{109} The EC anti-dumping actions is then not necessarily to stop distortion caused by unfair trade practices, but to protect EC industry from foreign competition.

As far as Taiwan is concerned, the EC autonomous textile regime has given rise to a series of problems including: (a) no consultative mechanisms provided in such regime; (b) the arbitrary setting of quotas by the EC; (c) the application of restrictions where no real risk of market disruption has been demonstrated in terms of Annex A of the MFA; (d) very low annual growth rates; (e) no flexibility for carry-over and carry-forward between different years; inter-category transfer; and regional transfers; (f) no GSP treatment; and (g) the increasing use of anti-dumping actions. Moreover, there are no serious trade restrictions among developed countries. Normal GATT rules are still permitted to function in EC trade with other developed countries. In fact, access among developed countries has improved considerably over the period of the MFA as a result of


\textsuperscript{108} Art.1:2 Reg.2904/91.

the Tokyo Round tariff concessions and the further economic integration in the EC.\textsuperscript{110} Based on the textile regime now in force, Taiwan's export expansion can be expected to remain slow, at least until the change of EC autonomous policy.

### Taiwan's Export of Textiles and Clothing 1988-1993

Quota Restricted Markets: EC, USA and Canada. 

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<td></td>
<td>USA</td>
<td>3,066 (31.32%)</td>
<td>2,970 (28.76%)</td>
<td>2,670 (25.96%)</td>
<td>2,953 (24.63%)</td>
<td>2,817 (23.80%)</td>
<td>2,733 (22.70%)</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>274 (2.80%)</td>
<td>267 (2.57%)</td>
<td>235 (2.28%)</td>
<td>230 (1.92%)</td>
<td>198 (1.67%)</td>
<td>198 (1.64%)</td>
</tr>
<tr>
<td></td>
<td>Other Markets</td>
<td>5,598 (57.18%)</td>
<td>6,239 (60.93%)</td>
<td>6,556 (63.73%)</td>
<td>7,818 (65.21%)</td>
<td>7,918 (67.42%)</td>
<td>8,410 (69.82%)</td>
</tr>
</tbody>
</table>

Sources: Statistics of Taiwan Textile Federation, Taipei.

### 3. EC and the MFA Phase-out

The GATT's concluding observations on the operation of MFA IV were: (a) MFA restraints continue to apply almost exclusively to products from developing countries; (b) the objectives of achieving the reduction of barriers and of progressive liberalization of world trade have not yet been achieved; (c) many developing countries have liberalized their import restrictions during MFA IV and many others continue to apply no such import restrictions; and (d) the EC's agreements under MFA IV were less restrictive than its very restrictive agreements under MFA III; however, the improvements have benefited only a few countries in Eastern European countries.\textsuperscript{111} If the MFA were to be phased-out, there should be no unilateral action to safeguard imports from one particular country. However, the safeguard action provided in Article 6:4 of the Textiles Agreement may be on a country-by-country basis. This may involves a selective safeguard action against the


selective country only, and would not give appropriate compensation. The EC considered that such selective safeguard action could strengthen GATT rules and disciplines and make it easier to provide acceptable terms for the EC in return for the ending of the MFA.\(^{112}\)

The EC's approach only served to highlight the danger of a selective safeguard system. It should be noted that GATT was based on the sacrosanct m.f.n. principle. Any renegotiation on this fundamental principle would only weaken it and should therefore be avoided. Selectivity in respect of safeguards should also be taken with little economic and political clout. Selective actions should also be taken against the efficient exporters. Once the efficient exporters are restricted, the less efficient exporters would not necessarily meet the demand in the importing countries. The result would be that the selective safeguard action taken operates to protect the domestic industry. The protected industry would become ineffective and a further clamour made by the industry to extend the restrictions to other countries. Consequently, it would expand the scope of the safeguard action. Therefore, the m.f.n. should be constantly maintained.

In principle, the EC cannot conclude new MFA-type bilateral agreements after 1995. Article 2(4) of the Agreement on Textiles and Clothing provides that 'The restrictions notified under paragraph 1 above shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of this Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions...'. Accordingly, the EC should conduct its relations with Taiwan based on the Textile Agreement and the GATT 1994 subject to Taiwan's accession to the GATT or the WTO. However, the EC may still resort to selective transitional safeguards provided in Article 6(4) of the Textile Agreement. To protect the interests of GATT members, the GATT does indeed require more obligations for the use of such transitional safeguard actions. The EC shall seek consultation accompanied by specific and relevant factual information, particularly in regard to the factors of serious damage or actual threat. Transitional safeguard restrictions could remain in force for up to 3 years without extension. Article 1(3) of the Textile Agreement also calls for special treatment to those

\(^{112}\)GATT.MTN.GNG/NG9/W/24/Rev.1.
GATT members which have not participated in the MFA. Article 26(1) of Regulation 517/94 provides that the EC textile regime shall not preclude the fulfilment of its existing international obligations. Therefore, the new GATT textile regime will provide more effective protection for Taiwan.

E. Conclusion

The textile regime highlights one of the central dilemmas faced by the internal market programme. While the Commission has been eager to reduce the level of protection in order to increase the EC's long-term competitiveness, countries like Spain and Portugal were deeply alarmed at the industrial restructuring and large-scale job losses that such a policy entailed. Few politicians could ignore the social, economic and political consequences of job losses on such a scale. But the alternative to industrial restructuring was to maintain obsolete high-cost plants with large public subsidies. Consequently, protective trade measures in the textile sector will remain a policy choice. Moreover, the EC considers the fiercer import competition is the main problem for its textiles and clothing industry in the years to come. The phase-out of MFA quota restriction in line with GATT requirements will largely depend on the adjustment of this EC industry, and the gradual opening up of markets in developing countries.

The textile and clothing industry plays an important role for economic development in Taiwan, which is still enjoying a very high comparative advantage in these sectors. The textile and clothing industry is among the first major manufacturing industries in Taiwan. The drive towards self-sufficiency, and later the urge to increase foreign exchange earnings by increased exports of textiles, had an expansionary influence


on the early development of Taiwan textile industry.\textsuperscript{117} Taiwan has already achieved a substantial measure of industrialization in textile sector since 1960s.\textsuperscript{118} The MFA-type quota restrictions have reduced Taiwan's exports of textiles and clothing to the EC market. Taiwan therefore concentrates its exports of textiles on the US market. Taiwan has been a major non-MFA source of exports of both textiles and clothing in the U.S. market. Taiwan's share in total U.S. import in 1989 was 7\% for textiles, and 10\% for clothing.\textsuperscript{119} Taiwan has not yet benefited from the big EC market. Taiwan is actually in a least-favoured-nation position under the EC autonomous textile regime. The progress in the internal market does not show positive signs for increasing imports from Taiwan. Moreover, the growth in intra-EC trade has been the most important single feature of the EC's overall growth in trade. As might be expected, Italy, Spain and Portugal will further improve their already high share of trade in textile and clothing sector in the internal market.\textsuperscript{120} The MFA does not interfere with trade flows among developed countries. It is likely therefore to favour those countries, such as Italy, which holds a comparative advantage in textile and clothing sector. Under the MFA, EC countries will not only benefit from internal liberalization for the EC members but also from external restrictions against import competition.\textsuperscript{121}

The MFA has derogated from the GATT rules for a long time. It actually works on the principle of quantitative restrictions on a discriminatory or selective basis against developing countries. The new GATT disciplines focus largely on phasing-out the MFA restrictions so as to improve market access on a non-discriminatory basis. As for the new regimes set up subsequently in the context of the Uruguay Round, the textile

\textsuperscript{117}GATT. A Study on Cotton Textiles (1966), at 9.


\textsuperscript{120}Balassa, Bela and Luc Bawens. ' The Determinants of Intra-European Trade in Manufactured Goods ', in Jacquemin, Alexis and Andre Sapir (eds). The European Internal Market (1991), at 199 and 200.

\textsuperscript{121}Faini, Riccardo and Alerto, Heimler. ' The quality and production of textiles and clothing and the completion of the internal market ', in Winters, L. Alan and A.J. Venables (eds). European integration: trade and industry (1991), at 54.

regime must go hand in hand particularly with the strengthening of GATT rules including safeguard, anti-dumping rules, and more effective measures against the abuse of safeguard and anti-dumping measures.\textsuperscript{123} It is also important for the governments to decide how that transition can best be made and what interim measures would be needed in the new GATT textile regime. The experience with more than three decades of 'temporary' measures in the form of the LTA and the MFA suggests that, if there is to be any real change, particular attention would have to be paid to the credibility of the transitional measures. The GATT should henceforth monitor not only import restrictions phase-out but also structural adjustment and other transitional measures taken by its members. It is also important to ensure that all developed countries move towards progressive liberalization at the same pace in the implementation of GATT obligations to avoid concentration of developing countries' exports in one or a few developed countries' markets.\textsuperscript{124}

\textsuperscript{123} EC Parliament. Resolution on GATT and the crisis in the Community textile industry, OJ 1993, C329/49, at 50.

Chapter 5: Taiwan and EC in Banking Services

The Second Banking Directive (89/646/EEC)\(^1\) provides for substantial liberalization for banking operations in the EC market. At the same time, the EC also intends to improve market access for EC banks in other third countries. To that end, reciprocity provides a means for trade negotiations at bilateral and international levels. From 1 January 1993, request for the authorization of subsidiaries or of the acquisition of holding made by non-EC firms are subject to a reciprocity test. Reciprocity will be applied on a country-by-country basis. The legal discussion of reciprocity will concentrate on the unilateral character and external effects concerning its operation. This Chapter will examine the reciprocity clause contained in the Second Banking Directive and its potential implications on both Taiwan and the GATT system.

A. Introduction

Banking services play a role of growing importance in the national economy and world trade. The importance of the services economy, including banking services, in promoting and facilitating trade and industrial restructuring has been recognized.\(^2\) In any market economy the banking services sector plays a triple role: (a) It provides a payments system for commercial transaction; (b) It provides a structure for safeguarding saving; and (c) It operates as a vehicle for the allocation of the economy's financial resources, at a national and international level.\(^3\) As regards trade, trade in services has expanded more rapidly than merchandise trade in recent years.\(^4\) In the GATT, the statistics on international service transactions are complied by IMF using a classification system recommended in its Balance of Payments Annual(1977).\(^5\)

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Traditionally, banking services ranks among the most heavily regulated sectors of all economic activities. Problems of interdependence and mutual vulnerability among financial institutions and problems of information faced by depositors, creditors and shareholders of financial institutions have led all governments to set up highly developed regulatory frameworks. Those regulations can be assigned to three types: prudential, consumer protection and general monetary and credit policy. The Price Waterhouse Report (Section 4) identified regulatory barriers on banking service sector as following:

1. barriers to establishment: restrictions on the legal form, number of branches, takeover of domestic banking and equity, etc.;
2. barriers to operating conditions: the need to maintain separate capital funds and to maintain certain capital-asset ratios, difference in the definition of "own capital" fund, and exchange control; and
3. barriers to competing for business: limitations on services offered, restriction on local retail banking and on acquisition of securities and other assets. Regulatory barriers, like other non-tariff barriers, are lack of transparency which makes them more difficult for foreign banks to deal with. Moreover, trade liberalization in banking services faces different classification of banking transactions, which may affect data collection. Therefore, trade liberalization in banking services will be more complicated and difficult.

B. Banking Services and the GATT

1. The General Agreement on Trade in Services

The 1982 GATT Ministerial Meeting decided upon a programme of work which provided

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6 GATT. "Trade in Financial Services", MTN.GNS/W/68, 4 September 1989, at 7.

7 Griffiths, Brian. Invisible Barriers to Invisible Trade (1975), at 70-79.


10 Nusbaumer, Jacques. The Services Economy: Lever to Growth (1987), at 11, 12 and 22. See also GATT. BISD, 32S/78.

for exchange of information on national examinations of issues in the services sector, and for a review of the results of such examination, so as to determine whether any multilateral action was appropriate and desirable. The 1982 Ministerial Declaration was further elaborated by the 'Agreed Conclusions' of the November 1984 Session of Contracting Parties. In line with that 1984 decision, a series of meetings were held during 1986 to facilitate the exchange of information on issues in the services sector. The discussion during these meetings was concentrated on four main areas: (a) general characteristics of services; (b) conceptual framework, statistical problems and methodologies; (c) national and international regulations governing individual services sectors, and problems identified in relation to international transactions in services; and (d) issues raised in connection with possible multilateral action over services.

