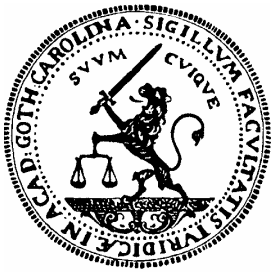

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Free Movement Of Goods - Quantitative Restrictions - In The European Community And The ASEAN Economic Community

Master thesis

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Field of study
EC law – Free Movement Of Goods

Semester
Spring 2006

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Summary

My thesis consists of three main parts. The first part, Chapter 2, describes the legal framework regulating free movement of goods, with the focus on quantitative restrictions in the EC. The starting point of this chapter is the current approach to harmonization in completing the internal market. This section considers the limits of economic integration prior to 1986 and the important steps taken since then to complete the single market. After that, in the second section, I present the basic provisions of EC Treaty, namely Articles 28, 29 and 30, governing the prohibition of quantitative restrictions between Member States in order to facilitate the free movement of goods. The third section analyses some problems concerning the need to protect intellectual property rights and the benefits of free movement of goods in the single market. Basically, the answer to this issue provided by the ECJ is that the Treaty would protect the existence of an intellectual property right, but the exercise of this right would still be subject to the strictness of Articles 28, 29, 81 and 82 EC.

The second part, Chapter 3, describes the policies on free flow of goods in ASEAN. This chapter begins with some general comments on ASEAN's history, including the trade policies of specific ASEAN countries which fall into two phases: from 1967 (when ASEAN was established) to 1992 (when the launching of a scheme toward an AFTA was adopted); and from 1992 to nowadays: a phase with very many important changes. In the next two sections, I analyze ASEAN's legal framework governing free flow of goods between member countries in AFTA. I especially concentrate on highlighting the Declaration of ASEAN Concord II, according to which an ASEAN Economic Community, the end-goal of ASEAN economic integration, including a single market, will be established in 2020, together with two other communities: the ASEAN Security Community and the ASEAN Socio-Cultural Community.

The third part, Chapter 4, contains a study on free movement of goods in the single market of ASEAN from the EU. In order to learn the lessons of EU legal and economic integration, in particular how to design the legal framework regulating free movement of goods in a single market, it is necessary to determine the basic similarities and differences between ASEAN Economic Community and EC. These are the contents of the first two sections. Based on these findings, the last one provides some recommendations for promoting the establishment of an ASEAN Economic Community in the future.

Preface

Free movement of goods is one of the four fundamental freedoms which were called the substantive law of the EU and were recognized early in European Community law. It is an indispensable and decisive factor for the goal of creating a single market. In company with the establishment and development of the European socio-economic foundation, the legal framework governing free movement of goods has been the subject of gradual improvement.

Having studied European law in the Master of European Affairs programme at Lund University, I recognize that the legal framework governing free movement of goods between Member States now has some issues which need to be solved, such as: what are selling arrangements? How can we find the solution when there is a conflict between the need to protect intellectual property rights and the benefits of free movement of goods in the internal market? The above questions urged me to find answers and this is also one of the main purposes of my thesis.

However, that is not all: being an Asian student with a desire to contribute academic knowledge to the process of building a legal framework for an ASEAN Economic Community, I acknowledge that I have to discover the best provisions of European laws, in particular these governing the principle of free movement of goods in the common market, and apply them appropriately to the establishment of a South East Asian area with stable politics and a prosperous economy in the future. These issues also motivated me to choose the topic: *"Free movement of goods – Quantitative restrictions – In European Community and ASEAN Economic Community"* for my Master's thesis at the end of my course in Sweden.

During my work on this thesis, I received valuable help, assistance and inspiration from my family and friends in Viet Nam and Sweden. I would like to express my sincere gratitude to them. In particular, I am very thankful to Lecturer Henrik Norinder, my tutor for this thesis, who gave me much useful knowledge and advices. I also thank the professors and lecturers of the Master of European Affairs programme in the academic year 2005-2006.

Despite my efforts, I think that my thesis cannot avoid certain shortcomings. I would be grateful for any comments and suggestions for its improvement.

Finally, I hope that I will have opportunities to research this topic more deeply and extensively together with other topics relating to EC and ASEAN law in the near future.

Le Huynh Tan Duy

Sweden, Spring 2006.

Abbreviations

ASEAN	Association of Southeast Asian Nations
AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AFTA	ASEAN Free Trade Area
AIA	ASEAN Investment Area
ASEAN-6	Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand
CEPT	Common Effective Preferential Tariff
CLMV	Cambodia, Lao PDR, Myanmar, Viet Nam
EC	European Community/European Community Treaty
EU	European Union
ECJ	European Court of Justice
EEC	European Economic Community
ERP	Effective Rate of Protection
GE	General Exception List
GATT	General Agreement on Tariffs and Trade
HSE	High Sensitive List
IL	Inclusion List
IP	Intellectual Property
IPRs	Intellectual Property Rights
ISEAS	Institute of Southeast Asian Studies
LAO PDR	Lao People's Democratic Republic
MEEs	Measures of Equivalent Effect
MRAs	Mutual Recognition Arrangements
NTBs	Non-Tariff Barriers
NTMs	Non-Tariff Measures
QRs	Quantitative Restrictions
SEA	Single of European Act
SL	Sensitive List
TEL	Temporary Exclusion List
WTO	World Trade Organization

1 Introduction

1.1 Background

Economic globalization is an indispensable tendency, bringing many benefits to human kind. This trend is creating favorable conditions for free trade between all the countries of the world. To achieve its ultimate goal, all obstacles to free movement of goods, services, and technologies must be removed. The establishment and development of EC is vivid evidence of the above trend. The socio-economic achievements of the EC have their origin in right orientations and solutions, the first of which being the establishment of the EEC in 1957. Further, one of the important foundations motivating the process of economic integration in Europe is the legal framework governing the free movement of goods, services, persons and capital between Member States.

Today in the EC, we can recognize that most barriers, both tariff and non-tariff are prohibited. Goods are circulated freely between Member States. The prices of goods are mainly regulated by the rules of the market, without the intervention of governments. That contributes to creating an EC market with a plethora of goods and services, bringing practical and huge profits for its people.

However, besides the above achievements, there still are some issues which need to be solved, for example the determination of the limits of Article 28 EC. This question has a close relation to finding a definition of selling arrangements. In the legislative system of EC as well as the case law of the ECJ, there still is no sufficient provision or explicit explanation of this issue. Moreover, in certain circumstances, when conflicts between the need to protect the fundamental rights of citizens, IPRs, the environment and the benefits of free movement of goods in the single market have occurred, there have not been any completely convincing solutions.

ASEAN was established in 1967 and consequently AFTA was also created. However, in order to obtain the desired socio-economic achievements, the governments of South East Asian Countries must make more effort in promoting the process of legal harmonization, particularly on the field of free movement of goods. According to the Declaration of ASEAN Concord II in Bali, Indonesia, AEC will be established in 2020, and this is the realization of the end-goal of economic integration. We can recognize that studying the EC's experiences in building and developing a legal framework regulating free movement of goods in the internal market with advantageous conditions, will help ASEAN to reach its ultimate aim.

There has been some academic research on trade and specialization between ASEAN and EC. However, most authors have concentrated on exploiting the issue from an economic perspective. As mentioned above, an indispensable factor for creating the right direction of regional economic integration is the legal framework governing free trade between countries. Acknowledging this urgent need, I have chosen the topic: *"Free movement of goods – Quantitative restrictions – In The European community and*

The ASEAN Economic community" as the topic of my Master thesis, with the wish to contribute a small part to the process of creating a developed and prosperous AEC. This topic is mainly approached by way of a legal perspective.

1.2 Purpose

When researching this topic, the planned purpose is to study, analyze and discover the advantages as well as the disadvantages of the EC and ASEAN legal frameworks regulating free movement of goods between Member States. Basing on this foundation, ASEAN can avoid the disadvantages and acquire all the advantages of the EC laws on this issue. After that they can rapidly promote the process of designing their own legal system governing free movement of goods in the single market, building a prosperous economic area and improving the standard of living for all people.

1.3 Delimitation

With definite level of understanding on European and ASEAN laws, in the permitted length of time, I concentrate on describing, analyzing and comparing the legal framework regulating free movement of goods in EC and ASEAN. However, the thesis only focuses on provisions and policies relating to quantitative restrictions as well as measures having equivalent effects between Member States in two regions. Other related issues of tariff barriers and State monopoly are not considered in this thesis.

1.4 Methods

The methods used in this thesis combine both law and economics with descriptive, enumerative, comparative, analytical and systematic methods and case law analysis. To achieve the intended research aims, my thesis is structured as follows:

- Chapter 1. EC laws on free movement of goods, in respect of quantitative restrictions.
- Chapter 2. ASEAN's policy on free flow of goods.
- Chapter 3. ASEAN and EU – A study on free movement of goods in the single market.

2 EC Law On Free Movement Of Goods, In Respect Of Quantitative Restrictions

2.1 Overview, the new approach to harmonization in completing the internal market

2.1.1 Overview

To begin with this topic we start by examining the age-old question, why is free trade important? All of us easily recognize that free trade will bring a lot of benefits. The benefits of it can be summarized briefly – free trade allows specialization, specialization leads to comparative advantages, comparative advantages leads to economies of scale which maximize consumer welfare and ensure the most efficient use of world-wide resources[1]. Free trade or economic integration can take place through different stages such as: Free trade area, customs union, common market and single market.

According to Article 23(1) EC, the EU is based in part on a customs union where customs duties are prohibited between Member States and a common customs tariff is adopted in respect of third countries. However, EC law has gone further than classical economic theory might expect by also prohibiting the use of NTBs, i.e., QRs which, in welfare terms, can be just as damaging to free trade without the revenue-producing benefits, and MEEs (Article 28 and 29 EC). The EU also prohibits anti-competitive behavior by private actors which might attempt to resurrect barriers to trade which partition the market on national lines (Articles 81 and 82 EC) as well as State aids (Article 87 and 88 EC)[2].

The creation of a common market lies at the heart of the EU. Article 2 EC says that the Community has its task the establishment of a common market, and one of the activities of the Community listed in Article 3 EC is the creation of *"an internal market characterized by the abolition, as between Member States, obstacles to the free movement of goods, persons, services and capital"*[3].

Part III of the EC Treaty contains many of the fundamental principles which are of importance in the establishment of a customs union and common market. This part of the Treaty sets out, *inter alia*, the "four freedoms" which are of central importance in realizing the goals of the Community. Title I of Part III is concerned with the free movement of goods, one of the "four freedoms" which was also guaranteed by the

[1] Barnard, Catherine, *The substantive law of the EU – The four freedoms*, (Oxford University Press, 2004), p. 3.
[2] Id., p. 9.
[3] Id., p. 10.

original Rome Treaty. This is designed to ensure the removal of duties, quotas, and other QRs on the free movement of goods within the Community. The fundamental objective in these provisions is to ensure that competition between goods coming from different Member States is neither prevented nor distorted by the existence of government provisions which limit the amount of such goods which can be imported (quotas), or increase their price (tariffs)[4].

More specifically, Articles 23 – 27 EC lay the foundations for a customs union by providing for the elimination of customs duties between Member States and by establishing a Common Custom Tariff. However, if matters rested there, free movement of goods would be only imperfectly attained. It would still be open to States to place quotas on the amount of goods that could be imported, and to restrict the flow of goods by measures which have an equivalent effect to quotas. The object of Article 28 – 31 EC is to prevent Member States from engaging in these strategies.

Nowadays, there are three central problems to be aware of in this area. The first is that the ECJ's jurisprudence has led to difficult issues about where this branch of EC law "stops". The second problem is the relationship between negative and positive harmonization. The third problem is the tension between Community integration and national regulatory autonomy[5].

2.1.2 The new approach to harmonization in completing the internal market

The completion of the single market is central to the ideals of the EC. However it is not easy to achieve this goal. Prior to 1986, the integration was limited for two main reasons: First, on the legislative front, there were two difficulties, procedural and substantive. In procedural terms, the passage of directives under Article 100 EC (now Article 94 EC) required unanimity. In substantive terms, the type of directives which the Commission normally devised in the 1970s and early 1980s demanded agreement between the States on a very detailed measure which was often difficult to attain.

Secondly, the judicial contribution to market integration was limited. The effect of *Cassis*[6] was essentially negative and deregulatory, serving to invalidate trade barriers which could not be justified by one of the mandatory requirements, but it did not ensure that any positive regulations would be put in place of the national measures which had been struck down[7].

In 1985, the Commission produced a White Paper[8] which was to provide the foundations for the passage of the SEA[9], one of whose main objectives was to facilitate the completion of the single market. The SEA introduces two major legislative

[4] Craig, Paul and De Burca, Grainne, *EU Law – Text, Cases and Materials*, (Oxford University Press, 3rd edn., 2003), pp. 580, 581.
[5] Id., pp. 613, 614.
[6] Case 120/78, Rewe-Zentrale *AG v. Bundesmonopolvewaltung fur Branntwein* [1979] ECR 649.
[7] Craig, Paul and De Burca, Grainne, fn. 4, p.1171.
[8] *Completing the internal market: White paper from the Commission to the European Council* (Milan, 28-29 June 1985), available at http://europa.eu.int/comm/off/pdf/1985_0310_f_en.pdf (14/04/2006).
[9] Single European Act (1985), available at http://europa.eu.int/eur-lex/en/treaties/selected/livre509.html (14/04/2006).

innovations which were of prime importance for the single market project: Article 7a (now Article 14 EC) and Article 100a (now Article 95 EC)[10]. Article 14 EC determines the period for establishing the internal market, provides the definition of it. Article 95 EC facilitates the passage of harmonization measures by allowing the Council to adopt measures for approximation of Member States' laws without the unanimity requirement.

The completion of the single market was dependent upon two necessary conditions. There had to be reform of the legislative procedure to facilitate the passage of measures to complete the internal market. There had also to be a new approach to harmonization which would make it easier to draft and secure the passage of these measures.

However, reform in the legislative progress would not have been sufficient to secure the internal market, even though harmonization measures could now be passed more easily. This was because traditional Community harmonization techniques had a number of disadvantages. They were slow and generated excessive uniformity. The Commission recognized these shortcomings in its White paper as well as in its proposals to the Council and Parliament for a New Approach to Technical Harmonization and Standards[11].

The general direction of the new approach is apparent in the extract from the Commission's White Paper on completing the internal market. ***There was to be mutual recognition through the Cassis de Dijon principle. National rules which did not come within one of the mandatory requirements would be invalid; legislative harmonization was to be restricted to laying down health and safety standards; and there would be promotion of European standardization.*** Four elements can be identified in the Community's new strategy:

- The first building block was the adoption of Directive 83/189[12] on the provision of information on technical standards and regulations. This measure, known as the mutual information or transparency directive, imposes an obligation on a State to inform the Commission before it adopts any legally binding regulation setting a technical specification. The Commission then notifies the other Member States, and may require that the adoption of the national measure be delayed by six months, in order that possible amendments can be considered. A year's delay is permitted if the Commission decides to push ahead with a harmonization directive on the issue.

- A second facet of the new approach was the willing acceptance of the *Cassis* jurisprudence. A product which had been lawfully manufactured in a Member State should be capable of being bought and sold in any other Member States. Mutual recognition should be the norm. Harmonization efforts should be concentrated on those measures which would still be lawful under *Cassis* exceptions or under Article 30 EC[13].

- The third aspect of the new approach was that legislative harmonization was to be limited to laying down essential health and safety requirements. When a standard has been approved by the Commission, all Member States must accept goods which

[10] Craig, Paul and De Burca, Grainne, fn. 4, pp.1179, 1180.
[11] Id., p. 1189.
[12] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, *OJ L 109, 26/04/1983 P. 8 – 12,* available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31983L0189:EN:HTML (14/04/2006).
[13] Craig, Paul and De Burca, Grainne, fn. 4, p. 1190.

conform to it. There was also a procedure to settle disputes of Member States about compatibility between the standard and the safety objectives set out in the directive.

- The final element is the promotion of European standardization. Standardization is of importance both because it reduces barriers to intra community trade, and because it increases the competitiveness of European industry. It is important to be clear about the relationship between Community harmonization of essential requirements and the standardization process. A directive which is passed pursuant to the new approach will lay down in general term the health and safety requirements which the goods must meet. The setting of standards is designed both to help manufacturers prove conformity to these essential requirements and to allow inspection to test for conformity with them. Promoting Community-wide standards in the manner described above is designed to foster this process by encouraging the development of a consensus on what the relevant standards in a particular area should be. Allowing a manufacturer to show that its goods comply with the essential safety requirements, even if they do not comply with the Community standard, provides flexibility.

This is not to say that the new approach has been problem-free. The adequacy of the funding for standardization bodies, the sufficiency of the bodies able to undertake the certification process, and the representation of consumer interest have all been causes for concern. Notwithstanding these difficulties the new approach to harmonization offers an opportunity for Community progress in this important area, and one which is a good deal more realistic than would have been the case using the traditional techniques[14].

This section describes the new approach to legal harmonization in the field of free movement of goods with a view to facilitating the process of completing the internal market in the EC. The next section will give us a more focused view of the legal framework regulating free movement of goods between Member States in the EC. Through this section, we will understand EC law regarding this issue as well as the reason why the EU needs a new approach in promoting economic and legal integration.

2.2 The legal framework regulating free movement of goods, in respect of quantitative restrictions

2.2.1 Quantitative restrictions

2.2.1.1 Quantitative restrictions on imports

Generally, goods originating in one EU Member States have the right to be exported from that State under Article 29 EC and the right to be imported into another Member State under Article 28 EC. While cases where Member States try to prevent exports are rare, host States are still trying to keep imported goods out of their country, given that imports may well threaten the viability of national production[15].

[14] Id., pp. 1191-1192.
[15] Barnard, Catherine, fn. 1, p. 28.

If Article 25 EC addresses fiscal barriers to trade at the frontier, Article 90 EC deals with fiscal barriers created internally within the Member States, Articles 28, 29 and 30 EC regulate non-fiscal barriers to trade. Such barriers can range from quotas to national measures prescribing the content and presentation of a product[16].

Article 28 EC provides: *"QRs on imports and all MEEs shall be prohibited between Member States"*. This apparently simple provision prohibits two types of national measure: QRs on import and MEEs.

