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The "Substantially all the Trade"-Requirement of GATT Article XXIV

A Lawyer's View

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Preface

The GATT/WTO has not been covered in any of the compulsory subjects in the law programme, and there are no electives on the subject. This is something that should be made clear already at the outset, because it puts the thesis in the right perspective. Like all other law students, I knew nothing about the subject when I started to work on the thesis, and even now, my expertise only dates back a few months. The problem is compounded by the sheer complexity of the subject matter. Someone said about the Australian *Native Title Act 1976* (Cth) that reading it was like "reading porridge", but having read both the *Native Title Act* and the GATT I can honestly say that the former is like a comic magazine compared to the latter. Under these circumstances, it is difficult not to write a predominantly descriptive thesis. Nevertheless, there is a fair bit of independent analysis, both in the mainly descriptive Chapters 1-4 and in Chapters 5 and 6.

A thesis, normally, should have a specific and limited purpose. Furthermore, this purpose should be pursued by consequently employing a certain method suitable to the task at hand. The present thesis does not purport to do that other than to a certain extent. The main "deviation" from this formula lies in the many descriptive parts of the thesis, which were necessary in order for myself to get acquainted with the subject. Besides, since we were told to write with other students in mind, these parts are probably necessary for the reader, too, assuming that the reader has as little background knowledge of the GATT as I did when I started writing the thesis. Thus, it would be a fairly pointless exercise to investigate the meaning of the words "substantially all the trade" in GATT Article XXIV without supplying any background information on what the GATT is in the first place. In fact, in previous theses I have been accused of providing *too little* background information, leaving it to the reader to find out the necessary information. This time, I wanted to do it right.

Chapter 4 sticks out from the rest. Arguably, it could be left out altogether. On the other hand, when it says in Chapter 3 that the EC and its member states are all parties to the WTO, this raises the question of how that can be. A footnote that merely says that the WTO Agreement is a so-called "mixed agreement" under internal EC law probably does not clarify things, and only raises more questions. Probably, it is wise to include a Chapter that methodically explains how the external powers of the EC and its members states work. As I said, I do not want to include too little background information. Not again.

The purpose of the thesis is to look into the question of whether Article XXIV:8 is justiciable. This is clear already from the cover, and an answer to that question is arrived at, using legal methods. However, with all the descriptive bits in thesis, it could perhaps be argued that its title does not adequately reflect its contents. Against this can be said that the background information is not there for its own

sake, but rather serves to put the purpose of the thesis in the right perspective. Besides, I like the title. It looks good.

Enough said. Enjoy!

Abbreviations

ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
BYIL	British Yearbook of International Law
CLR	Commonwealth Law Reports
CRTA	Committee on Regional Trade Arrangements
CTG	Council for Trade in Goods
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ITO	International Trade Organisation
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
S or s	Section (in a statute)
WTO	World Trade Organisation

1 Introduction

1.1 About the Subject

1.1.1 GATT/WTO - Law or Economics?

According to the view that held sway in the thirties, the subject matter of trade agreements was not something that should be left for lawyers to deal with. Hudec quotes a 1932 report of the League of Nations' Economic Committee, which is well worth quoting again in this context. The report says that

"… bodies composed of judges, who cannot be thoroughly well acquainted with all the details of economic life, and who are rather inclined to rely on criteria of pure law in judging cases in which situations of fact and technical considerations are of predominant importance, do not always appear to operate in a way satisfactory to the parties. Moreover, it appears… that the [International] Court itself is of the opinion that judicial settlement is not always the best way of settling disputes of an economic nature."[1]

Several comments can be made regarding this statement. Firstly, it assumes that only economic considerations are taken into account when drafting trade agreements, including the GATT. That is not true. In fact, some of the principles underlying the GATT, such as the most-favoured-nation principle, do not make economic sense in the view of some economists. The idea seems to be that the principle undermines the more important principle of reciprocity and creates a free-rider problem.[2] The rationale behind this principle, which has been a compulsory component of virtually every free trade agreement since the 19th century, is thus obviously not of an exclusively economic nature.[3]

Also, as Hudec rightly points out, the law deals mainly with economic matters anyway, some of which are highly complex. An example of such a complex area of law, which is growing in importance, would be competition law. If lawyers are competent to deal with matters of cartels and abuse of a dominant position, then surely they have a role to play in the regulation of international trade relations.[4]

Having said that, it must be conceded that the GATT/WTO cannot be fully understood without at least a basic understanding of economic principles.

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[1] League of Nations, Procedure for the Friendly Settlement of Economic Disputes between States (Official No.C.57.M.32.1932.II.B), p. 4. The quote appears at pp. 25-26 in Hudec's book.

[2] See McMillan, in Anderson/Blackhurst, at 292-306.

[3] See for example Tumlir, in Petersmann et al, at 6-10. The most-favoured-nation principle will be further discussed in Chapter 3.3.1.2.

[4] In fact, *every* legal subject borders on other scientific and academic disciplines to a greater or lesser extent. This does not mean that they are outside the lawyers' competence.

Knowledge of economics can also be practically useful when interpreting its provisions. Also, a lawyer has to be aware of the limits of what can be practically achieved via legal regulation, and what problems are better solved by economists. To put it in a less formal fashion, the lawyer has to be sensitive as to where the law stops and economics take over.

The answer to the question posed in the sub-heading above must be that the GATT/WTO can, and indeed should, be approached by both lawyers and economists from their respective view-points, with due regard to the limitations of each discipline.

1.1.2 Is the World being Subdivided into Different Trade Blocs?

Increased international interdependence and growing international co-operation have resulted in two parallel tendencies, that to some extent are mutually contradictive: globalisation and regionalisation. Globalisation, which predates regionalisation, quickly ran into difficulties, mainly because of the highly heterogeneous nature of the world community. Among states with widely diverse sets of values and agendas, it was all but impossible to agree on common, truly universal principles. This is still the case today, and one topical example would be the handling of the crisis in Kosovo. The Western states all seem to rank human rights and democracy far higher than they rank the customary international law principle of non-intervention, and in this case even higher than the prohibition on the use of force in the relations between states; accordingly they perceive military action against Yugoslavia to be justified. Indeed, by regional, European standards it certainly is, and NATO understandably wants to apply those standards when solving a European problem. However, the use of force has been regulated at the global level in the Charter of the United Nations, and the views of states other than those of the Western world had to be taken into account in that document. Very few of those states were democracies at the time the Charter was drafted, and too few have become democracies since. Also, some of them have rather appalling human rights records. Understandably, they are not eager to derogate from the principle of non-intervention, and so China and Russia would have blocked any attempts by the Security Council to intervene. Their concurring votes[5] in favour of authorising military force against Yugoslavia would have been essential in order to make the present NATO operations legal under current international law.

[5] The Charter, Article 27(3). In practice, however, an *abstention* from a permanent member of the Security Council does not preclude the adoption of a resolution, in spite of the letter of the law, that requires the *concurring* votes of all its permanent members (see Security Council Resolution 678).

The same problems arise in the context of world trade. Economic theories and liberal thought both spring from mainly western sources, which has made it difficult to make GATT the truly universal trade regime it was meant to be. The problem is of course compounded by the enormous gap between the countries of the world as regards their level of economic development. Instead, the vast majority of European states are now part of a regional organisation, the EU. It has a higher degree of economic and political integration than the GATT countries have ever had, and the organisational superstructure that the GATT failed to get when the ITO foundered (more on which later). Potentially, this raises the possibility of a protectionist and allegedly self-sufficient Europe raising barriers against the rest of the world, thereby eroding the global system.

As Anderson points out, other countries can react in one or both of two different ways in the face of other countries integrating into economically powerful trade blocs.[6] One would be to form their own regional organisations to balance the ones formed elsewhere, and the other would be to increase their efforts at strengthening the global system, i.e. the GATT. Recent history shows that both have been quite prevalent. A large number of different regional integration schemes have been created between parties to the GATT/WTO,[7] but at the same time, the multilateral system has been strengthened, and the GATT itself is now administered by a fully-fledged international organisation, the WTO.

It is beyond the scope of the present thesis to investigate whether and to what extent regionalism is changing the political map of the world, or to what extent it has taken place at the expense of globalism. Economists seem to think, however, that as far as economics is concerned, regional trading arrangements have had a positive impact on the world economy.[8]

Having said that, it is also true that the rules of the GATT governing free trade areas and customs unions[9] are the ones that have been most flexibly construed in

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[6] Anderson, in Anderson/Blackhurst, at 2-3.

[7] 194 regional trade agreements have been notified to the GATT/WTO under Article XXIV:(7)(a). Of those, 107 are still in force. At the same time, practically no such agreement was ever formally approved of by the GATT, and no decision has been taken on any of the 68 agreements that are currently reviewed by the CRTA under WTO procedures (source: www.wto.org/eol/e/wto08/wto8_58 and www.wto.org/wto/develop/regional.htm). This has led to a great deal of legal uncertainty in this regard, and has encouraged parties to such agreements to interpret the rules very flexibly. Apparently, it also has not helped that the "ordinary" dispute settlement procedures of the WTO are now applicable to disputes with respect to any matters arising under Article XXIV (paragraph 12 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994). No claims have as yet been made against a Member of the WTO under those procedures for violation of Article XXIV. For some reason, the states are reluctant to sue for violation of that Article, as opposed to violation of other provisions of the WTO.

[8] See the conclusions drawn by Blackhurst and Henderson, in Anderson/Blackhurst at 429-430.

[9] Article XXIV. An overview of its provisions will be given in Chapter 3.3.3.

practice - some would say "violated" is a more proper term. This fact, along with the large number of regional integration agreements in force, makes it important to review the functioning of those rules. After all, there are no guarantees that future free trade areas and customs unions will have as positive an effect on world trade as the current ones.

It may be, of course, that questions regarding tariff levels are increasingly becoming less important, since the difference between MFN-levels and the zero-levels applied in customs unions and free trade areas are rapidly decreasing.[10] However, the issue goes beyond mere tariff levels. Regional integration arrangements also affect the application of subsidies, quantitative restrictions and other restrictive regulations of commerce. Furthermore, in addition to the acknowledged economic importance of customs unions and free trade areas, Article XXIV can also be put in the wider context of globalism versus regionalism, which is an issue of far-reaching political ramifications. Last but not least, it has already been said that Article XXIV is arguably the most violated provision in the GATT. Now, from a lawyer's standpoint that represents a real challenge. If the GATT/WTO in its *entirety* should be considered outside the lawyers' competence, then what does that say about Article XXIV?

1.2 Limitation of the Scope of the Present Thesis

The European Economic Community, as it was called then, was the first real challenge to GATT Article XXIV on customs unions and free trade areas. However, its compatibility with those rules shall not be treated in this thesis.

Furthermore, the provisions of Article XXIV are detailed and extensive, so there is no scope here to look into the whole Article. The focus will be on the requirement for free trade areas that "duties and other restrictive regulations of commerce … are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories. [Emphasis added]".[11] A similar requirement applies to customs unions,[12] which will also be covered.[13] Furthermore, problems relating to customs unions and free trade areas that have to do with other agreements under the umbrella of the WTO, such as the General Agreement on Trade in Services (the GATS) shall not be pursued.

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[10] According to Roessler, in Anderson/Blackhurst at 315, the average tariffs of the United States, the EC and Japan ranged between 3-5 percent before the Uruguay round. This means tariffs are arguably no longer the threat they used to be to international trade.

[11] Article XXIV:8(b).

[12] Article XXIV:8(a).

[13] There are no indications that the requirement is substantively different for customs unions than for free trade areas.

1.3 Purpose

The purpose of this thesis is to answer the question: are the words "substantially all the trade" of Article XXIV of the GATT justiciable? If not, is it because the provision is of such a nature ("economic") that it cannot be properly dealt with by lawyers, or is there perhaps some other reason?

1.4 Materials and Method

The WTO agreement and all covered agreements, which include the GATT, are reproduced in Dennin and in Benedek. Although the latter is in German, it is a very handy pocket edition. All texts can also be found by consulting the WTO home page (www.wto.org). The GATT is reproduced in Lowenfeld and in Hilf (et al), but the WTO Agreement is obviously not included, since these books are from the early 80's. Excerpts from some of the provisions that are the focus of the present thesis are reproduced in Supplement A. As for EC law, the consolidated version of the Treaty of Rome can be found at europa.eu.int/eur.-lex/eu/treaties/dat/ec_cons_treaty_en.pdf (which is not a www-site) and in the third edition of Europafördrag (Swedish). The unconsolidated version can be found in *European Union Law Guide.*[14] As is the case with the WTO Agreement, some provisions are reproduced in the supplement.

WTO documents are available via the Internet. Unfortunately, not all documents dealing with this subject matter are available, but on the other hand, it seems many documents essentially contain the same or similar material.

The best book for an introduction to the WTO is in my view that by Lowenfeld, in spite of the fact that it was written almost twenty years ago. I can also recommend Van Houtte's book. Anderson/Blackhurst is excellent compilation of essays written mainly by economists, but is not difficult to understand for lawyers thanks to the high quality of the writers.

The bibliography only includes books that I have actually used for this thesis. For a more comprehensive list of literature on the GATT/WTO, please consult the bibliography in Benedek.

In order to examine the questions posed above, the first three Chapters are mainly of a descriptive nature. The method used is simply to summarise aspects of the GATT/WTO that are relevant for putting the legal analysis in Chapter 5 and the Conclusions is Chapter 6 in the right context. Nevertheless, there will be some independent analysis even in these Chapters. Chapter 4 briefly outlines the external competence of the EC and contrasts the EC with a federal state. In Chapter 5, I have used traditional legal methods to construe and interpret WTO

[14] This version of the Treaty of Rome employs American spelling, which is hardly correct.

documents in order to find what the law is on this particular subject. To put it differently, an attempt has been made to predict how an independent court would have decided if a case concerning GATT Article XXIV came before it, assuming that there was a strong habit of obedience among those affected by the court's decisions and the court thus did not have to make any political considerations.

Chapter 6 contains conclusions and analysis.