The Uruguay Round was the first time for the GATT to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors. The General Agreement on Trade in Services (GATS) was adopted by the GATT in the Final Act of the Uruguay Round. The GATS is based on three pillars. The first is a Framework Agreement containing basic obligations which apply to all member countries. The second concerns national schedules of commitments containing specific further national commitments which will be the subject of a continuing process of liberalization. The third is a number of annexes addressing the special situations of individual services sectors.

The GATS (Art.I) applies to measures by Members of the WTO affecting trade

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12 GATT. BISD, 29S/21.

13 GATT. BISD, 31S/15.

14 GATT. BISD, 32S/72, and 33S/49. Seven meetings were held on the following dates: 6-7 February, 24-26 March, 17-18 April, 12-13 May, 2-4 June, 27 and 30 June, and 29 August 1986.

15 GATT. BISD, 32S/75.

16 See the 1986 Ministerial Declaration on the Uruguay Round (GATT. BISD, 33S/28); the 1988 Montreal Mid Term Review (GATT. Focus, No.61 of May 1989); the 1991 Dunkel Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (GATT. MTN. TNC/W/FA.); and the 1993 GATS of the Final Act of the Uruguay Round (GATT. MTN/FA.).

17 GATT. MTN/FA II-A1B.

18 GATT. MTN/FA I. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.
in services. Trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; and (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. Accordingly, the scope of trade in services will extend to the international movement of service products, person and capital. In particular, the international movement of natural persons or commercial presence goes far beyond the traditional concept of trade in goods. Specially, trade in services will involve national policy objectives relating to immigration, monetary and financial areas.\textsuperscript{19} The GATS, therefore, will have profound impacts for national economy and development process.\textsuperscript{20}

"Measures by members" means measures taken by: (a) central, regional or local governments and authorities; and (b) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. Bank services form an oligopolic market, which is dominated by a limited number of suppliers. It is possible for banks to practise concerted actions and intra-firm transactions. This kind of unfair competition may affect trade between WTO members. Article IX:1 of the GATS only provides consultations for members to eliminate this kind of business practices. Private business practice is often lacking in transparency. In addition, the disclosure of confidential information is not often available under domestic law. Therefore, private business practice will be a problem in the operation of the GATS.\textsuperscript{21} The unfair competition in banking operations was considered in the EC case 172/80\textsuperscript{22}, which involved a concerted practice with regard to the charges made for the transfer of funds from one EC Member to another. GATT should further extend rules for banking services


\textsuperscript{21}Nayyar, Deepak. ' Some Reflections on the Uruguay Round and Trade in Services ', 22 JWT (1988), pp.35-47, at 44.

in areas of competition to protect consumers interest and fair competition.\textsuperscript{23}

2. Most-Favoured-Nation Treatment and National Treatment in the GATS

Article II of the GATS setting out a basic m.f.n. obligation states that each member "shall accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country ". The m.f.n. clause represents and is the instrument of the principle of non-discrimination in the field of service trade. The m.f.n. obligation brings about an immediate extension of autonomous and negotiated liberalization of services to all member countries.\textsuperscript{24} It would apply to autonomous liberalization and to those achieved in bilateral negotiations. The significance of the m.f.n. is that the GATS would contain the fundamental principle of GATT multilateralism. However, it is recognized that m.f.n. treatment may not be possible for every service activity and, therefore, it is envisaged that countries may indicate specific m.f.n. exemptions. Conditions for such exemptions are included as an annex and provide for reviews after five years and a normal limitation of 10 years on their duration.

The GATS, under certain circumstances, provides a number of opportunities for the exemption to GATS's obligations or commitments. Article XIV of the GATS provides a general exceptions based on: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; and (c) necessary to prevent deceptive and fraudulent practices; or to protect privacy of individual; or to secure safety. Article XIV bis further contains a security exception. These provisions do not give a more detail definition of many controversial concepts such as public morals or public order. In practice, it will be difficult to reduce the degree of subjectivity surrounding them. In addition, most of the Schedules of Specific commitment made by GATS members (including the EC, Japan, and the US) resulting from the negotiation on trade in services during the Uruguay Round were also contained a list of "Article II (m.f.n.)"

\textsuperscript{23} Petersmann, E.- U. ' International Competition Rules for the GATT - WTO World Trade and Legal System ', 27 JWT (1993), No.6, at 40 and 41.

\textsuperscript{24} Jackson, John H. ' Constructing a Constitution for Trade in Services ', in 11 World Economy (1988), at 196.

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Exemptions "". At its worst, the GATS will be " riddled " by these exceptions as was the case with GATT 1947. Article XXVII(a) of the GATS also provides a ' waiver ' from the m.f.n. obligation. Nations that accept the discipline of the GATS should also receive the benefits. Nations that refuse the discipline can be denied the benefits. This is a similar form of "conditional m.f.n.". The conditional m.f.n. will be a controversial issue and likely fragment the WTO members.

Part III of the GATS contains provisions on market access (Art.XVI) and national treatment (Art.XVII) which would be commitments made in national schedules. Thus, in case of market access, each member country " shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule ". The intention of the market-access provision is to progressively eliminate the following types of measures: limitations on numbers of service providers, on the total value of service transactions or on the total number of service operations or people employed. Equally, restrictions on the kind of legal entity or joint venture through which a service is provided or any foreign capital limitations relating to maximum levels of foreign participation are to be progressively eliminated.

The national-treatment provision contains the obligation to treat foreign service suppliers and domestic suppliers in the same manner. Article XVII states that each member country " shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers ". The ' no less favourable treatment ' requirement is undefined. In Article III of the GATT 1947, national treatment obligation is to protect expectations on the competitive relationship between imported and domestic products. Therefore, the application of Article III has been to base on the

25GATT. MTN/FA/Add.1, p.1-5.
distinctions made by the laws, regulations or requirements themselves and their potential impact, rather than on the actual consequences for specific imported products. The GATT further confirmed that Article III " obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products ". The GATT has also pointed out that national treatment has the function ' to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties '. National treatment therefore implies an important principle of " equal opportunity ". National treatment, if combined with the ' commercial presence ' sought in the GATS, would entail a very effective means for elimination of protective measures and barriers in the context of services sector.

3. Financial Services under GATS

To achieve an accord on the financial services was part of a broader negotiation on trade in services during the Uruguay Round. In the GATS, a financial service is defined as 'any service of a financial nature offered by a financial service supplier of a Member' (Annex on Financial Services). Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). The scope of banking activities includes: (a) acceptance of deposit and other repayable funds from the public; (b) lending of all types; (c) financial leasing; (d) all payment and money transmission services; (e) guarantees and commitments; (f) trading for own account or for account of customers, such as foreign exchange, futures and options, and transferable securities, etc.; (g) participation in issues of all kind of securities; (h) money broking; (i) asset management, such as cash or portfolio management; (j) settlement and clearing.

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29 GATT, " Brazilian Internal Taxes " (BISD II/184-5, paras 13-6); " Italian Discrimination Against Imported Agricultural Machinery " (BISD 7S/63-4, paras 11-12); and " EEC-Measures on Animal Feed Proteins " (BISD 25S/65, para 6.6).


services for financial assets; (k) provision and transfer of financial information; and (l) advisory, intermediation and other auxiliary financial services.

In the EC, banking activities subject to mutual recognition are listed in Annex of the Second Banking Directive including: (1) acceptance of deposits and other repayable funds from the public; (2) lending; (3) financial leasing; (4) money transmission services; (5) issuing and administering means of payment (credit cards, travellers' cheques, and bankers' drafts, etc.); (6) guarantees and commitments; (7) trading for own account or for account of customers in: (a) money market instruments (cheques, bills, etc.); (b) foreign exchange; (c) financial futures and options; (d) exchange and interest rate instruments; (e) transferable securities; (8) participation in share issues and the provision of services related to such issues; (9) advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings; (10) money broking; (11) portfolio management and advice; (12) safekeeping and administration of securities; (13) credit reference services; and (14) safe custody services. The Directive requires a broad range of banking activities. This includes, for example, trading in securities. The trend of EC financial integration has therefore tended to blur the boundaries among banking and other financial services.33

Apart from exceptions provided in Articles XIV and XIV bis, the GATS further recognizes the right of GATS members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives. Annex on Financial Services34 states that '... a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owned by a financial service suppliers, or to ensure the integrity and stability of financial system.' Under these circumstances, the GATS will be difficult to avoid domestic regulations be used as a means of evasion the Member's commitments or obligations under the GATS. Moreover, Second Annex on Financial Services35 permits Members to revise and finalize their Schedules of Commitments and their m.f.n. exemptions six months after the entry into


34 GATT. MTN/FA II-A1B, p.29.

35 GATT. MTN/FA II-A1B, p.32.
force of the GATS. It is clear that the GATS leaves much open on which Members are to enter into further negotiations on trade in financial services. Members of the GATS will seek reciprocal banking liberalization to avoid the free-rider problem.\textsuperscript{36} Although the GATT confirmed that commitments in financial services sector will be implemented on an m.f.n. basis,\textsuperscript{37} trade in financial services is still very uncertain.\textsuperscript{38}

C. Reciprocity and the Second Banking Directive

1. Reciprocity and the GATT

Reciprocity is described as a 'principle or practice of give and take, of making mutual concessions between two countries'.\textsuperscript{39} Reciprocity, therefore, has a core meaning involving the concept of 'equivalence'. It refers to exchange of equivalent concessions in which the actions of each party are contingent on the prior actions of the others.\textsuperscript{40} The actual reciprocal trade incorporates a compromise of equivalent trade concessions.\textsuperscript{41} For instance, the reduction of tariffs, could be, and was, quantified sufficiently to provide a sense of judgement of benefits gained as against those offered. The tariff concessions received and the value or volume of exports falling in the concession categories as indicated by past trade data could be determined and measured, although imperfectly, against the concessions granted and the value or volume of past imports in the concession categories.\textsuperscript{42} Today, some measures like trade coverage, trade balance or market share

\textsuperscript{36} Jackson, John H. 'Regional Trade Blocs and the GATT', in 16 The World Economy (1993), pp.121-131, at 123.

\textsuperscript{37} GATT. News of the Uruguay Round of Multilateral Trade Negotiations. NUR 080/Add.1, 15 December 1993.


\textsuperscript{40} Keohane, R.O. 'Reciprocity in international relations', in 40 International Organization (1986), at 5 to 8.

\textsuperscript{41} Rhodes, Carolyn. 'Reciprocity in trade: the utility of a bargaining strategy', in 43 International Organization (1989), at 274.

\textsuperscript{42} Weiss, Leonard. 'Reciprocity', in Seymour J. Rubin and Thomas R. Graham (eds) Managing Trade Relations in the 1980s (1984), at 177.
are also suggested by the developed countries for the measurement of equivalence. The main objectives are to protect domestic industry from foreign competitors or to open up foreign markets for some competitive products. Reciprocity then can be used for the protective purposes. Reciprocity is even used to open foreign markets. This is sometimes called as the aggressive reciprocity. The major concerns and problems of bilateral reciprocity include: the difficulties of assuring and maintaining equivalence; the narrow focus on sector-by-sector, country-by-country imbalance; the reliance of retaliation as the main means for the pursuit of equivalence; the legitimacy of retaliation under international legal obligation; and the impacts on international trading system.