In *Geddo*[17], the Court defined QRs as ***"measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit".*** QRs also include a ban on imports, which as the Court noted in *Henn and Darby*[18]. (The UK's ban on the import of pornographic material breached Article 28 EC).

So the concept of QRs covers not only "quotas", which term appeared in the old Article 32 and 33, but also any absolute prohibitions on imports or exports, as the case may be. This is so whatever the nature of the imports or exports, be they re-imports or goods in transit, or re-exports. Furthermore, a quantitative restriction may be based on legislation or merely be an administrative practice. On the other hand, the articles in question only cover non-tariff quotas, under these, import or export bans are imposed once the selling has been reached. Tariff quotas (under which customs duties are imposed on goods exceeding the ceiling laid down) infringe Article 25 EC if they are imposed between Member States.

Nevertheless, the exact dividing line between QRs and MEEs is not yet fully clear. For instance, the requirement of import or export licenses has been held to constitute a MEE. Yet such a requirement amounts to a prohibition on imports or exports without the requisite license. The same applies with respect to obligation to produce sanitary or veterinary certificates for imports or exports. Equally, it is unclear whether an import prohibition designed to protect industrial property rights constitutes a quantitative restriction rather than a MEE[19].

In any case, it would seem that the distinction between QRs and MEEs has meaning only for academic research because in reality, the prohibition in Article 28 EC applies in the same way to both of them.

2.2.1.2 Quantitative restrictions on exports

The volume of case law on Article 29 EC is considerably less than for its Article 28 EC equivalent. While it is generally in a Member State's interest to encourage exports, Article 29 EC does have an important role to play in respect of economically sensitive exports such as raw materials and politically sensitive exports: cultural goods, weapons, livestock. Like Article 28, Article 29 EC prohibits both QRs and MEEs. The prohibition of QRs was reviewed in some cases such as: *Delhaize*[20], *Hedley Lomas*[21].

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[16] Id., p. 63.
[17] Case 2/73 *Geddo v. Ente, Nazionale Rici* [1973] ECR 865, para. 7.
[18] Case 34/79 *R. v. Henn and Darby* [1972] ECR 3795, paras. 12-13.
[19] Oliver, Peter, *Free movement of goods in the European Community*, (London, Sweet and Maxell, 4th edn., 2003), pp. 89, 90.
[20] Case C-47/90 *Établissements Delhaize frères et Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669.

Delhaize, a Belgian company, ordered 3000 hectolitres of Rioja wine from Spain, contrary to Spanish rules which limited the quantity of wine available for export in bulk to other Member States, while imposing no such restrictions on domestic sales. The Court said that the rules breached Article 29 EC.

Sometimes the breach of Article 29 EC is intentional and the Member State concedes the point. In *Hedley Lomas*, the UK accepted that its refusal to issue an export license for quantity of live sheep intended for slaughter in a Spanish slaughterhouse was a QR contrary to Article 29 EC, as was a ban on export of live calves in CIWF[22]. In these cases the judgment turned on the justification under Article 30 EC[23].

2.2.2 Measures of equivalent effect

2.2.2.1 Definition

In the previous part we considered the prohibition in Article 28 EC on QRs. We saw that QRs concern quotas or bans on imports into a Member States which will breach Article 28 EC. In this part we consider the other aspect of this article's prohibition: MEEs.

The concept of MEEs differs from that of QRs themselves in that it is considerably wider and more complex[24]. In order to have an extensive understanding about MEEs, we should first be aware of the meaning of "measures".

The Commission has consistently taken a view that even non-binding acts may be caught by Article 28 or 29 EC. This is shown by the preamble to Directive 70/50[25] where it stated: *"Whereas for the purpose of Article 28 EC et seq. "measures" means laws, regulations, administrative provisions, administrative practices, and all instruments issuing from a public authority, including recommendations;…"*

In the *"Buy Irish"*[26] case, the Court to a considerable extent endorsed the Commission's view that non-binding measures could constitute MEEs. It held that the campaign reflected the Irish Government's *"considered intention to substitute domestic products for imported products on the Irish market and thereby to check the flow of imports from other Member States"*. The campaign amounted:

"To the establishment of a national practice, introduced by the Irish Government and prosecuted with its assistance, the potential effect of which on imports from other Member States is comparable to that resulting from government measures of a binding nature.

Such a practice cannot escape the prohibition laid down by Article 28 EC solely because it is not based on decisions which are binding upon undertakings. ***Even***

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[21] Case C-5/94 *R v. MAFF, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553.
[22] Case C-1/96 *R v. MAFF, ex parte Compassion in World Farming* [1998] ECR I-1251, para.39.
[23] Barnard, Catherine, fn. 1, p. 149.
[24] Oliver, Peter, fn. 19, p. 91.
[25] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, *OJ L 013, 19/01/1970 P. 29 – 31*.
[26] Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005, paras 23, 27, 28 and 29.

measures adopted by the government of a Member States which do not have binding effect may be capable of influencing the conduct of traders and consumers in that state *and thus of frustrating the aims of the Community as set out in Article 2 EC and enlarged upon in Article 3 EC.*

That is the case where, as in this instance, such a restrictive practice represents the implementation of a program defined by the government which affects the national economy as a whole and which is intended to check the flow of trade between Member States by encouraging the purchase of domestic products, by means of an advertising campaign on a national scale and the organization of special procedures applicable solely to domestic products, and where those activities are attributable as a whole to the government and are pursued in an organized fashion throughout the national territory"[27].

The ECJ's reasoning provides an excellent example of its more general strategy under Article 28 EC. *It looks to substance, not form*[28]. However, in this case the Court did not go so far as to state that all non-binding measures emanating from the authorities of a Member State may fall under Article 28 EC. Perhaps the reason for this was a desire to exclude ephemeral acts such as casual remarks by ministers, but they can probably not be described as acts of the Member States in any case. This ruling does not lay down any general criterion for distinguishing between acts constituting "measures" and mere ephemeral acts[29].

Another form of non-binding acts which can be considered as a "measure" within the meaning of Article 28 EC is administrative practice. This is shown through the judgment of the ECJ in Case *Commission v. France*[30]. The Court held that consistent and general administrative discrimination against imports could be caught by Article 28 EC. The discrimination could, for example, take the form of delay in replying to applications for approval, or by refusing approval on the grounds of various alleged technical faults which prove to be inaccurate[31].

The general definition of MEEs is now found in Case *Dassonville*[32], where the Court said: ***"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions".***

According to *Dassonville*, Article 28 EC applies to ***"all trading rules"***, which means that it applies to the marketing stage, and not to the production stage, of the economic process. Therefore in *Kramer*[33], the Court said that national rules limiting fishing in order to conserve fish stocks did not concern a trading rule and so did not constitute an MEE[34].

The next element of the *Dassonville* formula, ***"enacted by Member States",*** is sometimes misleading. As the previous section showed, the national measure does not need to be "enacted" to fall within the scope of Article 28 EC: a consistent policy or

[27] Oliver, Peter, fn.19, pp.96, 97.
[28] Craig, Paul and De Burca, Grainne, fn. 4, p. 620.
[29] Oliver, Peter, fn.10, p. 97.
[30] Case 21/84, *Commission v. France* [1985] ECR 1356.
[31] Craig, Paul and De Burca, Grainne, fn. 4, p. 622.
[32] Case 7/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, para. 5.
[33] Case 3/76 *Kramer* [1976] ECR 1279.
[34] Barnard, Catherine, fn. 1, p. 87.

practice will suffice. Article 28 EC applies to measures adopted by the authorities of a federal state or other territorial authorities. It also applies to bodies for whose acts the national government is responsible, as *Commission v. Ireland* demonstrates. Moreover, Article 28 EC not only applies to government or quasi-government bodies but also applies to bodies which regulate the conduct of a particular profession. For example in Case API[35], the Court ruled that Article 28 EC applied to the Royal Pharmaceutical Society of Great Britain, the professional body for pharmacy[36].

The third limb of the *Dassonville* formula is that the national measure must ***"directly or indirectly, actually or potentially"*** hinder intra-Community trade. While most of the cases concern measures which have an actual effect on trade, the Court recognized that it is sufficient for the measure to have a potential effect for it to breach Article 28 EC[37].

Dassonville also provides that national measure must ***"directly or indirectly"*** hinder intra-Community trade. This has been interpreted to mean that both direct and indirect discrimination against imported goods are prohibited[38].

However, the concept of MEEs is not so wide as to cover restrictions on movement of goods falling under other provisions of the Treaty. This was clearly stated by the Court in *Iannelli v. Meroni*[39], in the following term:

"However wide the field of application of Article 28 EC may be, it nevertheless, does not include obstacles to trade covered by other provisions of the Treaty.

In fact, since the legal consequences of the application or of a possible infringement of these various provisions have to be determined having regard to their particular purpose in the context of all the objectives of the Treaty, they may be of a different kind and this implies that their respective fields of application must be distinguished, except in those cases which may fall simultaneously within the field of application of two or more provisions of community law".

Consequently, the following fall outside the scope of Article 28 EC:

- Discriminatory measures contrary to Article 12 EC.
- Customs duties and charges of equivalent effect within the meaning of Article 25 EC.
- State aids (Article 87 EC to 89 EC)
- Internal taxation (Article 90 EC)[40]

[35] Joined Cases 266&267/87 *R. v. Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers* [1989] ECR 1295, para.14-15. See also Case C-292/92 *Hunermund v. Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787, para.14.
[36] Barnard, Catherine, fn. 1, p. 89.
[37] Id., p. 91.
[38] Barnard, Catherine, fn. 1, p. 92.
[39] Case 74/76 *Iannelli v. Meroni* [1977] ECR 557, para. 9.
[40] Oliver, Peter, fn.19, pp. 104, 105.

2.2.2.2 Two main types of measures of equivalent effect

- Distinctly applicable measures

QRs always take effect at the borders of the Member States which impose them. MEEs may do so, but need not[41]. Some classic examples of MEEs may be cited from Directive 70/50/EEC on the abolition of measures which have an effect equivalent to QRs on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty[42]. In this Directive, the Commission distinguished between measures which discriminate directly against imports ("distinctly applicable measures") and measures that indirectly affect imports ("indistinctly applicable measures" or "equally applicable measures"). This Directive applied only to the Community's transitional period (now expired)[43] but continues to be an important source for helping one to understand this terminology[44]. Article 2 of Directive 70/50 describes distinctly applicable measures as following:

"This Directive covers measures, other than applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production".

Thus, distinctly applicable measures are loosely equivalent to directly discriminatory measures: the imported goods are treated less favorably then the domestic product when in objective terms they should be treated in the same way. Putting it another way, the national measure has a different burden in law and in fact on the domestic and imported good[45].

Examples of distinctly applicable measures:

+ Imposing an additional requirement on the imported goods.

One group of distinctly applicable measures is those which, as Article 2 of Directive 70/50 puts it, place conditions on imported products only, or demand higher standards of imports than of domestic products, such as:

- Import inspections and controls[46].
- Other unlawful conditions relate to the requirement for the imported goods (but not the domestic goods) to have a license or other official approval such as a certificate of fitness[47]; the composition of the goods; the circumstances under which the goods are promoted[48].

+ Rules limiting channels of distribution.

- Obligation to produce certificates[49].

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[41] Id., p. 101.
[42] See fn. 25.
[43] The transitional period expired at 1 Jan. 1970.
[44] See, e.g., Case 12/74 *Commission v. Germany* [1975] ECR 181, para. 14.
[45] Barnard, Catherine, fn. 1, pp. 92, 93.
[46] Oliver, Peter, fn.19, p. 158. (See Case 4/75 *Rewe-Zentralfinanz eGmbH v Landwirtschaftskammer* [1975] ECR 843, para. 4).
[47] Case 251/78 *Firma Denkavit Futtermittel GmbH v Minister für Ernähung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen* [1979] ECR 3369, para. 11.
[48] Barnard, Catherine, fn. 1, p. 94.
[49] Oliver, Peter, fn.19, p. 158. (See Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837).

+ National rules giving preference to or advantage for domestic goods.

- Measures restricting the use of imported products or requiring the use of domestic products[50].
- Discrimination in public supply contracts[51].
- Incitement to purchase domestic products[52].
- The obligation to make a declaration of origin[53].
- The abusive reservation of appellations of origin or indications of source[54].
- Obligatory origin marking[55].

+ Discrimination arising from treating national and imported goods alike[56]:

- Price fixing[57]
- Reverse discrimination[58]

- Indistinctly applicable measures

Indistinctly applicable measures are ***those rules and practices which in law apply to both national and domestic products but in fact have a particular burden on the imported goods***. This different burden may arise because while the national producer has to satisfy only one regulator (the home State), the imported goods have to satisfy a dual regulatory burden (home State and host State regulation), with the additional costs that this entails. Such indistinctly applicable measures whether they constitute an absolute barrier or a mere hindrance to the import of the foreign goods may constitute very effective barriers to the free movement of goods and the Court has been assiduous in declaring them unlawful, unless they can be justified by the Member State in some way[59].

The forms of indistinctly applicable rules were mentioned in Article 3 of Directive 70/50: *"This Directive also covers measures governing the marketing of products which deal, inter alia, with shape, size, weight, composition, presentation, and identification, where the measures are equally applicable to domestic and imported products, and where the restrictive effect of such measures in free movement of goods exceeds the effects intrinsic to such rules"*.

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[50] Id., p. 163. (See Case C-379/88 *PreussenElektra AG v. Schleswag AG* [2001] ECR I-2099, para. 70. See also Case 72/83 *Campus Oil* [1984] ECR 2727, para. 16).
[51] Id., p. 164. (See Case C-21/88 *Du Pont de Nemours Italiana SpA v Unità sanitaria locale Nº 2 di Carrara* [1990] ECR I-889, para. 11).
[52] Id., p. 167. (See Case 249/81 *Commission v. Ireland* [1982] ECR 4005 and Case 222/82 *Apple and Pear Development Council v. Lewis* [1983] ECR 4083, para. 18).
[53] Id., p. 163. (See Case 41/76 *Donckerwolcke v. Procureur de la Republique* [1976] ECR 1921).
[54] Id., p. 182. (See Case 12/74 *Commission v. Germany* [1975] ECR 181).
[55] Id., p. 188. (See Case 113/80 *Commission v. Ireland* [1981] ECR 1625).
[56] Barnard, Catherine, fn. 1, pp. 98, 99.
[57] See Case 82/77 *Openbaar Ministerie v. van Tiggele* [1978] ECR 25, Case 65/75 *Criminal Proceedings against Riccardo Tasca* [1976] ECR 291.
[58] See Joined Case C-321-4/94 *Pistre* [1997] ECR I-2343.
[59] Barnard, Catherine, fn. 1, p. 100.

The possibility that Article 28 EC could be applied to indistinctly applicable measures was also apparent in *Dassonville*. The seeds that were sown in Directive 70/50 and in *Dassonville* came to fruition in the seminal ***Cassis de Dijon*** case[60].

The applicant intended to import the liqueur "Cassis de Dijon" into Germany from France, but it was refused because the French drink was not of sufficient alcoholic strength to be marketed in Germany. In paragraph 14(3) and (4) of its judgment, the ECJ concluded that:

"....It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 28 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the member states, alcoholic beverages should not be introduced into any other member state; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules".

The Court's ruling in this case affirmed and developed the *Dassonville* judgment:

- First, it affirmed paragraph 5 of the *Dassonville* judgment: Article 28 EC could apply to national rules which did not discriminate from trade rules applicable in the country of origin.

- Secondly, it encapsulated a principle of mutual recognition: paragraph 14 (4).

- Thirdly, it developed the rule of reason in *Dassonville:* four matters (fiscal supervisions, the protection of public health, etc.) were added to mandatory requirements which are now taken into account within the fabric of Article 28 EC and are separate from Article 30 EC.

Consequently, there have been numerous cases applying *Cassis* to vary trade rules such as:

- *Rau*[61], *Prantl*[62], *Mars*[63] (Indistinctly applicable measures concerning packaging and presentation requirements).

- *Drei Glocken*[64], *Deserbais*[65], *Commission v. Italy*[66] (Indistinctly applicable measures concerning the composition of a product and its designation).[67]

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[60] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolvewaltung fur Branntwein* [1979] ECR 649.
[61] Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961.
[62] Case 16/83 *Karl Prantl* [1984] ECR 1299.
[63] Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923.
[64] Case 407/85 *Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR 4233.
[65] Case 286/86 *Ministere Public v. Deserbais* [1988] ECR 4907.
[66] Case 14/00 *Commission v. Italy* [2003] ECR I-513.
[67] Barnard, Catherine, fn. 1, pp. 101-102.

2.2.3 Exceptions

2.2.3.1 Express exceptions

Article 30 EC provides: *"The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States"*.

The wording of this provision shows that it applies both to QRs and to MEEs. Furthermore, it covers the latter whether they are "distinctly" or "indistinctly" applicable. Equally, it applies both to import restrictions and to export restrictions[68].

In the absence of harmonization Member States remain free to invoke the derogations. However, the Court has imposed two constraints on the Member States' freedom to invoke the Article 30 EC derogations. *First, since Article 30 EC constitutes a derogation from the basic rule of free movement of goods, it has to be interpreted strictly.* Therefore the exceptions listed in this Article could not be extended to include cases other than those specially laid down. *Secondly, the derogation cannot be used to serve economic objectives.*

Subject to these constraints, Member States can invoke any one of the derogations laid down in Article 30 EC[69]. The burden of proof under this article rests with the Member State seeking to rely on it.

Although it is somewhat artificial to separate the two conditions in Article 30 EC, it is necessary to do here. ***In order to be justified under this Article, national provisions must fall within one of the following grounds of justification:***

- Public morality.

Member States enjoy a margin of discretion to determine what constitutes public morality in their own territory[70]. This was demonstrated through the judgment of the Court in *Henn and Darby*[71]. However, Member States cannot place markedly stricter burdens on goods coming from outside than those which are applied to equivalent domestic goods[72].

- Public policy.

The definition of public policy is potentially broad, but the ECJ has resisted attempts to interpret it too broadly. The Court has reasoned that since Article 30 EC derogates from a fundamental rule of the Treaty enshrined in Article 28, it must be interpreted strictly, and cannot be extended to objectives not expressly mentioned therein[73]. A public policy justification must, therefore, be made in its own terms, and

[68] Oliver, Peter, fn.19, p. 215.
[69] Barnard, Catherine, fn. 1, pp. 64-66.
[70] Id., p.66.
[71] Case 34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1972] ECR 3795.
[72] Craig, Paul and De Burca, Grainne, fn. 3, p. 628.
[73] Case 113/80, *Commission v. Ireland* [1981] ECR 1625.

can not be used as a vehicle through which to advance what amounts to a separate ground for defense.