1.5 Terminology

In this thesis, "the GATT" will be used to refer to both the agreement concluded in 1947 (GATT 1947) and the text that is included in Annex 1A to the agreement establishing the WTO (GATT 1994). With minor differences, they are identical, so it does not really matter which one is meant in any given context.[15]

In some cases, when the work towards world trade liberalisation is referred to more generically, the WTO, the GATT or even GATT/WTO are used interchangeably. Hopefully, it will be clear from the context what is meant.

Since the European Union (the EU) has no legal personality, it cannot be party to any international agreements. It is the European Communities that are capable of binding themselves on the international scene, and of these, only the European Community will be covered and referred to. Some of what is said about the EC may be true for the other communities, but no attempt has been made to account for when this might be the case. The Treaty establishing the relevant community should be consulted.

[15] The two texts are, however, "legally distinct" according to Article II:4 of the Treaty establishing the WTO.

2 Historical Background[16]

2.1 The New World Order

Why was the GATT concluded in the first place? The reasons date back to the twenties and thirties, when states paid lip-service to the high ideals of free trade, as expressed in a number of solemn treaties and lofty declarations, while in fact the reality was quite different. Protectionist policies were ripe during that period of nationalism and ideological tensions, and the situation was particularly bad in the thirties. Tariffs were raised to record levels all over the world in response to the American Smoot-Harley tariff of 1930, quantitative restrictions were imposed and currencies were depreciated in order to boost exports. States also displayed a rather stunning creativity when it came to devising new types to barriers to trade. Germany, for example, had in force a number of trade agreements with smaller countries under which Germany paid for her imports from those countries with scrip or inconvertible marks, that could only be used to make purchases in Germany at prices set by the Germans. As a result, the world economy suffered, and that in its turn helped precipitate the outbreak of World War II.[17]

After the war, the victorious states, mainly the United States and Britain, were intent on establishing a new world order. The "old order", in which the doctrine of state sovereignty ruled supreme, was a regime according to which a state was subordinate to nothing but God.[18] Consequently, states were free to act as they pleased, weather they decided to use force against another member of the international community or raise tariffs. The "new" world order would have to include a limitation of these sovereign powers, which were to some extent the root of the evil. This meant "legalising" international relations to a greater extent than was previously the case. The creation of supra-national institution with greater power than the ones established by the League of Nations was also part of the "legalising" scheme.

With the main aim of "sav[ing] succeeding generations from the scourge of war",[19] the United Nations was created in 1945. The Charter of the United Nations, its founding document, also contained a legally binding provision to the effect that

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[16] This Chapter is based on Hallström, pp. 22-46, Lowenfeld, pp.11-21, and Hudec, pp. 3-61.

[17] At the time, the connection between free trade and prosperity was not obvious to most people. As Lowenfeld notes at p.103, it was widely believed in the US at the turn of the century that *protectionism* was the reason for American affluence, and that free trade was a threat to that prosperity.

[18] The doctrine of the sovereign nation state had held sway since the late 16th century, when the supra-national influence of the Catholic church dwindled as a result of the reformation and the renaissance. Early proponents included the French legal philosopher Jean Bodin.

[19] Charter of the United Nations, preamble. The Charter of the United Nations will hereinafter be referred to as "the Charter".

"[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state",[20] and vested the Security Council with a virtual monopoly in the use of force.[21] The Security Council, in its turn, could only use force in order to "maintain or restore international peace and security".[22] Thus the use of force between states had in effect been outlawed.[23]

These developments were paralleled in the field of economics. Even during the war, British and American trade experts had met in informal meetings to discuss the post-war economic order. They all agreed that free trade was a *condictio sine qua non* of a peaceful post-war world order, and that detailed and stringent rules were necessary to this end. Also, provision had to be made for strict and compulsory enforcement procedures for those rules. A novelty was the consensus that future trade agreements would have to be multilateral rather than bilateral. This was a consequence of the emerging spirit of globalism, but it also makes more sense in economic terms (see Chapter 3.3.1.2).

Apparently, it was not that difficult for the trade experts to agree. It was all a matter of economic theory. A different story altogether was to sell the concept to the world's governments, as we shall see later.

A few months after World War II, in December 1945, there was a joint British-American proposal on the basis of which the Charter for an International Trade Organisation was to be negotiated. With some modifications, the proposal had its intellectual origins in the informal meetings between Anglo-American trade experts during the war. The proposal was seized upon by the Economic and Social Council of the United Nations, which convened a conference and created a committee, which was charged with preparing a more detailed proposal. Once the preparatory committee had adopted that proposal, the matter was to be referred to the plenary conference, which should reconvene at a later stage.

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[20] The Charter, Article 2(4).

[21] States could only use force in individual and collective self-defence (the Charter, Article 51), and even then the right expired when the Security Council had "taken measures necessary to maintain international peace and security".

[22] The Charter, Chapter VII, Article 39.

[23] Obviously, this did not mean that no armed conflicts ever occurred after the entry into force of the Charter. This is partly because the international legal system is not strong enough to deter states completely from engaging in breaches, but also because the "founding fathers" of the United Nations did not foresee that future armed conflicts would mainly take place *within* states, not *between* them. The draftsmen of the Charter believed that only states, and no other entities such as political fractions and guerrilla movements within them, would remain actors on the international scene. Nor did they foresee that *conglomerations* of states (such as the European Union) would be created. The situation was slightly different as regards the GATT and the WTO. Even the GATT envisaged that "a separate customs territory possessing full autonomy in the conduct of its external commercial relations… may accede to this agreement" (Article XXXIII, compare Article XXIV:1). As for the WTO, the EC is one of the original Members.

The proposals at this stage all contained strict rules of conduct regarding commercial policy measures, such as tariffs, quantitative restrictions and export subsidies, and they also contained provisions on employment and competition policy. To back up the substantive rules, a full-fledged international organisation was to be formed, and final appeal in the dispute settlement procedure was to lie with the International Court of Justice. Furthermore, it was envisaged that the new International Trade Organisation was to be a United Nations organ, open to all of the United Nations membership.

What happened, however, was that the stringency of the rules were successively watered down in the face of resistance from a number of governments. There was also some opposition against the involvement of the International Court of Justice, and in the final proposal, its role was confined to giving advisory opinions. They are, of course, not binding, and the final decision on whether the ICJ's decisions should be adopted was to be taken by the organisation itself, according to its own decision-making procedures. Even these less onerous obligations, however, were too much for the world's governments. Although the ITO Charter was agreed upon, after much debate, at the Havana Conference in late 1947, it failed to win the necessary support of the American Congress. Without American ratification of the ITO, there was no point in pursuing the matter any further. Other governments thus refrained from seeking ratification from their respective parliaments, and so the ITO charter never came into force.

2.2 "ITO light", a.k.a. the GATT

Fortunately, the struggle for free trade did not end there, possibly because the major trading nations were eager not to repeat the mistakes of the inter-war years. In fact, at the time of the demise of the ITO, a fallback option had already been prepared.

About six months before the Havana Conference, the United States and a few other countries decided they could not wait for the ITO to come into force. They thought that tariffs should be brought down immediately, and to that end they entered into tariff negotiations with each other. Once tariff concessions had been agreed upon, it was necessary to agree on a legal regime that would govern those concessions, and for that purpose, Chapter V of the ITO Charter was "lifted out" and signed separately. The Chapter deals with commercial policy measures, and as a separate agreement, it was named the General Agreement on Tariffs and Trade, i.e. GATT.[24]

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[24] Neither Chapter V of the ITO Charter nor the GATT or specifically prohibits the imposition of tariffs, but provides for procedures for their negotiation and gradual abolition. Also, the Most Favoured Nation principle (MFN) stipulates that a tariff imposed on a certain commodity by one signatory state has to be imposed equally on the like products of all signatory states, irrespective of origin. The choice of Chapter V of the ITO Charter to

It is believed that the GATT was not meant to last very long, and was supposed to be replaced by the ITO as soon as its charter came into force. This is evidenced, *inter alia*, by the fact that the GATT entered into force by way of a "Protocol of Provisional Application". However, there are indications that the signatory states of the GATT counted on the possibility of the ITO foundering. How else can the existence of dispute settlement procedures in Chapter V of the ITO Charter and in the GATT[25] be explained, given the existence of a separate Chapter in the ITO with provisions for dispute settlement? It seems that the drafters of the ITO Charter suspected at an early stage that there would be a lack of support for the kind of powerful, supra-national international organisation that the ITO represented, and that Chapter V might be extracted from the ITO Charter and signed as a separate agreement. In that case, it would be necessary for that agreement to contain provisions on dispute settlement.

The GATT lacked the strong organisational structure envisaged for the ITO. Its only "organ" was "THE CONTRACTING PARTIES", which simply consisted of representatives of all the states parties to the GATT. THE CONTRACTING PARTIES could take decisions relating to the implementation of the GATT and settle disputes, but it was no judicial body, and other considerations than those that are strictly legal certainly influenced its decision-making. Overall, the enforcement of GATT rules was quite weak, and depended on the good faith of the contracting parties.[26]

As it turned out, the application of the GATT was anything but "provisional". It was not until the WTO Agreement came into force that the GATT was finally replaced, not by the ITO, but by something roughly similar.

2.3 The Road to the WTO

In the first decade or so after the conclusion of the GATT, the level of adherence to its provisions was quite high. There were several reasons for this. Firstly, there was a fairly far-reaching consensus regarding the nature of the necessary trade rules as among the rather narrow, mainly western group of states that made up the contracting parties. With firm roots in liberal thought they all agreed that in principle, trade should be as free as possible and that obstacles should be removed. A second reason for the success of GATT in the 1950s was the fact that the Second World War still lurked fresh in the collective memories of the decision-makers, diplomats and economists of the day. If the alternative to a strict

govern these states' tariff negotiations was of course a natural one; they were all familiar with its provisions, and had already more or less agreed to its terms. There will be more on the MFN principle and the basic provisions of the GATT/WTO in Chapter 3.

[25] Articles XXII and XXIII of the GATT.

[26] Also, the GATT never became a specialised agency of the UN, as opposed to what the ITO was supposed to have become. Wallace, at 282, seems misinformed.

adherence to the GATT was political tension, economic crises and possibly even armed international conflicts, then the GATT was certainly to be preferred.

Soon, however, problems arose. This was partly due to the fact that the GATT was anything but gap-less, in spite of the care taken by its drafters to create a strict, detailed code of conduct in the field of world trade. Also, the GATT membership increased in a way that was unforeseen at the time of its drafting. Most of these new members were recruited from among developing nations, whose agendas differed slightly from those of the original, mainly western states. A third challenge to the GATT was the emergence of the EEC. It is of course true that the GATT did make provision in its Article XXIV for the creation of free trade areas and customs unions, but nevertheless, the EEC represented a major challenge to the GATT system.

The problem of filling gaps in the GATT was simply solved by negotiating detailed separate agreements, each dealing with specific issues, which complemented the various GATT provisions. Thus during the negotiating rounds[27] that followed in the following decades separate agreements were concluded on subjects as diverse as subsidies, customs valuation, import licensing and government procurement. The relationship of these side agreements to the GATT was ambiguous, as Van Houtte states.[28] The codes are full-bodied treaties, while the GATT is only of provisional application, which would mean that the Codes are superior. On the other hand, these agreements were all concluded within the framework of the GATT, which remains the overriding, all-encompassing main document. Thus, according to Van Houtte, many "assume" that the GATT prevails.[29]

In practice, the substantive conflicts between GATT and the various side agreements may have been of little practical significance. A more serious problem was the fact that each of the various side agreements had its own dispute settlement procedures and its own membership. In any given dispute, it had to be worked out what agreements were in force between the parties to the particular dispute, and what parts of the dispute should be settled under what procedures, if some issues could reasonably be said to relate to more than one legal document.

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[27] These "rounds", as they have come to be called, have been named after persons or the cities or countries where they took place. The famous "GATT rounds" that took place in the 60s and 70s were, in turn: the "Dillon Round" (1960-61), the "Kennedy Round" (1964-67) and the "Tokyo Round". The last "round" was the "Uruguay Round", which started in 1986 and resulted in the creation of the WTO. During these rounds, tariff reductions were also negotiated. See Chapter 2.2.3.2.

[28] At 53.

[29] The better view is probably that the ordinary rules of treaty law apply. Thus, if two parties to a multilateral treaty negotiate a treaty as between themselves with inconsistent provisions, it is this latter treaty that prevails as between the parties to that treaty (Vienna Convention on the Law of Treaties, Article 30(3) and (4)). Applying the principle of *Lex Specialis* would yield the same conclusion.

The participation of a large number of third world countries in the GATT, the second problem, shall not be treated in depth here. As for the third “problem”, the EC and the GATT/WTO, it has already been said that it lies without the scope of this thesis. What is important for the moment is to see what changes were brought about by the arrival of the WTO. In this context, it is important to bear in mind how complex the whole system had become, with the GATT and its various side agreements. A major overhaul of the entire system was necessary, and in particular, the rules needed to become less complicated easier to use.

3 Overview of the WTO and the GATT[30]

3.1 The Importance of Trade

As Lowenfeld points out,[31] the richest societies have generally been the ones that have engaged in trade. Thus, substantial empirical evidence suggests that trade results in increased prosperity, and this is borne out by modern economic theory. An attempt will be made here to explain briefly exactly *why* trade creates prosperity.

To begin with, trade is necessary to overcome what economists call *absolute scarcity*. A country that has no oil will simply have to import it, and the same is obviously true of other commodities.

Furthermore, free trade makes possible a high degree of *specialisation* and *efficiency*. Producing a commodity close to where the necessary raw materials are to be found, for example, brings down transportation costs. Barriers to trade and investment would force an entrepreneur to produce the commodity elsewhere, which would increase costs and thus be inefficient.[32] As for specialisation, free trade would enable a producer to export his products all over the world, which in its turn would increase his potential sales and lower the average cost of each unit.