GATT does provide reciprocity as a technical means for trade liberalization. However, the GATT approach is an overall reciprocity based on the m.f.n. treatment. Therefore, any reciprocal concession made by contracting parties must be generalized to all GATT members, whether they have provided reciprocal concessions during the GATT trade negotiations. The overall reciprocity is often constrained by the desire to retain the bilateral approach in order to maximise national interest. GATT requires that protective measures also should be based on the non-discrimination principle. Trade disputes should provide consultation for the country concerned. Trade problems cannot be solved by reciprocity based on a unilateral determination of discriminatory treatment, unilateral time tables, and the threat of unilateral retaliation if no agreement is reached. It could also not be the intention of GATT to condone unilateral measures which, applied to the advantage of one or two countries, lead to the manipulation of a specific product or services sector, to the detriment of other countries. Nor could it be condoned that such action was taken.

44 Culbertson, Williams. Reciprocity (1937), at 159.
47 The Preamble GATT states that ' by entering into reciprocity and mutually advantageous arrangements... ', and Art.28 bis(1) GATT also provides that trade negotiations should be carried out ' on a reciprocal and mutually advantageous basis '. Recognizing the limitation of reciprocity for the trade negotiations between economic unequal parties, GATT also provides a non-reciprocity treatment for developing countries in Art.36(8) GATT from 1965.
bilaterally, in the absence of any form of meaningful consultation and transparency under multilateral surveillance. This argument was actually supported by the EC in the GATT Panel on 'Japan -Trade in Semi-Conductors'. Weakness of bilateral reciprocity was a main reason for the United States to support an overall reciprocity in the GATT system.

2. The Concept of Reciprocity in the Second Banking Directive

The EC banking liberalization is based on the Second Banking Directive. This Directive came into force on 1 January 1993. It constitutes the essential instrument for the achievement of the internal market, from the point of view of both the freedom of establishment and the freedom to provide banking services. It applies the approaches of a single licence, of mutual recognition, and of home country control. The single banking licence system will authorise a bank or credit institution established in one Member State to supply its services throughout the EC either by establishing branches in other Member States or by provision of cross-frontier banking services to customers in other Member States. This licence will be mutually recognized by other banking supervisors in all the other Member States. The Directive also allows a non-EC bank subsidiary to carry out all activities throughout the whole Community by the single license.

In the course of the EC financial services liberalization, the question of access for the internal market for the non-EC financial firms was an important consideration for


Community policy makers. The EC introduced a more aggressive policy, reciprocity, for its relations with third countries in the banking services. The financial services sector is subject to a further 6 months of negotiations after the Final Act of Uruguay Round comes into force on 1 January 1995. The EC may table an m.f.n. exemption towards some specific countries which do not provide the EC banks effective market access. In other words, the reciprocal requirements may be used towards specific countries. Market access should be effective whatever the legal or political structure or regulatory system of the countries concerned. The EC may thus have to negotiate bilaterally with its partners in order to obtain satisfactory access to their markets. The yardstick approach based on reciprocity could enable the EC to attain a level of playing field with maximum market access. The impact of this Directive, therefore, will go, in many respects, beyond the progress in other major financial centres of the world. Reciprocity has caused strong concerns by Member States and third countries. The EC’s approach in the banking services sector reflects the facts of the EC’s prominence in world services trade and of its strong desire for market access to foreign markets.

The terms ‘reciprocity’ and ‘reciprocal treatment’ appear only in recitals 19 and 20 of the Second Banking Directive, which characterize the procedures set forth in Title 3 as intended ‘to ensure that Community credit institutions receive reciprocal treatment’.


56 EEC Doc7748/86, PV/CONS.33 EXT.1 GATT 107, " the EEC Overall Approach ", compiled in Denneth R. Simmonds and Brian H.W. Hill. (eds) Law and Practice under the GATT, at 107, paras.36 and 37.


in third countries and ' to keep its financial markets open to the rest of the world and to improve the liberalization of the global financial markets in other third countries '. To that end, this Directive provides for procedures for negotiating with third countries and, as a last resort, for the possibility of taking measures involving the suspension of new applications for authorization or the restriction of new authorizations. The EC has made a particular effort to clarify Articles 8 and 9 of the Second Banking Directive relating to reciprocity. These provisions only apply to the establishment in the EC of subsidiaries of banks from third countries. The establishment of branches by a non-EC bank in the EC is still subject to regulations of each Member State. Within the framework of Article 9, the concept of reciprocity is a compromise between mirror-image reciprocity and mere national treatment. Mirror-image reciprocity would allow a banking to do in another country whatever it may do in its own country of origin. National treatment would allow a foreign bank to do in a country whatever the local bank can do. In the Second Banking Directive, reciprocity itself was recast as a standard of ' comparable treatment ' and of ' national treatment ' relating to Article 9(3) and (4) respectively. The operation of Article 9 depends on an assessment of the combined effect of many factors. Article 9 thus goes beyond the mere national treatment. 

Comparative Treatment in Article 9(3)

Article 9(3) of the Second Banking Directive provides that if third countries are not granting EC banks ' effective market access comparable to ' that granted by the Community to banks from third countries concerned, the Commission may submit proposals to the Council for the appropriate mandate for negotiations with a view to obtaining comparable competitive opportunities for EC banks. Article 9(3) is concerned the treatment of EC banks abroad comparable to the EC banking regime. Article 9(3) indicates an objective that EC banks may establish themselves and carry on their activities in third countries with a comparable degree of facility and freedom as is enjoyed by third country banks in the Community. Therefore, Article 9(3) refers to ' comparable ' effective

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63 Dijk, Jaap van and Martijn van Empel. ' Reciprocity ', in Empel, M. van and René Smits (eds). Banking and EC Law Commentary (1992), at Reciprocity - 24.
market access. In particular, Article 9(3) was designed to deal with restrictions resulting from differences of regulatory regimes between the Community and its trading partners, which may pose problems to EC banks as regards access to these markets. Article 9(3) addresses non-discriminatory obstacles resulting from the differences of regulatory structure between the Community and third countries, such as the limitations imposed on the range of activities which EC banks may carry out in the Community, as well as restrictions on geographical expansion.

Article 9(3) does not provide a specific guidance on how 'comparable competitive opportunities' are to be evaluated, nor on how they should be achieved in negotiations with third countries concerned. The phrase 'effective market access' may lead to an additional and perhaps more restrictive reciprocity test. The concept of effective market access may, then, include the abolition of restrictions such as quotas on establishment, or blocking the acquisition of local banks. The endorsement of effective market access linked with comparable treatment further indicates the intention of the Community to advance beyond national treatment for establishment. It could involve reverse discrimination in favour of EC banks. In the absence of agreement upon goals for regulatory convergence, systematically more favourable treatment of foreign banks resulting from the application of home-country regulations in a host country market would probably be unacceptable because of the resulting overall competitive inequality between foreign and domestic banks. It also affects the national policy of developing countries to protect their financial services sector. Therefore, it would amount to mirror-image reciprocity if the comparable treatment is used as an obligation. The EC acknowledges that its own standard of access cannot be imposed on others. The EC thus accepts implicitly that the achievement of comparable competitive opportunities should be the subject of negotiations. Moreover, Article 9(3) does not provide for sanctions if the objective of reciprocity is not obtained.

National Treatment in article 9(4)

Article 9(4) of the Second Banking Directive stipulates that if EC banks in a third country

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64 Longstreth, Bevis and Thomas Kelly. 'EC banking: interpreting the reciprocity standard', in International Financial Law Review (June 1990), at 9.

do not receive national treatment offering 'the same competitive opportunities' as are available to domestic banks and the conditions of 'effective market access' are not fulfilled, the Commission may initiate negotiations in order to remedy the situation. Article 9(4) is concerned with the treatment of EC banks abroad comparable to the banking regime of host country. Article 9(4) implies two crucial elements for national treatment. Firstly, there must be a right of establishment for EC banks, subject to reasonable prudential requirements and on the same basis as the domestic operator. Secondly, once established in the market, EC banks should have the opportunity to compete effectively in the market on the same basis as its domestic counterpart. This dual condition attached to Article 9(4) - effective market access (including right of establishment) and national treatment formally or in effect offering the same competitive opportunities - is a clear feature of the provision.

Article 9(4) mandates 'national treatment offering the same competitive opportunities as those available to domestic credit institutions'. The reference to 'same competitive opportunities' underlines the EC concerns not only de jure but also de facto national treatment for EC banks abroad. Any law and regulations containing provisions which provide for an explicit differential and more unfavourable treatment of EC banks as compared with domestic ones, would constitute a denial of national treatment. This is the de jure national treatment definition, and constitutes the most clearly identifiable case of denial of national treatment. But de jure national treatment standard is not the only criterion to assess whether national treatment is granted in effect. In assessing de facto national treatment, it is necessary to examine whether the legislation or practices of the third countries have differential negative effects on EC banks. Thus, any other official requirement or instruction, which although formally not discriminatory, distorts competitive opportunities in favour of domestic banks, or which adversely affect the ability of EC banks to enter and compete effectively in the market as compared with their domestic banks, would also constitute a denial of national treatment, unless the measures providing for such a treatment may be properly justified for prudential reasons. This is the concept of de facto national treatment, which requires that countries, in the exercise of their regulatory activity, should not do so in a way that disadvantages EC banks.

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National treatment requires the abolition of discriminatory treatment between foreign and domestic banks. Third countries must offer EC banks the same treatment regarding establishment and operation. Interpreted restrictively, national treatment does not require the abolition of restrictive measures to the extent that they be applied to foreign as well as domestic banks in a non-discriminatory basis. However, the addition of the term 'and the conditions of effective market access' to Article 9(4) leaves broad scope for interpretation and discretion. The additional criterion of 'effective market access' will not be de-linked from the application of a de facto national treatment standard, and gives particular emphasis to the concept of right of establishment. In other words, third countries should not impose restrictions to the establishment which would in effect deny EC banks access to the market. There are many examples of such restrictive regulations or practices, which even if applied formally in a non-discriminatory manner, imply a denial of 'effective market access': quotas on new entrants or application of economic needs tests, unreasonably and disproportionately high standards for entry, discretionary powers exercised in a manner which results in a denial of right of establishment, restrictive practices conducted by self-regulatory organizations.

As regards operation, the conditions of effective market access depend largely on market competitiveness of the bank concerned. The Second Banking Directive applies a broad definition of banking activities with reference to the scope of universal banking. The EC may call for some activities such as security-related activities which are still not permitted in many countries for market access. The connection of effective market access and competitive opportunities with national treatment may involve the requirement of comparable effective market access, mirror image or home-country reciprocity. The strict application of reciprocal national treatment may involve the extraterritorial application of EC law. That is, the application of EC rules to host-country activities. This gives the EC banks a competitive advantage over local banks in the conduct of banking activities in the host countries. As a result, the EC banks can receive better treatment than

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68 For instance, the U.S. Glass-Steagall Act separates commercial and investment banking by generally prohibiting a bank or its affiliated company from underwriting or dealing in securities. Sections 16, 20, 21 and 22 of the Banking Act of 1933, 48 Stat.162 (codified at 12 U.S.C. §§ 24, 377, 378, 78, respectively), are collectively known as the Glass-Steagall Act.
national treatment required by the GATT. It may result in discrimination, even against a country with a relatively open, non-discriminatory regulatory system.69

3. The Operation of Reciprocity
Reciprocity is not simply a philosophical concern raised by the Community in the Directive. Rather, the procedure is devised to allow for extensive negotiations to pursue its objectives.70 In the light of its goals, the Commission shall draw up ‘periodically’ a report regarding national treatment in third countries.71 It is then the function of the Commission to ensure the pursuit of reciprocity as well as the maintenance of reciprocity. Time table for negotiations with third countries will be unilaterally determined by the Community. The burden of proof lies with third countries. The pressure of retaliation may be used by the Community within a short period of three months. All these factors would place third countries in a very disadvantageous position in negotiating with the Community.72 Article 9 provides the procedure concerning reciprocity as follows:
- Requests for authorization by non-EC banks have to be notified to the Commission by Member States, but no automatic suspension is provided for during the Commission’s enquiries as to the situation of Member country banks in the relevant countries;
- Member States shall inform the Commission of any general difficulties encountered by their credit institutions in establishing themselves or carrying on banking activities in a third country;
- the Commission will examine how Community banks are treated in third countries periodically with a first report before the Directive comes into force. Monitoring of the requirement for reciprocity will not be carried out case by case for each application but rather by more general, more continuous procedures;
- where the Commission finds a third country is not granting the Community’s credit


71 The first Report was drawn up on 15 July 1992, See SEC (92) 1343 final: Report on Treatment Accorded in Third Countries to Community Credit Institutions and Investment Companies.

institutions market access and competitive opportunities comparable to those granted by
the Community to non-EC banks, then the Commission may submit suitable proposals to
the Council for negotiations with the third country in question;
- where it seems to the Commission that the Community’s banks do not enjoy national
treatment and the same competitive opportunities as the third countries’ own credit
institutions, and that the condition of effective market access has not been secured, the
Commission may initiate negotiations in order to remedy the situation;
- in the event that the Commission notes the absence of national treatment for Community
credit institutions in third countries, and only in this event, the Community may resort to
reitaliatory measures. The Commission may decide at any time that Member States must
limit or suspend their decision regarding requests for authorizations by the undertakings
of third country in question.