This derogation has increasingly been invoked by Member States to justify interference with the free movement of goods caused by protestors. But generally, the Court has not been sympathetic to such arguments[74].

- Public security.

In the past, the Court has been more sympathetic to arguments based on public security than those based on public policy, as *Campus Oil*[75] demonstrates[76]. However, the broad approach to public policy seen in *Campus Oil* has been more and more narrowed in the light of proportionality principle.

In addition to this specific derogation, the Treaty also contains some more general provisions in respect of public security, such as Article 296(1) (b) EC, Article 297 EC[77].

- The protection of health and life of human, animals, or plants.

These are derogations most frequently invoked by the Member States. In the absence of harmonization, the ECJ will closely scrutinize such claims. *First,* the Court will determine whether the protection of public health is the real purpose behind the Member States' action, or whether it was designed to protect domestic producers. *Secondly,* the ECJ may have to decide whether a public health is sustainable where there is no perfect consensus on the scientific or medical impact of particular substances. *Thirdly,* a Member State might not ban imports, but it might subject them to checks that rendered import more difficult, and it may do so even though the goods were checked in the State of origin[78].

The Court seems particularly sympathetic to public health arguments when they are directly related to the functioning of the national health system[79]. And we should not forget that Article 30 EC protects not only human health but also animal health.

- The protection of national treasures possessing artistic, historic, or archaeological value.

The Court has not decided any case on the basis of the national treasures derogation. However, the values recognized by this derogation were reinforced by the inclusion of the Title on Culture in the Treaty at Maastricht, Article 151(2), and more specifically in Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State[80] and Regulation 3911/92 on the export of cultural goods from the EU[81].

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[74] Barnard, Catherine, fn. 1, p. 67.
[75] Case 72/83 *Campus Oil* [1984] ECR 2727.
[76] Barnard, Catherine, fn. 1, p. 71.
[77] Id., p. 73.
[78] Craig, Paul and De Burca, Grainne, fn. 4, pp. 631-633.
[79] Barnard, Catherine, fn. 1, p. 75.
[80] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, *OJ L 074, 27/03/1993 P. 74 - 79* [1993].
[81] Council Regulation 3911/92 on the export of cultural goods from the EU, *OJ L 395, 31/12/1992 P. 1 – P. 5.*

- The protection of industrial and commercial property.

This derogation consists of the forms of IPRs such as: patents, trade marks, copyright and other types of design rights. It is intended to protect the private, as opposed to the pubic, interests found in the other derogations. In this area, the Court has engaged in a delicate balancing act between Article 28 EC and the first and second sentences of Article 30 EC[82].

The second condition which a national rule has to fulfill in order to be considered satisfied under Article 30 EC is that it must not constitute arbitrary discrimination nor a disguised restriction on trade between Member States. The function of this condition is to prevent restrictions on trade based on one of the derogations mentioned in the first condition of Article 30 EC from being diverted from their purpose and used in such a way as either to create discrimination in respect of goods originated in other Member States or indirectly to protect certain domestic products[83].

In addition, the Court has long emphasized that the measures taken by the Member States must not only serve the purpose for which they are intended but they must also be proportionate to the risk presented by the import.

The principle of proportionality comprises essentially two tests: a test of suitability and a test of necessity. *The first* refers to the relationship between the means and the ends: the means employed by the test must be suitable. *The second test* is one of weighing competing interests: the Court assesses the adverse consequences that the measure has on an interest worthy of legal protection and determine whether those consequences are justified in view of the importance of the objective pursued. Sometimes this second limb is viewed as having two distinct elements: determining whether there are other less restrictive means of producing the same result and even if there are no less restrictive means, confirming that the measure does not have an excessive effect on the applicant's interests.

Therefore the essential characteristic of the proportionality principle is that the Court performs a balancing exercise between the objective pursed by the measure at issue and its adverse effects on individual freedom[84]. The burden of proving that the steps taken are proportionate rests with the Member States. Usually, the question of proportionality is a matter for the national court to decide, but the ECJ often intervenes.

While proportionality has proved the most significant general principle of law limiting Member States' right to rely on one of the derogations, the Court has also emphasized that fundamental rights, including freedom of expression, the freedom to pursue a trade or profession, and the right to own property can limit a State's discretion[85].

[82] Barnard, Catherine, fn. 1, p. 78.
[83] Id.,
[84] Id., pp. 79, 80.
[85] Id., pp. 81, 82.

2.2.3.2 Case law exceptions – Mandatory requirements

The rationale for mandatory requirements is that many rules which regulate trade are also capable of restricting trade, yet some of these rules serve objectively justifiable purposes, as exemplified by the list of mandatory requirements in the *Cassis* case. This list is sometimes referred to as the rule of reason, drawing on the earlier hint in *Dassonville* that, in the absence of Community measures on an issue, reasonable trade rules can be accepted in certain circumstances. A similar approach is evident in other areas of Community law, such as those dealing with the freedom to provide services and of establishment. Thus Advocate General Verloren van Themaat regarded the rule of reason as a general principle of interpretation designed to mitigate the effects of strict prohibitions laid down in the Treaty provisions on free movement.

The traditional view has been that the *Cassis* mandatory requirements are separate from the justifications under Article 30 EC. The ECJ held that the *Cassis* exceptions could only be used only in respect of rules that were not discriminatory[86]. In other words, these mandatory requirements apply only to indistinctly applicable measures and not to distinctly applicable measures. The ECJ also said that, like the Article 30 EC derogations, the mandatory requirements were available only in the absence of harmonization, provided the harmonization occupies the field to the exclusion of Member States competences[87].

The *Cassis* list is also not exhaustive and the Court has added other objective justifications which might have been difficult to fit within the framework of Article 30 EC. The ECJ's willingness to create a broader category of justifications for indistinctly applicable rules is also explicable because discriminatory rules strike at the very heart of what the Community is intended to abolish. It is unsurprising that they are viewed with suspicion by the Court; and that any possible justifications should be narrowly confined. However, the distinction between Article 30 EC and the mandatory requirements in Cassis has come under increasing strain in recent years[88]. And one of the objections is that there is no reason why phrases within Article 30 EC, such as protection of the health and life of humans could not be interpreted to include matters such as consumer protection and the environment. The ECJ has construed other Treaty provisions in a far more expansive manner when it wished to do so[89]. Community harmonization can solve the problem. It may render it impossible for a Member States to have recourse to the mandatory requirements as a defense to breaches of Article 28 EC. Whether it has this effect will depend upon whether the measure is directed at total or only a minimum harmonization[90].

It seems that the Court has recognized the following non-exhaustive list of mandatory requirements:

- The effective of fiscal supervision.
- The protection of public health.
- The fairness of commercial transactions.

[86] Craig, Paul and De Burca, Grainne, fn. 4, p. 659.
[87] Barnard, Catherine, fn. 1, p. 108.
[88] Craig, Paul and De Burca, Grainne, fn. 4, pp. 659, 660.
[89] Id., p. 661.
[90] Id., p. 668.

- The defense of the consumer[91].
- Protection of environment[92].
- Protection of working condition[93].
- Protection of cinema as a form of cultural expression[94].
- Protection of national or regional socio-cultural characteristics[95].
- Maintenance of press diversity[96].
- Preventing the risk of seriously undermining the financial balance of the social security system[97].
- Protection of fundamental rights[98].

The two mandatory requirements most commonly invoked by the Member States are public health and consumer protection[99].

The ECJ has often rejected justifications based on consumer protection for rules relating to the content of goods, by stating that adequate labeling requirements can achieve the desired national aims with less impact on intra-Community trade. However, even labeling requirements themselves may not escape Article 28 EC if the details given on the original labels of the goods contained the same information as required by the State of import, and that information was just as capable of being understood by the consumers[100].

We have already noted that the traditional view was that only indistinctly applicable rules could take advantage of the mandatory requirements. However, the ECJ has, on occasion, not been too concerned about whether it treats a justification as falling within Article 30 EC or within the list of mandatory requirements, provided that the justification pleaded by the Member States comes within both lists. This may occur particularly where it is unclear whether the impugned rule is discriminatory or not. Public health finds a place both in the list of Cassis mandatory requirements and in Article 30 EC[101].

We can now see how Member States can use Article 30 EC as well as mandatory requirements and the proportionality principle to justify national measures which breach Article 28 EC, through the diagram below:

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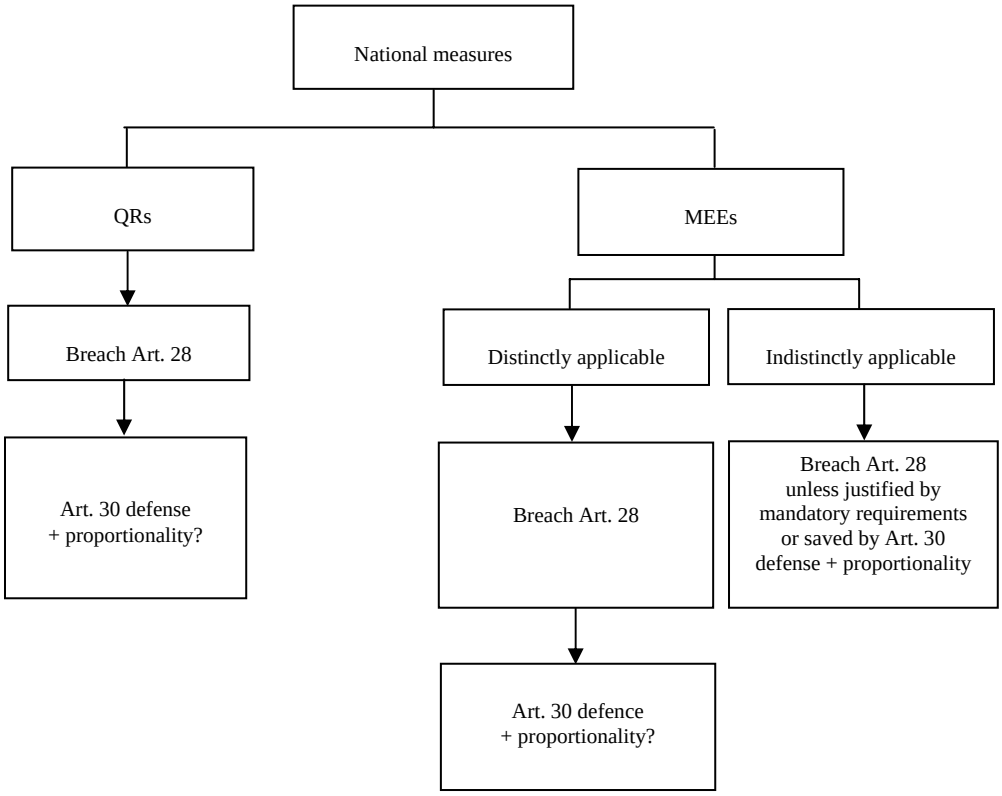
[91] First four mandatory requirements were mentioned in *Case Cassis de Dijon* [1979] ECR 649, para. 8.
[92] Case 302/86 *Commission v. Denmark* [1988] ECR 4607.
[93] Case 155/80 *Oebel* [1981] ECR 1993, para. 12.
[94] Case 60/84 *Cinéthèque SA and others v Fédération nationale des cinémas français* [1985] ECR 2605.
[95] Case 145/88 *Torfaen v. B&Q plc* [1989] ECR 3851.
[96] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.
[97] Case 120/95 *Decker v. Caisse de Maladie des Employes Prives* [1998] ECR I-1831.
[98] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria*, judgment of 12/06/2003, para. 82.
[99] Barnard, Catherine, fn. 1, p. 109.
[100] Craig, Paul and De Burca, Grainne, fn. 4, pp. 663.
[101] Id., p.664.



(Diagram 1)[102]

2.2.4 The boundary of Article 28 EC – Selling arrangements

2.2.4.1 The road to Keck

It is necessary to focus on the limits of Article 28 EC because all rules that concern trade, directly or indirectly, could be said to affect the free movement of goods in various ways[103]. In order to define the precise boundary of this article, we should begin with the distinction between dual burden rules and equal burden rules.

Dual burden rules are prohibited under Article 28 EC because of the double burden they entail: the disparities between national rules obligate the producer/importer to comply with both the home and host states' rules, thereby increasing the producer's costs. Equal burden rules are those applying to all goods, irrespective of origin, which regulate trade in some manner. They are not designed to be protectionist. These rules may have an impact on the overall volume of trade, but this will be no greater impact for imports than for domestic products. A key issue is whether rules of this latter nature should be held to fall within Article 28 EC, subject to a possible justification or whether they should be deemed to be outside Article 28 EC altogether.

The approach of the Court was not always uniform. In some cases it held that rules which did not relate to the characteristics of the goods and did not impose a dual

[102] Barnard, Catherine, fn. 1, p. 65.
[103] Craig, Paul and De Burca, Grainne, fn. 4, pp. 641.

burden on the importer, but concern only the conditions on which all goods were sold, were outside Article 28 EC. Thus, in *Oebel*[104], the Court held that a rule which prohibited the delivery of bakery products to consumers and retailers at night was not caught, since it applied in the same way to all producers wherever they were established. Similar, in *Blesgen*[105], the Court said that a national rule restricting the sale of drinks above certain strength on premises used for public consumption was not caught by Article 28 EC[106].

However, in similar cases, the Court held that Article 28 EC could apply. For examples, in *Cinetheque*[107], a rule which banned the sale or hire of video films during the first year in which the film was released, prima facie, was caught by Article 28 EC and could be considered lawful if objective justification/mandatory requirement – protection of cinema as a form of cultural expression. Similarly, in *Torfaen*[108], the rule which prohibited retail shops from selling on Sundays could be lawful if objective justification/mandatory requirements and if proportionate to its aims.

In these two cases we can see that the fundamental approach remained the same: such rules were prima facie within Article 28 EC, but could be upheld provided that the objective was justified under Community law, and provided also that they were proportionate[109].

It is now clear that the Court has had second thoughts on whether this general strategy for dealing with equal burden rules was correct. ***The Keck***[110] case signaled a change of approach towards such rules[111].

2.2.4.2 Some issues of selling arrangements in the light of Keck

Keck and Mithouard were prosecuted in the French court for selling goods at a price which was lower than their actual purchase price (resale at a loss), contrary to a French law. In their defense, they argued that since the French law deprived them of a method of sales promotion it restricted the volume of sales of imported goods and so was incompatible with Article 28 EC. The Court disagreed. It began by noting that the purpose of French law was not to regulate trade in goods even though such legislation could restrict the volume of sales. It then indicated that it wanted to stop dissatisfied traders from using Article 28 to challenge any restriction on their freedom to sale what they wanted, where they wanted and when they wanted[112].

It is clear that the rationale for the decision was based in part upon the distinction between dual burden rules and equal burden rules, as is evident from the reasoning in paragraph 15 to 17 of the judgment.

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[104] Case 155/80, *Sergius Oebel* [1981] ECR 1993, para.20.
[105] Case 75/81, *Belgian State v. Blesgen* [1982] ECR 1211.
[106] Craig, Paul and De Burca, Grainne, fn. 4, pp. 642.
[107] Join Cases 60 & 61/*84 Cinéthèque SA and others v Fédération nationale des cinémas français* [1985] ECR 2605.
[108] Case 145/88 *Torfaen v. B&Q plc* [1989] ECR 3851.
[109] Craig, Paul and De Burca, Grainne, fn. 4, pp. 642-645.
[110] Case C-267&268/91, *Keck and Mithouard* [1993] ECR I-6097.
[111] Craig, Paul and De Burca, Grainne, fn. 4, p. 646.
[112] Barnard, Catherine, fn. 1, p. 134.

Cassis-type rules relating to the goods themselves were within Article 28 EC, in part because these rules would have to be satisfied by the importer in addition to any such provisions existing within his or her own State. Such rules were by their very nature likely to impede access to the market for imported goods.

Rules concerning selling arrangements, by way of contrast, simply imposed an equal burden on all those seeking to market goods in particular territory (paragraph 17). They did not impose extra costs on the importer, their purpose was not to regulate trade (paragraph 12), and they did not prevent access to the market. They were therefore not within Article 28 EC, provided that those provisions apply to all affected traders operating within the territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic goods and of those from other Member States (paragraph 16). If the selling rules discriminated in either respect they would be caught by Article 28 EC[113].

The decision in Keck raises the question: what are certain selling arrangements? Basing on the content of national measures, we can divide selling arrangements into two types:

+ *Static selling arrangements:* rules relating to opening hours, working time, type of premises in which certain goods may be sold.

+ *Non-static or dynamic selling arrangements:* rules relating to possible ways for the manufacturer to market his products (advertising, sales-promotion etc.)[114]

The exclusion of selling arrangements from the ambit of Article 28 EC is however subject to two important qualifications in Keck itself.

- First, it is open to the ECJ to characterize certain rules which affect selling in some manner as part of the nature of the product itself, and hence within the ambit of Article 28 EC.

This is exemplifies by *Familiapress*[115]. (The national rule in this case was Austrian legislation which prohibited publishers from including crossword puzzles from which the winning readers would receive prizes). We can see that this is a method of sales promotion, so can it was considered outside Article 28 EC? In paragraph 11 and 12 of its judgment, the ECJ answered this question. It said that:

"*Even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in Keck and Mithouard.*

[113] Craig, Paul and De Burca, Grainne, fn. 4, p. 648.
[114] Id., 649.
[115] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer* Verlag [1997] ECR I-3689.

Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of Article 28 of the Treaty".

- Secondly, even if a rule is categorized as being about selling arrangements, it will be within Article 28 EC if the rule has a differential impact, in law or in fact, on domestic traders and importers. This is made clear in paragraph 16 of Keck and is exemplified by the following cases[116]:

+ Konsumentombudsmannen v De Agostini[117]:

The case was concerned with a Swedish ban on television on advertising directed at children under 12 and a ban on commercials for skincare products. It was argued that this was in breach of Article 28 EC and could not be applied in relation to advertising broadcasts from another Member States. The Court characterized the Swedish law as a selling arrangement, and said that:

"As regards the second condition, it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

Consequently, an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising, as provided for by the Swedish legislation, is not covered by Article 28 of the Treaty, unless it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States".