It is clear that protectionist policies prevent the kind of specialisation and efficiency that is referred to in the preceding paragraph. What is less clear is that protectionism is always a costly policy even for the country that pursues it. True, if a heavy tariff is imposed on a certain commodity, the local producers of that commodity will make financial gains. On the other hand, their gains will be the loss of the local consumers, who will end up paying more for the locally produced product than for the imported one, which presumably would have been cheaper were it not for the tariff. Thus, a tariff only redistributes wealth within the customs area; it certainly does not create any. Also, a protected industry will end up being less and less efficient, which means the total income in the relevant customs area will decrease.

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[30] The reader is reminded that the full treaty texts (the WTO agreement and all covered agreements, including the GATT) are reproduced in Dennin and in Benedek. The GATT is reproduced in Lowenfeld and in Hilf (et al). Excerpts from some provisions are reproduced in Supplement A.

[31] At 1. This short introduction to the economic rationale of the GATT draws heavily on Lowenfeld's book.

[32] Possibly, it would not be economically viable at all.

Another way in which protectionist regimes create obstacles to trade is by their sheer complexity. If a country imposes one tariff on the import of a certain commodity produced in one country, and a different tariff on similar commodities produced in other countries, rules of origin are necessary in order to determine where a product comes from, and thus which tariff should be imposed on its importation.[33]

In fact, no borders at all would seem to be the best solution from an economic standpoint. As Jan Tumlir states, "[i]f all governments were restricted to only two economic functions, (a) issuing money of a stable purchasing power and (b) protecting private property rights, including the freedom to contract nationally as well as across national borders, the world would be a single market with a highly efficient price system and economic stability much less of a problem than it is now."[34] The message from the economists is clear: government interference with international trade should be avoided.

Why then, do governments engage in these activities? Is it perhaps because of some lingering mercantilism, according to which a country should try to sell more than it buys? More likely, it has to do with powerful protectionist lobbies at home. Their voices are louder than those of the consumers, each of whom loses much less *with* protection, than the local producers would lose *without* it. This would account for the passivity of the consumers, in spite of the fact that their losses are on the whole larger than the potential losses of the protected producers. Protectionist lobbies are a recurring theme in a lot of GATT literature.

Another reason may be political stability. If there were no trade barriers at all, then the sudden appearance of a cheap product of high quality in one country would quickly wipe out the local producers of like products in some other countries. The result would be a radical adjustment of local markets with major short-term problems in terms of unemployment and social unrest. Even in relatively stable countries, this would be politically impossible. In less politically stable countries, the ensuing social unrest might well lead to civil strife and even to a toppling of the government.

The provisions of the GATT reflect both the desire of the contracting parties to move towards freer trade and their parallel aim not to cause too much change too fast. To this end, the GATT contains a large number of safeguards and exceptions, in addition to the provisions that aim at liberalisation. Maybe these safeguards and exceptions are a bit of a disappointment to an economist with a strong faith in free trade. On the other hand, the goal of absolutely free world trade can only be achieved in a peaceful and stable world, and at any event, clear

[33] As Palmeter notes in Anderson/Blackhurst, at pp.326-340, this can create enormously difficult problems for producers. This is a strong argument in favour of the MFN-principle, and is even an argument against regional agreements in general.
[34] In Petersmann et al, at 2.

and predictable rules are necessary. In that sense, maybe the GATT/WTO is as good as it gets in a less-than-perfect world.

3.2 Overall Structure of the WTO

3.2.1 Consolidation

The main thrust of the WTO is the gathering of the GATT, the side agreements, and even some new agreements under one roof. This is achieved by including all of these agreements in four annexes to the WTO Agreement, and stipulating in Article II:1 that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement". Perhaps even more importantly, Article II:2 states that almost all of those "agreements and associated legal instruments" (namely the ones in Annexes 1, 2 and 3, that are referred to as "Multilateral Trade Agreements") are "integral parts of [the WTO Agreement]".[35] That means that a state that signs and ratifies the WTO Agreement is *ipso facto* party also to the GATT and the other covered agreements.

The WTO Agreement goes on to providing in Article III:3, read in conjunction with the Understanding of Rules and Procedures for the Governing the Settlement of Disputes (DSU), for common dispute resolution procedures for all agreements in Annex 1, of which the GATT is part. Even as regards amendment of any of those treaties, or indeed the WTO, uniform procedures apply according to Article X:1.

As for the dispute settlement and amendment procedures contained in the covered agreements, they have become obsolete by virtue of Article XVI:3 of the WTO Agreement. It provides that in the case of any inconsistency between the WTO and any of the covered agreements, the WTO "shall prevail to the extent of the conflict".

At the same time, continuity is ensured by Article XVI:1, which stipulates that "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT

[35] The agreements in Annex 4 that are not "integral parts" of the WTO Agreement under Article II:2, but in relation to which the WTO nevertheless provides "the common institutional framework" under Article II:1 are the so called *Plurilateral Agreements*. These should not be confused with the *Multilateral* ones, to which Article II:2 *does* apply. The role and status of these Plurilateral Agreements shall not be examined here. Suffice it to say that there are only two of them in force at the moment (Benedek, at 7), that their importance is relatively minor, and that they are completely irrelevant for this thesis anyway.

1947 [i.e. the "old" GATT] and the bodies established in the framework of GATT 1947."

3.2.2 Organs

The main organ of the WTO is the Ministerial Conference, consisting of representatives from all the Members (Article IV:1). The Conference meets at least once every two years, and its powers are wide-ranging. It has the "authority to take decisions on all matters under any of the Multilateral Trade Agreements", in addition to the powers conferred on it by the WTO Agreement. The Ministerial Conference also appoints the Director General of the WTO (see below) and grants so called *waivers* on application of a Member of the WTO (Article IX:3).[36]

When the Ministerial Conference is not in session, its powers are exercised by the General Council. The General Council consists of representatives of all the Members, just like the Ministerial Conference, and it also acts as *Dispute Settlement Body* and *Trade Policy Review Body*. The dispute settlement procedures involve the establishment of a *panel*, which looks into the legal merits of a claim, whereupon the panel report is adopted by the DSB. The DSB may, however, decide by consensus not to adopt the report (DSU, Article 16(4)). Appeal lies with an *Appellate Body*, but its findings, too, must be adopted by the DSB to come into force (DSU, Article 17(1) and (2)). The dispute settlement

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[36] A waiver can be defined as the permission from the Ministerial Conference (or previously under the GATT the CONTRACTING PARTIES) to continue to engage in an activity that is contrary to the GATT. For example, the European Coal and Steel Community was not a free trade area or a customs union under GATT Article XXIV, since only the coal and steel trade was free between the Member States. Thus, the abolition of import and export duties, or charges with an equivalent effect on those goods *as between the members of the ECSC only* was inconsistent with GATT Article I (which requires unconditional MFN treatment to be accorded to all contracting parties). However, the CONTRACTING PARTIES granted a waiver, stating in part:

"The governments of the member States, notwithstanding the provisions of paragraph 1 of Article I of the General Agreement, will be free to eliminate…customs duties and other charges imposed on or in connection with the importation or exportation of coal and steel products from or to the territories of any other of the member States, without being required to extend the same treatment to the like products imported from or exported to the territories of any other contracting party."

Thus, the scheme could go ahead anyway. Since waivers are not supposed to be granted lightly, a decision in that regard is taken with consensus, and failing that, it is taken by three fourths of the members according to Article XVI:3(b) of the WTO Agreement. (The ECSC waiver is reproduced in its entirety in Lowenfeld, at DS-561. NB: The ECSC waiver was granted under GATT Article XXV:5, which is now, of course, obsolete for inconsistency with the WTO. It contained slightly less stringent provisions than the WTO in that it only required a two-thirds majority of the votes cast and that such majority comprise more than half of the contracting parties.)

procedures have been strengthened in relation to the old situation in the sense that previously, it did not take consensus not to adopt a panel report.

The Ministerial Conference, the General Council and the Trade Policy Review Body all have a large number of subsidiary bodies at their disposal. Relevant in this context are the Council for Trade in Goods (CTG),[37] which oversees the functioning of the Multilateral Trade Agreements in Annex 1A, and its subsidiary organ the Committee on Regional Trade Arrangements (CRTA). The latter continuously reviews the functioning of GATT Article XXIV and examines regional trade arrangements notified under paragraph 7(a) of that Article.[38] Any findings they make can then be acted upon by the CTG, which has the power to make the appropriate recommendations (DSU, paragraph 7).

However, no reports have as yet been made by the CRTA, and there are practically no instances of any such agreement having been formally approved under the old GATT procedures (see Chapter 1.1.2)

The WTO also has a secretariat (Article VI) with mainly administrative duties.

3.3 Substantive Provisions of the GATT 1994

Providing a cursory overview of the GATT is no easy task. The text of the agreement is extensive, detailed and contains a large number of cross-references and exceptions. In this Chapter, an attempt will be made at explaining the *gist* of the agreement, without getting into the details of its provisions. Inevitably, this could mean that the following account may be considered an oversimplification. For more detailed analyses, consult the bibliography.

3.3.1 The Most-Favoured-Nation Principle

3.3.1.1 What it is

The most important principle underlying the GATT is the principle of most-favoured-nation treatment, or more properly the principle of *unconditional* most-favoured-nation treatment (hereinafter referred to as simply “the MFN principle”). It is manifest throughout the GATT and other agreements, but its most succinct statement is in GATT Article I:1, which provides (*inter alia*) that “any advantage,

[37] WTO Agreement, Article IV:5. All Members of the WTO can also become members of the CTG.

[38] The CRTA has taken over the duties formerly carried out by working parties under paragraph (7) of the DSU (which is one of the agreements covered by the WTO by virtue of Annex 1A).

favour, privilege or immunity granted by any contracting party[39] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other contracting parties." This means that if a country lowers the tariff on a certain commodity, that same, low tariff must apply to all of those products irrespective of their origin, as long as they originate in the territory of a Member. A Member of the WTO cannot impose a higher tariff on cars from one Member than those imposed on cars from other Members. On the other hand, they are free to impose higher tariffs on goods originating in the territories of non-members - they enjoy no protection under the GATT, and discrimination against them is allowed according to the MFN principle. By the same token, discrimination in their favour is not allowed, since Article I:1 talks of "favour[s]… granted by a contracting party to any product originating in … *any other country* [both Members and non-members. Emphasis added] shall be accorded… the like products originating in… the territories of all other contracting parties".

Apart from the above-mentioned Article I, the MFN principle can also be found in Article XIII and in Article II of the General Agreement on Trade in Services (GATS). The former of these provisions stipulates that if quantitative restrictions are imposed (although they are in principle disallowed by the GATT under Article XI), they shall be imposed in a non-discriminatory fashion, and the latter provision corresponds to GATT Article I in the context of services.

The importance of the MFN principle can hardly be overestimated. Tumlir calls it "the keystone of the whole multilateral arrangement",[40] and Lowenfeld says that "[MFN] remains a standard - some would say *the* standard - against which all government regulation of international trade is tested."[41]

3.3.1.2 Rationale

So, what is the rationale of the MFN principle? It has been suggested above (1.1.1) that the GATT is not based purely on economic considerations, and the MFN principle has indeed come in for a lot of criticism. The first of these relates to the "free rider problem". If country A negotiates tariff concessions from B, so that B will lower its tariffs on goods produced in A, then A is likely to have had to "pay" for those concessions by offering something in return. Most likely, A will have had to lower *its* tariffs on goods produced in B. Now, what happens if country C also produces some of the commodities that A produces? According to the MFN principle, B will have to apply the same low tariffs on products originating in C. This will boost C's exports, without C having made any concessions at all on its part. In effect, C will be a free rider on the efforts made

[39] The term "contracting party" as used in the GATT equals, for the purposes of this thesis, the term "Member" (of the WTO).
[40] Tumlir, in Hilf et al, at 7.
[41] Lowenfeld, at 31.

by A.[42] Apart from the obvious tension this is likely to cause between the countries involved, it may also result in a stop in the liberalisation process. A and B are not likely to make any further efforts at liberalisation, that will benefit other countries, and C will be happy with its strong position and hardly want any change. The ensuing stalemate will not be conducive to reducing barriers to trade.

So, what *is* the rationale behind the MFN principle? One of its most important functions is to "protect the bargain".[43] Suppose country A negotiates tariff concessions from country B, and pays dearly for those concessions. What would happen if B then enters into negotiations with C, and B then lowers its tariffs *even more* on goods originating in C? Obviously, goods from C would enjoy a competitive advantage on the market in B, as against goods from A. Surely this is not what A had in mind, or was even able to predict. An MFN clause in the original agreement between A and B makes sure these situations do not arise at all - if B lowers its tariff on some products originating in C, then the same low tariffs will have to apply to the "like" products from A, which makes sure A's agreement with B does not suddenly become worthless.

All Members of the WTO are thus protected against other Members suddenly lowering their tariffs in a discriminatory fashion. This is akin to what some economists refer to as the "club" approach to the MFN principle: Members of the WTO "club", who have paid their membership dues, are entitled to being treated as one of the paid-up members.[44]

Also, it must not be forgotten that most states would, if they could, discriminate on political grounds between other countries. Without the MFN principle, tariffs on a certain product would vary immensely depending on its origin, and importers would be guided by other than quality and price considerations for their purchases. This would distort competition and create artificial price advantages for products originating in the "right countries". This in its turn would lead to producers moving to countries that have negotiated the relevant concessions, even if resources and know-how are located elsewhere. The results would be huge

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[42] This has long been recognised as a grave injustice by some people. Snape, in Anderson/Blackhurst at 277, quotes John Jay as saying that "[i]t would certainly be inconsistent with the most obvious principles of justice and fair construction, that because France purchases, at a great price, a privilege of the United States, that therefore the Dutch shall immediately insist, not on having the like privileges at the like price, but without any price at all." (John Jay was an American politician, diplomat and lawyer. Among other things, he was the first Chief Justice of the Supreme Court of the United States between 1789-1795.)