The procedure for initiating retaliation regarding limitations and suspension is
given in Article 22(2) of the Directive, that is, the decision comes within the competence
of the Commission, assisted by the Banking Advisory Committee made up of
representatives of Member States, whose opinion must be heard.3 The Banking Advisory
Committee (BAC)4 is chaired by a representative of the Commission. The BAC is a
regulatory committee. In case of application of the reciprocity clause, the BAC is to give
its opinion on draft measures. The Commission representative shall submit to the
committee a draft of the measures to be taken. The committee shall deliver its opinion on
the draft within a time limit which the chairman may lay down according to the urgency
of the matter. The opinion shall be delivered by the majority laid down in Article 148(2)
of the Treaty in the case of decisions which the Council is required to adopt on a proposal
from the Commission. The votes of the representatives of the Member States in the
committee shall be weighted in the manner set out in that Article. The chairman shall not
vote. The Community thought that it is appropriate to apply in all the banking directives

3 Art.9(4)(b) Dir.89/646/EEC.

4 The Banking Advisory Committee (BAC) was based on Article 11(1) of the First Banking Directive. The institutional
aspects of EC BAC and other EC banking advisory fora, see van den Bergh, Marieke, Patrick Pearson and René Smits. ‘
Institutional Arrangements’, in Empel, M. van and René Smits (eds). Banking and EC Law Commentary (1992), International
Arrangements - 17 to 49.
the procedures of the regulatory committee. Therefore, the Commission is to adopt the measures envisaged if they are in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal concerning the measures to be taken. The Council shall act by a qualified majority. If the Council does not act within three months of the referral to it the Commission shall adopt the measures proposed, unless the Council has decided against those measures by a single majority. Although the regulatory committee system is the least favourable to the Commission, the Commission still seems to be given more discretionary power in executing the reciprocity clause in the long run.

Reciprocity cannot be implemented without some risk of generating a costly trade tension for the EC external relations. If the targeted country has the ability to counter-retaliate, the EC may obtain little bargaining advantage from a retaliatory action. Therefore, it is difficult to build an effective trade relations exclusively around unilateral policy and mandatory retaliation among economic powers. The EC considered that US and Japan provided national treatment to the EC banks. Reciprocity then may be applied mainly towards some selective developing countries such as Taiwan, South Korea and Malaysia. The Second Banking Directive does not provide a more favourable or non-reciprocity treatment to developing countries, which have a relative disadvantage in service trade. The requirement of ‘the same competitive opportunities’ from developing countries would go beyond the means that they can offer and take little

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75 Procedure 3(a) of the Council Decision of 13 July 1987 (87/373/EEC. OJ 1987, L197/33). Article 145 of the EEC Treaty, as amended by Article 10 SEA, provides for the general framework measure applicable to these ‘committee systems’ including: the consultative committee, the management committee system, and the regulatory committee system.

76 Article 22(2) of the Directive.


79 EC Commission. op. cit., SEC (92) 1343 final.

considerations of their development needs. Reciprocity will be applied on a country-by-country basis. This may work out quite differently from one case to another and then involves selectivity. The implementation of reciprocity represents an enormous administrative burden for the Commission. Reciprocity may then generate a high degree of unpredictability like any power-oriented diplomacy for targeted developing countries.

D. Treatment of EC Banks in Taiwan

1. The Banking System in Taiwan

According to Article 2 of the Banking Law of the Republic of China on Taiwan, the term 'bank' means 'an institution organized and registered hereunder to conduct banking business'. Article 3 states that a bank may conduct the following business: (1) accept checking account deposits; (2) accept various other deposits; (3) manage trust funds as entrusted; (4) issue financial bonds; (5) extend loans; (6) discount negotiable instruments; (7) invest in securities; (8) invest directly in productive enterprises; (9) invest in residential and commercial construction; (10) engage in domestic and foreign remittances; (11) engage in the acceptance of commercial drafts; (12) issue letters of credit; (13) engage in domestic and foreign guarantee services; (14) act as a collecting and paying agent; (15) undertake the underwriting and trading or securities for itself or for its consumers; (16) engage in management and consultation for issuing bonds; (17) act as a registrar for the insurance of securities and bonds; (18) manage various kinds of

81 Art.IV GATS.

82 Dijk, Jaap van and Martijn van Empel. 'Reciprocity', in Martin van Empel (ed.) Banking and EC Law Commentary. (1992), at Reciprocity - 24.


property as trustee; (19) engage in business related to securities investment trust; (20) buy and sell gold, silver and foreign currencies; (21) engage in warehousing, custodial, and agency services related to any item described above; and (22) engage in other related business as may be approved by the central competent authority. The revised Banking Law of 1989 reflected a significant progress in Taiwan’s efforts for financial reform. The new Banking Law has extended the scope of banking activities to the areas such as securities and trust. It also relaxes existing restrictions on the establishment of additional financial institutions.

The central competent authority for the banking sector is the Ministry of Finance. However, any business relating to foreign exchange shall be regulated by the Central Bank of China (Taiwan). The banking policy of Taiwan is to streamline banking business, to provide protection to depositors, to facilitate the development of productive enterprises, and to coordinate the operation of bank credit with national monetary policy. Taiwan has undertaken a financial reform during the 1980s. The major reasons for Taiwan’s financial reform has been the rapid economic growth that has transformed Taiwan from a small, underdeveloped country into a newly industrialized country. Financial reform was also a result of the interaction of domestic market forces and the experiences of other major financial markets. U.S. pressure played a role in Taiwan’s financial reform. The U.S. International Banking Act of 1978, as amended (IBA) requires that the Department of the Treasury periodically report to the U.S. Congress regarding foreign treatment of U.S. financial institutions. The IBA provides national treatment to foreign financial institutions in the establishment and operation in the United States. National treatment has provided foreign participants equality of competitive opportunity with U.S. domestic banks. Therefore, the United States requires Taiwan to provide national treatment to U.S. banks in Taiwan. The U.S. national treatment thus is in order to secure equal treatment for U.S. banks in Taiwan as Taiwan’s domestic banks in similar

86 Art.1 The Banking Law.


Taiwan financial reform covered financial liberalization and financial internationalization. Financial liberalization has been made in the areas such as deregulation of interest rate, privatization of government-owned banks, and the authorization of new private commercial banks. Financial internationalization places the emphasis on the free movement of capital and foreign direct investment, the lifting of foreign exchange controls, offshore banking operations, the establishment of Taipei Foreign Currency Call-loan market, and the use of foreign exchange reserves to assist enterprises. On 26 June 1991, Taiwan approved the establishment of 15 new private commercial banks.

Capital flow deregulation is an important part of Taiwan's financial reform. The free movement of capital is the ultimate goal of Taiwan's financial reform. On 15 July 1987, Taiwan revised its Foreign Exchange regulations, which resulted in a significant deregulation of foreign exchange controls. The deregulation of foreign exchange controls also has a far-reaching impact on movements towards further financial liberalization and internationalization. The relaxation of foreign exchange controls has contributed to Taiwan's foreign direct investment activities. Taiwan's banks have in recent years been actively expanding into overseas markets. As of the end of March 1992, ten Taiwan's banks had established a total of 26 branches, 14 representative offices, and 5 subsidiaries in the main financial centres of the world. There were 6 branches, 4 representative offices, and 3 subsidiaries in EC countries by that time.

2. The Treatment of EC Banks in Taiwan

According to 116 of the Banking Law, a foreign bank means 'a bank organized and registered under the laws of a foreign country whose branch is recognized by the
Government of the Republic of China and is registered pursuant to this Law and the company Law to operate within the territory of the Republic of China. The establishment of a foreign bank in Taiwan is subject to prior authorization from the Ministry of Finance, and shall be in the form of a 'branch'. The foreign bank branch requirement contains a significant policy difference from many foreign countries which permit banking subsidiaries. This difference arises from the historical consideration of protecting domestic banks and of maintaining the soundness of the banking system.\(^4\) A foreign bank branch is fully subject to regulatory control by both Taiwan and the home country, as well as joint liability by bank branch and parent bank. This dual supervision and protection contributes to financial stability and investor protection.

A wholly-owned foreign bank subsidiary is actually impractical even where Taiwan grants national treatment to foreign banks. Article 25 of the Banking Law provides that a single investor will not be permitted to own more than 5% of a bank’s total shares outstanding. It should not exceed 15% of the total issued shares of the bank in the case of related persons. Article 25 states that

\begin{quote}
'Bank stock shall be in the form of registered stock. Unless the approval of the central competent authority has been obtained, a person shall not hold shares in a bank in excess of 5% of the total issue shares of the bank, nor shall related persons hold shares in excess of 15% in aggregate. 'a person' referred to in the preceding paragraph includes a natural person as well as a body corporate...'
\end{quote}

Under this situation, it is difficult for a foreign bank to exercise significant influence on its subsidiary in Taiwan. Moreover, the minimum paid-in capital of a new bank must be NT$ 10 billion (about US$ 400 million), and capital contributions of promoters are limited to cash. Regarding Taiwan’s small financial market, it is also impractical for a foreign bank to transfer a big paid-in capital for the establishment of a subsidiary in Taiwan. On 10 April 1990, Taiwan promulgated a revised vision of 'Guidelines for Screening and Approval of Establishment of Branches and Representative Offices by Foreign Banks'.\(^5\) The Guideline is to relax the standards for the establishment of a foreign bank in Taiwan and to expand the scope of permissible activities of foreign banks operating in Taiwan. Generally, Taiwan only accepts a foreign bank’s application if the

\(^4\)Winn, Jane Kaufmann. op. cit., at 910-912.

\(^5\)The Ministry of Finance, R.O.C.
bank has had a representative office in Taiwan for at least one year, conducted a certain amount of business (US$ 1 billion) with Taiwan, and ranks among the world’s 500 largest banks in terms of assets or capital. Taiwan also accepts foreign banks which have a physical presence in Taiwan for more than 10 years and meet certain business volume requirements (US$ 1 billion) in the last three years. This is an improvement over the previous practice of only accepting applications from the world’s 150 largest banks. Three foreign bank applications to establish a branch are approved per year, an increase of one over the previous practice.96

The 1989 Banking Law and 1990 Guidelines expanded the scope of business for foreign banks. Foreign banks are now allowed to offer additional services including: accepting saving deposits; providing medium and long-term loans; accepting, managing and employing trust funds without guarantee of profit; and providing securities brokerage and underwriting services.97 The ceiling for the total amount of deposits a foreign bank can receive in Taiwan has been increased from 12.5 to 15 times its paid-in capital.98 Foreign banks are now permitted to establish up to three branches a year in Taiwan and are given more flexibility in deciding where to locate these new branches. This is an improvement over the previous practice of a total of only two branches, one in Taipei and one in Kaohsiung.99 The new banking regulations represent a progress towards national treatment for foreign banks. As of the end of March 1992, there were a total of 50 foreign bank branches and 23 representative offices in Taiwan, of which 11 EC bank branches and 4 EC banking representative offices.100

Despite recent financial reform in Taiwan, the EC considered that Taiwan did not grant national treatment and effective market access to EC banks in Taiwan. The

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96 Arts. 3 and 7 of the 1990 Guidelines.