+ Konsumentombudsmannen v. Gourmet International Products AB (GIP)[118]:

This case also concerned a Swedish law. It prohibited advertising of alcohol on radio and television, and prohibited advertising of spirits, wines and strong beer in periodicals other than those distributed at the point of sale. The prohibition did not apply to periodicals aimed at traders such as restaurateurs. GIP published a magazine containing advertisements for alcohol. It contented that the Swedish law breached Article 28 EC because it had a greater effect on imported goods then on those produced in Sweden. The ECJ agreed with this argument and held that:

"It is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.

A prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of

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[116] Craig, Paul and De Burca, Grainne, fn. 4, pp. 650-653.
[117] Cases C-34-36/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB* (C-34/95) *and TV-Shop i Sverige AB* [1997] ECR I-3843, paras 42, 44.
[118] Case C-405/98 *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)* [2001] ECR I-1795, paras 20, 21 and 25.

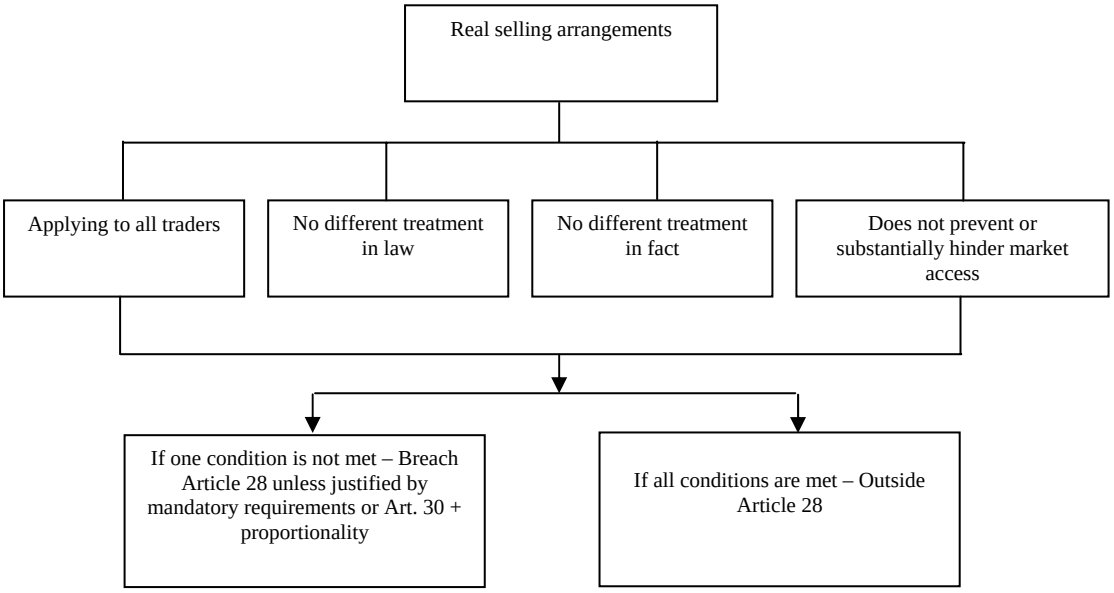
unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.

A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 28 of the Treaty".

- Thirdly, the ECJ showed that it was willing to consider the proviso to paragraph 16 of Keck in relation to a selling arrangement that impeded, rather than prevented, access to the market. This was demonstrated in the case *Heimdienst*[119].

The case concerned an Austrian rule relating to bakers, butchers and grocers restriction sales on rounds: requirement to have a permanent establishment. The ECJ found that the legislation did have a different impact on domestic traders and others. Local economic operators would be more likely to have a permanent establishment in the administrative district or an adjacent municipality, whereas others would have to set up such an establishment, thereby incurring additional costs. In paragraph 29 of its judgment, the Court held that: *"….the application to all operators in the national territory of national legislation such as that in point in the main proceedings in fact impedes access to the market of the Member States of importation for products from other Member States more than it impedes access for domestic products…"*

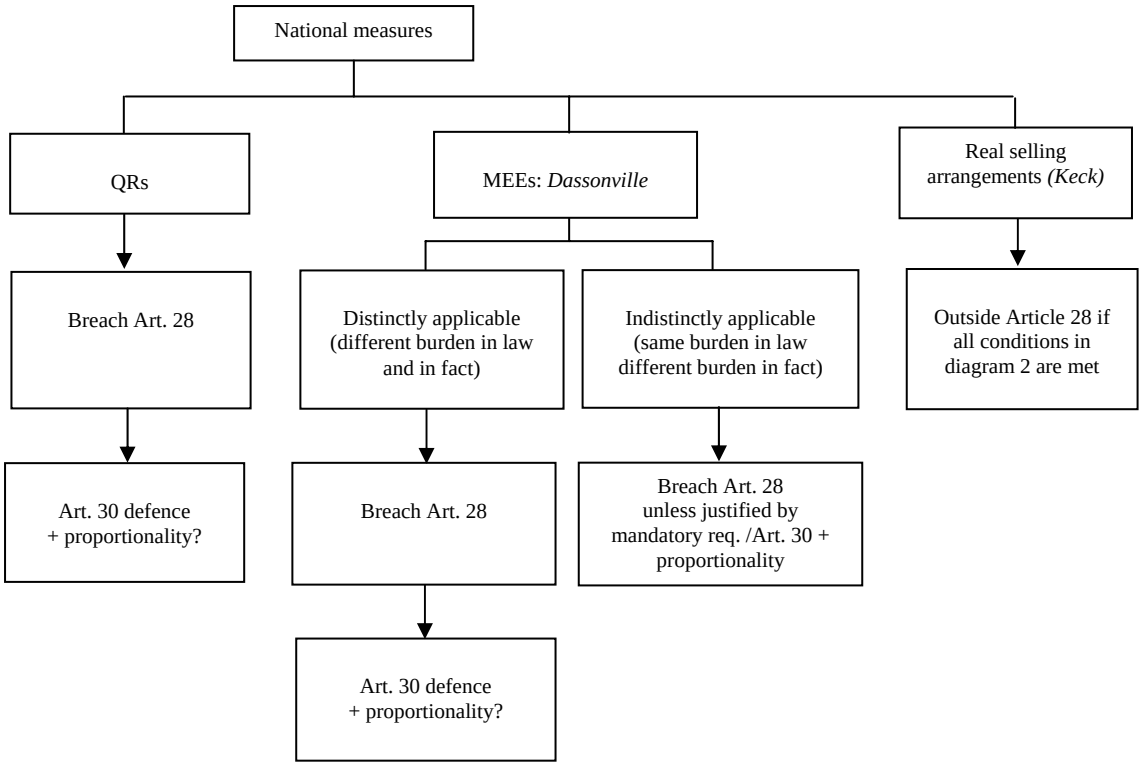
The following diagram describes the relationship between selling arrangements and Article 28, 30 EC. In particular, it displays how to determine whether a national rule which is a selling arrangement falls outside Article 28 EC.



(diagram 2)

[119] Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH* [2000] ECR I-151.

Finally, after analyzing the legal framework regulating the free movement of goods in EC, we can, by way of the diagram below, summarize the mechanism whereby Article 28 and Article 30 EC are applied so as to define the compatibility of national rules, which are considered as QRs, MEEs or selling arrangements, with Community law:



(diagram 3)[120]

2.3 The free movement of goods and Intellectual property rights

Intellectual property is an important branch of the global economy. Although it is not a new issue in the EU, the resolution of the conflict between the need to protect IPRs and the benefits of free movement of goods in the single market is not always simple. This section will describe the jurisprudences of the ECJ on cases dealing with IPRs and free movement of goods in the EC.

ASEAN countries are paying more and more attention to this issue. The ASEAN IPR Action Plan 2004 – 2010 covers IP matters related to protection and enforcement as well as to economic development in the region. Member Countries' laws and regulations continue to be progressively adjusted and broadened to better conform to the Trade-Related Aspects of Intellectual Property Rights agreement. The jurisprudence of the ECJ is a practical lesson for ASEAN at the present and ASEAN Community in the future in designing their own mechanism for dealing with the relationship between IPRs and free flow of goods.

[120] Barnard, Catherine, fn. 1, p. 88.

2.3.1 Intellectual property rights and the single market

The idea behind the IPR protection is to give the inventor/creator/author a right to capitalize on his or her efforts before any third party can reap the benefits. The rights holder will be the first to put the protected product on the market and thereby be financially compensated. During the time the protection lasts the owner holds a monopoly on this right. She can use it herself, assign it or grant limited rights in the form of a license.

Even most IPRs have been harmonized based on international conventions, enforcement of the rights largely remains national and independent. They follow the principle of territoriality, which means that the rights can only be relied on in the territory where they are granted and are not affected by the fact that parallel rights may exist in other countries. As a consequence, markets are fragmented and isolated.

A market-dividing effect is contrary to the very idea of creating a unified single market like the EU. The Rome Treaty instituted a system, which is intended to lead to the abolition of all pecuniary charges for cross border transactions and measures with effect equivalent to QRs. From this perspective, national rules which are based on a territorial principle should give away to the common rule.

Article 295 EC stipulates that the Treaty shall *"in no way prejudice the rules in the Member States governing the system of property ownership"*. National IPRs are covered by this stipulation. But they function like a QRs prohibited by Article 28 EC. Article 30 EC derogates from this latter prohibition thereby recognizing the national law. Such legislation should not, however, be used in a discriminatory way or as a disguised restriction on trade.

The interpretation of these concepts has been the subject of protracted development in the case law. The ECJ has striven for a balance between its wish to uphold a single market and its appreciation of the need to support national laws compensating the creative inventor or developer in the absence of true EU-wide parallel protection[121]. In other words, the task has largely fallen to the Court to reconcile both the different Treaty provisions with the IP laws of the Member States and the interests of IPRs holders with the interests of market integration[122].

The answer provided by the ECJ was to draw a distinction between the existence of an IPR and its exercise. The Treaty would protect the former, the latter would be subject to the rigors of Article 28 and 29 EC, and also Article 81 and 82 EC[123].

[121] Hans Henrik Lidgard, *IPR & Technology transfer*, Chapter 3 IPR-Free movement of goods, pp. 57, 58, Juridiska Fakulteten vid Lunds Universitet, (Spring 2006).
[122] Barnard, Catherine, fn. 1, p. 158.
[123] Craig, Paul and De Burca, Grainne, fn. 4, p. 1080.

2.3.2 Intellectual property rights and Article 28 EC

The case law on the compatibility with Articles 28 to 30 EC of the exercise of IPRs can be summarized in one general rule and three exceptions. However, special rules apply to geographic denominations.

General rule: Member States are free to legislate in the field of IP unless and until it is harmonized, subject to the following exceptions:

Exception 1: Non-discrimination: A Member State cannot discriminate in its legislation on grounds of nationality or place of manufacture.

Exception 2: Goods in transit: A Member State may not prevent goods from passing through its territory, unless this entails the use of the IPRs within that territory.

Exception 3: Community exhaustion: A Member State may not allow the owner of a right to prevent the import or sale of goods which have been lawfully distributed on the market of another Member State by the owner of that right or with his consent.

- General rule: nearly all the cases on IP state that the Treaty does not affect the existence of IPRs granted pursuant to the legislation of a Member State, but only their exercise. Accordingly, national legislation on the acquisition, transfer or extinction of such rights is lawful. While national legislation could in theory be so absurd as to fall outside the concept of IP in Article 30 EC altogether, the Court has consistently declined to make such a finding. Parities frequently sought to rely on Article 28 EC to cut back national IPRs. Save for those cases which fit within the three exceptions, the Court has refused to interfere with national policy decisions[124].

- Exception 1: non-discrimination. The rule described above is subject to the overriding consideration that a Member State may not discriminate on the basis of nationality of the right-holder or the place of manufacture of the protected subject matter[125].

- Exception 2: goods in transit. This exception is demonstrated in case *Commission v. France (spare parts in transit)*[126] concerned the use made by French customs authorities of legislation to detain spare parts which French law would regard as counterfeit but which had been lawfully manufactured in another Member State (such as Spain) and which were intended, following their transit through French territory, to be placed on the market in another Member State (such as Italy) where they could be lawfully marketed. This ban on transit was intended to protect the rights of holders of the French design right in these goods. The Court found that the detention of spare parts by the French authorities constituted a restriction on the free movement of goods under Article 28 EC[127].

- Exception 3: exhaustion. The “exhaustion of rights” principle is a traditional concept of national IP law. Its reasoning is so simple that it is typically taken for granted. Once an owner has sold a product which is protected by his IPR, that particular product can generally be bought and sold freely on the national market (subject to any

[124] Oliver, Peter, fn.19, pp. 332, 333.
[125] Id., p. 339.
[126] Case 23/99 [2000] ECR I-7653.
[127] Id., pp. 341, 342.

contractual restrictions). In other words, the IP gives rights over the first sale in the market but not over the second hand market. Although it would be possible for a system to grant the owner rights over all sales, typically this does not happen within national systems.

Difficulties arise, however, when the product is sold by the owner in one State and imported into another. Along with the right to prevent manufacture, IP typically gives the right to prevent imports. Some jurisdictions traditionally ignore the prior sale abroad and say that the owner retains the right to prevent any such imports ("national exhaustion"). Other jurisdictions treat the sale abroad as no different from a sale within the national market and say that the owner thus has no right to prevent such imports ("international exhaustion"). Finally, some jurisdictions traditionally place themselves between the two camps and will allow imports under certain conditions (such as whether the products are of identical quality or whether there is reciprocity in allowing such imports).

These difficulties soon became an issue within the context of Article 30 EC. The question arose whether the Member States could continue to apply national exhaustion where a product had been put on the market in another Member State. In other word, the question was whether Member States could allow an IP owner the right to block the import of a product which had been put on the market in another Member State by the owner or with his consent.

The Court came to adopt a concept of Community exhaustion which mirrored the approach taken within a Member State and this concept has been adopted in the harmonization legislation such as: Directive on trade marks[128] and Regulation on the Community trade mark[129]; Regulation on community designs[130]; Proposed Regulation on community patent[131].

The community exhaustion rule was first laid down in *Deutsche Grammophon v. Metro*[132]. The Court held that even if the exercise of an IPR was not the subject, the means or the result of an agreement so as to fall under Article 81 EC, its compatibility with the provisions of the Treaty on the free movement of goods must be examined and in particular its compatibility with Article 30 EC. This rule was then extended to the various forms of IP, including patents, trade marks and design rights.[133]

The leading decision on the application of the Treaty to patents is *Centrafarm BV v. Sterling Drug Inc*[134]. The judgment defined Community law did not affect the existence or specific subject matter of the patent. However, it would control the exercise of the right, once the product had initially been marketed in this manner. The exhaustion

[128] First Council Directive of 21/12/1988 to approximate the laws of the Member States relating to trade marks, *OJ L040, 11/02/1989 P. 1 – 7.*
[129] Council Regulation 40/94 of 20/12/1993 on the Community trade mark, *OJ L 011, 14/01/1994, P. 1 – P. 32.*
[130] Council Regulation 6/2002 of 12/12/2001 on Community designs, *OJ 2002 L 003, 05/01/2002, P. 1 – P. 24.*
[131] Commission: Proposal for a Council Regulation on the Community patent (2000/C 337 E/45), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/ce337/ce33720001128en02780290.pdf (14/04/2006).
[132] Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, [1971] ECR 487.
[133] Oliver, Peter, fn.19, pp. 343, 345.
[134] Case 15/74 *Centrafarm BV v. Sterling Drug Inc,* [1974] ECR 1147.

of rights doctrine gave expression to the limitation imposed on the exercise of the right. The patent holder's rights were exhausted, in the sense that it could not prevent the goods from being bought by a third party in a country where the patentee or its licensee had marketed the goods and sold into another country.

There were only two situations in which the patentee or its licensee could obtain injunctive relief of the type being sought here. This was where it sought against goods coming from a State where they were not patentable, and had been manufactured by a third party without the consent of the patentee, or where the original patentees were legally and economically independent of each other. The ECJ will strictly construe any qualifications to the exhaustion of rights doctrine. We have seen that one such qualification operates where the goods are imported from a country where they are not patentable and they have been made by a third party without the consent of the patentee. It is clear that both conditions must be met[135]. Some cases supporting this doctrine are: *Merck v. Stephar*[136]*; Pharmon BV v. Hoechst AG*[137].

In respect of trademarks, the *Centrafarm* case also laid the initial foundations of EC law in this area. Similar to patent rights, Community law would recognize and protect the existence of trade mark rights. However the exercise of national trade mark rights would be controlled by EC law. Consent was the key to exhaustion of rights. It was the placing of the goods on the market by the trademark holder itself, or with his consent, which exhausted the rights of all those who derived their right to the mark from its initial holder. It is, however, clear that the consent principle will only apply so as to exhaust rights where the owners of the trade mark in the importing and exporting States are the same, or where, even though they are separate, they are economically linked.

The application of these principles can, however, be problematic, since the importer may alter the packaging of the goods. This occurred in case *Hoffmann v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*[138]*; Centrafarm BV v. American Home products Corporation*[139]. Basically, the Court said that the right to affix a particular trade mark to a product was part of the specific subject matter of the trade mark; it went to the existence of the trade mark itself. So the owner of the trade mark could prevent a third party from changing the mark, since it would thereby safeguard the guarantee of origin, which was one of the main purposes of a trade mark. This was so even where the goods had lawfully been placed on the market of a State under one trade mark. The Court accepted that it was legitimate for a company to use varying marks in different States[140].

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[135] Craig, Paul and De Burca, Grainne, fn. 4, p. 1091.
[136] Case 187/80, *Merck v. Stephar* [1981] ECR 2063.
[137] Case 19/84, *Pharmon BV v. Hoechst AG* [1985] ECR 2281.
[138] Case 102/77, *Hoffmann v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1978] ECR 1139.
[139] Case 3/78, *Centrafarm BV v. American Home products Corporation* [1978] ECR 1823.
[140] Craig, Paul and De Burca, Grainne, fn. 3, pp. 1095-1097.