It is apparently a different matter entirely, that economists argue that the mercantilist view is wrong. Even one-sided "concessions" in the form of the complete removal of trade restrictions will actually benefit the country making the concessions. However, foreign and national policy is not conducted on the basis of economic considerations alone.

[43] Tumlir, in Hilf et al, at 7.

[44] Snape in Anderson/Blackhurst.

losses in economic efficiency. The MFN principle guarantees that only economic considerations are taken into account by importers and investors alike,[45] and prevents unnecessary trade diversion.

The MFN principle also makes it possible for producers in "new" countries to enter the markets for certain commodities. Otherwise, chances are that their home country might not have negotiated concessions for the commodity in question (since it was not produced there in the first place) and it would be impossible for the new industry to export its products. Thanks to the MFN, a newly established car manufacturer in a Third World country would know that the United States (for example) would impose a tariff on the cars that is no higher than the tariff already imposed on Japanese cars (for example).[46] This assumes, of course, that the Third World country in question is a Member of the WTO.

As for "free riding", that turned out not become a major problem. The reason is mainly that in a large and complex community, with regular tariff negotiations on a multilateral scale, everyone will eventually gain as much as he gives up.[47]

Last but not least, world trade needs orderly rules that are reasonably simple to apply. This if anything is the lesson to be learned from the inter-war period. Maybe a perfectly balanced world trade system could be devised. Maybe a regime, not based on the unconditional MFN principle, could be created, where the trade relations between all countries would be carefully structured so that no country would gain more than what the country had paid for. It is, however, highly unlikely that such a system could be created and at the same time produce the legal certainty that world trade needs. As Snape states: "It is difficult to envisage a world of criss-crossing, bilaterally negotiated, conditional [as opposed to unconditional] MFN agreements, each designed to discourage free riding and foot-dragging and each therefore with limited coverage, leading to a stable and harmonious trading system, or even one with the degree of harmony and stability produced by that which we have." Tumlir, at 7 agrees: "[unconditional MFN] is, indeed, a *condictio sine qua non* of a trading system in the full sense of the word, referring to regularity, orderliness and predictability."

The sheer complexity of the rules in such a system would furthermore constitute a barrier to trade *in and of itself*, just like rules of origin can be.[48] Eventually, the lack of predictability and ambiguity of the rules would enable states to discriminate on other grounds than lack of reciprocity in the concessions, without any other state being able to prove a violation. Finally, the system would collapse. This is also a reason why a multilateral system, with the same rules for all, is more likely to encourage trade than a large number of bilateral agreements.

[45] Tumlir, in Hilf et al, at 8.
[46] Tumlir, in Hilf et al, at 9.
[47] Lowenfeld, at 27-28.
[48] Palmeter, in Anderson/Blackhurst.

3.3.2 Tariff Negotiations

As stated previously (Chapter 2.2, note 23, and in the preceding Chapter) the GATT did not prohibit tariffs outright. Instead, they were to be successively lowered and possibly abolished through negotiations, an idea that was supported by stipulations in the preamble regarding the need for "arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce". Other than that there were no specific provisions in the GATT on how tariff should be lowered until 1954-1955, when Article XXVIII *bis* was added. On the other hand, that Article did not really add anything in terms of substantial provisions. All the contracting parties did was basically to recognise the importance of negotiations in order to reduce tariffs.[49] The form of those negotiations was up to the contracting parties, just as it was previously.

In practice, tariff reductions have been negotiated at the multilateral level during the so-called "rounds" referred to in Chapter 2.3, note 27. The various negotiating techniques used are of minor importance in this context. What is important is that once a tariff on a certain commodity has been lowered, it is governed by the MFN principle in Article I.

3.3.3 Article XXIV

3.3.3.1 Substantive Contents

Are there any exceptions to the MFN principle, the "keystone" of the international trading system? Do all Members always have to accord the same treatment to all other Members? The answer is no. There are some exceptions to this rule, the most important of which are doubtless the ones contained in GATT Article XXIV. Under that provision, Members of the WTO can legally abolish tariffs *vis-à-vis* some states, but maintain them as against other states, whether Members of the WTO of not. This makes customs unions and free trade areas possible, and Article XXIV is thus to be seen as an exception to the general rule of unconditional MFN. As an exception, it had to be carefully circumscribed in order not to open the doors to a general deterioration of the MFN principle, which would lead to the very situation the GATT was supposed to prevent: a disorderly international trade system, with no discernible rules as to what is allowed and what is not, where ambiguity and legal uncertainty pave the way for

[49] According to the report of the Review Working Party on "Schedules and Customs Administration", in which agreement was reached regarding the amendment of the GATT, the Article imposed "no new obligations on contracting parties". The Working Party Report is quoted in GATT, *Analytical Index,* at 912.

the same kind of disastrous, short term protectionist policies that prevailed in the inter-war period.

First of all, what exactly is allowed under Article XXIV? Provision is made for *customs unions* and *free trade areas*. A customs union is a regional integration arrangement whereby

"duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to *substantially all the trade* between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories [emphasis added]."[50]

Furthermore,

"…duties and other regulations of commerce imposed at the institution of any such union ... in respect of trade with contracting parties not parties to such union shall not on the whole be higher or more restrictive that the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union…"[51]

Roughly summing up what the requirements are, *internal* barriers to trade should be abolished, and uniform *external* tariffs should be introduced that should be no higher than before.

As for free trade areas, Article XXIV:8(b) contains a similar provision to the one contained in paragraph (a) dealing with customs unions:

"A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories [Emphasis added]."

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[50] Article XXIV:8(a). It is interesting to note that a customs union may be limited to goods originating in the territories of the members of the customs union, since a customs union must have a common external tariff (in the words of Article XXIV:8(b), "substantially the same duties and other regulations of commerce [should be] applied by each of the members of the union to the trade of territories not included in the union"). In other words, if member state A imports commodity 1 originating in a non-member state, duties may be imposed on that commodity when exported again to member state B, depending on the terms of the customs union. This hardly makes sense. If the customs union has a common external tariff, then internal tariffs of varying value imposed on goods originating in non-member states will have serious trade diverting effects. In order to avoid high internal tariffs, exporters in non-member states will want to export their goods to the member state with the highest internal tariff. That tariff will not hit the imported goods, since the common external tariff will apply. When the goods are then re-exported to other members of the customs union, their lower tariffs will apply. Surely this was not the point when Article XXIV was drafted. However, the problem is of little practical importance, and it shall not be pursued here.

[51] Article XXIV:5(a).

In Article XXIV:5(b) we find the provision for free trade areas that corresponds to paragraph (a) above:

"… duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area … to the trade of contracting parties not included in such area … shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area…"

There is no requirement that the free trade areas impose a common external tariff, and there is no mention of free trade areas including goods originating in the territories of non-member states.[52]

3.3.3.2 Rationale

The foundation of Article XXIV in economic theory is weak and disputed, as is the case with the MFN principle.[53] However, there seems to be at least some economic rationale even for Article XXIV.

According to the theories referred to in Chapter 3.1, trade creates wealth (this is sometimes referred to as the "gains-from-trade argument"). It is also clear that customs unions and free trade areas have a positive effect on intra-regional trade, which is increased when tariffs and other disincentives to trade are abolished or reduced. This creates wealth for the countries participating in the regional integration arrangement, or as some economists put it, it creates "a bigger cake". If the cake increases, there is no reason why that should not be beneficial to all, members and non-members alike. This provides that there is no decrease, and preferably an increase, in the external trade of the regional integration arrangement. This should not be impossible if the wealth of the region increases. Wealthy nations trade more than the poor ones.[54] In sum, if internal barriers are abolished and the external ones are not raised, this should create wealth for all.

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[52] This makes sense of course. A regional integration arrangement without a common external tariff must by logical necessity exclude products originating in the territories of non-member states. If not, the scheme would have trade diverting effects similar to the ones referred to above in note 51; a producer in a non-member state would export his products to the member state with the lowest tariff, and the goods would then be exported freely to other member states.

[53] Snape, at 274, quotes Harry Johnson as saying about MFN and Article XXIV that "[the MFN principle] has absolutely nothing to recommend it on the grounds of either economic theory or the realities of international commercial diplomacy … . The speciousness of the principle of non-discrimination is only exceeded by the irrationality of permitting nothing less than 100 per cent discrimination in the case of customs unions and free trade areas." (Johnson, *Trade Negotiations and the New International Monetary System*, Leiden: A.W. Sijthoff, for the Graduate Institute of International Studies, Geneva, and the Trade Policy Research Centre, London, 1976)

[54] McMillan, in Anderson/Blackhurst at 293, Lowenfeld at 44.

Other reasons in favour of accepting customs unions (at least) lie in the fact that once one customs jurisdiction is substituted for several smaller ones, this simplifies the rules of international trade, which in itself is an important goal. Also, since customs unions provide for free internal trade in all goods once within the customs wall whatever their origin, both external and internal trade is encouraged. The same cannot be said for free trade areas. Since they only provide for free trade in goods originating in the territories of the members of the free trade area, external trade is effectively discouraged. Also, since discrimination is made on the basis of origin to a much higher extent than is the case for a customs union, free trade areas necessitate complex sets of *rules of origin*. As noted above (3.3.1) the sheer complexity of these rules can constitute a serious barrier to trade.

It has been said that one argument for accepting customs unions is that they have the same effect as when two or more countries unite and become one state (usually federal). After all, under general principles of public international law states have the right to do so if they wish - how could that be protested against for violating the MFN principle?[55] That argument is not completely convincing, however. If two or more states unite, then the new state will be bound by most of the international obligations of the old, constituent states.[56] If the new state thus continues the old states' membership in the WTO, it will be treated as *one* Member, with *one* customs territory, and whatever relations the constituent territories have with each other, GATT does not cover them. That is because the rules of the GATT including Article XXIV do not apply *within* Members, only *between them*.[57] In other words, if two or more states wanted to integrate economically they could do so by uniting into one state, which would not necessitate any provision like Article XXIV.

As we have seen, there are good reasons why the GATT should not prevent states from uniting, even if this means that two formerly independent customs territories were to "discriminate" in favour of each other in the future. This is, however, no convincing argument why independent states should be allowed to discriminate as among different states.

Article XXIV itself adds to this confusion. It stipulates that tariffs and some other restrictive regulations of commerce should be abolished, but seems to provide at the same time that some other restrictive regulations of commerce *must not* be

[55] Snape, in Anderson/Blackhurst, at 280.
[56] For a basic account on when and under what circumstances newly formed states are bound or can choose to be bound by the obligations of earlier states on the same territory, see Wallace at 243-244.
[57] Interestingly, the economic integration in Europe (which obviously consists of several independent states) has gone further than the economic integration in some federal states such as Canada and Australia. Nobody would ever get the idea to accuse such states of hindering free trade, nor to accuse them of creating "trade blocs" if remaining obstacles were removed. The GATT simply does not cover these situations. See Blackhurst/Henderson, writing in Anderson/Blackhurst at 409-410.

abolished. For example, if a member of a customs union decides to impose quantitative restrictions according to Article XI or restrictions on the grounds of public health under Article XX, these must be applied to all other countries according to the MFN principle, that is even to goods from other members of the regional integration arrangement. On a literal reading, this is what Article XXIV:8 seems to say, and that construction is also favoured by some members of the CRTA.[58]

There is probably no country in the world that allows any of these trade barriers between its constituent provinces or states. Even if there were, they would be free to do so legally. Consequently, a customs union does *not* have the same effect as when two states unite into one state.

Probably, the main reason why customs unions and free trade areas were accepted is political expediency. It was foreseen that some members would choose to integrate more thoroughly and at a faster pace than the rest of the GATT contracting parties, and a complete ban on regional integration arrangements would possibly mean that these countries would not sign the GATT. Since some of these states, mainly the European ones, were of extraordinary economic importance, concessions were made in order to keep them aboard.[59]

Are customs unions and free trade areas good or bad for world trade? Some economists think the question cannot be answered with a clear "yes" or "no". They can be either good or bad depending on their terms, the context, their purpose and so forth.[60] Others emphasise the strict conditions contained in Article XXIV. They discourage states from lightly entering into regional trade agreements, which will keep the number of such arrangements to a minimum. That in itself will make them easy to monitor. Furthermore, the requirements that the agreements apply to "substantially all the trade" internally, and that barriers are not raised with respect to external trade, preclude such agreements from becoming in reality tools for selectively introducing free trade in some sectors, while protecting others. Thus, if the requirements of Article XXIV are met, regional integration arrangements will probably have a positive effect on world trade.[61]

However, this raises the issue of whether the rules are followed. As indicated earlier (Chapter 1.2) the enforcement of especially Article XXIV has been a major problem for the world community, and the question of what can actually be said to be required by the words "substantially all the trade" is the theme of Chapter 5 of this thesis.

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[58] See, for example, WT/REG/W19, at paragraph 7, per the representative of Hong Kong, China.
[59] Snape, in Anderson/Blackhurst, at 287.
[60] McMillan, at 306, and Leidy/Hockman, at 266 in Anderson/Blackhurst.
[61] Snape, in Anderson/Blackhurst, at 287-288.

3.3.4 The Rest of the GATT and Related Agreements

The international trading system obviously contains more than rules on MFN, tariff reductions and regional integration arrangements. They have been singled out in this context because of their basic importance, and because familiarity with these issues provides the minimum background knowledge required to understand this thesis.

Under this heading, a brief introduction to the rest of the WTO system will be made.[62]

Other GATT articles contain provisions on subjects such as non-discriminatory application of internal laws and regulations (Article III), anti-dumping measures (Article VI) and subsidies (Article XVI). Quantitative restrictions are prohibited as a general rule (Article XI), but can be applied in some circumstances. If so, the MFN principle applies, as previously stated (Chapter 3.3.1).[63]

Conspicuous in the GATT are the numerous provisions to the effect that the contracting parties undertake to communicate with each other before resorting to any dispute settlement procedures, and sometimes even before and during the implementation of certain economic measures (see for example Articles II:5, XI:2, XII:4-6 and Articles XXII and XXIII).[64] This reflects the weakness of the dispute

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[62] It should not be forgotten that the system is highly complex, detailed and extensive, in spite of the efforts at simplification. For example, the actual texts of the relevant treaties are 500 pages long in Benedek's convenient, pocket size edition. Any summary has to be selective in some parts, and cursory in others.