97 Arts. 12: 1, 2, 9, and 10 of the Guidelines.

98 Art. 14 Guidelines.

99 Art. 118 Banking Law; and Art. 8 Guidelines.

100 Europe-Asia Trade Organization. European Trade Offices And Banks In The Republic of China. February, 1992, Taipei. The 11 EC bank branches are ANZ Grindlays Bank; Standard Chartered Bank; Barclays Bank plc; Societe General; Banque Paribas; Banque Nationale de Paris; Credit Lyonnais; Banque Indosuez; Deutsche Bank AG; Hollandsche Bank-Unie N.V.; and NMB Bank. The 4 EC banking representative offices are Midland Bank plc; Dresdner Bank AG; Banco Santander; and Kredietbank NV.
Commission considered that EC banks only enjoy a limited degree of market access in Taiwan. In banking sector, access is restricted to branches and representative offices, and licensing conditions are very restrictive. The main disadvantages for foreign banks seeking market access in Taiwan include high minimum capital requirements and restrictive screening criteria for admission; restricted access to the Central Bank rediscount facilities; a prohibition on offshore foreign exchange settlements; and exclusion from the Foreign Exchange Centre, which helps set exchange rates. Moreover, restriction on foreign banks’ ability to fund themselves competitively in local currency remains a disadvantage for foreign banks.¹⁰¹

Taiwan’s regulatory authorities define foreign bank capital as branch capital. In other words, the activities of foreign banks are limited by defining a foreign bank’s capital in terms of its Taiwan branch(es) rather than its global worth. The branch capital accounting approach restricts foreign banks operations to an extent that makes it difficult for them to compete with domestic banks which have extensive branch networks. Consequently, foreign banks did not enjoy effective market access in Taiwan.¹⁰² Foreign banks are only allowed to accept New Taiwan dollar (NT$) deposits of 15 times their paid-in capital, excluding retained earnings. They can import capital, but they are not allowed to raise capital locally by issuing bonds. Domestic banks are not subject to a limit on deposits and may issue bonds to raise capital.

The branch capital approach also confines the size of loans and guarantees that foreign banks can extend. Specially, loans to one borrower are limited to the greater of NT$ 500 million ( $ 18.2 million ) or 10% of the foreign branch’s total New Taiwan dollar exposure. Local banks, however, are allowed to lend a single borrower any combination of New Taiwan dollar and foreign currency loans up to 25% of their institutional net worth if the loan is secured and 5% if it is unsecured. Foreign branches can guarantee commercial paper only up to ten times their net worth, while local banks do not face such a restriction. Foreign access to securities business is very limited.


Foreign securities also cannot list on the Stock Exchange. The Commission, therefore, concluded that 'considerable liberalization will be necessary if EC banks... are to be granted national treatment and effective market access'. Therefore, Taiwan may become the target of the EC reciprocity test.

Reciprocity neglects the legitimate differences in the national regulatory system. Before 25 June 1991, Taiwan granted three new licences to foreign banks each year, while banning on domestic applications. Therefore, foreign banks actually received better treatment regarding establishment. In addition, the Banking Law of 1989 has extended foreign bank activities to securities and some other non-banking business. Taiwan’s banking regulatory structure thus was actually more liberal than the EC before 1992. Moreover, the banking business operations may be liberal in one area or another between different countries. It will be difficult to measure effectively the concepts of reciprocity and of effective market access if a country’s banking business operation is more liberal in one area but less liberal in another in comparison with the EC. Since the laws and regulations relating to establishment and operation of non-EC banks in different Member States vary, it is also not feasible for the EC to determine on a mirror image basis whether all EC banks receive reciprocal treatment in third countries.

For instance, establishment in the banking sector may be subject to the application of economic needs in Ireland, Portugal and Spain. Non-EC banks participation in domestic banks is limited to 40% of the capital in Greece. Some Member States (Greece, Ireland and Portugal) have citizenship requirements for bank directors or personnel. In this connection, reciprocity based on the consideration of legal structure will be inappropriate.

Sectoral reciprocity also neglects a basic fact that national economies differ.

103 SEC (92) 1343 final, at 25.


Countries do not produce or necessarily have the capability to produce everything or develop the same level of economies. Two countries rarely export and import the same goods or services to and from each other. The success of a EC bank in foreign market cannot be based on the consideration of regulatory structure of the host country. The absolute identity of reciprocity is relatively unusual. Therefore, a narrow sectoral approach to trade negotiations could be unfair in itself too. Most leading banks are already established in the EC, reciprocity would presumably apply only to more modest new comers. This may actually work to protect existing banks on one hand and to discriminate against the potential new banks on the other hand. This will particularly affect the interests of those banks from developing countries wishing to establish a subsidy in the EC market. EC reciprocity dose not apply to branches of non-EC banks. Thus, a non-EC bank would tend to establish a branch, as a substitute for the subsidiary, in a more liberal EC financial market. Consequently, non-EC banks may operate densely in only one or a few so-called "hot spots" such as London, Luxembourg and Frankfurt. The potential result is not necessarily to the benefit of other EC members and a harmonious development of EC financial activities among EC Member States.

3. Legal Issues of Reciprocity

Unilateral Interpretation

There is no explicit definition of the concept 'effective market access' provided in Article 9(4) of the Second Banking Directive. Its interpretation would tend to depend on the specific context in which it is applied and may evolve over time according to changing circumstances. Third countries are concerned that the term effective market access could be used in ambiguous and selective ways in the context of banking operation.

The broad definition of effective market access would, in effect, mean agreement on goals for regulatory convergence in areas as the permissible activities of banks or the types of products that may be offered. In other words, it is defined in terms of liberalization of a host country's financial structure. Effective market access may also be defined as requiring de facto national treatment because the Community is more interested in economic equivalence than legal equivalence.\footnote{Cruson, Michael and Werner Nikowitz. ' The Second Banking Directive of the European Economic Community and its Importance for Non-EEC Banks ', in 12 Fordham Int'l Law J. (1989), at 240.}

As far as banking services are concerned, de jure and de facto national treatment may be distinguished on the basis of 'effects'. The concept of effect, however, should not refer to the end result of market performance such as market share. Rather, it should refer to the adverse effects that might affect normal competition for importing services and service providers. The difference in relative market shares that could not be interpreted as the less of effective market access in the host country. The relative market shares depend upon a variety of economic as well as regulatory factors. These include the size of the host country market, the extent of international banking activity conducted in the host country, the extent of direct investment in the host country by home country banks, the volume of bilateral trade, the relative skills and expertise of different banks and banks from different countries, consumer preferences, and the extent of internationalization of host country financial market.\footnote{Sydney, J Key. op. cit., at 369.} The scope of effective market access goes beyond national treatment. It implies an objective of reciprocity that a third country may be required to fulfil to obtain national treatment for their banks within the Community. The use of effective market access as an obligation may be applied as a general escape clause from the commitments to national treatment.\footnote{Hudec, R. E.' Thinking about the New Section 301: Beyond Good and Evil ', in Bhagwati, J and H. T. Patrick (eds): Aggressive Unilateralism (1990), at 124.}

The absence of clear definition of national treatment provided in Article 9 gives the Commission broad discretion, including the power to initiate a negotiation without an examining report. Article 9 provides that the Commission may propose or initiate negotiations on the basis of its own examining reports regarding national treatment provided by third countries. The proposal may even be based on 'other information'. The
Commission is also allowed to take 'any appropriate proposals' to the Council for the acquisition of reciprocity in foreign markets. The lack of transparency on the decision-making of the Commission increases the problems which they engendered. It is also not clear whether different criteria or a selective approach is used for reciprocal requirement. The reciprocity approach will impose a considerable uncertainty in trade in banking services.

**Mandatory Retaliation**

The threat of unilateral retaliation is applicable under Article 9. In addition to initiating negotiations, the EC retaliation may also be decided 'at any time' in accordance with the procedure laid down in Article 22(2) of the Directive. One controversy regarding retaliation is that of - appropriateness - of the measures to be taken. This issue is with respect to whether the retaliatory measures should be limited to equivalence of the foreign discriminatory measure or whether the Commission is authorized more extensive powers in the nature of a sanction. The words 'limit' and 'suspend' provided in Article 9(4)(b) do not require equivalence. It does not even require the damage test for the application of retaliation, such as in the case of anti-dumping procedures. Thus the pre-request to invoking Article 9 does not depend upon some sort of injury to EC financial services sector. Retaliation, therefore, does not have to be restricted to a minimum so as to disrupt trade as little as possible. The foreign discriminatory measures may be retaliated against by limitations or even total suspension imposed on the new establishment. The EC retaliation may very well be out of proportion to the foreign discriminatory measures under which establishment was still permitted. The EC could therefore impose unreasonable burdens on third countries. In addition, retaliation cannot guarantee reciprocity. On the contrary, the suspension or limitation of foreign banks may affect the general interest of EC citizens such as consumer and employment interests. The specific interest of the EC banks in a third country may also be affected by counter-retaliation. If there is little market-access interests or there are other alternatives, it is unlikely to have much effect to force a foreign country to change its policy and

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Thus, the potential net effect of the reciprocity clause could be closed markets abroad and a closed EC market. This may partly explain why retaliatory measures were not so effective in obtaining the objective of market access in international trade relations.

E. Conclusion

Reciprocity marks a change in the character of the EC trade policy. It implies a move from a system of broadly overall reciprocity to one of aggressive, sectoral reciprocity. It signals EC intolerance of foreign discriminatory practices and its desire for market access abroad. It is psychologically important for the signals it sends to third countries. Reciprocity is clearly meant to protect EC banks against discriminatory treatment abroad. It also improves the EC position during trade negotiations. Reciprocity can be interpreted and operated in many ways. The Commission clearly retains much discretion over its use. If the Commission decides to use it minimally then reciprocity may not presage much change in the substance of EC trade policy. If strictly enforced by the Commission, this may well lead to a dramatic change in EC trade policy. Efforts to reform the GATT involve significant areas of overlap with developments in the EC internal market plan. Although the goals of both the GATT and the EC exercises offer positive signs for international financial services trade liberalization, it is unclear to what extent the initiatives will reinforce one another or will be blocked if EC policies move in

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117 Taussing, F.W. Free Trade, the Tariff and Reciprocity. (1927), at 127 and 128.
121 Footer, Mary E. GATT and the Multilateral Regulation of Banking Services, in 27 Int’l Lawyer (1993), at 361.
the direction of mirror-image reciprocity or disregard GATT rules.\textsuperscript{123}

Although reciprocity is seen as an essential ingredient in the international trading relations\textsuperscript{124}, it can be made more meaningful on the basis of the m.f.n. principle.\textsuperscript{125}

It is seen that 'The crucial characteristic that has made GATT into a very beneficial instrument for global welfare is multilateralism rather than reciprocity. But the reciprocity in entering into the system is vital to obtain and retain the national consent to be bound by the results. Without reciprocity, the multilateralism would remain the pious wish of economists that countries liberalize their international relations. Without multilateralism, reciprocity would become a dangerous protectionist device, building antagonistic regional trading blocs'.\textsuperscript{126} The EC commits its obligations under international agreements. Article 9(6) of the Second Banking Directive indicates that 'measures taken pursuant to this Article shall comply with the Community's obligations under any international agreements, bilateral or multilateral, governing the taking-up and pursuit of the business of credit institutions'. Therefore, it is necessary to take into account of national treatment standard provided in the GATS. Unilateral liberalization also should be generalized to foreign financial services and financial service providers according to the national treatment clause. Individual commitment made in bilateral or regional negotiations should be extended to other countries according to the m.f.n. clause provided in the GATS. Non-discrimination realized through the m.f.n. principle would preclude reciprocity in the treatment of foreign banks. Financial services are covered by the GATS, the EC would in future be barred from taking unilateral action.\textsuperscript{127} The GATT regimes then can help banking trade liberalization at international level.


\textsuperscript{124}Gadbaw, R.M. 'Reciprocity And Its Implications For U.S. Trade Policy', in 14 Law & Policy in Int'l Business (1982), at 691.

\textsuperscript{125}Dell, Edmund. The Politics of Economic Interdependence (1987), at 232.