➢ Conclusion

This Chapter provides us with a general view of the legal framework regulating one of the four fundamental freedoms of the EC – free movement of goods – in the internal market. Basically, this legal framework is compatible with the Member States' law systems and is an important factor in the process of regional economic integration. It was established very early and has been improved gradually through the case law of the Court, as well as legislation adopted by other EU institutions. However, there are still some problems that need to be solved such as: the relationship between free movement of goods and fundamental rights; free movement of goods and environment

In the next Chapter we will see what the level of economic integration of ASEAN countries is at present and how they plan to establish their policies on free flow of goods between Member States; the advantages and shortcomings of these policies, as well as their specific future economic integration goals.

3 ASEAN's Policy On Free Flow Of Goods

3.1 ASEAN overview

3.1.1 The history of ASEAN – ASEAN's road to regionalism

On 8 August 1967, five leaders – the Foreign Ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand – sat down together in the main hall of the Department of Foreign Affairs building in Bangkok, Thailand and signed a document. By virtue of that document, ASEAN was born. The five Foreign Ministers who signed it would subsequently be hailed as the Founding Fathers of probably the most successful inter-governmental organization in the developing world today[141].

The reasons this region need an organization for co-operation were numerous. The most important of them was the fact that, with the withdrawal of the colonial powers, there would have been a power vacuum which could have attracted outsiders to step in for political gains. As the colonial masters had discouraged any form of intra-regional contact, the idea of neighbors working together in a joint effort was thus to be encouraged.

Secondly, as many of us knew from experience, especially with the Southeast Asia Treaty Organization[142], co-operation among disparate members located in distant lands could be ineffective. We had therefore to strive to build co-operation among those who lived close to one another and shared common interests.

Thirdly, the need to join forces became imperative for the Southeast Asian countries in order to be heard and to be effective. This was the truth that we sadly had to learn. The motivation for our efforts to band together was thus to strengthen our position and protect ourselves against Big Power rivalry.

Finally, it is common knowledge that co-operation and ultimately integration serve the interests of all - something that individual efforts can never achieve[143].

Despite great economic and social diversity, and other similar obstacles to regionalism, there is none the less sufficient common ground and rationale for closer co-operation in various fields in the region. Among the cohesive forces operating in

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[141] Jamil Maidan Flores and Jun Abad, *"The founding of ASEAN"*, (1997), available at http://www.aseansec.org/7069.htm (08/04/2006).

[142] Southeast Asia Treaty Organization (SEATO), alliance organized (1954) under the Southeast Asia Collective Defense Treaty by representatives of Australia, France, Great Britain, New Zealand, Pakistan, the Philippines, Thailand, and the United States. Established under Western auspices after the French withdrawal from Indochina, SEATO was created to oppose further Communist gains in Southeast Asia, more information at http://columbia.thefreedictionary.com/Southeast+Asia+Treaty+Organisation (08/04/2006).

[143] Thanat Khoman, *"ASEAN conception an evolution"*, available at http://www.aseansec.org/thanat.htm (08/04/2006).

favor of regionalism, one is that the ASEAN countries are all committed to rapid economic growth as their top national priority, which, as they also realize, can be achieved through their own effort and not by relying on external economic aid from the industrially advanced countries. If national "self reliance" is often too unrealistic a policy to pursue for achieving rapid economic growth, "self reliance" on a regional basic is an acceptable alternative, an idea currently gaining ground rapidly in the Third World.

In the political domain all the ASEAN countries share a mutual concern for the greater physical security, which demands internal stability as well as a new regional equilibrium. The security motive is a sufficient incentive for the ASEAN countries to subordinate their diverse national interests to joint action[144].

After repeated unsuccessful attempts in the past, this event was a unique achievement, ending the separation and aloofness of the countries of this region that had resulted from colonial times when they were forced by the colonial masters to live in *cloisons etanches,* shunning contact with the neighboring countries. And the document that the five leaders signed would be known as the ASEAN Declaration.

It was a short, simply-worded document containing just five articles. It declared the establishment of an Association for Regional Cooperation among the Countries of Southeast Asia to be known as the Association of Southeast Asian Nations and spelled out the aims and purposes of that Association: *"to accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations, and to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter"*[145].

It proclaimed ASEAN as representing *"The collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom and prosperity"*. In 1995, the ASEAN Heads of States and Government reaffirmed that "Cooperative peace and shared prosperity shall be the fundamental goals of ASEAN".

The two-page Bangkok Declaration not only contains the rationale for the establishment of ASEAN and its specific objectives. It represents the organization's modus operandi of building on small steps, voluntary, and informal arrangements towards more binding and institutionalized agreements. All the founding Member States and the newer members have stood fast to the spirit of the Bangkok Declaration. Over the years, ASEAN has progressively entered into several formal and legally-binding instruments, such as the 1976 Treaty of Amity and Cooperation in Southeast Asia and the 1995 Treaty on the Southeast Asia Nuclear Weapon-Free Zone.

Against the backdrop of conflict in the then Indochina, the Founding Fathers had the foresight of building a community of and for all Southeast Asian states. Thus the Bangkok Declaration promulgated that *"The Association is open for participation to all*

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[144] Wong, John, *ASEAN Economies in Perspective – A comparative Study of Indonesia, Malaysia, the Philippines, Singapore and Thailand,* (The Macmillan Press Ltd., 1979), p. 3.

[145] The ASEAN Declaration (Bangkok Declaration), 08/08/1967, available at http://www.aseansec.org/1212.htm (10/04/2006).

States in the Southeast Asian region subscribing to the aforementioned aims, principles and purposes". ASEAN's inclusive outlook has paved the way for community-building not only in Southeast Asia, but also in the broader Asia Pacific region where several other inter-governmental organizations now co-exist[146].

Consequently, more and more other countries in this region are now integrated into ASEAN: Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Laos and Myanmar on 23 July 1997, and Cambodia on 30 April 1999[147], increasing the total Member Countries of ASEAN to ten.

And in 2003, ASEAN took a very important step in establishing an ASEAN Community with the full meaning of that term. The Declaration of ASEAN Concord II (Bali Concord II) laid down the framework for achieving a dynamic, cohesive, resilient and integrated ASEAN Community: *"An ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region"*[148].

The characteristic of ASEAN nowadays is reflected in a statement of Kofi Annan, Secretary-General of the United Nations, in 16 February 2000: *"Today, ASEAN is not only a well-functioning, indispensable reality in the region. It is a real force to be reckoned with far beyond the region. It is also a trusted partner of the United Nations in the field of development…"*[149].

3.1.2 Trade policies in ASEAN countries

3.1.2.1 From 1967 to 1992

When ASEAN was established, trade among the Member Countries was insignificant. Estimates between 1967 and the early 1970s showed that the share of intra-ASEAN trade from the total trade of the Member Countries was between 12 and 15 percent[150]. There were two main reasons for this:

- First, the high tariffs and effective rate of protection. The tariff policies in Indonesia, Malaysia, the Philippines and Thailand had been the subject of several reforms and the general trend was towards liberalization. However, the tariff averages in this period were still high. Trade reform in Indonesia included conflicting goals, where the need to promote efficient production opposed the aim of protecting infant industries[151]. Although tariff reform aimed at reducing the tariff level, tariffs were reduced on items already facing relatively low duties, such as raw material, machinery

[146] Jamil Maidan Flores and Jun Abad, fn. 141.
[147] Overview of ASEAN, available at http://www.aseansec.org/64.htm (10/04/2006).
[148] Declaration of ASEAN Concord II, (2003), available at http://www.aseansec.org/15159.htm. (10/04/2006).
[149] The address of Secretary-General Kofi Annan to the Indonesian Council on World Affairs in Jakarta, Indonesia, on 16/02/2000, available at http://www.aseansec.org/6910.htm (10/04/2006).
[150] Overview of ASEAN, fn. 147.
[151] The objectives of Indonesia tariff policy is to foster the growth of domestic industries, especially those with export potential, provide protection for infant industries and stipulate the development of efficient import competing domestic industries. According to the Authorities, GATT, 1995b.

and equipment and increased on other items. This left the overall average level of tariffs relatively unchanged and the conflict resulted in dispersion and significant escalation of the tariff structure[152]. In Malaysia, the Philippines and Thailand, tariffs in general were reduced, but tariff escalation is not a general feature.

A consequence of the escalation and the unevenness of tariffs in the countries above was great differences in the effective rate of protection (ERP)[153]. On the average the ERP in manufacturing has been declining, but ERP is predominantly low on export competing goods and high on import competing commodities, i.e. protecting the latter while taxing the former. The result is a distorted resource allocation, where scare resources are drawn to sectors with a high protection and away from sectors with low or negative protection[154].

- Secondly, the QRs on imports and exports.

+ Import restrictions:

Import licenses work to control the degree of import competition that the domestic producers are exposed to and important steps regarding this measure have been taken.

In Indonesia, the number of tariff lines affected by licenses amounted to 1122 in 1990, but only 261 in 1994, which was less than three percent of the tariff lines[155]. Despite reduced incidence and coverage of import licenses, *the system has remained complex and non-transparent,* making it the most serious non-tariff barrier measure in Indonesia's trade policy.

Malaysia's system of import licensing and import prohibitions is not fully transparent and is subject to administrative discretion. The system is justified by health and environmental reasons, but also by protection of domestic industries. The reasons for the use of licenses are not clearly distinguished between the two cases. Measures may also be cancelled or amended at the discretion of the authorities, which creates uncertainty[156].

In the Philippines, QRs have been prevalent in a large number of cases. However, since 1981, 2800 import restrictions have been removed and the tendency is to shift away from QRs through tariffication to more transparent tariff protection[157]. In Thailand the scope of import licensing has declined significantly because of trade liberalization[158]. The aim is similar to the Philippines' replacing the quantitative measures with tariffs.

Import licenses and controls in Singapore are kept to a minimum and maintained mainly to follow international obligations or for public health, environmental and security considerations[159].

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[152] Ljungkvist, Tina, *ASEAN and EU – A Study on Trade and Specialization*, (Department of Economics at the University of Lund, 1998), p. 11.

[153] The effective rate of protection is a measure of the protection given to the domestic value added. See e.g. GATT, 1993c.

[154] Ljungkvist, Tina, fn. 152, p. 12.

[155] GATT, 1995b. Trade policy review: Indonesia. GATT Secretariat, Geneva.

[156] GATT, 1993b. Trade policy review: Malaysia. GATT Secretariat, Geneva.

[157] GATT, 1993c. Trade policy review: The Philippines. GATT Secretariat, Geneva.

[158] GATT, 1995c. Trade policy review: Thailand. GATT Secretariat, Geneva.

[159] GATT, 1996. Trade policy review: Singapore. GATT Secretariat, Geneva.

In Vietnam, before 1989, *all exports and imports were subject to quotas. Since 1989, however, quotas have been gradually removed and currently none are applied.* The coverage of import goods which require permits has also been reduced. The process of obtaining permits for the remaining goods has been simplified, from the previous three step process to two steps. In 1994, the requirement of licenses for export shipments was abolished for all goods, except for rice, timber and petroleum. For imports, the requirement was expected to be eliminated in 1996[160].

+ Export restrictions:

A very large part of Indonesia's exports are restricted and controlled by bans, licenses, quotas, taxes and requirements for export approval. The controls have remained significant and have also increased in some sectors. Export controls covered half of Indonesia's non-oil exports. The most affected sectors were agriculture and wood products, covered to 60 and 85 percent respectively. These export restrictions were justified by the government on several grounds e.g. conserving scarce resources, environmental concern and encouraging increased domestic processing. But instead of using a first best solution, tackling the problems at sources, second best solutions have been used which are associated with inefficiency and costs[161].

Malaysia's export controls are exercised via export charges and export licenses and the objectives were the same as for import licenses. Export taxes have mainly been used for raising revenue, but are on a decline except for the export of petroleum which faces the highest duty, 25 per cent. Export licenses are used to control products regarded as sensitive[162].

The Philippines export environment has become, in principle, free of regulations and taxes. Exporters benefit from tax exemptions on inputs, but significant costs due to bureaucracy have been associated with the use of these benefits and the coverage is limited[163].

Singapore has no export duties, taxes or surcharges. The control measures exercised on exports are justified for the same reasons as for import controls.

Thailand levies export duties to encourage domestic use of the products e.g. in wood. The scope of export licenses has narrowed significantly since 1991 to currently cover only 36 product groups[164].

In Vietnam, exports had historically not only been restricted but also controlled by the State, and the former restrictions on establishing trade organizations were removed in 1988. This implied that exporters and importers could establish direct contact with foreign companies and avoid the inefficiencies associated with the administration of the state trading monopolies. Since 1991, both private and state enterprises are allowed to trade[165].

To summarize the trade policies of the ASEAN countries in this period, policies and incentives have promoted manufacturing exports and export incentives such as

[160] Ljungkvist, Tina, fn. 152, pp. 12, 13.
[161] GATT 1995b.
[162] GATT 1993b.
[163] GATT, 1993c.
[164] GATT, 1995c.
[165] Ljungkvist, Tina, fn. 152, p. 14.

export allowances, import duty exemptions and export credit financing have helped the export drive. ***However, import substituting activities have continued to coexist with the export oriented industries as a result of protectionist policies.*** Despite export promotion measures, the trade reforms have not altered the anti-export bias of the structure of protections in Indonesia, Malaysia, Philippines and Thailand. ***To conclude, there is great variation in the trade regimes in ASEAN, from virtually free trade in Singapore to the complex system in Indonesia. But taken as a whole, the ASEAN countries are relatively open and the trend is towards liberalization and integration into the multilateral trading system***[166].

3.1.2.2 From 1992 to nowadays

The Framework Agreement on Enhancing Economic Cooperation was adopted at the Fourth ASEAN Summit in Singapore in 1992, which included the launching of a scheme toward an AFTA. The strategic objective of AFTA is to ***increase the ASEAN region's competitive advantage as a single production unit. The elimination of tariff and NTBs among the Member Countries is expected to promote greater economic efficiency, productivity, and competitiveness.*** The Fifth ASEAN Summit held in Bangkok in 1995 adopted the Agenda for Greater Economic Integration, which included the acceleration of the timetable for the realization of AFTA from the original 15-year timeframe to 10 years.

In 1997, the ASEAN leaders adopted the ASEAN Vision 2020, which called for ASEAN Partnership in Dynamic Development aimed at forging closer economic integration within the region. The vision statement also resolved to create a stable, prosperous and highly competitive ASEAN Economic Region, in which there is a free flow of goods, services, investments, capital, and equitable economic development and reduced poverty and socio-economic disparities. The Hanoi Plan of Action, adopted in 1998, serves as the first in a series of plans of action leading up to the realization of the ASEAN vision.

In addition to trade and investment liberalization, regional economic integration is being pursued through the development of a Trans-ASEAN transportation network consisting of major inter-state highway and railway networks, principal ports and sea lanes for maritime traffic, inland waterway transport, and major civil aviation links. ASEAN is promoting the interoperability and interconnectivity of the national telecommunications equipment and services. The building of Trans-ASEAN energy networks, which consist of the ASEAN Power Grid and the Trans-ASEAN Gas Pipeline Projects, are also being developed.

Today, ASEAN economic cooperation covers the following areas: trade, investment, industry, services, finance, agriculture, forestry, energy, transportation and communication, intellectual property, small and medium enterprises, and tourism[167].

[166] Id., p. 15.
[167] Overview of ASEAN, fn. 147.

3.1.3 External economic relations

ASEAN has long-standing economic relations with many countries outside the region. ASEAN's goal is to develop even closer and more integrated economic ties with such countries. This is to help boost trade and investment flows between ASEAN and the rest of the world and bring about progress and prosperity for the ASEAN peoples. At the same time, ASEAN's economic outreach is expected to serve as a catalyst towards greater ASEAN economic integration.

At the height of the Asian financial crisis in 1997 – 1998, the Member States of ASEAN demonstrated their collective will to look beyond the short-term difficulties by adopting the ASEAN Vision 2020. A key tenet of Vision 2020 is ASEAN's reaffirmation of its outward-orientation in an increasingly globalized world. This resolve paved the way for intensified efforts to promote closer economic partnerships with ASEAN's immediate neighbors as well as its key economic partners. This has culminated in a series of bilateral contractual agreements for trade and investment liberalization as well as a broad range of economic partnership and cooperative activities.

In an era where economic systems are still protected, the promotion of multilateral economic cooperation via contractual relations has become much more significant. ASEAN's bilateral agreements with other countries are ASEAN's response to overcome the obstacles to trade, investment and other areas of economic collaboration[168].

ASEAN has made major strides in building cooperative ties with States in the Asia-Pacific region and will continue to accord them a high priority. Cooperation with other East Asian countries has accelerated with the holding of an annual dialogue among the leaders of ASEAN, China, Japan, and the Republic of Korea. In 1997, a joint statement between ASEAN and each of them was signed, providing a framework for cooperation towards the 21st century. In November 1999, the leaders of ASEAN, China, Japan and the Republic of Korea issued a Joint Statement on East Asia Cooperation outlining the areas of cooperation among them.

The ASEAN Summit of 1992 mandated that *"ASEAN, as part of an increasingly interdependent world, should intensify cooperative relationships with its Dialogue Partners"*. Consultations between ASEAN and its Dialogue Partners are held at the Foreign Ministers' level on an annual basis. ***ASEAN's Dialogue Partners include Australia, Canada, China, the European Union, India, Japan, the Republic of Korea, New Zealand, the Russian Federation, the United States of America, and the United Nations Development Programme. ASEAN also promotes cooperation with Pakistan in certain sectors.***

Consistent with its resolve to enhance cooperation with other developing regions, ASEAN maintains contact with other inter-governmental organizations, namely, the Economic Cooperation Organization, the Gulf Cooperation Council, the Rio Group, the South Asian Association for Regional Cooperation, and the South Pacific Forum. Most ASEAN Member Countries also participate actively in the activities of APEC, ASEM and the East Asia-Latin America Forum[169].

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[168] *ASEAN - Towards a Single Economic Space*, p. 1, available at http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN010350.pdf (11/04/2006).
[169] Overview of ASEAN, fn. 147.

3.2 ASEAN Free Trade Area

3.2.1 General

In 1992 Thailand's suggestion of a free trade area was realized and the result of the proposal was AFTA. ***The model for AFTA was the EU Single Market, where the opening up and lowering of tariffs had led to further integration of the region with the gains being both static and dynamic***[170]. The aims of AFTA were to further industrial development in the region, to attract foreign direct investment and to stimulate intra-regional trade[171]. This clearly indicates that intra-ASEAN trade needed to be liberalized if the participating countries were to achieve a well-functioning and stable free trade area[172].