[63] The reason why quantitative restrictions are prohibited but not tariffs is because in economic theory, quantitative restrictions are more costly and inefficient that tariffs. If a customs duty is imposed on a commodity, that commodity will still be imported in large quantities if production of it has become so efficient that the imported product is cheaper than the domestic one, in spite of the tariff. By contrast, once the amount stipulated by a quota has been imported, there can be no imports beyond that. This means that domestic products receive a greater degree of protection under a quota than under a tariff system, which in its turn means that the price will increase and efficiency will decrease. The losers are the domestic economy, and especially consumers who will end up paying more than they have to. Another reason why quotas are prohibited is that it is difficult to measure the level of protection afforded by quantitative restrictions, whereas the level of protection afforded by a tariff simply equals the value of the duty that has to be paid. See Tumlir, in Hilf et al, at 4, and Lowenfeld, at 34.

[64] Articles XXII and XXIII are the major "dispute settlement" provisions of the GATT. The reader may think that these provisions must have become obsolete when the WTO came into force. After all, it has been stated earlier that uniform dispute settlement procedures lie in the heart of the WTO agreement, and that the WTO prevails if there is any inconsistency between it and any of the covered agreements by virtue of the above-mentioned Article XVI:3 of the WTO Agreement. This is not quite the case, however. The WTO Agreement provides that "[t]he General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding" (WTO Agreement, Article IV:3). Article 3(1) of the Dispute Settlement

settlement procedures, and consequently the lack of political will on the part of the contracting parties to agree to more stringent enforcement measures. Most states are still jealously guarding their sovereign powers, and are not keen on limiting them unless absolutely necessary. It may also be a reflection of the complexity of the subject matter at hand; there may still remain some lingering belief that matters of economic policy are better dealt with by negotiation between trade officials in good faith than by lawyers, who cannot be expected to have any adequate understanding of economic matters (see Chapter 1.1.1).

Other agreements in the annexes the WTO include, *inter alia*, so called *understandings* on how various GATT Articles should be interpreted, *agreements* on subjects such as agriculture and technical barriers to trade, a General Agreement on Trade in Services (the GATT only covers commodities) and an Agreement on Trade-Related Aspects of Intellectual Property Rights. The complete schedule is included in Supplement B.

Understanding in its turn refers back to GATT Articles XXII and XXIII. These GATT provisions, and the principles applied under them, are thus still valid law. However, *technically speaking*, they now derive their legal force not from the GATT, but from the WTO Agreement and the Dispute Settlement Understanding, which are superior law in relation to the GATT.

4 The EC as a Player on the International Arena[65]

4.1 The Legal Personality of International Organisations

Traditionally, international law deals with the rights and obligations of *states* as against each other. Increasingly however, entities other than states have become subjects of international law, most notably international organisations. The first of these was the United Nations, which was deemed by the ICJ in the late 40's to have international legal capacity, a decision which the court based on a number of considerations.[66] Among other things, attention was drawn to the existence of reciprocal rights and duties between the organisation and the member states, and the court also concluded that it seemed to be the purpose of the Charter to endow the United Nations with legal personality, without which it would be difficult for the organisation to perform its functions.

The question of the legal personality of the EC is less problematic. Article 281 (Article 210)[67] of the Treaty Establishing the European Community (in this Chapter hereinafter "the Treaty") clearly states that "[t]he Community shall have legal personality", but strictly speaking, the provision is redundant. Applying the test from the Reparations Case, the result is obvious; the powers of the EC *vis-à-vis* its member states are far more extensive than those of the United Nation, and large number of provisions in the Treaty imply that the Community shall have legal personality.

As an entity endowed with international legal personality, the EC also has the power to enter into legal agreements with states and other international organisations. However, there are some limitations. It cannot itself become a member of an international organisation if the statute of that organisation only allows states,[68] and there are several limitations imposed by internal EC law as well.

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[65] For interpretations on relevant EC law, this Chapter draws heavily on McLeod's, Hendry's and Hyett's *The External Relations of the European Communities*.
[66] *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep. 174.
[67] The Treaty Establishing the European Community has recently been amended by the Treaty of Amsterdam, which came into force on May 1, 1999. The provisions of that treaty will be cited according to the amended version. The old numbering appears within brackets.
[68] For example, membership in the United Nations is only open to states (Articles 3 and 4(1) of the Charter), and only states can be parties in cases before the International Court of Justice (Article 34(1) of the Statute of the International Court of Justice).

4.2 Contrasting the EC with a Federal State

In this Chapter, the EC will be contrasted with a federal state, the Commonwealth of Australia (hereinafter "Australia"). In the present atmosphere of talk about "federalism" in the European context, it is believed that such a comparison will be fruitful in order to understand what the EC is, and what it is not. Australia was chosen because the author happens to be familiar with its constitution.

4.2.1 Internal Structure

One basic similarity between the EC and Australia is that they both consist of (member) states (hereinafter "states") on the one hand, and a central/federal ("central") power on the other. Furthermore, while the states have virtually unlimited legislative powers as far as subject matter is concerned, the power of the central legislature is limited. For example, the Commonwealth Parliament in Canberra can only enact laws with respect to the enumerated subject matters in ss 51 and 52,[69] mainly. By the same token, the powers of the EC are also limited, albeit in a different way (see below).[70]

On the other hand, the Acts of the central legislatures in both cases prevail before inconsistent state laws.[71] In Australia, this is provided for by s 109 of the Constitution,[72] and in the EC, a similar result follows from the principle of supremacy of Community law.[73]

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[69] All provisions of the Australian Constitution that are cited in this thesis are included in Supplement D.

[70] Article 5, paragraph 1 (Article 3b).

[71] Obviously, there are good reasons for this. If the states could legislate with respect to any subject, *and* state law prevailed before central law, then the federation/community would quickly dissolve.

[72] The generally accepted analysis of s 109 is that when an otherwise valid State law is inconsistent with a valid Commonwealth law, the former does not become "invalid" in the true sense of the word. It merely becomes "inoperative" to the extent of the inconsistency, and must not be applied by the courts of the Commonwealth to that extent. This means that if the Federal law is repealed, there is no longer any inconsistency, and the State law is operative again and can be applied by the courts.

[73] It is not difficult to see why Commonwealth law prevails before state law in Australia, since it is explicitly provided for in the Constitution, which in its turn derives its validity from the Australian people itself, which is the ultimate lawmaker in the country. It is more difficult to see why Community law prevails before national law in the EC. The Treaty of Rome, as all treaties, derives its validity from the treaty-making powers of the various executive branches of the signatory states. Those treaty-making powers, in their turn, derive from these states' respective national constitutions, which constitute the highest laws of Europe in the absence of any proper European constitution. According the principle that "a stream cannot rise higher than its source", it is not possible for a rule of law to be inconsistent with a norm of higher dignity, from which the law of lower standing derives its validity. Since the Treaty of Rome ultimately derives *its* validity from the various constitutions of the states that are members of the EC (see above) the Treaty and any legislation made under it should be inoperative in the Member States to the extent of any inconsistency with domestic constitutional law (it is a different matter entirely that the Treaty is still valid under international law, under which internal law as a rule may not be

However, there are differences in principle between the EC and Australia as regards legislative powers. The powers of the EC are wide in the sense that they are not limited to specific subject matters. It is true of course that in many areas, such as the Common Commercial Policy, only the EC is competent to act, but the EC can act outside those areas if such action serves to attain one of the objectives of the Treaty. In fact, if there is no other grant of competence in the Treaty, the Community can sometimes rely on Article 308 (Article 235), which gives seemingly unlimited legislative powers to the EC. On the other hand, the principle of subsidiarity must be taken into account when the Community takes action in areas not within the "exclusive competence" of the EC according to Article 5, paragraph 2 of the Treaty (Article 3b). This severely limits the Community's freedom of action. Furthermore, any action of the EC shall not go beyond what is necessary to achieve the goals of the Treaty, regardless of the subject matter (Article 5, paragraph 3 (Article 3b)).

As previously stated, the Commonwealth Parliament in Australia can only legislate with respect to certain subject matters. Any federal law that has no "sufficient connection"[74] to at least one of the heads of power contained in ss 51 and 52 is invalid. However, there are few requirements other than that.[75] For example, the *purpose* is irrelevant; that is a political decision for the Parliament to make.[76] Consequently, there is also no room for any tests of "reasonable proportionality" when assessing the validity of Commonwealth laws.[77] If the Parliament decides to impose a 100 % income tax, for example, that is clearly a law "with respect to taxation" (s 51(ii.)), and the law is valid. It is within Parliament's prerogative to

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invoked to invalidate a treaty [Vienna Convention on the Law of Treaties, Article 46(1)]). Yet the European Court of Justice has stated in Case 106/77, *The Italian Finance Administration v Simmenthal*, [1978] ECR 629 that EC law prevails before even national constitutional law. It is difficult to make complete logical sense of this. The confusion is further borne out by the fact that most European constitutions contain provisions to the effect that legislative powers are conferred from the national parliament to the Community. Now, if Community law has supremacy over domestic constitutional law *anyway*, it cannot be dependent on provisions in domestic constitutional law to acquire validity in those countries. So, if we accept the principle of supremacy of Community law (as we must *de lege ferenda*), then those provisions are clearly redundant.

[74] See, for example, *Re Dingjan; Ex parte Wagner* (1995) 128 ALR 81.

[75] Of course, s 51 does say that Parliament's legislative power is "subject to this Constitution". Although there is no "Bill of Rights" in the Australian constitution, there are some other limitations, such as an implied right to political speech and various provisions that prohibit Parliament from discriminating between the different States.

[76] That was established as early as 1920 in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (190) 28 CLR 129. For the sake of completeness, however, it should perhaps be stated that there is *one* head of power that is deemed "purposive" - that is, the purpose of laws enacted under it is taken into account when assessing their validity. The power in question is the defence power (s 51(vi.))

[77] This was emphatically rejected in *Leask v The Commonwealth* (1996) 70 ALJR 995. The defendant in a criminal proceeding argued that the federal law that he had violated was disproportionally harsh in relation to its purpose, i.e. to combat a particular type of crime. The High Court confirmed that the question was one of "sufficient connection" only, and refrained from making any political value judgements.

make disproportionate laws, laws with no purpose at all, and simply bad laws. They are all political decisions, and should be left to the politicians. Only the voters, not the judiciary, have the right to review.

It almost goes without saying that there is no such concept as "subsidiarity" in Australian constitutional law. The only thing remotely resembling the concept of subsidiarity would be the underlying rationale of the Constitution, which proceeds from the idea that some things are better regulated at the Federal level than state level, such as defence, customs policies and external affairs.

4.2.2 External Decision Making Procedures

4.2.2.1 The European Community. General Remarks

The European Community has only limited powers to conclude agreements with international organisations and states. This is partly because whatever else it could be described as, it is not a state. Thus it cannot, under international law, have the same set of rights and obligations that a state has.[78] Furthermore, the member states have only limited their sovereign rights within limited fields, as the ECJ said in *Van Gend en Loos*.[79]

It follows that in areas where the Community does not have the power to conclude agreements, the member states retain their sovereign powers. Exactly where the line between Community and state competence is to be drawn will be further discussed below, but for the present purposes it suffices to say that the Community's external powers roughly correspond to their internal powers.

4.2.2.2 Australia

Australia, on the other hand, enjoys that totality of international rights and duties recognised by international law, which the ICJ spoke of in the *Reparations Case*. This is of course obvious since it is a state recognised under international law. What may be more surprising, perhaps, is that the rights on the international level are completely paralleled on the internal level. That is, the executive branch has plenary powers to conclude agreements on any subject matter. In other words, the external powers of the Commonwealth may seem to exceed by far its internal legislative powers under the Constitution.

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[78] The ICJ in the *Reparations Case* said that "…[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the [United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." (At 179-180.) The same is true of the European Community and any other international organisation.

[79] Case 26/62 NV *Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

However, that is not quite the case. Once the Commonwealth has duly signed and ratified a treaty, any implementation measures necessary are automatically within the external affairs power (s 51(xxix.)). Thus, any Act of Parliament that is reasonably proportionate and adapted to implementing the terms of treaty will be deemed to have the necessary "sufficient connection" to a head of Federal power.[80]

It follows, that by concluding international agreements, the Commonwealth Parliament can acquire internal legislative powers that it would not otherwise have. There may be a lot of good sense of course in this construction of the external affairs power; a more narrow construction would risk making Australia an international cripple. That is because firstly, the Commonwealth would only be able to enter into agreements on a limited number of subjects, and secondly, even as regards some of these treaties, no one would ever really know when a treaty would be in power. That is because the High Court cannot give opinions beforehand like their European colleagues.[81] As a consequence, Australia would have to choose one of two paths: either to conclude only the agreements that fall squarely within a head of power, or open itself up to accusations of violating its international agreements, if implementing legislation is deemed to be *ultra vires*.[82]

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[80] See, for example, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania* (1983) 158 CLR 1192. One example of how this works is the *Toonen* case. Nick Toonen is a well-known Tasmanian homosexual, who had long been bothered by the fact that the Tasmanian criminal code penalised "various forms of sexual contacts between consenting adult homosexual men in private"(ss 122 and 123, if I remember correctly). Since Australia was a party to the ICCPR and its first optional protocol, he took the case to the ICCPR Committee, which duly found that Australia had violated Mr Toonen's right to privacy under Article 17 of the ICCPR. It should be noted, that the *Federal* government was responsible on the international level for its constituent states under general international law and under Article 50 of the ICCPR. Nevertheless, the Federal government supported Mr. Toonen's claim, so the rather odd situation arose where both the "plaintiff" (Mr. Toonen) and the "defendant" (Australia) were in complete agreement regarding both law and fact. The "real" villain, Tasmania, has no international legal personality and thus lacked standing before the Committee. After the Committee had handed down its "verdict", the Commonwealth Parliament responded by enacting legislation that provided that "[s]exual conduct involving only consenting adults acting in private is not to be subject… to any arbitrary interference with privacy within the meaning of Article 17 of the [ICCPR]". The power to legislate on this topic derived from the external affairs power and the fact that Australia was a party to the ICCPR, and the relevant sections of the Tasmanian criminal code are now inoperative by virtue of s 109 of the Constitution. They remain, however, valid law technically speaking. I know this does not have much to do with the GATT. Just thought that since the GATT is a rather boring topic, I might throw this in so as to spice things up a bit.