\textsuperscript{126}Wilis, Geert. op. cit., at 259.

\textsuperscript{127}F.T. 'Confusion over Section 301 powers on services', December 17, 1993, p.4.
Chapter 6: Summary and Conclusions

The previous Chapters have reviewed EC-Taiwan trade relations in the sectors of agriculture, textiles and banking services. Under the autonomous trade policy, the EC maintains more restrictive measures in its trade with Taiwan than other third countries. Many of the restrictions are on agricultural products, textiles, footwear, and some electronic products. In many cases, these are of considerable importance to Taiwan. Quantitative restrictions are often in the form of VERs. Taiwan has always been excluded from the EC's hierarchy of trade preferences. Although the EC has granted some real, if limited, trade concessions to Taiwan in recent years, many non-tariff barriers continue to exist. The unilateral nature of the autonomous trade policy remains largely unchanged, leading to charges of EC discrimination by Taiwan. This Chapter will summarize previous chapters and then put forward conclusions for possible changes to the EC-Taiwan policy, within the wider multilateral framework of the GATT.

The introduction gave a general review of EC-Taiwan trade relations in a world of economic interdependence. It indicated that EC-Taiwan trade relations still have much room for further development. This Chapter also discussed methodology of this thesis which is based both on legal and policy analyses of EC-Taiwan trade relations from the GATT point of view.

Chapter 1 examined the impact of structural changes on both international trading system and national trade policies. It referred to the new development of the GATT after the completion of the Uruguay Round and national trade policy reform. GATT is generally recognized as the main international regime for trade cooperation. In particular, the most-favoured-nation clause is considered as the cornerstone of the GATT for trade liberalization at international level. However, the functions of GATT are limited by many exceptions such as regional economic arrangements and non-tariff trade barriers. The Final Act of the Uruguay Round and the World Trade Organization provide an unique opportunity for GATT to reorganize its system. This Chapter also looked into the general background of economic development in Taiwan, including Taiwan's effort to join GATT which reflect its intention to integrate Taiwan's economy into the GATT system. It was suggested that the GATT could provide a feasible means for EC trade cooperation with Taiwan.

Chapter 2 reviewed EC trade policies. The GATT provides an exception for the
establishment of regional economic arrangements. However, it does not mean that the GATT should allow serious injury to be caused to third countries. The EC is seen as the most successful example of regional economic arrangement. The dynamic inner strength can only add to the EC's international standing, bringing with it new responsibilities and new challenges. The EC trade policy then has profound implications for third countries since the EC is one of the rule-makers in the international trading system. It exerts a significant influence on global trends in trade policy, for instance towards bilateralism or multilateralism, towards sectoral arrangements or overall trade liberalization, towards a rule-oriented or a power-oriented trade relations. It is suggested that the leading role of the EC requires that its internal trade liberalization be matched by a parallel lifting of external barriers and closer adherence to GATT rules and legal disciplines.

Chapter 3 discussed the EC common agricultural policy with special reference to Taiwan's export of preserved mushrooms to the EC. In principle, the GATT requires members to avoid the use of subsidies on export of primary products. However, this provision is not very strict and subject to some exceptions and consequently, agricultural support policies have been adopted by many countries. GATT also requires the general elimination of quantitative restrictions on imports, subject to some exceptions for agricultural products under certain circumstances. However, many countries have continued to use and intensify a number of import restrictions on agricultural products. The agricultural sector has become a main source of dispute and tension in international trade relations. The EC, under the CAP, adopts a protective trade policy for the agricultural sector. In addition, the EC protective agricultural policy is often implemented on a selective basis. This Chapter examined how the CAP affects Taiwan's export agricultural products to the EC, with the preserved mushroom as an example.

Chapter 4 analyzed the EC textiles policy and its effects on Taiwan. GATT requires the general elimination of quotas and other quantitative restrictions. However, trade in textiles and clothing has been regulated under MFA for a long time. The MFA permits bilateral or unilateral restrictions as a result of market disruption. The MFA further provides for bilateral agreements to eliminate the risk of market disruption. Restraints under MFA have been applied almost exclusively to products from developing countries although the MFA contains the objective of eventually applying GATT rules to trade in textiles and clothing but does not specify a time limit for reaching it. The EC has
concluded 19 restraint agreements under Article 4 of MFA IV, down from 23 under MFA III. Most import quotas under MFA were negotiated for the EC as a whole. Community quotas are generally allocated to individual Member States according to traditional trade patterns. The EC applies an autonomous procedure for textiles import from Taiwan. Taiwan's export textiles is then affected under this procedure, particularly with the accession of Portugal and Spain to the EC. The textile industry illustrates the marked inter-regional differences in production structures within the EC. There is still no clear signs of immediate changes in the EC protective textile regime.

Chapter 5 was devoted to EC and Taiwan banking services, with special reference to the EC's reciprocal policy with respect to Taiwan. The GATS is based on m.f.n. and national treatment for banking service liberalization at an international level. The Second Banking Directive provides for substantial liberalization of operations for non-EC banks subsidiaries in the EC. At the same time, the EC also adopt a reciprocity clause to improve the treatment of EC banks in third countries. The EC is of the view that Taiwan does not grant national treatment to EC banks in Taiwan. Taiwan's expected accession to the GATT and acceptance of the GATS will provide an occasion for securing multilateral commitments to Taiwan's financial liberalization.

The foregoing summary leads to the following conclusions. The EC appears to prefer sector-specific solutions in some policy areas. Agriculture has traditionally enjoyed a special status in the EC for reasons of farmers' interest protection and self-sufficiency in food production. Other sectoral measures have evolved in response to structural adjustment pressures (textiles) or to open foreign markets (banking services). Selective sectoralism leads to a power-oriented diplomacy in which the main economic powers may find it expedient to impose their will by using a wide range of bargaining tools.¹ EC policy in the areas of preserved mushrooms, textiles and banking services demonstrates this trend towards power-diplomacy. Sectoralism is also deployed in other trade sectors which experience difficulties. The EC's new regimes for Japanese car imports and banana provide good examples with respect to the EC's protective trend as discussed in Chapters 2 and 3 respectively. As was seen in Chapter 2 relating to EC trade policies, regional

safeguard measures are inconsistent with the common commercial policy after 1992. Moreover, sectoral protection in the car sector may be extended to a period longer than was originally expected, as examined in Chapter 4 relating to textile trade. The car sector is a capital-intensive and high-technology industry. It is striking that EC sectoralism has expanded to such an advanced and competitive sector. This protective trend is equally seen in the EC polyester yarn textiles relating to anti-dumping measures as discussed in Chapter 4.

Reciprocity is applied in EC trade policies in the banking sector. As was mentioned in Chapter 5, reciprocity especially is the key of external dimension of the internal market in the banking sector. Reciprocity set out in the Second Banking Directive forms a model for other EC financial legislation in dealing with external relations. It also shows an influence in the area of GATT financial liberalization based on a conditional m.f.n. approach. The nature of reciprocity provided in the Second Banking Directive is based on bilateral arrangements with specific trade partners. Bilateralism based on strict reciprocity would have harmful effects on international trade relations. It will force one country after another to adjust its trade relations in the direction of equalizing trade balances. It is more than likely that these adjustments will be made by cutting down imports to the level of lower exports, rather than by raising them to the level of higher exports. In this respect, the tendency of bilateralism would reduce the volume of world trade. Moreover, the strong trading dependence of countries bound by a bilateral approach may easily develop into a one-sided dependence, which may progress from being economic and end up as political. In other words, this would lead to an unilateral dependence of small countries on greater countries. Bilateralism therefore tends to be a power-oriented form of diplomacy. Bilateralism has potential dangers of generating more

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diplomatic controversy, more international ill-feeling, more conflict between international obligations and municipal law and between judicial interpretation and executive practice, more confusion and uncertainty in operation.\textsuperscript{7} Therefore, a trade policy based a bilateralism will create resentment and inefficiency, increase bureaucracy, and send unwise signals to other nations.\textsuperscript{8}

The GATT has progressively achieved its objectives of trade liberalization at the international level. More and more countries display their interests for trade policy reform under the auspices of GATT. There is also no other system such as the GATT to promote multilateral trade between countries regardless of differences in their political structure and economic development.\textsuperscript{9} The GATT has a vital contribution to make to the solution of problems arising from international trade relations. The function of the GATT depends not only its rules but also the overall reciprocity approach. The GATT order thus must be obeyed because the GATT is based on common interests. In the long run, it will benefit all the contracting parties involved.\textsuperscript{10} The GATT also shows its capacity to adapt in the changing circumstances. In this connection, the GATT has formed part of the actual world economic order, not merely that of international morality or cooperation.\textsuperscript{11}

It appears that the GATT is the best means for trade cooperation at the international level. GATT membership reinforces the domestic reform process in a liberal direction whilst GATT obligations, based on the principle of overall reciprocity, also help the expansion of international trade cooperation.\textsuperscript{12} It is expected that GATT m.f.n. treatment will be more stable and more general than Taiwan presently receives on the basis of limited bilateral agreements. Violation of a bilateral agreement would be a matter only between the country involved and Taiwan, whereas a violation of the GATT

\textsuperscript{7} Viner, J. 'The Most-Favoured-Nation Clause in American Commercial Treaties', in International Economics (1954), at 25.
\textsuperscript{10} Higgins, R. Conflicts of Interests (1965), at 7.
\textsuperscript{12} Hudec, Robert E. Developing Countries in the GATT Legal System (1987), at 162 and 163.
obligation by third countries against Taiwan will affect the interests of other GATT members or the GATT system. Therefore, Taiwan membership could help it cope with the pressures of unreasonable requirements outside the GATT regimes.\textsuperscript{13} GATT membership may facilitate further links for Taiwan with certain UN specialized agencies such as the IMF and the IBRD.\textsuperscript{14}

A fundamental factor in EC-Taiwan relations is that the two sides will continue to rely heavily on international trade. It is generally recognized that Taiwan has undertaken a significant trade liberalization in recent years.\textsuperscript{15} Taiwan has also offered to join the GATT as a developed nation. Therefore, it is expected that it will reduce its tariff and other trade barriers to the same level maintained by other developed countries and to match concessions offered by current GATT members in the Uruguay Round.\textsuperscript{16} In the EC-Taiwan relations, Taiwan needs to grant non-discriminatory treatment to the EC, particularly in areas such as financial services and government procurement. Moreover, Taiwan should guarantee legal protection of EC intellectual property rights.\textsuperscript{17} The proper protection of intellectual property rights may actually contribute to the transfer of EC technology to Taiwan through either international trade or licence arrangement.\textsuperscript{18} Taiwan must pay special attention to direct investment in the EC. Since this could prove another useful foundation for EC-Taiwan trade relations.\textsuperscript{19} Direct investment may provide Taiwan


\textsuperscript{14}The GATT has a close link with IMF, the World Bank and UNCTAD. See Arts 1(1) and 55-58 UN Charter; and Arts XV and XXXVIII(2)(b) GATT.


\textsuperscript{16}F.T. ' Pressure mounts on Taiwan over tariffs ', November 30, 1993, p.6.

\textsuperscript{17}Interview with EC Commission official, DG I, at Brussels, on 17 December 1993.

\textsuperscript{18}Blakeney, Michael. Legal Aspects of Transfer of Technology to Developing Countries. (1989), at 87.

\textsuperscript{19}Benavides, Pablo. ' Bilateral relation between the European Community and Eastern European countries: the Problems and prospects of trade relations ', in Maresceau, Marc. (ed.) The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe. (1989), at 25.
with an alternative pattern to penetrating EC trade barriers, since it is also more likely to achieve direct access to EC technology, management and other economic and financial resources.