The 1992 agreement to set up AFTA was the organization's first breakthrough towards creating an integrated ASEAN economic region[173]. AFTA comprised three component programs: The Common Effective Preferential Tariff (CEPT) scheme which governs liberalization of traded goods, the ASEAN Framework Agreement on Services (AFAS) which governs liberalization of traded service, and the ASEAN Investment Area (AIA) scheme which governs investment liberalization. Among them, the CEPT is the major component within AFTA and was to be finished off first[174].

Under the CEPT, ***tariffs on a wide range of products traded within the region are progressively either lifted totally or limited to a maximum of 5 percent. Quantitative barriers on the volume of certain products a country imports and other NTBs such as outright prohibition and unnecessary technical requirements are being eliminated.***

The elimination of tariffs and NTBs among the ASEAN members has served as a catalyst for greater efficiency in production and long-term competitiveness. Moreover, the reduction of barriers to intraregional trade gives ASEAN consumers a wider choice of better quality consumer products[175].

AFTA's final goal is altogether to eliminate import duties on all products, to create a truly free-trade, or tariff less, region. The Third ASEAN Informal Summit in Manila in 1999 advanced the timetable for this goal to 2010, ahead of the original schedule of 2015, for the six original signatories to the CEPT scheme-Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand. The newer ASEAN members: Cambodia, Laos, Myanmar and Viet Nam have committed themselves to eliminating all import duties by 2015, with some sensitive products to follow these members' original target of 2018.

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[170] Brülhart, Marius & Elliot, Robert (1998) p. 242, cited in Isabelle Ahlström, Camilla Stålros, *"Integration, Trade pattern and Intra-Industry Trade in ASEAN"*, Bachelor Thesis (2005), p. 12.
[171] Yue, Chia Siow (1998) p. 218, cited in Isabelle Ahlström, Camilla Stålros, *"Integration, Trade pattern and Intra-Industry Trade in ASEAN"*, Bachelor Thesis (2005), p. 12.
[172] Isabelle Ahlström, Camilla Stålros, *"Integration, Trade pattern and Intra-Industry Trade in ASEAN"*, Bachelor Thesis (2005), p. 12.
[173] ASEAN – Economic integration, p. 2, available at http://www.aseansec.org/10372.htm (14/04/2006).
[174] Isabelle Ahlström, Camilla Stålros, fn. 172, p. 13.
[175] *Southeast Asia - A Free Trade Area*, available at http://www.aseansec.org/viewpdf.asp?file=/pdf/afta.pdf (10/04/2006).

For the orderly reduction and eventual lifting of tariffs, the CEPT classifies products into three lists: ***Inclusion List*** (IL), ***Temporary Exclusion List*** (TEL) and ***Sensitive List*** (SL), stipulating tariff cutting schedules for each.

- Those on the IL make up the bulk of ASEAN products. By 2002, all quantitative and non-tariff restrictions on these products should have been removed, and tariffs will be either eliminated or limited to a maximum of 5 percent. Rates on at least 85 percent of each of the first six signatories' IL must be no more than 5 percent by 1 January 2000. This objective has already been achieved. The newer ASEAN members have been given more time for this: 2006 for Viet Nam, 2008 for Laos and Myanmar, and 2010 for Cambodia. Those on the IL make up about 85 percent of the tariff lines of all ten ASEAN countries.

- Products on the TEL are exempt from tariff reduction for a temporary period. However, they have to be gradually moved to the IL, and their tariffs eventually reduced to the 0 to 5 percent range.

In October 2000 the ASEAN economic ministers endorsed a Protocol allowing a member country facing real difficulties in meeting its CEPT obligations to delay the transfer of products from its TEL to the IL or suspend the concession on products already transferred.

The same Protocol, however, limits the application of the modification to manufactured products that were on the TEL on 31 December 1999 (or other applicable dates in the case of Cambodia, Laos, Myanmar and Viet Nam).

- Items on the SL are some unprocessed agricultural products. These will not be included in AFTA's coverage until 2010. New ASEAN members are given even more time: 2013 for Viet Nam, 2015 for Laos and Myanmar, and 2017 for Cambodia. The 360 tariff lines on this list constitute a mere 0.6 percent of ASEAN's total tariff lines.

The CEPT, however, permanently excludes from AFTA's coverage 829 tariff lines, which represent only 1.3 percent of ASEAN's tariff lines. Classified on the so-called General Exception List, these are products ASEAN excludes from the free-trade program for reasons of national security, public morals, public health or environmental protection.

As one measure to ensure the smooth implementation of the CEPT agreement, ASEAN in November 1996 adopted a dispute-settlement mechanism to cover not only the CEPT agreement but also all other ASEAN economic agreements[176].

In order to make trading easier and thus help integrate the ASEAN market, ASEAN has moved to simplify and harmonize national tariff nomenclatures, or the technical descriptions of products traded by its member countries. ASEAN has set 1 January 2002 as the deadline for adopting the ASEAN Harmonized Tariff Nomenclatures.

ASEAN has been developing product specific mutual recognition arrangements so that product related standards and regulations do not impede trade. Several sectors have been identified for inclusion in such arrangements, among them cosmetics, pharmaceuticals, telecommunications equipment and electrical and electronic products.

[176] ASEAN – Economic integration, fn. 173, pp. 2, 3.

The association is also seeking to harmonize its Member Countries' product standards with international standards such as those of the International Standards Organization, the International Electro-technical Commission, and the International Telecommunications Union for 20 priority product groups. These 20 product groups include some of the most widely traded products in Southeast Asia, among them radios, television sets, refrigerators, air conditioners and telephones.

➢ **Conclusion**

Over the past 33 years, economic linkages among ASEAN members have grown phenomenally. In the last decade, intra-ASEAN trade has been growing faster than total ASEAN exports. ASEAN countries have all committed themselves to creating an AFTA, an ASEAN wide manufacturing base, an ASEAN Investment Area, and ultimately a single ASEAN integrated economy. The 1997 Asian financial crisis tested this commitment and found ASEAN steadfast in its programs for economic integration.

ASEAN's gains in economic integration, however, have occurred in a period of rapid globalization, leaps in technology and the phenomenal growth of huge, liberalizing economies such as China and India. All over the world, continent sized economies, regional free trade areas and other forms of economic partnership have been organized. These developments pose new challenges for ASEAN as it determines how to undertake economic cooperation with these blocs and countries, and how to strengthen and speed up its own integration in an increasingly competitive globe. And ASEAN must meet these challenges while taking into account the national interests and priorities of each member country, as well as the unevenness of economic development within the region.

Fortunately, the foundations for an ASEAN integrated economy were built well and severely tested by the Asian crisis. The first decade of the new century and the new millennium should see the completion of this work, which ASEAN's founding fathers envisioned a generation ago[177].

3.2.2 Declaration of ASEAN Concord II – ASEAN Economic Community

3.2.2.1 Background

At the 2003 Summit in Bali, ASEAN Leaders declared the formation of an ASEAN Community consisting of three pillars: ASEAN Economic Community (AEC), ASEAN Socio-Cultural Community, and ASEAN Security Community, as their collective vision for the region to ensure durable peace, stability, and shared prosperity. The Leaders also reaffirmed their earlier declaration on the need to narrow the development gap among and within the ASEAN Member Countries so that they could

[177] ASEAN – Economic integration, fn. 173, p. 6.

move forward in a unified and cohesive way in realizing their vision. The ASEAN Community envisioned for the region can then be said to consist of four dimensions: the three pillars and the special agenda for narrowing the development gap, which is an important cross-cutting issue for ASEAN.

At the 2004 Summit in Vientiane the ASEAN Leaders also agreed to pursue the comprehensive integration of ASEAN towards the realization of an open, dynamic and resilient ASEAN Community by 2020 and thus accordingly adopted the Vientiane Action Programme that outlines the medium term goals and targets to be achieved by 2020, along with the strategies and specific cooperation measures under each dimension of the ASEAN Community[178].

On the economic front, ASEAN made progress in its push to realize a single ASEAN market and production base by 2020[179]. ASEAN reached a new milestone in ASEAN economic cooperation in November 2004 with the signing of the Framework Agreement for the Integration of Priority Sectors and its Protocols. Member Countries demonstrated their intention to move closer to the realization of the AEC as these are the main instruments that will catalyze the creation of a single market and production base.

Under this Framework Agreement, integration in eleven sectors, namely, agro-based products, air travel, automotive products, e-ASEAN, electronics, fisheries, healthcare, rubber-based products, textiles and apparels, tourism, and wood-based products, is to be achieved by 2010. These cost competitive sectors, wherein Member Countries have a comparative advantage, account for 52.7% of intra-ASEAN trade.

Each of the eleven Sectoral Protocols comprises a roadmap that details measures for the economic integration of the respective priority sector. The basic objectives of these roadmaps are to enhance the competitiveness of Member Countries, both individually and collectively; strengthen regional integration through liberalization, facilitation and promotion measures; and promote greater private sector participation in ASEAN economic integration. The roadmaps were prepared with the active involvement of the private sector and include sector specific measures as well as common (or horizontal) measures that cut across all the priority sectors.

More specifically, Member Countries agreed to advance the elimination of tariffs on 85% of the products in the priority sectors by three years to 2007 for ASEAN-6 and 2012 for the CLMV. These deadlines are three years earlier than the deadlines of 2010 (for the ASEAN-6) and 2015 (for the CLMV) under AFTA. Barriers to trade will also be eliminated. To facilitate trade and investment, the transaction cost of doing business in ASEAN will be reduced through the development of an ASEAN Single Window, which would include electronic processing of trade documents, and through the harmonization of product standards and technical regulations, and mutual recognition of test reports and certification. The roadmaps also include measures to

[178] ASEAN Baseline Report: *Measurements to monitor progress towards the ASEAN Community*, (2005), p. 2, available at http://www.aseansec.org/ABR.pdf (12/04/2006).
[179] ASEAN Annual Report 2004 – 2005, p. 6, available at http://www.aseansec.org/AR05/PR-Prosperity.pdf (17/04/2006).

facilitate intra-ASEAN travel for ASEAN nationals and the movement of business people, experts, professionals and talents[180].

To deal with disputes arising from trade liberalization and related initiatives, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism was signed in November 2004. This Protocol will cover about fifty ASEAN economic agreements[181].

3.2.2.2 ASEAN Economic Community

At the Ninth ASEAN Summit in Bali, ASEAN leaders agreed to establish an AEC by 2020. The idea of an AEC was first proposed by Singapore Prime Minister Goh Chok Tong in ASEAN Summit in Phnom Penh in 2002. The AEC is one of three pillars that make up the ASEAN Community in 2020.

Of these three pillars, it is perhaps the AEC that has the greatest chance of being fully realized by 2020. This is because ASEAN has already put in place the building blocks towards achieving an integrated ASEAN market. This would include economic integration initiatives such as AFTA, AFAS and AIA[182].

The AEC is the realization of the end-goal of economic integration, as outlined in the ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services and investment as well as a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities by the year 2020. The overall strategy for moving toward the AEC involves the deepening and broadening of economic integration in the product and factor markets and the acceleration of the integration process toward a single market and production base[183].

As laid out in the Vientiane Action Programme, ASEAN's activities to realize the AEC focus on: (i) intensifying current economic initiatives and accelerating the integration of eleven identified priority sectors within ASEAN; ***(ii) removing, to the extent feasible and agreeable to all Member Countries, barriers to the free flow of goods, services, skilled labor, and a freer flow of capital by 2010; (iii) developing essential elements or conditions for ASEAN to function as a single market*** and production base through measures that enhance the attractiveness of ASEAN as an investment destination, accelerate the liberalization of trade in goods, improve trade and business facilitation, reduce trade transaction costs, upgrade the competitiveness of ASEAN Small and Medium sized Enterprises, strengthen the ASEAN Dispute Settlement System, and promote regional trade in services, among others; and (iv) pursuing strong external economic relations and terms of trade with Dialogue Partners through the establishment of free trade areas and Closer Economic Partnerships[184].

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[180] ASEAN Annual Report 2004 – 2005, fn. 179, pp. 24, 25.
[181] Id., p. 7.
[182] Hew, Denis, *"ASEAN Commits to Deeper Economic Integration"*, (2003), p. 1, available at http://www.iseas.edu.sg/viewpoint/dhoct03.pdf, (12/04/2006).
[183] ASEAN Baseline Report, fn. 178, p. 3.
[184] ASEAN Annual Report 2004 – 2005, fn. 179, p. 24.

Looked at holistically, the formation of an AEC could be seen as a logical step up the economic integration ladder. The High Level Task Force on Economic Integration has unveiled numerous initiatives with clear deadlines to expedite the economic integration process and to realize the AEC. These initiatives – which include the fast-track integration of priority sectors and creating a more effective dispute settlement mechanism – are clearly bold and ambitious.

In February 2003, the Institute of Southeast Asian Studies (ISEAS) prepared a concept paper on the AEC. Many of the recommendations in the ISEAS paper were taken into account by the High Level Task Force which came out with the plan of action for the AEC.

However, the ISEAS paper argued that the end-goal of an AEC by 2020 would not be a customs union like the EEC of the 1950s. Basically, a customs union is a group of countries where trade barriers among Member Countries are removed and a common external tariff policy is established with non-Member Countries.

It is one integration level above an FTA where tariffs are harmonized among Member Countries, but they are allowed to have different tariffs with non-members. Given the different degrees of openness and stages of economic development among ASEAN countries, forming a customs union would be extremely difficult to achieve by the given deadline.

Instead, it would be more realistic to envisage the AEC as an "FTA-plus" arrangement that covers a zero-tariff ASEAN free trade area and some elements of a common market (viz. free movement of capital and skilled labor). The ISEAS paper envisages the AEC to have the following characteristics:

- Free movement of goods, services, investments and capital. This would include achieving a zero-tariff free trade area and the elimination of all NTBs.
- An attractive regional production platform that would be a magnet for foreign direct investment.
- Free movement of skilled labor and creative talent.
- Free movement of tourists from all ASEAN countries.
- Harmonization of customs procedures and minimization of customs requirements.
- Harmonization of standards that is consistent with international standards.
- A well-developed institutional and legal infrastructure to facilitate the economic integration of ASEAN[185].

Although forming a customs union may not be realistic by 2020, ASEAN should nevertheless consider establishing a fully integrated common market as part of a longer-term objective[186].

[185] Hew, Denis, fn. 182, p. 2.
[186] Hew, Denis, *"Towards an ASEAN Economic Community by 2020: Vision or Reality?"*, (2003), available at http://www.iseas.edu.sg/viewpoint/dhjun03.pdf, (12/04/2006).

3.3 The legal framework regulating the free flow of goods, in respect of quantitative restrictions.

3.3.1 Important legislation governing free flow of goods, in respect of quantitative restrictions.

In the previous section, we concentrated on analyzing the legal framework regulating tariffs in AFTA. In this part we will move to another important issue in facilitating the free flow of products in AFTA which will be as important in AEC in the future. Basically, this issue does not get enough attention because the main problem which has to be solved first in ASEAN is the elimination of tariff barriers. However, NTBs will become more and more important in establishing a single market in the future. Generally, the legal framework governing QRs and MEEs on import and export in AFTA has been created and improved gradually. The list of basic legal documents regulating tariff and non-tariff limits in AFTA:

- Protocol to Amend the Agreement on the ***Common Effective Preferential Tariff (CEPT)*** Scheme for the ASEAN Free Trade Area (AFTA) for the ***Elimination of Import Duties*** (2003).
- Protocol Regarding the Implementation of the CEPT Scheme ***Temporary Exclusion List,*** Singapore, (2000).
- Protocol on the Special Arrangement for ***Sensitive and Highly Sensitive Products***, Singapore, (1999).
- ASEAN framework agreement on ***mutual recognition arrangements***, Viet Nam, (1998).
- ASEAN Framework Agreement on the Facilitation of ***Goods in Transit*** (1998).
- Protocol to Amend the Framework Agreements on ***Enhancing ASEAN Economic Cooperation*** (1995).
- Protocol to Amend the Agreement on the ***Common Effective Preferential Tariff Scheme*** for the ASEAN Free Trade Area (1995).
- Protocol to Amend the Agreement on ***ASEAN Preferential Trading Arrangement*** (1995).
- Framework Agreements on ***Enhancing ASEAN Economic Cooperation*** (1992).
- Agreement on the ***Common Effective Preferential Tariff Scheme*** for the ASEAN Free Trade Area (1992).

- The definitions of NTBs and QRs are provided in Article 1 (2, 3) of the

Agreement on the Common Effective Preferential Tariff Scheme for the AFTA (1992)[187], as well as in Article 1 (4, 6) of Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Singapore, (1999)[188]:

*"**Non-Tariff Barriers** mean measures other than tariffs which effectively prohibit or restrict import or export of products within Member States.*

***Quantitative restrictions** mean prohibitions or restrictions on trade with other Member States, whether made effective through quotas, licenses or other measures with equivalent effect, including administrative measures and requirements which restrict trade".*

Moreover, in paragraph 4 of the same Article we also have the definition of "Foreign exchange restrictions", *which mean measures taken by Member States in the form of restrictions and other administrative procedures in foreign exchange which have the effect of restricting trade.*

- Article 5 A (1) and (2) of this agreement provides that:

"Member States shall eliminate all QRs in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to those products.

Member States shall eliminate other NTBs on a gradual basis within a period of five years after the enjoyment of concessions applicable to those products".

- Article 6 (1, 2) of the same agreement stipulates that:

"If, as a result of the implementation of this Agreement, import of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member States, the importing Member States may, to the extent and for such time as may be necessary to prevent or to remedy such injury, suspend preferences provisionally and without discrimination, subject to Article 6 (3) of this Agreement. Such suspension of preferences shall be consistent with the GATT.

Without prejudice to existing international obligations, a Member State, which finds it necessary to create or intensify quantitative restrictions or other measures limiting imports with a view to forestalling the threat of or stopping a serious decline of its monetary reserves, shall endeavor to do so in a manner, which safeguards the value of the concessions agreed upon".

- Article 2 (2, 3) of the Framework Agreements on Enhancing ASEAN Economic Cooperation (1992)[189] stipulates that:

*"Member States shall **reduce or eliminate NTBs** between and among each other on the import and export of products as specifically agreed upon under existing arrangements or any other arrangements arising out of this Agreement.*

Member States shall explore further measures on border and non-border areas of cooperation to supplement and complement the liberalization of trade".