[81] In *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, the Commonwealth had enacted legislation conferring power on the High Court to give advisory opinions. The legislation was struck down as unconstitutional.

[82] As noted above, a state cannot invoke provisions of its internal law as an excuse for the non-performance of its international obligations (note 73, Chapter 4.2.1).

The question remains, however, if the external affairs power has become a means for the Commonwealth Parliament to tilt the federal balance. After all, there is virtually no limit as to what subject matters may potentially become the object of international regulation. On the other hand, international agreements are not entered into lightly (least of all simply to obtain domestic legislative powers), and besides, any implementing legislation has to follow the terms of the treaty.

4.2.3 Monism or Dualism?

It should be obvious from what has been said above that Australia adopts a dualistic approach to international law. Thus, international agreements are not part of domestic law unless they have been implemented by Acts of Parliament.

The issue is more complex when it comes to the EC, which takes a monist approach. The starting point in this regard is Article 300(7) (Article 228) which provides:

"Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and the Member States."

According to McLeod, the provision means that Member States are bound not as against other contracting parties, but *vis-à-vis* the EC.[83] This means that Member States will violate Article 300(7) (Article 228) of the Treaty of Rome if they take any measure that jeopardises the fulfilment by the EC of its international obligations. The same effect would perhaps be achieved by applying the Member States' duty of co-operation in Article 10 (Article 5), but Article 300(7) is arguably a bit more specific.

Furthermore, the provision means that these agreements become "integral parts of Community law",[84] and the general consensus seems to be that they prevail in the internal legal order of the EC over conflicting *secondary* legislation.[85] This also means that treaties can have direct effect if they are clear, unconditional and not dependent for their application on implementing legislation.

However, direct effect has always been denied the GATT, apparently because of its many safeguards and exceptions.[86] According to Petersmann, there are also political considerations by the ECJ behind this stance - the Court simply gives way in face of the "unanimous opposition of the governments of the [EC] States

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[83] At 128.

[84] The quote is from Petersmann, in Hilf et al, at 56, and McLeod, at 134. It is unclear where they got it from.

[85] Petersmann and Ehlermann in Hilf et al at 56 and at 131-132, respectively, and McLeod, at 134, quoting Mayras A.G. in Joined Cases 21-24/72 *International fruit Company NV v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

[86] Case 112/80 *Dürbeck I* [ECR] 1095 and Case 245/*81 Edeka AG v Federal Republic of Germany* [1982] ECR 2745.

as well as of the EC commission against direct enforceability of GATT rules by individuals and courts against the European executives".[87]

4.3 EC Treaty-Making Powers

While in Australia, only the Commonwealth can enter into treaty obligations, the situation is different in the EC, as noted above. An attempt will be made here to examine a bit more closely how things are meant to work. However, given the immense complexity of these matters, the account shall be limited to what is necessary in order to understand this thesis. Thus, powers of the EC will be discussed in the context of the WTO as much as possible.

4.3.1 General Remarks

When can the member states conclude treaties, and when is it a matter for the EC? States of course have plenary powers to enter into agreements on anything, so the question should rather be this: what exactly has been delegated by the EC member states to the Community? Everything beyond that would remain within the power of the member states.

The treaty-making powers of the EC are either *express* or *implied*, *exclusive* or *non-exclusive.* An express power is not necessarily exclusive.

Express powers are the ones provided for in the Treaty Establishing the European Community. The most important ones for our purposes are Articles 133 (113) and 310 (238), which enable the EC to conclude agreements relating to the common commercial policy and association agreements, respectively. Article 133 (113) also confers exclusive powers on the community; the member states thus have no competence to conclude international agreements in these areas.[88]

The express powers are *relatively* easy to work out by simply reading the Treaty, even if it may be difficult to know whether the power at hand is exclusive. Implied powers are more illusive, partly because the state of the law in itself is uncertain, and partly because the extent of the implied powers changes. Implied powers can arise in three cases, according to Mcleod, Hendry and Hyett:

1. "[w]here measures have been adopted by the institutions on the basis of an internal power."

[87] At 59. It is possible too that we are dealing here with a clash of legal cultures. The GATT was drafted by a group of Anglo-American lawyers, trained in common law. Their way is to draft legal documents in a cursory way and then leave it to the judiciary to interpret them and hammer out the details by way of case law. Continental lawyers, on the other hand, would prefer legal rules to be a bit more precise before entrusting their application to the judges and the lawyers.

[88] *Opinion 1/75 (Re OECD Local Cost Standard)* [1975] ECR 1355.

2. "where measures have not been adopted, either because external and internal competence must be exercised simultaneously…"
3. "an external power is implicit in the scheme of the internal power."[89]

There is a certain logic to this. If the Community has enacted valid internal rules on a certain subject matter, there would be no point for the member states to conclude agreements on the same topic; they would not be able to implement these agreements anyway because of the supremacy of Community law.[90] It also makes sense to conclude that that treaty-making competence has gone over to the Community, which is after all a legal person with wide-ranging powers. This also avoids undesired *lacunae* in the law. It also makes sense to assume that some external powers may be implicit in the Treaty; no document of constitutional significance has ever managed successfully to enumerate all powers that the state/organisation is supposed to wield in the future.[91]

Implied powers can be shared or exclusive. One reason a power may become exclusive is that the EC has regulated an area so exhaustively that there is simply no room for member state legislation.

4.3.2 Mixed Agreements

However, if the treaty-making powers are shared or even divided, what happens when the EC negotiates a treaty that partly deals with matters within state competence or vice versa? The solution so far has simply been for the EC *and* the member states to become parties to such agreements, and they are therefore called "mixed agreements".

Mixed agreements raise a number of important legal issues. For example, what part of the treaty is the EC responsible for, and what parts are the member states' responsibility? Third states have often insisted on knowing exactly where the line is to be drawn, but the EC has not been able to state that with any certainty.[92] Besides, as we have seen, the law is constantly changing in this area.

[89] At 48-49. An interesting contrast between the EC and Australia is that the former can increase its external powers by exercising its internal ones, while the latter can increase its internal powers by exercising its external ones.
[90] Indeed, Member States have a duty not to enter into such agreements, or do anything else that might jeopardise the functioning of Community law, since they have a duty of co-operation towards the Community. See Article 10 (Article 5) of the Treaty of Rome, *Opinion 2/91 (Re ILO Convention 170)* [1993] ECR I-1061 and *Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)* [1978] ECR 2151. For more on the duty of co-operation, see below.
[91] For example, it says nowhere in the UN Charter that the UN has the power to bring international claims, even if it has legal personality. Yet the ICJ concluded that the UN had such power in the *Reparations Case*.
[92] McLeod et al, at 161.

It may seem to be difficult for a third state to know who to sue in case of a conflict, the EC or the member state responsible for the disputed measure. The practice so far, however, has been to sue the EC in all cases. This was common practice even during the last years of the GATT 1947, to which the EC was never a party. It is expected that this practice will continue in the WTO, of which the EC is formally a member, especially since the ever-changing division of powers between the EC and its member states is changing in favour of the former rather than the latter.

Another situation that might arise is where EC member states are reluctant to sign a mixed agreement. When matters come to head this way it may seem urgent to delineate exactly what parts of the agreement they will be bound by anyway, since it is within Community powers, and which parts are not. However, the Court has managed to get around this extremely difficult problem by invoking the member states' duty of co-operation as contained in Article 10 (Article 5) or the Treaty of Rome.[93]

4.3.3 The Law Governing EC Treaties

The Vienna Convention on the Law of Treaties does not apply to treaties concluded by the EC, since the EC is not a state. There is another convention that would cover those agreements, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which is closely modelled on the original Vienna Convention. However, it is not in force, and is unlikely to be ratified by the EC or any of its member states according to McLeod et al.[94]

The law that governs agreements concluded by the EC is mainly customary international law and general principles of law. The original Vienna convention is widely regarded as codifying customary treaty law as between states, and there is even authority for the proposition that it could be applied by way of analogy, *mutatis mutandis*, to treaties involving international organisations. Gaja quotes two such cases from the International Court of Justice.[95] If that position were correct, that would mean that something analogous to Article 46(1) in the first Vienna Convention[96] would apply to the EC as well. This means that the EC would be bound internationally also by provisions of treaties that lie outside its competence according to internal EC law. Thus it would be possible for third

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[93] *Ruling 1/78 (Re Draft Convention on the Physical Protection of Nuclear Materials)* [1978] ECR 2151, and *Opinion 2/91 (Re ILO Convention 170)* [1993] ECR I-1061.
[94] At 77.
[95] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep. 73 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep. 16.
[96] See note 73 above.

states to sue the EC for breach of parts of mixed agreements which lie outside the Community's competence. This would definitely make the situation a lot easier for third states. Furthermore, it would be consistent with the practice that developed within the framework of the GATT and is expected to continue in the WTO (see above). This position is also supported by McLeod and by ECJ practice.[97]

At the same time, the risk of that the EC concluding agreements on its own that are *ultra vires* are not great, since the EC can always request the opinion of the Court of Justice beforehand.[98] The importance of this to an organisation such as the EC that has only limited powers to conclude treaties can hardly be overestimated.

4.3.4 The EC and the WTO

The WTO is established by one of the mixed agreements referred to above. Since it was not clear exactly where the division of powers lay, an opinion was requested from the Court,[99] which said that many aspects of services and intellectual property were still among the residual powers of the states, although some were included in the common commercial policy. Thus many provisions of the General Agreement on Trade in Services and the Agreement (the GATS) on Trade-related Aspects of Intellectual Property (the TRIPS) lay outside Community competence.

The solution was as usual for the member states to "co-operate" and co-sign the WTO Agreement, and become Members of the WTO alongside the Community.[100]

[97] McLeod et al, at 129-132, Case 327/91 *France v. Commission* [1994] ECR I-3641. There is no doubt that this view is borne out by good sense. If the EC could not be held responsible for its treaty obligations just because they were *ultra vires* under internal EC law or because the disputed provision might be within member state competence, other states would be reluctant to enter into agreements with the Community, which would all but cripple its stature on the international scene. Besides, if the EC is found to be in violation of its treaty obligations when the real culprit is one of its member states, then the Community could simply "settle the score" by internal litigation under Articles 300(7) and 226 or 227 (228, 169 and170, respectively). The present state of the law makes it relatively easy to deal with the Community, and avoids unnecessary complications.

[98] Treaty of Rome, Article 300(6) (Article 228).

[99] *Opinion 1/94 (Re WTO Agreement)* [1994] ECR 5267.

[100] It is foreseen that within the organisation, the EC votes on matters within its competence (such as the common commercial policy) and the states on matters within theirs (such as questions regarding financial contributions). As far as the rest of the membership of the WTO is concerned, it does not make any difference, since the EC, when voting alone has "a number of votes equal to the number of [its] member States which are Members of the WTO" (WTO Agreement, Article IX:1). This also means that changes can take place in the internal division of powers within the EC without any votes being lost in the WTO.

It should be noted, however, that the Treaty of Rome has recently been amended. In Article 133 (113) a new paragraph 5 has been added, under which the Community may be empowered to conclude agreements on service related matters and intellectual property even in regarding aspects that are not covered by the common commercial policy. As Kapteyn and Verloren van Themaat point out, this means that more of the subject matters covered by the WTO are now potentially within the Community's competence, although some of them still remain within state competence.[101]

[101] Kapteyn and van Themaat, at 1387-1388.

5 “Substantially all the Trade” - A Legal Approach

5.1 General Remarks

5.1.1 Legal Scepticism in the CRTA

It became apparent already in Chapter 1 that there is a great deal of scepticism towards a legal approach to international trade law. The issue is no different as regards the problem of defining the words “substantially all the trade” in GATT Article XXIV:8(a) and (b). Thus, the representative of Hong Kong all but apologised for suggesting that the Vienna Convention on the Law of Treaties might be helpful in the interpretation of Article XXIV, and was quick to emphasise that “[h]is delegation was not advocating a rigid, legal approach”.[102] Others seem to fear that if the rules are *too clear* (which presumably might be the result of a rigid legal approach) then states would know exactly where the line is drawn between what is allowed and what is not. States would then have “incentives” to liberalise their trade to that minimum point, *but not further*.[103]

Still, the clearest statement of the reluctance of the CRTA officials to use any methods that they might suspect are legal is the following by the Australian representative: ”The Membership should avoid the difficulty of having a pseudo-legal inquiry into the meaning of [substantially all the trade] and instead *tackle the issue directly* [emphasis added].”[104] However, the “direct tackle” proposed by Australia has serious weaknesses, which shall be discussed more at length below. Other approaches have not been more successful.

5.1.2 Sources

The main source of law in this regard is of course the WTO Agreement itself. It is a treaty, so in order to construe its provisions, normal treaty interpretation could be a valuable tool. The representative of Hong Kong, China has indeed already attempted this, and nobody seemed to mind in spite of the sordid legal

[102] WT/REG/M/16, at paragraph 111.
[103] WT/REG/M/16, at paragraph 118 per the EC representative, and at paragraph120 per the American representative. However, as the representative of New Zealand said in WT/REG/M17 at paragraph 16, clear and high standards that are enforced are obviously preferable to the present situation, with vague and low standards that are not enforced.
[104] WT/REG/M/15 at paragraph 65.

connotations of the exercise.[105] The application of treaty law to the WTO Agreement will be further expounded below.