The bilateral problems in Taiwan-EC trade relations are in fact multilateral, equally shared by many other non-EC countries. The EC trade protective policy is a multilateral problem, therefore, a bilateral solution is not sufficient. Since most of EC protective measures are not uniquely applied to Taiwan, but also to other countries, it is necessary to reconsider the multilateral approach. With the accession to the GATT, Taiwan could benefit from the opportunity to bring multilateral pressure for possible changes in the EC protective measures. Dispute settlement by the GATT is also more acceptable to the contracting parties involved and then more likely to improve bilateral relations. In this connection, the examination of legal problems in Taiwan-EC trade relations also indicate a way forward in seeking to resolve multilateral trade problems. From Taiwan's point view, GATT multilateralism is the best and most feasible means for EC-Taiwan trade cooperation. The following conclusions should be considered by the EC in its trade policies:

First, the EC external trade relations needs to be mainly based on GATT multilateralism. The GATT can provide the framework for EC trade cooperation with third countries in a manner that will be both predictable and flexible enough to balance all the interests involved. However, the GATT is a complex interplay of national, regional and international trade rules, institutions and policies. Therefore, the linkages between national trade policy reform and GATT's function improvement are very crucial for the future of the GATT. GATT has recently increased its role in national trade policy reform,

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though its impact varies between countries and individual sectors. In many aspects, EC trade policy is presently not working as effectively as it should to stimulate positive trade reform. Although some structural change has been carried out by the EC, it cannot be concluded from this fact alone that the changes were necessarily adequate to respond to the underlying forces or have been aimed in the right direction. In particular, relatively little progress has been made in trade liberalization in traditional "core" protective sectors such as agriculture and textiles.

The EC must ensure that its external trade relations do actually comply with GATT's principle of non-discrimination. The EC has developed a hierarchy of trade preferences towards third countries. While these preferential arrangements liberalize entry to the EC market for many products from developing countries, they nevertheless depart further from GATT's non-discriminatory principle. The hierarchy of preferences has an adverse impact on EC trade relations with other third countries because it encourages other countries into bilateral or regional relations, limiting opportunities to bring trade liberalization to the international level. It also reduces the EC's credibility to obtain redress for the adverse effects of other countries' bilateral or regional approaches. It erodes the GSP effect for the developing countries which then affects trade relations with developing countries, an area of growing importance to the EC.

The "grey-area" measures such as VERs should be adapted in line with the new GATT rules. The lack of international consensus on the application of GATT Article XIX has led to an ever-increasing incidence of grey-area measures which paved the way for arbitrary and unilateral actions by the EC. The GATT Agreement on Safeguards, concluded in the Uruguay Round, breaks major ground in establishing a prohibition against grey-area measures, and in setting a sunset clause on all safeguard actions. Therefore, the EC is no longer to seek, take or maintain any VERs or any other similar measures on the import products. Safeguard measures permitted by the GATT should not exceed four years. (Section II:10) and additionally they should be applied on a non-discriminatory basis. In other words, safeguard measures have to be applied irrespective of source. Normally, the allocation of shares would be on the basis of proportion of total

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24 F.T. 'GATT sounds warning over EC preferential treaty', May 19 1993, at 8.

quantity or value of the imported product over a previous representative period. Selective safeguard measures may be adopted only in consultation and under the auspices of the GATT Safeguards Committee. In future, EC grey-area measures in the agricultural sector will have to be limited and account must be taken of the GATT Agreement on Safeguards.

Anti-dumping actions should not be used mainly for protective purposes. The increasing use of anti-dumping actions has been fostered by the fact that it provides an easier option for the EC under GATT rules than the actual safeguard mechanism itself. Anti-dumping procedures can be taken against individual countries without the possibility of compensating innocent exporting countries for lost trade. The GATT "Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping)"\(^{26}\), concluded in the Uruguay Round, provides for greater clarity and more detailed rules for the dumping procedure. A fair comparison is made between the export price and the normal value of a product so as not to "arbitrarily" create or inflate margins of dumping. (Art.2:4) Anti-dumping actions can be taken only if dumped imports cause injury to a domestic industry. (Art.3) The domestic industry should refer to the entirety of producers of like products or to those of them whose collective output of products constitute a major proportion of the total national production of those products. (Art.4) Accordingly, the EC cannot apply anti-dumping actions based on individual or small interest-group considerations. All anti-dumping actions will have to be notified to the GATT Committee on Anti-Dumping Practice. The GATT also affords parties involved in anti-dumping disputes the opportunities of consultation and of dispute settlement. (Art.17)

Second, there will be a need for the new WTO to reinforce the effectiveness of its role in the regulation of regional trading blocs. Regional trading blocs have greatly increased in number and importance since the establishment of the GATT in 1947 and today cover a significant proportion of world trade. There is, however, a need to improve the transparency of all regional trading bloc agreements. The WTO, as a first step, must seek to clarify the interpretation of the existing provisions of Article XXIV of the GATT. Secondly, it must undertake a re-examination of the conformity of existing regional arrangements with GATT and GATT rules. The strict enforcement of Article XXIV GATT

\(^{26}\)GATT. MTN/FA II-A1A-8, (15 December 1993).
and Article V GATS requirements would be an important extension of trade liberalization at international level. It could also avoid the segmentation of world trade by the surge of regional trading blocs.27

A new mechanism is needed by which a third country suffering a serious injury due to the loss of market access to members of the regional arrangement may have its injury redressed. In other words, sector-specific and country-specific approaches should be considered in the application of Article XXIV:5 GATT, Article V:5 GATS. Compensation for such injury or a liberalization of market access of the item concerned on the m.f.n. basis should be considered by the relevant WTO Members. In addition, non-tariff measures within the regional arrangements can also have trade-distorting effects on the trade between member and non-member countries. It therefore, where relevant international disciplines on such measures exist, they must be effectively applied to the members of the regional arrangements.28 The "Understanding on the Interpretation on Article XXIV of the GATT 1994"29 does contain a provision (para.5) for the necessary compensatory adjustment in the form of reduction of duties. But, non-tariff barriers have replaced tariffs as the main obstacle to international trade. Therefore, it will be more meaningful if the WTO were to pay more attention to the reduction of non-tariff barriers when considering claims for compensatory adjustment.

In the case of the EC, the re-examination of Article XXIV GATT and also Article V GATS should focus on the practical problems arising from the operation of the Treaty concerning the protective measures applied in agriculture and textiles, and the hierarchy of trade preference. All EC trade restrictive measures inconsistent with Article XXIV GATT and Article V GATS should be phased out or brought into conformity within an agreed time limit. There should be progressive implementation of this commitment on an equitable basis in consultations with other countries, including all affected countries. The approach made by the EC to exclude some sensitive products, proposed by the EC in the Uruguay Round, must be rejected. A partial agreement of that kind would give a

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29 GATT. MTN/FA. II-A1A-1(d).
free ride to the EC in areas only of interest to itself, but fail to meet demands for reciprocal treatment in areas of importance to other countries. Therefore, import restrictions and export refunds provided in the CAP should be phased out within a fixed timetable. The price support system will have to be regulated under the requirements set out in the new GATT Agreement on Agriculture.

Third, the EC needs to change its autonomous trade policy after Taiwan’s accession to the GATT or the WTO. The autonomous trade policy prevents Taiwan from fully benefiting from the EC market. Taiwan feels discriminated against in comparison with other countries in the EC market. Unilateralism is a characteristic element of the EC autonomous trade policy. This policy permits unilateral determinations and actions, or threats thereof, to pursue specific objectives in the EC-Taiwan trade relations. The GATT does not allow for any unilateral interpretation of the rights and obligations of contracting parties, nor for unilateral action by any one contracting party aimed at inducing another contracting party to bring its trade policies into conformity with the GATT. To abandon unilateralism is an important objective for the EC in the Uruguay Round. The EC itself considers that unilateralism or even sectoral reciprocity is inconsistent with the principles of the international trading system.  

Taiwan is expected to accede to the GATT and become a member of the WTO in the near future. This would seem to be a prime opportunity for the EC to re-assess its overall trade policy with respect to Taiwan and to change its policy of unilateralism. The EC may also improve existing EC-Taiwan trade relations before Taiwan’s accession to the GATT and membership of the WTO. The policy option based on bilateral concessions or even unilateral liberalization is also applicable for the improvement of EC-Taiwan trade relations. Taiwan should be treated in a comparable manner to other Newly Industrialized Countries. At the present stage, the EC-Taiwan relations would best be promoted by adopting a pragmatic approach in order to encourage bilateral cooperation in all non-political areas. The EC should broaden the range of trade instruments towards Taiwan. Flexibility or relaxation should be considered by the EC in order to soften the

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application of EC protective measures. The EC may consider removing the double-check licensing system, the strict quota ceiling, and the high tariffs rate on Taiwan's exports. Further liberalization can be stimulated by the use of normal common commercial policy instruments. The EC should also provide regular informal consultations to resolve issues arising from EC-Taiwan trade relations. The need to consult, and the fact that consultations have taken place are seen as a very useful means to improve bilateral relations.

Finally, it is important for the GATT to be supported by all its members as the main world trading system. The GATT was established to avoid repetition of the protection and discrimination that caused economic havoc in the 1930s. Its success is beyond the wildest dreams of its designers. The foundations of the GATT and of the future WTO have been laid; now its Members must build upon them. The fundamental principles of the GATT such as the m.f.n., national treatment and non-discrimination, have lost none of their importance for international trade relations. Indeed, they have been expanded into other areas, such as trade in services and trade-related aspects of intellectual property rights. The success of the GATT-WTO legal order must be the preoccupation of all countries concerned with the application and maintenance of its rules. The system can only be sustained if all countries, particularly the EC and the United States, in good faith, adhere to the spirit and the letter of the GATT-WTO rules and disciplines, using collective mechanisms to enforce the rights and obligations of the weak as well as the strong in a balanced, transparent and non-discriminatory manner. The International Court of Justice clearly pointed out the importance of the principle of good faith: 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields becomes increasingly essential'. The GATT-WTO system then can serve not only in times of economic prosperity but also help to prevent recourse to protective policies like some of those which the EC has pursued in its relations with Taiwan.

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Bibliography

Official Documentation and Publications

GATT: GATT Activities.
   Basic Instruments and Selected Documents (BISD).
   Focus/Newsletter.
   International Trade Report.
   International Trade Statistics.
   Multilateral Trade Negotiations: The Uruguay Round. MTN. GNG.
   News of the Uruguay Round Multilateral Trade Negotiations.
   Press Release.
   Trade Policy Review of GATT Members.

EC: Basic Statistics of the Community.
   Bulletin of the European Communities/Union.
   COM Documents: official documents (proposals, communications, etc.) of the European Commission.
   Debates of the European Parliament - Supplement to the Official Journal of the EC.
   European Economy.
   European File.
   Panorama of EC Industry.
   Opinion and reports of the Economic and Social Committee.
   Reports of Cases before the Court of Justice of the European Communities.
   Research on the 'Cost of non-Europe' - Basic findings, 16 vols.
   This Week in Europe: News of the European Commission. UK Edition.

   Taiwan Statistical Data Book. Taipei: Council for Economic Planning and Development.

Treaties and Agreements


Agreement on Implementation and Application of Article VI, XVI and XXIII of the General Agreement on Tariffs and Trade. See GATT. BISD 26S/56, Part II.


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Arrangement Regarding International Trade in Textiles (MFA I, 1974), GATT BISD 21S/3; MFA II (24S/5); MFA III (28S/3); MFA IV (33S/7; and 36S/8); and Protocol Maintaining in Force the Arrangement Regarding International Trade in Textiles (38S/113 and 39S/4).


Official Decisions


Memorandum on Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu submitted by the Republic of China to the General Agreement on Tariffs and Trade (January 1, 1990) and (January 17, 1992 revision), reprinted in Chiu, Hungdah (ed.) Chinese Yearbook of International Law and Affairs vol.9 (1989-90), pp.224-76; and vol.10 (1990-91), pp.206-270.

EC Secondary Legislation


Reg.459/68, on protection against dumping of the granting of bounties or subsidies, by countries which are not members of the European Economic Community, OJ 1968, L93/1 (English Special Edition, 1968, p.80); as replaced by Reg.3017/79, OJ 1979, L339/1.

Reg.865/68, on the common organization of the market in products processed from fruit and vegetables, OJ, English Special Edition 1968 (I), p. 225.


Reg. 1428/71, defining the condition for the implementation of protective measures for products processed from fruit and vegetables, OJ 1971, L151/6 (English Special Edition, 1965-72, p.36).