And then in Article 12 of the same framework agreement, there are some ***general exceptions*** for the rule in Article 2:

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[187] Available at http://www.aseansec.org/12375.htm (10/04/2006).
[188] Available at http://www.aseansec.org/1207.htm (10/04/2006).
[189] Available at http://www.aseansec.org/12374.htm (10/04/2006).

"Nothing in this Agreement shall prevent any Member State from taking action and adopting measures which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value".

- Article 4 and 5 of the Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Singapore, (1999)[190] require all QRs and other NTBs shall be eliminated by different Member Countries in different deadlines. Specifically as following:

"Member States, except Cambodia, Lao PDR, Myanmar and Viet Nam, shall eliminate all QRs on sensitive and highly sensitive products by 1 January 2010.

Viet Nam shall eliminate all QRs on sensitive products by 1 January 2013.

Lao PDR and Myanmar shall eliminate all QRs on sensitive products by 1 January 2015.

Cambodia shall eliminate all QRs on sensitive products by 1 January 2017".

There is a like provision for eliminating other NTBs on sensitive products.

With the effective realization of AFTA, ASEAN Member Countries are now placing more emphasis on the elimination of NTBs to trade, particularly with regard to those that are associated with standards, technical regulations, and conformity assessment procedures.

In 2004, 82 standards on safety and electromagnetic compatibility were completed with another 24 standards for electrical and electronic equipment set for harmonization before 2007. Currently, a survey is being conducted to identify more standards fit for harmonization to support the integration of the eleven priority sectors[191].

To eliminate technical barriers to trade, a Framework Agreement on *Mutual Recognition Arrangements* (MRAs) was signed in December 1998. MRAs allow countries to recognize one another's product standards or regulations and make it easier to trade. Efforts are currently under way to formulate specific MRAs in three important areas – telecommunication equipment, pharmaceutical products and cosmetics.

A Framework Agreement on the *Facilitation of Goods in Transit* was also signed in December 1998. This will allow goods to be moved by road or rail across ASEAN countries with minimum customs inspections, vehicle specifications and regulations for drivers[192].

Overall, substantive work was taken to facilitate the integration of the eleven priority sectors. This includes the adoption of action plans on standards, technical regulations and conformity assessments for medical devices, automotives, wood-based and rubber-based products, and traditional medicines and health supplements. A number of areas have been identified for the harmonization of technical requirements and regulations in these sectors[193].

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[190] See fn. 188.
[191] ASEAN Annual Report (2004-2005), fn. 179, pp. 29, 30.
[192] Recent developments in ASEAN economic integration, available at http://www.aseansec.org/7661.htm. (13/04/2006).
[193] ASEAN Annual Report 2004 – 2005, fn. 179, p. 30.

3.3.2 Advantages and shortcomings of AFTA and the CEPT

The AFTA and CEPT agreements are short texts, without detailed guidelines and clarifications. This is a strength but also, at the same time, a weakness. It is a strength as it enables a political breakthrough by consensus, with the essence of the message conveyed in all the clarity needed. It is a weakness as there are so many accompanying measures and implementation modalities still to be developed and adopted, which can brake the momentum of the process of integration.

In a discussion paper of Centre for ASEAN Studies, *Cuyers and Pupphavesa* have noted the following advantages and shortcomings of AFTA and the CEPT that will influence the future pace of integration between the ASEAN countries [194]:

3.3.2.1 Advantages

Among the advantages of both agreements they mention:

- For the first time in the history of ASEAN, a timetable for tariff reductions was agreed.

- Although originally raw agricultural products did not fall under the CEPT, the ASEAN countries agreed to introduce these products by unilateral decisions. In September 1994, the ASEAN Economic Ministers subscribed to the recommendation of the AFTA Council to bring agricultural products under the CEPT, apart from items that would be mentioned in an exclusion list that had to be drawn up.

- AFTA can be considered as a "kindergarten" or "playing ground" for the "young" ASEAN producers, who by opening up their protected markets for regional competitors, can prepare themselves for the hard world of international competition outside ASEAN.

- Because of AFTA, ASEAN countries are becoming more attractive for foreign direct investment. In this way, it is hoped, they can turn the receding tide of foreign direct investment, which is increasingly flowing to China and Vietnam.

- Peace and stability in the region is a non-economic advantage of AFTA, which has important economic spin-offs. Because of peace and stability, the investment and business climate, no doubt, will improve further, and the ASEAN countries can also concentrate much more on economic targets and goals [195].

3.3.2.2 Shortcomings

Among the most important shortcoming of AFTA and the CEPT, they list:

- The transition period is much too long and many experts agree that the pace of implementation has to be speeded up. The exclusion lists have to be reviewed sooner.

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[194] Cuyvers, Ludo and Pupphavesa, Wisarn, *"From ASEAN to AFTA"*, (09/1996), available at http://143.129.203.3/cas/PDF/CAS06.pdf (19/04/2006).
[195] Id., p. 9.

- AFTA relates only to international trade and there are no rules for the elimination of the many national distortions.

- As economic cooperation with non-ASEAN countries is not settled, there remain too much national differences in the treatment of non-ASEAN partners.

- Although safeguard measures can be adopted, there is no timetable for phasing out these measures. In this respect also, the AFTA agreement is clearly lagging behind the multilateral agreement reached in the Uruguay Round.

- It is not clear what will happen to the NTBs, including norms and standard. According to Article 5(A) of the CEPT agreement, quotas are to be abolished immediately upon enjoyment of concessions. The same goes for other NTBs, be it within a period of 5 years. This process should be speeded up. Also the issue of how to distinguish a rightful regulation from an illegitimate trade distortion has to be tackled, as must the survey and monitoring of the process of NTB reduction. *Moreover, under AFTA anti-dumping rules will have to be designed.*

- There is a huge information need for private sector and official circles alike. Therefore the need of an information centre on the implementation of AFTA is intensely felt[196].

➢ Conclusion

Through the above Chapter, we can see that ASEAN now is at the lowest level of economic integration – a free trade area. However, the tariff barriers as well as NTBs between Member Countries are still not totally removed. The legal framework regulating free flow of goods in AFTA has been established and strictly implemented. This is an indispensable foundation for further economic integration in the future.

The next Chapter will show us the similarities and the points of difference between the two legal systems governing the free movement of goods in EC and AFTA and the AEC. In particular, we will see how ASEAN countries can apply the economic, legal integration experiences of the EU to their specific situation.

[196] Cuyvers, Ludo and Pupphavesa, Wisarn, fn. 178, pp. 10, 11.

4 ASEAN and EU – A study on free movement of goods in a single market

In order to be able to find EU legal lessons on free movement of goods for ASEAN, we should begin with the comparison between two regions. This will help us to create rationales for some legal integration lessons the EU offers ASEAN, as well as provide specific recommendations for promoting the process of establishing an AEC in the future.

4.1 The ASEAN Economic Community in comparison with the European Community

4.1.1 The similarities

Although AEC is not yet established, based on the Declaration of ASEAN Concord II, we can say that both AEC and EC *have the characteristics of regional economic integration*. Their main purpose is establishing a single market in which there are fundamental freedoms such as: free movement of goods, services, capitals.

Article 2 EC stipulates that: *"The Community shall have its task,* ***by establishing a common market and an economic and monetary union****,…, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States"*.

Similarly, Part B (1) of the Bali Concord II provides that: *"The AEC is the realization of the end-goal of economic integration as outlined in the ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region in which* ***there is a free flow of goods, services, investment and a freer flow of capital,*** *equitable economic development and reduced poverty and socio-economic disparities in year 2020"*.

Generally speaking, four types of regional economic integration can be distinguished. The lowest level of economic integration is reached when countries agree on the creation of a FTA. In an FTA, import tariffs on each other's products are removed, but the member countries retain their own systems of tariff duties on products from non-member countries. The second level of economic integration is a customs

union, in which case free trade applies to each other's products, but a common external tariff system is also adopted with respect to non-members. In addition, the group acts as one body in all matters relating to international trade agreements with non-members. A third level consists of a common market, which is one important step further than the customs union. Among the members of a common market there is free trade and they have a common external tariff system, but also all barriers to factor movements (labor and capital) are removed. The highest level of regional economic integration is reached when an economic union is established, which has the characteristics of a common market, but also brings about the unification of economic institutions and the co-ordination of economic policies throughout the member countries[197].

These above forms of economic integration are also the necessary stages of establishing an integrated market community, they are interrelated. The decision to create a FTA would generate pressures for the establishment of respectively a custom union, a common market and monetary union. This could culminate in total economic integration among the participant economies[198].

Concerning the legal framework regulating the four fundamental freedoms in the single market in general, and the "free movement" or "free flow" of goods in particular, we can see that both EC and AEC already have the basic legal framework in place.

Articles 3(1) (a) and 3(1) (c) EC provides that: "*The activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:*

- The prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

- An internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;…"

This Article is amplified by Part III EC: "Community policies", especially Title I: "Free movement of goods" which consists of two chapters: Chapter 1: "The customs union" (Article 25 EC – Article 27 EC) and Chapter 2: "Prohibition of QRs between Member States" (Article 28 EC – Article 31 EC).

Although ASEAN does not have a Treaty as does the EC, the legal framework governing the free flow of goods has been established through a package of agreements as mentioned above.

Moreover, one of the interesting points we can recognize is that the contents of the provisions in EC and ASEAN law are more or less similar.

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[197] Cuyvers, Ludo, "*Contrasting the European Union and Asean integration and Solidarity*", (2002), p. 1, available at http://www.eias.org/conferences/euaseam4/euaseamcuyvers.pdf (20/04/2006).
[198] Balassa, B. (1962), cited in Rosamond, Ben, *Theories of European integration*, (Palgrave Macmillan, 2000), p. 60.

The first example is the definitions of QRs. According to Article 1 (3) of the Agreement on the Common Effective Preferential Tariff Scheme for the AFTA (1992), *"QRs mean prohibitions or restrictions on trade with other Member States, whether made effective through quotas, licenses or other measures with equivalent effect, including administrative measures and requirements which restrict trade"*. Although we can not find the definition of QRs or MEEs in the EC Treaty, the explanation of the ECJ about this issue in its case law is similar to the definitions in ASEAN law. In the *Geddo* case, the Court defined QRs as "*measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit*", and the general definition of MEEs was found in Case *Dassonville*, where the Court said: *"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions"*.

The second example is Article 28 EC which provides: *"QRs on imports and all MEEs shall be prohibited between Member States";* Article 5 (1, 2) of Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1992) similarly provides that: "*Member States shall eliminate all QRs in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to those products.*

Another example relates to the exceptions to the above rules, Article 30 EC provides: *"The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States"*.

- Article 12 of the Framework Agreements on Enhancing ASEAN Economic Cooperation (1992) stipulates that: "*Nothing in this Agreement shall prevent any Member State from taking action and adopting measures which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value"*.

In addition, if the EU found a new approach to harmonization and to completing the internal market in the Commission's White Paper, as further specified by the adoption of Directive 83/189 on the provision of information on technical standards and regulations, the ASEAN countries are also now paying more attention to the elimination of NTBs to trade, particularly with regard to those that are associated with standards, technical regulations and conformity assessment procedures, as also mentioned in the previous part.

In conclusion, although the ASEAN single market is not yet established, the legal framework regulating free flow of goods has been set up and gradually improved.

The study of EC laws in this area will become a useful and practical way aid in the promotion of progress of economic integration in AEC.

4.1.2 The differences

In trying to glean EU lessons for the AEC, *Michael G. Plummer*, Professor of International Economics, Johns Hopkins University SAIS-Bologna began with several caveats regarding the differences in the subjective environments facing the EEC in the 1950s and ASEAN today[199]:

- The institutional environment facing ASEAN in the first decade of the 21st Century is very different than that of the EEC of the 1950s.

European integration was clearly pushed both by memories of a devastating war and emerging Cold War concerns. Political and social motivations for economic integration were, thus, far different than those of ASEAN today, though, it should be added, ASEAN has been instrumental in keeping Southeast Asia a peaceful region, an important contribution that is often underestimated.

Institutional development is more difficult in the ASEAN context, given that: (a) nation-state formation is much younger than was the case in the European context, and in some countries this still remains a strong priority; (b) divergence in socio-political institutions are far greater than they were in the European context, especially since in some European countries these institutions were being created anew after the war; (c) it is not clear that European institution-building has been particularly successful in all areas, though it would receive high marks for economic-related matters (though this, too, is a testable hypothesis); and (d) these European institutions are quite expensive and ASEAN government budgets are much smaller.

Similarly, Mr. Rodolfo Severino, the former Secretary-General of ASEAN, in his remarks to the 2001 one-day conference in Brussels, mentioned that ASEAN will never be like the EU. The historical, cultural and ideological foundation that impelled the EU's formation and shaped its character, in many ways, is different from ASEAN.

From European Coal and Steel Union, to European Common market, EEC, and EC and finally EU, the path progressed for half century. It is a gradual and steady institutional designing and building which made Europe the way it is now.

In this respect, ASEAN is different from the EU. Unlike the EU, which took institutional building, ASEAN is taking a different route. *It favours functional cooperation first. ASEAN has proceeded even without the required institutions.*

For years, ASEAN cooperation has been premised on political commitments. It subscribes to the fundamental principles of non-interference and respect for sovereignty and territorial integrity of member countries, with consensus building playing an important part. We call it "the ASEAN way".

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[199] G. Plummer, Michael, *"The ASEAN Economic Community and the European Experience"*, (2005), p. 12, available at http://www.aeaweb.org/annual_mtg_papers/2006/0108_1015_1404.pdf (18/04/2006), (citation with the author's permission).

Although ASEAN will not be like the EU, the EU can certainly be the kind of reference to ASEAN community building efforts. ASEAN can certainly learn from an integrated approach of the EU in developing its high level regional institutions.

The significance of European regionalism is that all European countries have been gradually absorbed into a united and highly integrated "Grand Europe", by a single market, a single currency, as well as a single political system. In this respect, ASEAN still has a long way to go.

In ASEAN, the association is not a supranational organization where the ASEAN Secretariat has the mandate and legal instruments to direct member countries and regional policies. *It is an organization that is very much led and paced by the member countries with the Secretariat playing a coordinating and facilitating role*[200].

- The international economic environment is far different today than it was in the 1950s.

+ First, the contemporary global marketplace is extremely open relative to the past. This is true because of extensive reductions in trade barriers internationally, due to the GATT/WTO rounds as well as unilateral liberalization and huge increases in international capital flows, which have increasingly been knitting together an integrated global marketplace. The costs of using regional integration as a form of "Fortress," that is, to maximize trade diversion, are consequently much higher than they were in the past.

+ Second, regionalism has grown by leaps and bounds recently; trade groupings reported to the WTO come to well over 200, with a majority being established after 1995. Some of these groupings include ASEAN's most important trading partners and could potentially isolate ASEAN, as well as forcing it to pay the costs of trade diversion. These trends further underscore the need for the AEC to be open as well as for the organization to be engaged in the regionalism movement. The more integrated the ASEAN marketplace is, the easier this will be. These considerations were far less important in the EEC context.

- ASEAN features far greater diversity in terms of economic development. While the expansion of the EC to include the 10 Central and Eastern European countries in May 2004 significantly increased diversity within the EU, the region is still dominated by developed countries and is far more homogeneous than ASEAN, which features developed "dynamic Asian economies"; middle-income developing countries; and least-developed countries. *Hence, the divergence within ASEAN is far greater than that of the EU, and the countries are far poorer.* This suggests that matters related to the speed of implementation of AEC, and even the ability of ASEAN to be completely inclusive for all member-states, will be complicated and difficult.

- ASEAN countries are far more open than was the case of Europe in the 1950s. ASEAN countries are (economically) small and very open relative to the EEC of the 1950s (and even with respect to most EU countries today), with the exception of a few of the transitional CMLV countries. ASEAN countries are closely integrated with international markets through international trade as well as multinational networks. Not only is this a reality but also a policy focus for ASEAN governments. This is another reason why one would expect the AEC to embrace openness much more than the

[200] Ong Keng Yong, *"Advancing ASEAN-EU Relations in the 21st Century"*, (10/2004), available at http://www.aseansec.org/16535.htm (18/04/2006).

EEC/EC might have. In addition, even as an integrated market, ASEAN countries together still could not influence international terms of trade (the AEC would still be relatively "small"), suggesting that the "optimal" Common External Tariff would be zero. This was not the case with the EEC[201].

In the previous section, we analyzed some similar provisions of ASEAN law and EC law concerning the free movement of goods in the single market. We now need to analyze the differences between the legal frameworks governing free movement of goods in AFTA now (AEC in future) and in EC.

- In legal form, EC is now at a high degree of legal integration.

+ Firstly, EC has uniform substantive and procedural law at the formal level. Moreover, EC also has common sources of law such as: Treaties (primary law), regulations, directives, decisions (secondary laws), as well as common organization of legal institutions and legal professionals such as: ECJ, Parliament, Council, Commission, An important feature when analyzing an integrated legal community is the relationship between national laws and community laws. This relationship reflects the position of each legal system. Obviously, in order to create an integrated legal community, community laws must have higher effect than national laws. This requirement is expressed through principles which underlie the constitutional structure of EC such as: supremacy, direct effect, loyalty; principles of substantive community law: the four freedoms, as well as those deriving from the rule of law: equality, legal certainty, proportionality, fundamental rights.

+ Secondly, the laws of Member States are harmonized/approximated at different levels. This is an indispensable requirement for achieving the goal of integration. This purpose can not be achieved if there are a lot of differences between Member States' laws. There would always be a need for harmonization legislation enacted by the community institutions to help the process of integration taking place more rapidly. However, because each Member State has private policies in certain areas and different levels of protection of economic-social values, the harmonization of laws is also carried out at various levels. The EU has experimented with different types of harmonization: exhaustive, optional, partial, minimum and reflexive. Minimum harmonization is one of the most common forms of harmonization used today.

Contrarily, ASEAN legal integration is not at such a high degree as it is in the EC and regional economic integration in ASEAN at the lowest level. ASEAN had the Treaty of Amity and Cooperation in 1976, and after that the major forms of legal integration are just Declarations, Framework Agreements and Protocols. Hopefully, when the AEC is established, we will have ASEAN community law regulating the fundamental freedoms as in EC nowadays.