Other than that, sources are scarce.[106] There is no authoritative statement on the meaning of "substantially all the trade", and even if the CTG had dealt with the matter, they can only issue "recommendations"[107]. Arguably, only a decision by the DSB would be considered to be truly authoritative, but as of today, there is none.[108]

What is available seems to be limited to the records of meetings of the CRTA, where they have examined integration agreements and discussed various "legal" issues. It is true that the members of the CRTA rarely agree on anything, and even if they did, these documents are even less binding than recommendations by CTG.

Still, the documents have *some* value. First of all, they indicate what the parties (at least some of them) intended when they signed the WTO. This may be valuable when interpreting the terms of Article XXIV in the light of their "object and purpose".[109] In the few instances where there is agreement, especially, the common view could plausibly be said to be a statement of the law. Secondly, the documents could amount to "subsequent practice in the application of the treaty" according to Article 31(3)(b) of the Vienna Convention.[110] Thirdly, some of the contributions made by the various members of the CRTA could have *persuasive authority* to the extent that they make more sense than others do, although this clearly calls for an evaluation of their relative legal merits.

So, is it possible to say that the law can be found in these documents combined with applicable provisions of the WTO? Maybe. If nothing else, the documents will at least serve as an indication of what the problem areas are, for all it is worth.

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[105] The legal instrument used was the Vienna Convention on the Law of Treaties. Although it has not been ratified by all WTO Members, it is thought to codify existing customary law, as stated earlier.
[106] See note 10 above.
[107] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, paragraph 7.
[108] The reader is reminded that there are two procedures in force for the examination of regional trade arrangements: examination by CRTA and recommendations by CTG, or ordinary dispute settlement procedure, which ends with a decision by the DSB.
[109] Vienna Convention, Article 31(1).
[110] The representative of Hong Kong, China, proposes this view in WT/REG/M/16, at paragraphs 111 and 126, while the representative of the EC disagreed at paragraph 118.

5.2 The Issues

5.2.1 Narrow Versus Broad Construction

The first question to be answered is whether Article XXIV should be given a narrow or broad construction. Most views seem to favour the former, and thus the trade covered by an agreement should be as large as possible.[111] This is related to the view that Article XXIV is an exception to the general rule in Article I that Members of the WTO should not discriminate between other Members, but instead apply the same tariffs to all products, whatever WTO country they originate in.[112] In fact, the view has been put forward that approval of Article XXIV agreements could be compared to the granting of waivers under Article IX:3 of the WTO agreement.[113] This would call for a very strict interpretation of Article XXIV indeed.

The EC, mainly, has disputed some of these views. Firstly, the approval of a free trade agreement or a customs union could not be considered a "waiver". Waivers are sometimes granted to Members who are undisputedly in violation of their WTO obligations, but who can give convincing reasons why they nevertheless should be allowed to continue their offending practices. GATT, on the other hand, specifically welcomes regional integration agreements.[114] However, the EC has not explicitly said Article XXIV should be interpreted broadly, or refuted calls for a narrow construction. This, of course, does not amount to EC approval of the arguments made by the others. Nevertheless, it is an indication that the EC might not be prepared to go against the consensus among the other members of the CRTA, and it is submitted that this consensus carries a great deal of persuasive authority.[115]

5.2.2 Article XXIV of the GATT in Relation to its Purpose

A treaty should be construed "in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose."[116] Since the term "substantially all the trade" is ambiguous, context, object and purpose become more important. Of these, the latter shall be treated first here.

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[111] See for example WT/REG/W/19, at paragraph 3, per the representative of Hong Kong, China, WT/REG/M/16, at paragraph 124, per the representative of Norway, and WT/REG/M/17, at paragraph 17, per the representative of New Zealand.

[112] See 3.3.1.1.

[113] See note 36, above.

[114] WT/REG/M/17, at paragraph 24. The provision referred to would be Article XXIV:4.

[115] See 3.3.1-3.3.3. On any reading of the GATT, it would seem that the MFN principle *is* the rule, and that customs unions and free trade areas are an exception to that rule.

[116] Vienna Convention, Article 31(1).

The EC has disputed that the purpose of the WTO is the liberalisation of world trade. It may have been one of its "consequences" but was never its purpose and object in "purely juridical terms".[117]

It is difficult to make sense of this statement. First of all, it is doubtful whether a treaty needs to have a provision that says "The formal purpose and object of this treaty is…". A purpose can be inferred from its provisions. Secondly, there are in fact numerous instances in the WTO and its preamble where reference is made to the importance of free trade. The preamble talks about the desirability of "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations"; Article III:1 of the WTO Agreement charges the WTO with "further[ing] the objectives, of this Agreement and of the Multilateral Trade Agreements"; GATT Article XXIV:4 says that "the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories"; Article XXVIII *bis* talks about the necessity for "the substantial reduction of the general level of tariffs and other charges on imports and exports" since they "often constitute serious obstacles to trade". Even without these specific allusions to the importance of free trade, the history of the GATT could provide useful hints what the purpose of the agreement is.[118]

It seems it would be fair to say that the liberalisation of world trade is the object and purpose of WTO. That was also the view of the representative of Hong Kong, China, to whom the representative of the EC had responded so vigorously.[119]

5.2.3 The Context of the "Substantially-All-the-Trade" Requirement

A related issue is that of the relationship of Article XXIV:8 with other provisions, particularly paragraph 4. Does that provision serve as a "preamble" for paragraphs 5-8, or does it in itself contain requirements that a customs union and a free trade area should fulfil?[120]

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[117] WT/REG/M/16, at paragraph 118.

[118] See Chapter 2. Of course, there is a number of provisions in the GATT/WTO that allow safeguard measures and a number of protectionist practices. In my view, these provisions indicate that there are inevitable domestic concerns that need to be taken into account, and also reflect the will of the parties not to proceed too quickly. They do not, however, detract from the ultimate goal of liberalising world trade (see 3.1).

[119] WT/REG/M16, at paragraph 111.

[120] The Understanding on the Interpretation of Article XXIV of the General Agreement of Tariffs and Trade 1994 does not clarify matters. It merely says in paragraph 1 that Article XXIV agreements "must satisfy, *inter alia*, the provisions of paragraphs 5,6,7 and 8 of that Article." However, the fact that Article XXIV:4 is virtually reproduced in the preamble to the

In the context of CRTA's examination of regional integration agreements,[121] the view has been put forward that if trade figures show that both intra-regional and external trade has increased, the agreement is in conformity with Article XXIV:4. No further analysis of paragraphs 5-8 would be necessary.[122] However, members of the CRTA have insisted on further information, so obviously, it is not enough. It is true though, that many feel that actual increases in intra-regional as well as external trade should be taken into account when assessing agreements under Article XXIV.[123]

The opposite view also has its supporters, however. Under this interpretation, the paragraph is but a preamble to paragraphs 5-8, which might even mean that an agreement that is consistent with the latter paragraphs is *ipso facto* consistent with the former.[124]

The practice of the CRTA seems to be in cautious support of this latter view. Although questions put to the parties to agreements under review do include questions on actual increase of trade,[125] most queries regard more concrete issues (see below).

From a legal perspective, the better view seems to be to choose the "preamble approach". Trade figures go up and down for a number of reasons besides tariffs and non-tariff barriers, and should only be used with great caution when assessing agreements under Article XXIV.

Article XXIV:4 can still, however, provide a useful tool for the interpretation of paragraphs 5-8.[126]

Understanding indicates that the provision is not meant to justiciable, but rather is meant to provide a background to the operative provisions in paragraphs 5-8.

[121] Arguably, the documents on examination of various agreements carry more "legal" weight than documents on discussion in the CRTA.

[122] WT/REG22/M/2, at paragraph 5, per the representative of Turkey, WT/REG11/M/2, WT/REG33/M/2, WT/REG41/M/2 and WT/REG42/M/2, at paragraph 8, per the representative of the Czech Republic.

[123] WT/REG/M/19, at paragraph 116, per the Indian representative, WT/REG11/M/3, WT/REG33/M/3, WT/REG41/M/3 and WT/REG42/M/3, at paragraph 27 per the Australian representative.

[124] WT/REG/W/16 (Note by the Secretariat), at paragraph 6.

[125] WT/REG11/M/2, WT/REG33/M/2, WT/REG41/M/2 and WT/REG42/M/2, at paragraph 56. On a question put by the Japanese representative regarding whether there is an actual increase in trade between the parties to the agreement and third parties, the Slovenian representative said yes. Strictly speaking, the question concerns external trade, but if actual trade figures are considered important in evaluating the barriers raised against third countries, then surely they have a bearing on the issue of whether trade has been liberalised within the free trade area or the customs union.

[126] This approach is suggested by the representative of Norway in WT/REG/M/16 at paragraph 124. Furthermore, in WT/REG11/M/3, WT/REG33/M/3, WT/REG41/M/3 and WT/REG42/M/3, at paragraph 28, the EC representative says that information on actual

Something needs to be said about the "duties and other restrictive regulations of commerce" that should be eliminated on "substantially all the trade". These obviously include tariffs, but specifically exclude quantitative restrictions and a number of other trade barriers. The idea seems to be that a member of a free trade area can discriminate against non-members by imposing customs duties on goods originating in their territories, but when the same member imposes quantitative restrictions, the MFN principle applies. Thus, the restrictions have to be imposed on other members of the free trade area as well as other countries. In short, some restrictions must be taken away in their entirety, while some must remain. In fact, in one case the representative of Hong Kong, China, argued that safeguard measures under Article XIX could not be applied other than on an MFN basis by members of regional integration arrangements. This in spite of the fact that Article XIX is not among those enumerated in Article XXIV:8(i)![127]

The logic of the view of the Hong Kong representative is not immediately apparent. If the idea is that regional integration should not be allowed unless it is complete, then surely the parties to such agreements should be encouraged to abolish various safeguard measures as between themselves. At any rate, this should be applied to measures that are not among those that are enumerated in paragraphs 8(i) and 8(ii). Thus was the view of the representative of Australia,[128] and the Canadian representative drew the CRTA's attention to the fact that anti-dumping measures had been abolished as between the parties to the Canada-Chile Free Trade Agreement. This went towards showing that "other restricting regulations of commerce" had been eliminated, according to the Canadians.[129]

Then again, why stop there? Arguably, there is no *specific prohibition* against applying the restrictive measures enumerated in paragraph 8 other than on an MFN basis. In light of the provisions of paragraph 4, should not the parties be allowed to abolish as between themselves even those measures that are taken pursuant to the Articles enumerated within brackets in paragraph 8? After all, paragraph 4 says that the purpose of regional integration agreements "should be to facilitate trade between the constituent territories".[130]

It is true that a literal interpretation of the provision may yield a different result (see above, 3.3.3.2). Nevertheless, it is only when members of a customs union are allowed to abolish *all* restrictive regulations of commerce as between themselves that a customs union is the same as a state, in economic terms. This

trade flows is not important. That view is supported by the representative of Switzerland in the following paragraph.

[127] WT/REG/W19, at paragraph 7.

[128] WT/REG/M/13, at paragraph 9.

[129] WT/REG38/M/1, at paragraph 3. Anti-dumping duties are regulated in GATT Article VI, and are not among the exceptions to the "other restrictive regulations of commerce" enumerated in Article XXIV:8, sub-paragraphs (i) and (ii).

[130] This is an example of how Article XXIV:4 could be used as an aid to interpretation.

was, after all, cited as one of the reasons why customs unions should be allowed in the first place.

This view may be too progressive to be accepted by the WTO Members. There is some support for it, however. The Hong Kong, China representative once wondered "whether harmonization of sanitary and phytosanitary regulations were *required* by virtue of Article XXIV:8 [emphasis added]".[131] Now, those regulations are covered by GATT Article XX, which is one of the Articles enumerated in Article XXIV:8. Is the Hong Kong delegate then trying to say that on their reading, safeguard measures under the enumerated Articles *may*, but do not *have to*, be eliminated between members of regional integration agreements? This obviously contradicts their view in WT/REG/W/19 above, but it makes a lot more sense.

The point of all this is that "substantially all the trade" should be understood in conjunction with the "duties and other restrictive regulations of commerce" that should be eliminated. The more of those that are eliminated, the better it is, regardless of whether they are included among the exceptions within brackets in Article XXIV:8. In fact, in some cases there could even be reasons to be slightly more lenient on the "substantially all the trade" requirement if the elimination of duties and restrictive regulations is complete on the trade that is covered.

5.2.4 The Quantitative versus the Qualitative Approach

Traditionally, the attempts at defining "substantially all the trade" have evolved around two basic approaches: the quantitative and the qualitative approaches. Of these two, the first to emerge was the quantitative approach, which was favoured by the EC when the treaty of Rome was reviewed under the old GATT procedures. Thus, a free trade agreement should be considered consistent with Article XXIV:8 when the volume of liberalised trade amounted to 80 % of total trade.[132]

The shortcomings of this approach lie mainly in the fact that it would make it possible for the parties to exclude important sectors of their economy from the agreement, as long as the trade in these sectors did not amount to more than 20 %. This has lead a majority of the members of the CRTA to conclude that there has to be a qualitative aspect as well to the requirement. In particular, the trade covered should include all sectors of the relevant economies, or at least all major sectors.[133] There are plenty of instances in the official documents where members have expressed their support for this view.[134]

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[131] WT/REG/M/17, at paragraph 14.

[132] WT/REG/W/18, at paragraph 6, referring back to GATT document L/778.

[133] This view was expressed when the Stockholm convention was under review in 1960. The percentage of trade covered was as high as 90 %, but the exclusion of the agricultural sectors still made some doubt the consistency of the agreement with Article XXIV.

The sector that is most commonly excluded to a greater or lesser extent is the agricultural sector. Recently the European Communities – Turkey agreement has come in for some criticism for allegedly not covering trade in agricultural products,[135] and in the Central European Free Trade Agreement some duties on agricultural products were lower than MFN rates but higher than zero. In the first case, the counter-argument was that the agricultural sector *was* covered, or at least that it would be covered further down the line,[136] and in the second case, the argument was put forward that Article XXIV allows tariffs that were lower than MFN, but higher than zero.[137] In no case was it argued that it was consistent with WTO rules to *exclude* one sector, such as agriculture.