Reg. 2107/74, laying down protective measures applicable to imports of preserved mushrooms. OJ 1974, L218/54.


Dir. 75/268, on mountain and hill farming and farming in certain less-farmed areas. OJ 1975, L128/1.


Reg. 1849/75, on allocating quantitative quotas in respect of imports into the Community of certain textile products originating in Taiwan. OJ 1975, L189/24.

Reg. 1927/75, concerning the system of trade with third countries in the market in products processed from fruits and vegetables. OJ 1975, L198/7.

Reg. 1928/75, laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables. OJ 1975, L198/11.

Reg. 3096/76, replacing Regulation 2107/74 laying down protective measures applicable to imports of preserved mushrooms, OJ 1976, L348/26.

Reg. 516/77, on the common organization of the market in products processed from fruit and vegetables. OJ 1977, L73/1.

Reg. 2464/77, imposed a special duty on imports of certain nuts of iron or steel originating in Taiwan, OJ 1977, L286/7.

Dir. 77/780, on the coordination of laws, regulation and administrative provisions relating to the taking up and pursuit of the business of credit institution. OJ 1977, L322/30.

Reg. 1119/78, laying down special measures for peas and field beans used in the feeding of animals. OJ 1978, L142/8.
Reg.1102/78, adopting protective measures applicable to imports of preserved mushrooms. OJ 1978, L139/26.


Reg.1213/78, on the non-applicable of protective measures applicable to imports of preserved mushrooms. OJ 1978, L150/5.


Reg.3155/78, opening and providing for the administration of preferential Community tariff ceilings for certain products originating in developing countries. OJ 1978, L375/15.

Dir.79/279, co-ordinating the conditions for the admission of securities to official stock exchange listing. OJ 1979, L66/21.


Reg.219/84, instituting a specific Community regional development measure contributing to overcoming constraints on the development of new economic activities in certain zones adversely affected by restructuring of the textile and clothing industry. OJ 1984, L27/22.


Reg.3787/85, amending, on account of the accession of Spain and Portugal, Regulation 3587/82 on common rules for imports of certain textile products originating in Taiwan. OJ 1985, L366/43.

Dec.87/373, laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1987, L197/33.

Dec.87/433, on surveillance and protective measures which Member States may be authorized to take pursuant to Article 115 of the EEC Treaty, OJ 1987, L238/26.

Dir.88/361, for the implementation of Article 67 of the Treaty. OJ 1988, L178/5.
Dec.88/376, on the system of the Communities' own resources. OJ 1988, L185/24.

Reg.561/88, instituting a system for the authorization of imports into Italy of footwear originating in South Korea and Taiwan. OJ 1988, L54/59.

Reg.1857/88, instituting a system for the authorization of imports into France of footwear originating in South Korea and Taiwan. OJ 1988, L166/6.

Reg.2423/88, on protection against dumped or subsidized imports from not members of the European Economic Community, OJ 1988, L209/1.

Dir.89/117, on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents. OJ 1989, L44/40.

Dir.89/299, on the own funds of credit institutions. OJ 1989, L124/16.

Dir.89/646, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. OJ 1989, L386/1.

Dir.89/647, on a solvency ratio for credit institutions. OJ 1989, L386/32.

Reg.1707/90, laying down detailed rules for application of Reg.1796/81 on import of preserved mushrooms from third countries. 1990, L158/34.

Reg.1735/90, introducing prior Community surveillance of imports of certain types of footwear originating in South Korea and Taiwan. OJ 1990, L161/12.

Dec.90/518, concerning the conclusion of an Agreement between the European Economic Community, on the one hand, and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, on the other hand, laying down a procedure for the exchange of information in the field of technical regulations, OJ 1990, L291/1.

Reg.2904/91, imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, OJ 1991, L276/15.

Reg.3766/91, establishing a support system for producers of soya beans, rape seed and colza seed and sunflower seed. OJ 1991, L356/17.


Reg.830/92, imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty. OJ 1992, L88/1.


Reg.1948/92, replacing Regulation (EEC) No 2464/77 imposing a special duty on imports of certain nuts of iron or steel originating in Taiwan. OJ 1992, L197/1.

Reg.3951/92, on the arrangements for imports of certain textile products originating in Taiwan, OJ 1992, L405/6.

Dir.93/22, on investment services in the securities field. OJ 1993, L141/27.


Reg.2455/93, amending Regulation (EEC) No 1798/90 in respect of the definitive antidumping duty on imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand. OJ 1993, L225/1.

Reg.2861/93, imposing a definitive anti-dumping duty on imports of certain magnetic disks (3.5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed. OJ 1993, L262/4.

Reg.3030/93, on common rules for imports of certain textiles products from third countries, OJ 1993, L275/1.


Reg.517/94, on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community rules, OJ 1994, L67/1.

Reg.518/94, on common rules for imports and repealing Regulation 288/82. OJ 1994, L67/77;


Reg.521/94, on the introduction of time limits for investigation procedures carried out against dumped or subsidized imports from countries not members of the European Community and amending Regulation (EEC) No 2423/88, OJ 1994, L66/7.


Dec.94/277, on the provisional application of certain Agreement and Protocols between European Economic Community and certain third countries on trade in textile products (Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Romania, Russian Federation, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan), OJ 1994, L123/1.

Dec.94/288, concerning the Conclusion of the Protocol maintaining in force the Arrangement regarding international trade in textiles (MFA), OJ 1994, L124/11.


**Cases (ICJ)**


**Cases (GATT)**

GATT. "Brazilian Internal Taxes", adopted on 30 June 1949, BISD II/181.


GATT. "Italian Discrimination Against Imported Agricultural Machinery", adopted on 23 October 1958, BISD 7S/60.


GATT. "European Communities-Refund on Exports of Sugar - Complaint by Brazil", adopted on 10 November 1980, BISD 27S/69.


GATT. "Follow-up on the Panel Report on European Economic Community Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins", Report of the Members of the

**Cases (EC)**


Case 40/72, Schroeder v Germany, [1973] ECR 125.

Case 5/73, Balkan-Import-Export v Hauptzollamt Berlin-Packhof, [1973] ECR 1091

Case 131/73, Gросоли, [1973] ECR 1555

Case 2/75, Einfuhr-und Vorratsstelle Getreide v Mackprang, [1975] ECR 607

Case 38/75, Nederlandse Spoorwegen v Inspecteur Der Invoerrecht en Accijnzen, [1975] ECR 1439


Case 87/75, Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze, [1976] ECR 129.


Case 29/77, Roquette v France, [1977] ECR 1835


Case 113/78, Schouten v Hoofdparkwachter voor Akkerbouwprodukten, [1979] ECR 695.


Case 119/78, Peureux v Services Fiscaux De La Haute-Saone Et Du Territoire De Belfort, [1979] ECR 975.

Case 177/78, Pigs and Bacon Commission v McCarey, [1979] ECR 2161


Case 245/81, Edeka v Germany, [1982] ECR 2745.

Case 266/81, SIOT v Ministero delle Finanze, [1983] ECR 731.


Cases 300-301/81, Commission v Italy and Belgium, [1983] ECR 449.


Re Screwdriver Assembly: Japan v EEC (Case L/6657), A GATT Panel, [1990] 2 CMLR 639.
Books


Bagchi, Amiya Kumar. The Political Economy of Underdevelopment. (Cambridge University Press, 1982).


Blakeney, Michael. Legal Aspects of Transfer of Technology to Developing Countries. (Oxford: ESC Pub., 1989).


EC Commission:
- The European Community, international organizations and multilateral agreements. 3rd ed.(Luxembourg, 1983).
- Thirty Years of Community Law. (Luxembourg, 1983).
- Multilateral Conventions and Agreements: Signatures and/or Conclusions by the European Communities. (1987).
- Research on The "Cost of Non-Europe". Basic Findings. 16 volumes, (Luxembourg, 1988).
- Relations between the European Community and international organizations. (1989).
- Opening Up The Internal Market. (1991)
EC Commission. European Documentation series:
- The Customs Union. Periodical 1977/5;
- European economic and monetary union. Periodical 3/79;
- 25 Years of European Community External Relations. Periodical 4/79;
- European Economic and Monetary Union. Periodical 4/1981;
- The ECU. Periodical 5/1987;


Feldstein, Martin (ed.) The United States in the World Economy. (Chicago University Press, 1988).

Feldstein, Martin (ed.) International economic cooperation. (Chicago University Press, 1988).


Finger, JM and Fung, K.C. Will GATT enforcement control antidumping? (Washington, DC: Policy
Research Department, The World Bank, 1993).


Howarth, Richard W. Farming for Farmers?: A critique of agricultural support policy. (London: The Institute
of Economic Affairs, 1985).


Li, K.T. The Evolution of Policy Behind Taiwan's Development Success. (Yale University Press, 1988).


Maresceau, Marc. (ed.) The Political and Legal Framework of Trade Relations Between European Community and East Europe. (Dordrecht: Martinus Nijhoff, 1989).


Mayes, David G. (ed.) The External Implications of European Integration. (Hemel Hempstead: Harvester Wheatsheaf, 1993).


Morishima, Michio. Why has Japan ’ succeeded ’?: Western technology and the Japanese ethos. (Cambridge University Press, 1982).


Nello, Susan Senior. Recent Developments in Relations Between the EC and Eastern Europe. EUI Working Paper, No.89/381. (European University Institute, 1989).


Overseas Development Institute. Britain, the EEC and Third World. (London: Overseas development Institute, 1972).


Petersmann, E-U. Constitutional functions and constitutional problems of international economic law and foreign trade policy in the United States, the European Community and Switzerland. (Switzerland: Fribourg University Press, 1991).


Raistrick, D. Index to Legal Citations and Abbreviations. 2nd ed. (London: Bowker-Saur, 1993).


Scott, A.M. The Dynamics of Interdependence. (University of North Carolina Press, 1982).


Snyder, F.G. European Community law and international economic relations: the saga of Thai Manioc. (European University Institute, 1993).


Taussing, F.W. Free Trade, the Tariff and Reciprocity. (New York: Macmillan, 1927).


UNCTAD. International Trade in Textiles with Special Reference to the Problem Faced by Developing Countries. (1984).


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Waelbroeck, Jean, Peter Praet and H.C. Rieger. (eds.) Asean - EEC trade in services. (Singapore: ASEAN Economic Research Unit, 1985).


Weil, G.L. A Foreign Policy For Europe? The External Relations of the European Community. (Bruges: College of Europe, 1970).


Articles


van den Bergh, Marieke, Patrick Pearson and René Smits. 'Institutional Arrangements', in Empel, M. van and René Smits. (eds.) Banking and EC Law Commentary. (1992), International Arrangements - 17 to 49.

Bergsten, C. Fred. 'The Primacy of Economics', in 87 Foreign Policy (1992), p.3.


Bhagwati, J. 'Splintering and Disembodiment of Services and Developing Nations', 7 World Economy, June 1984, p.133.


Bronckers, M.C.E.J. 'The non-discrimination application of Article 19 GATT: Tradition or Fiction ?', LIEI 1981/2, p.35.


EXT.1 GATT 107.


European Parliament. 'Resolution on the inclusion of China and Taiwan in the GATT', A3-0092/93, PE 171.


Lachmann, Per. ‘International Legal Personality of the EC: Capacity and Competence’, LIEI 1984/1, p.3.


Petersmann, E.-U., 'International Competition Rules for the GATT-MTO World Trade and Legal System', 27 JWT (1993), No.6, p.35.


Preusse, Heinz G. 'Regional Integration in the Nineties: Stimulation or Threat to the Multilateral Trading System ?', 28 JWT (1994), No.4, p.147.


Shieh, Sammual C. 'Financial Liberalization and Internationalization: The Development of Taipei as a Regional Financial Centre in Asia', in 77 Industry of Free China (1992), p.27.


Wu, Chung-lin. 'Trade Relations Between the ROC and European Communities in the Twentieth Century', in LXIV Industry of Free China (1985), p.7.

Wu, Huang Sophia. 'Structural Change in Taiwan's Agricultural Economy', in 42 Economic Development and Cultural Change (1993), p.43.