Moreover, ASEAN does not have supranational bodies such as the Commission and Parliament and Community Court as the ECJ. The highest decision-making body in ASEAN is the annual meeting of the ASEAN Heads of State and Government. Whenever it is so decided, the ASEAN Summit is preceded by a Joint Ministerial Meeting composed of Foreign and Economic Ministers. The ASEAN Standing Committee, under the Chairmanship of the Foreign Minister of the country-in-chair, is mandated to coordinate the work of the Association in between the annual ASEAN

[201] G. Plummer, Michael, fn. 199, pp. 12, 13.

Ministerial Meeting. The ASEAN Chair and Vice Chair are elected based on alphabetical rotation of all ASEAN Member Countries. The ASEAN Secretariat, headed by the Secretary-General of ASEAN, is mandated to "initiate, advice, coordinate, and implement ASEAN activities"[202].

- In substantive laws regulating free movement of goods, EC shows some differences when compared with ASEAN. We know that in establishing a single market, a prior necessary step is to create a customs union which means that customs duties on import and exports and charges having equivalent effect shall be prohibited between Member States, and this is indeed provided in Article 25 EC. At present, economic integration in EC is on the way to completing the internal market; the customs union has already been established. So, in the EC nowadays, one of the problems in guaranteeing free movement of goods is the harmonization of national measures which would still be lawful under case law exceptions (for example in *Cassis* case) or under Article 30 EC.

This issue is not the same in ASEAN. ASEAN is still at the lowest level of economic integration, that is a FTA. And even when the AEC is established in 2020, it will be difficult to have a customs union at that time. As analyzed in the previous part, the legal framework regulating free flow of goods in AFTA is concentrating on reducing and abolishing tariff barriers to trade between ASEAN countries. Attention is paid to NTBs but not enough.

From the foregoing we can conclude that because ASEAN and EC are now at very different levels of economic integration, the legal framework regulating free movement of goods in particular and the four fundamental freedoms in general can not be entirely similar. However, EU economic and legal integration experiences are always the best lessons for any regions in the world on the way to establishing a single market.

4.2 Legal integration lessons in free movement of goods from the EU

In respect of the EC legal framework regulating free movement of goods in the single market, we notice the following lessons:

- First, ASEAN should research and apply availably the new approach to harmonization of the EC in designing its own legal framework regulating the free flow of goods.

This lesson will help ASEAN to shorten the time needed to establish the process of legal integration, to avoid the traditional EC harmonization techniques' disadvantages - slow and generated excessive uniformity - and to have ideal substantive laws regulating free trade between Member Countries in the single market of AEC planned in Bali Concord II.

[202] Illustrative ASEAN Organizational Structure, available at http://www.aseansec.org/13103.htm (27/04/2006).

As analyzed above, the main content of this new approach is that there should be a mutual recognition principle similar to one in the *Cassis de Dijon* case. National rules which did not come within one of the mandatory requirements would be invalid; legislative action was to be restricted to laying down health and safety standards; and there would be promotion of ASEAN standardization.

Specifically, the principle of the free movement of goods implies that products must be traded freely from one part of the community to another. This general principle should be complemented by a harmonized regulatory framework, following the "new approach" (imposing general product requirements), replacing the "old approach" (imposing precise product specifications).

- Secondly, ASEAN should have secondary laws implementing primary laws regulating free flow of goods.

As mentioned above, the AFTA and CEPT agreements are short texts, without detailed guidelines and clarifications. This makes the implementation of these regional framework agreements difficult and probably different in some Member Countries. So, a system of secondary sources of law should be adopted in order to make the implementation of ASEAN laws more easy and uniform. This will lead to another requirement: establishing an ASEAN Economic Institution or similar body which will be responsible for adopting and observing the process of implementation of the legal framework regulating free movement of goods in ASEAN market.

- The third lesson is that ASEAN should prepare a more detailed legal frame work regulating NTBs, in respect of QRs, to trade between Member Countries.

This will become more important after all tariff barriers to trade in AFTA are removed. In this field, the experiences of the EC, especially the ECJ's juridical analysis through its case law are really useful for ASEAN. Moreover, the contents of the provisions in secondary laws adopted by other EC institutions on this field, such as regulations, directives, are other references which ASEAN should consider. It is a necessary step in establishing an AEC with a single market in the future.

- The last lesson is that ASEAN should set up a court similar to the ECJ.

Although an ASEAN trade dispute settlement mechanism has already been established, it would be better if an ASEAN Court of Justice can be set up in the future. This Court will have responsibility for resolving disputes between Member Countries in certain areas. Through its jurisprudence, ASEAN laws regulating the four fundamental freedoms in general and free movement of goods in particular will be explained and implemented uniformly. The effectiveness and flexibility of case law of an ASEAN Court will catch up with new changes in socio-economic lives of Member Countries.

Moreover, although ASEAN is currently improving the existing Dispute Settlement Mechanism, it has yet to empower it by providing any sanction mechanism. ASEAN has limited powers to ensure proper implementation of all economic

agreements and expeditious resolution of any dispute[203]. Hence, a sanction mechanism, established parallel with the ASEAN Court of Justice will strengthen the effectiveness of ASEAN laws, and increase States' obligations in implementing these laws in the future. This will make the process of deeper economic integration in ASEAN go more quickly.

4.3 Some recommendations to promote the process of establishing an ASEAN Economic Community

In the Bali Concord II in 2003, ASEAN declared that it would establish the AEC by 2020. However, there are still some doubts regarding on this goal, the first of which is the very definition of an AEC.

The EU, a typical community, asks each member country to concede part of its sovereignty. This was required even when it was called the EEC. Like the EU, each member country of the AEC will concede part of its sovereignty, such as the right to conduct international trade policies, to the AEC.

Would the AEC be a real community like the EU, or at least the EEC? Because the Bali Concord II emphasized the importance of the non-interference principle, this seemed to contradict the concept of a real community, namely the concessions of part of a country's sovereignty to the community.

Each leader in ASEAN countries responded to the above question by unanimously denying the concession of sovereignty to the AEC. Some of them even said that the AEC would be something like an Economic Partnership Agreement among ASEAN countries. If the AEC is just an ASEAN Economic Partnership Agreement, it would be misleading to name it a "community."[204]

As mentioned above, it is not clear exactly what form the AEC will take. Some scholars have suggested a less-ambitious approach to the AEC, including an "FTA-plus" arrangement, which would include certain elements of a common market, e.g., free-flow of capital, free-flow of skilled labor, zero tariffs on intra-regional trade, but would not have a Common External Tariff. It should be noted that the European example teaches that, without integrated external tariffs, markets continue to be segmented and key benefits of integration are stymied.

The transitional economies pose an important problem here. Cambodia, for example, until recently received about 70 percent of its government income from import-related taxes. However, it is reducing reliance on international-trade-based taxes as part of its reform program, and this has also been the case in the other CMLV countries. Vietnam has made tremendous progress in its transition program and should be on-line with AFTA in 2006. Allowing the logical progression of this reform program

[203] Ong Keng Yong, *"Advancing ASEAN-EU Relations in the 21st Century"*, (10/2004), fn. 200.
[204] ASEANONE, *"What is the ASEAN Economic Community?"*, (07/2005), available at http://www.aseansec.org/article234.pdf (19/04/2006).

to continue to 2020 will not be easy but would be quite desirable from an economic-development perspective. Again, 2020 is a long way off and much can happen; Viet Nam has reinvented itself from a non-market, closed, and state-directed economy into an increasingly outward-looking, market-oriented economy in less time than will be the case for the establishment of AEC. It may even be possible for ASEAN to allow for a longer-term transition period for Cambodia, Myanmar, and Laos, especially since there remain political uncertainties in these countries[205].

So, it is important to ensure that the less developed ASEAN member countries namely Cambodia, Laos, Myanmar and Vietnam are not left too far behind. Otherwise, this could have serious implications on ASEAN's cohesiveness.

In August 2003, ISEAS organized the annual ASEAN Roundtable with the main theme: "Roadmap to an ASEAN Economic Community". The Roundtable brought together academics and experts on economic integration to discuss how the AEC could be successfully realized over the next two decades. It was hoped that the conclusions from the Roundtable would contribute to building a credible roadmap to an AEC.

The Roundtable arrived at the following conclusions:

- ***ASEAN should move towards greater institutionalization.*** The establishment of independent "regional units" to manage some areas of economic integration would be a major institutional innovation for ASEAN.

- ***ASEAN should consider setting up two supranational bodies:*** a) ASEAN Court of Justice, to be responsible for dispute settlements; and b) ASEAN Economic Secretariat, to be responsible for the general economic affairs of ASEAN.

- The causes of the low utilization of the CEPT scheme for AFTA should be urgently examined. The views of the private sector must also be sought on this and related issues such as the prevalence of NTBs in the region.

- For AFTA-plus initiatives such as the AIA to be successful, the use of more rule-based arrangements should be given consideration.

- Given the disparities in income levels and living standards among the citizens of ASEAN member countries, a Ministerial level ASEAN Committee on the Poverty Implications of Integration should be set up.

- A common ASEAN policy on improving the quality of human resources via education and skills training should be formulated.

- As part of bridging the economic and social gaps within ASEAN, technical assistance to the CLMV countries should focus on the area of institutional building and human resource development.

Moreover, strong political will among ASEAN policy-makers would be absolutely vital if the AEC project is to succeed. Does the region really have the desire to integrate despite the growing economic challenges? *Certainly one of the most valuable lessons to be learnt from the European experience was a strong political desire and a common vision to integrate their economies to form today's EU.*

[205] G. Plummer, Michael, fn. 199, pp. 18, 19.

Furthermore, implementation has always been ASEAN's problem despite clear and specific deadlines: observe the backtracking by some member countries in their AFTA commitments. The big question would therefore be ASEAN's readiness to take the crucial decisions in the long march ahead[206].

The following specific recommendations of *Peter Lloyd and Penny Smith* in the Final Report of REPSF Project 03/006a[207] are good references for the purpose of promoting the process of establishing an AEC with a single market in the future:

- ASEAN should state a precise objective as a basis of the Vientiane Action Programme. The choices include:

+ A single market covering all goods, services, capital and the labor market.

+ A single market for goods, services and capital.

+ A single market for goods and capital.

+ A FTA with the removal of all border restrictions on the intra-ASEAN free flow of goods, services and capital plus specified beyond-the-border measures.

Of these options, the choice of a single market covering goods, services and direct capital markets is preferred. These three markets are closely linked and the full benefits of integration in one area require integration in the other two market areas.

The chosen objective of a single market in the market for some commodities or assets will give strong guidance as to the desirable measures that need to be eliminated or harmonized and the best modalities. In particular, the choice of a single market requires an equal commitment of all member countries to the achievement of a single market throughout the areas. To be implemented this objective must have the full support of all ASEAN leaders.

- Definite starting and end dates and timetables need to be set for all borders, beyond-the-border and across-borders measures covered by the choice of objective.

- There should be an investigation of all the measures which currently prevent the free movement of goods, services, and capital between member economies. This investigation should include business laws and other laws and regulations affecting corporate activities, as the achievement of a single market for goods, services and direct capital will require the harmonization of a range of business laws that affect trade in these markets. Such an investigation will provide guidance for the choice of measures and modalities.

- In goods markets, the achievement of a single market requires that all tariff items are in the Inclusion List, other than GATT Article XX exceptions. All NTBs must be eliminated.

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[206] Hew, Denis, fn. 182 pp. 2, 3.

[207] Lloyd, Peter and Smith, Penny, *"Global economic challenges to ASEAN integration and competitiveness: A prospective look"*, (2004), pp. 8, 9, available at http://www.ausaid.gov.au/publications/pdf/global_econ_challenge.pdf (16/05/2006).

- The difficulties of the CMLV countries in adjusting to the single market measures should be accommodated by more distant end dates and more attenuated timetables for this group of countries. Once set, these timetables should be adhered to, apart from limited safeguard actions under previously specified conditions.

Measures to promote development in the poorer sub-regions are to be expanded. They should be directed both at poor regions in old members and the new members. The selection of eligible areas might be based on a level of average incomes, as in the EU. Special assistance might be granted to any economy, especially a CMLV economy, which diverges from the richer economies. This will require monitoring of growth performances.

The higher income members of ASEAN should expand programmes for labor training at primary, secondary and tertiary levels and additional special programmes for selected groups such as public sector employees who are to administer an expanding set of single market policies and business executives who are to make business decisions in a single market.

- A monetary union should be considered at a later date when the ASEAN economies are more integrated. A monetary union may then be feasible only if done on an ASEAN-X basis or even on a small group or bilateral basis. This is because of the large differences among ASEAN economies in terms of the structure of their macro economies, the extent of their bilateral trade, the sophistication of their financial sectors and other relevant features.

- Steps are taken to strengthen institutions. These should include the monitoring of progress for all measures in all market areas, and the grant of means to ensure that all countries keep to their timetables.

- There should be an ongoing review of possibilities for new areas of integration and new modalities.

➢ Conclusion

The noticeable points of this Chapter are the lessons acquired by ASEAN from EC legal and economic integration experiences, as well as some basic proposals in promoting the process of establishing an AEC in 2020. Most importantly, for the success of an AEC, there must be a strong political will to drive the integration process forward. For example, there may be a need to tackle the issue of ceding some level of sovereignty for more economic integration in the near future. At the end of the day, it could very well be the political dimensions of forming an economic community that would pose the greatest challenge for ASEAN[208].

[208] Hew, Denis, fn. 186.

5. Conclusion

The principle of free movement of goods is one of the cornerstones of the internal market. The mechanisms in place to achieve this aim are based on prevention of barriers to trade, mutual recognition and technical harmonization. The free movement of goods within the EU has advanced rapidly and is accelerating as the new harmonization approach policy is more fully implemented.

Many barriers have been lifted through Community harmonization. For products which have not been the subject of Community harmonization, Articles 28 to 30 EC forbid Member States to maintain or impose barriers to intra-Community trade of goods, except in special circumstances.

These provisions are also the basis of the mutual recognition principle which means that, in any sectors that have not been subject to harmonization measures at Community level or which are covered by minimal or optional harmonization measures, every Member State is obliged to accept on its territory products which are legally produced and marketed in another Community Member State. Member States may only challenge the application of the principle in cases where, in particular, public safety, health or the protection of the environment are at stake; in these cases, any measures taken must be compatible with the principles of proportionality[209].

Although the objective and the provisions of the EC Treaty confirm the free movement of goods notion, the freedom to move goods across border without any restrictions is still impeded to some extent. This is because of two obstacles. The first is the interpretation of the ECJ on the general provisions of the free movement of goods. The second is the exception provisions contained in Article 30 EC and the exceptions based on mandatory requirements arising from the ECJ in *Cassis de Dijon* case. The ECJ and all EU Member States are in the position to break down these obstacles.

Under Articles 28 EC and 29 EC, for the meaning of MEEs to QRs, the ECJ should still follow its interpretation in the *Dassonville* case to cover all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, except only "selling arrangements", the word arising from *Keck and Mithouard* case. Furthermore, the ECJ should clarify the meaning of "selling arrangements" and draw the vivid distinction between measures relating to selling arrangements and measures relating to the goods.

The ECJ must narrow the scope of "mandatory requirements" because they constitute a derogation from the fundamental principle of the free movement of goods. Therefore, it must be interpreted strictly, so as not to extend its effects further than is necessary for the protection of the public interests[210].

Under an economic integration perspective, the EU nowadays is not a full-fledged economic union, in spite of being a monetary union since 2000, as sovereignty

[209] EU Commission, Enterprise and Industry, *Free movement of goods – Non-harmonized areas*, available at http://www.members.tripod.com/asialaw/articles/saravuth.html (22/04/2006).

[210] Saravuth Pitiyasak, "*Free movement of goods within EU*", available at http://www.members.tripod.com/asialaw/articles/saravuth.html (22/04/2006).

of the Member states over quite a number of policies still holds in full or in part. The EU is somewhat more than halfway between a common market and an economic union[211]. However, the speed of economic integration in EU seems slower than before, especially in the free movement of services. The new proposal for a service directive does not introduce appreciable changes. Member states are slow in opening and integrating their policy in this sector.

The ASEAN was established in 1967, ten years after the EEC. Generally, ASEAN Member countries have been making great efforts on building and promoting the progress of regional economic and legal integration. One of the dominant achievements is the establishment of AFTA in 1992 through the adoption of the framework agreement on enhancing ASEAN economic cooperation. The main instrument for the implementation of this is the CEPT Scheme with the purpose of reducing effective preferential tariffs and eliminating all QRs as well as other NTBs to intra-trade on specific timetables for each group of Member countries.

Another success of ASEAN is the Declaration of Bali Concord II in 2003 in Indonesia, according to which an ASEAN Community shall be established in 2020 comprising three pillars, namely ASEAN Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community, that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region. Among them, it is perhaps the AEC that has the greatest chance of being fully realized on time. This is because ASEAN has already put in place the building blocks towards achieving an integrated ASEAN market, such as AFTA, AFAS and AIA. However, the end-goal of an AEC by 2020 would not be a customs union like the EEC of the 1950s, and it would be more realistic to envisage it as an "FTA-plus" arrangement that covers a zero-tariff ASEAN free trade area and some elements of a common market (for example, free movement of capital and skilled labor).

In spite of the fact that there are some certain differences between the progress of economic and legal integration in two regions, such as the socio-economic features of member countries, subjective environments facing the EEC in the 1950s and ASEAN today. The EU's experiences in this field are always good lessons for ASEAN countries on the way to establishing a desirable AEC. Particularly, the EC's formation of a legal framework regulating the free movement of goods in the common market can usefully be studied by ASEAN in designing its own specific legal system making the progress of deeper economic integration develop in the right way.

Finally, as the Secretary – General of ASEAN, Ong Keng Yong said: "*While ASEAN's economic performance is generally positive and ASEAN is committed to economic integration, there are many challenges from elsewhere which could impact negatively on Southeast Asia. The rising oil prices and the threat of international terrorism are two obvious examples. Nevertheless, ASEAN believes that by pulling together, all its ten Member Countries can gain substantively and substantially. The big picture of the ASEAN Community is settled. Now, we will implement the elements to realize the short-term and long-term goals*"[212].

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[211] Cuyvers, Ludo, fn. 197, p. 2.

[212] Ong Keng Yong, "*Comprehensive integration towards the ASEAN Community*", (11/2004), available at http://www.aseansec.org/16570.htm (28/04/2006).

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