Does this mean there is some sort of consensus on this point? In any case, it seems no one would seriously argue that sectors *can* be excluded from the trade liberalised under Article XXIV. The statements made by the members of the CRTA interpreted in what is arguably the purpose of the WTO (i.e. liberalisation of world trade) supports the proposition that paragraph 8 of GATT Article XXIV does not allow for one sector to be excluded. This could bring with it the very protectionist effects that the rules were originally designed to prevent.[138]

Another way of safeguarding the qualitative aspects of the "substantially all the trade" requirement is via the Australian "direct tackle". The idea of this is to look at the number of categories of goods covered and tick them off on a list of goods traded among the members of the WTO. The list of goods proposed was the Harmonised System, which is originally intended for harmonisation of customs classification, but the Australian representative thought that it might be useful in this context as well. Thus, the suggestion was that an agreement would be deemed compatible with Article XXIV:8 if it covered 95 % of products as categorised in the Harmonised System.[139]

This view is consistent with what is arguably the purpose of the stringent requirements of that Article. If states were allowed selectively to liberalise some sectors, while protecting others, the advances towards the goal of free world trade would be severely stunted (see 3.3.3.2).

[134] WT/REG/M/16, at paragraph 111, per the representative of Hong Kong, China, WT/REG/M/17, at paragraph 17 per the representative of New Zealand and WT/REG/M/15 at paragraph 66 per the U.S. representative.

[135] WT/REG22/M/2, at paragraph 4.

[136] WT/REG22/M/2, at paragraphs 8 and 15.

[137] WT/REG11/M/2, WT/REG33/M/2, WT/REG41/M/2 and WT/REG42/M/2, at paragraph 14, per the European Community representative.

[138] See 3.3.3.2 above.

[139] The Harmonised System contains an extensive list of goods subdivided into categories and sub-categories, each preceded by a number. The fewer digits the number contains, the rougher the classification, and the more digits, the more precise it is. The Australian proposal referred to 95 % of the 6-digit tariff lines. See WT/REG/W/22, at paragraph 10.

The reaction of the other members of the CRTA was mixed. The EC representative made it clear that "his delegation did not support it",[140] and there has been scepticism from others as well.[141] The weakness of the approach was put succinctly by the EC representative. He explained that in some free trade agreements in force, about 50 % of the products covered in the six-digit tariff-lines made up about 80 % of the trade. Would it be realistic to require that the parties amend their agreement, in spite of its fairly extensive coverage?

Nevertheless, the idea has caught on. In examinations of agreements under Article XXIV, questions have often been put to the parties regarding tariff-line coverage, and adequate answers have been given by the parties to the agreements under review.[142]

More importantly, there seems to be consensus now that both quantitative and qualitative aspects are important.[143] This makes sense, since any inflexible, one-eyed application of either quantitative of qualitative criteria would inevitably lead to gigantic legal loopholes, which could be used for whatever purposes the Members of the WTO might need them for.

This does not mean that the legal situation becomes unclear. Courts have always striven to take all relevant criteria into account when deciding cases. This does not necessarily make for unprincipled decision-making or legal uncertainty.

5.2.5 State Practice

The EC has often emphasised the need for interpreting Article XXIV in the light of subsequent state practice.[144] This has consistently been rejected by some other members of the CRTA, such as Hong Kong, China, and the United States.[145]

This latter view is certainly the better one. Current state practice is probably a better indication of slack enforcement of the rules than proof of what the Member States perceive the content of those rules to be.

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[140] WT/REG/M/16, at paragraph 118.

[141] See, for example, WT/REG/M/15 at paragraph 67 per the Brazilian representative.

[142] See, for example, WT/REG11/M/2, WT/REG33/M/2, WT/REG41/M/2 and WT/REG42/M/2, at paragraph 6, per the representative of Canada, and the following paragraph, per the U.S. representative. The response from the Czech Republic is at paragraph 9. In WT/REG38/M/1, at paragraph 3, the Canadian representative gives information regarding the tariff line coverage of the Canada-Chile Agreement.

[143] See, for example, WT/REG/W/18, at paragraph12, per the Australian representative, WT/REG/M/15, at paragraph 66, per the U.S. representative, WT/REG/M/16 at paragraphs 111, 122 and 127 per the representatives of Hong Kong, China, Hungary and Japan, respectively.

[144] See for example WT/REG22/M/2, at paragraph l5, and WT/REG/M/16, at paragraph 118.

[145] WT/REG/W/19, at paragraphs 4 and 5 per the representative of Hong Kong, China and WT/REG/M/16, and paragraphs 111 and 120 per the representatives of Hong Kong and the U.S., respectively.

Furthermore, it was indicated above that the rationale behind the stringent rules in Article XXIV is to limit the number of regional integration agreements. That was to be achieved by introducing conditions that could only be met by states that were "serious" about free trade.[146] If that view is correct, then the current complex web of myriads of criss-crossing free trade agreements may be an indication that enforcement of the rules has collapsed, to the extent they were ever enforced in the first place.

5.2.6 Burden of Proof

Some members of the CRTA have addressed the issue of what party should have the burden of proof in proceedings before the Committee. The idea seems to be that either the members of the regional integration agreement or the party invoking the provision should have to "prove" consistency or inconsistency with Article XXIV.[147]

This line of thinking is essentially flawed. Questions of proof arise when there is a dispute as to what the facts are, and sometimes a tribunal would solve such problems by imposing a burden of proof on either of the parties before it. However, to the best of my knowledge, no such issues have ever come before the CRTA. The parties to the agreement(s) under review submit information to the CRTA regarding tariffs, trade statistics and whatever else the Committee might enquire about.[148] The accuracy of this information is rarely, if ever, in dispute, which means that there are no problems ascertaining what the relevant facts are. Consequently, there has so far been no need for any rules on burden of proof.

The problem is rather drawing the right conclusions from these facts. This problem could more properly be characterised as a question of law, rather than a question of fact. It is for the relevant tribunal to know the law according the principle of *jura novit curia*.

[146] 3.3.3.2.
[147] See, for example, the discussion in WT/REG/M/16 at paragraphs 111 to 127.
[148] Article XXIV:7(a) seems to support the view that the parties have a duty to provide the CRTA with the information necessary for the Committee to arrive at a conclusion. The procedure, then, is one where the CRTA questions the parties, requests information from them and discusses the issues internally. Afterwards, a report is made to the CTG. The CRTA may not be aware of it, but this is what a lawyer would call inquisitorial procedure.

6 Conclusions

It goes without saying that the investigation is incomplete. To begin with, the way in which other provisions of the WTO have been interpreted might have a bearing on how Article XXIV should be construed. For example, state practice might have been one of the most important considerations when assessing the content of other trade rules, and if so, state practice should carry more weight in the Article XXIV context. Nevertheless, a number of conclusions can be drawn from the investigation.

6.1 Law or Economics?

The analysis above shows that GATT Article XXIV:8 is perfectly conducive to legal construction. There are several issues in the context of that Article that involve questions of legal principle and "drawing lines" between what is allowed and what is not. It is true, perhaps, that economics plays an important part in the construction of provisions of trade agreements, and that any tribunal charged with applying them to specific situations should be composed of both layers and economists. Nevertheless, as in most courts of law, lawyers would have to make up the majority.

These conclusions can be taken a step further. Arguably, not only *can* Article XXIV:8 be the object of legal construction, in fact it makes no sense without it. Economists seem preoccupied in every case with finding some ideal solution that simply does not exist. Lawyers, on the other hand, recognise the need for compromise. When an ambiguous provision such as Article XXIV:8 is to be given a more defined substantive content, lawyers are capable of hammering out rules case by case, well aware that it is better to have rules that *usually* lead to the desired result than to try to find perfect solutions that do not exist. Judicial decision making may be categorical, and in an instant case, it may even be regarded as unfair, but the alternative to clear rules of general application is to have no rules at all.

6.2 The GATT/WTO in an International Law Context

Perhaps there are other reasons why lawyers have been barred (no pun intended) from interpreting Article XXIV and other provisions of the WTO, besides their alleged incompetence in economic matters. Possibly, these reasons can be traced from Chapters 1-3 above, rather than from Chapter 5.

Under traditional international law, each state is sovereign and virtually free to do as it chooses. This was discussed briefly in Chapter 2.2, but here, an attempt at drawing conclusions from the doctrine of the nation-state will be made.

The only way a state can limit its more or less God-given sovereignty is by concluding treaties with other nation states. Now, limiting one's sovereignty is not something that is done lightly, so already we can see that few states would have an incentive to do so. Add to this the fact that different states often have widely differing views on what is right and what is wrong, and what policies should be pursued in any given context. Any contract, treaties included, is dependent on there being some sort of agreement between the parties, and without this common ground, there can be no agreements of any kind. Jealousy of its sovereign powers and its freedom combined with lack common interests with other states combine to make it something of a miracle that treaties are concluded in the first place.

When that happens, it seems to be either because the subject matter to be regulated is uncontroversial, or sometimes because all parties to the agreement realise that it is strictly necessary. Agree or perish, more or less. The UN Charter and the GATT fall in this second category, since it took the worst depression the world had ever seen and the bloodiest war in history to make states negotiate and sign these agreements.

Even when agreement is reached, narrow national interests often make sure the provisions are vague enough to accommodate as many as possible of the conflicting and opposing views of the parties to the agreements, and as a rule, and its provisions often reflect the least common denominator. By the same token, states are wary of creating international courts to settle their international disputes. Tribunals have a tendency to arrive at conclusions that possibly make sense, but are in conflict with the view of at least one of the states parties to the relevant agreement. The only proper international court, the ICJ in The Hague can only bind the parties to the dispute, which means that there can be no unwanted and highly undesired international "common law".

Even where there are courts or other dispute resolution mechanisms, states are often reluctant to use them. Some say that is because it is considered a hostile act to sue an other state, but that argument is not completely convincing. It is hardly an indication of a co-operative spirit to sue one's business partners either, but that does not mean that domestic courts are out of work. The reason why states sometimes choose not to avail themselves of dispute resolution mechanisms is rather that they do not want matters to be settled *legally.* A legal solution means that once comfortably ambiguous rules are given a clearer meaning. Now, if the parties went to great lengths to phrase the provisions in such a way as to make everybody happy, regardless of their disagreements in real life, they do not want a tribunal to ruin that. Even a court decision that is only binding as between the parties would have a bit too much authority for the resolution of future conflicts.

Especially, even complainant states do not want clarity added to rules that they themselves might want to interpret flexibly in the future. Against this backdrop, the scepticism towards lawyers on the international arena becomes more understandable.

6.3 Final Remarks

As far as Article XXIV is concerned, the WTO membership does not want clear rules. In that particular context, states want to retain maximum freedom of action. It may be because regional integration agreements are of a highly political nature or for some other reason, but the fact remains that nobody seems to want Article XXIV to be given a clearer substantive meaning. Not only is this conclusion consistent with what is known about the mechanics of international law. It is further borne out by the rather half-hearted attempts in the CRTA to clarify the rules and the fact that WTO Members do not use other dispute settlement procedures at their disposal to enforce their rights under Article XXIV.

GATT Article XXIV is "enforced" simply via the notification procedure under paragraph 7(a) and the discussions in the CRTA. It is not a very efficient enforcement procedure, but maybe the publicity in the Committee is at least efficient enough to prevent the most blatant violations of Article XXIV. It seems that states are in fact quite happy with that.

Supplement A: GATT Articles I and XXIV. Excerpts

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports of exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. (...)

Article XXIV

Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

(…)

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the

formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in sub-paragraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

(…)

7. (*a*) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and

XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories. (…)

Supplement B: Schedule of Annexes to the WTO

ANNEX 1

ANNEX 1A: MULTILATERAL AGREEMENTS ON TRADE IN General Agreement on Tariffs and Trade 1994

- General Agreement on Tariffs and Trade 1947
- Understanding on the Interpretation of Article II:l(b) of the General Agreement on Tariffs and Trade 1994
- Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994
- Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994
- Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994
- Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994
- Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994
- Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin
- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

ANNEX 1B: GENERAL AGREEMENT ON TRADE IN SERVICES

ANNEX 1C: AGREEMENT ON TRADE-RELATED APSECTS OF INTELLECTUAL PROPERTY RIGHTS

ANNEX 2: UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

ANNEX 3: TRADE POLICY REVIEW MECHANISM

ANNEX 4: PLURIALATERAL TRADE AGREEMENTS

ANNEX 4(a) AGREEMENT ON TRADE IN CIVIL AIRCRAFT

ANNEX 4(b) AGREEMENT ON GOVERNMENT PROCUREMENT

ANNEX 4(c) INTERNATIONAL DAIRY AGREEMENT

ANNEX 4(d) INTERNATIONAL BOVINE MEAT AGREEMENT

- Decision on Measures in Favour of Least-Developed Countries
- Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking
- Decision on Notification Procedures
- Declaration on the Relationship of the World Trade Organization with the International Monetary Fund

- Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries
- Decision on Notification of First Integration under Article 2.6 of the Agreement on Textiles and Clothing
- Decision on Proposed Understanding on WTO-ISO Standards Information System
- Decision on Review of the ISO/IEC Information Centre Publication
- Decision on Anti-Circumvention
- Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures
- Decision Regarding Cases where Customs Administrations have Reasons to Doubt the Truth or Accuracy of the Declared Value
- Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires
- Decision on Institutional Arrangements for the General Agreement on Trade in Services
- Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services
- Decision on Trade in Services and the Environment
- Decision on Negotiations on Movement of Natural Persons
- Decision on Financial Services
- Decision on Negotiations on Maritime Transport Services
- Decision on Negotiations on Basic Telecommunications
- Decision on Professional Services
- Decision on Accession to the Agreement on Government Procurement
- Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes

UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

Supplement C: Treaty of Rome. Articles 10, 133, 300 and 310. Excerpts

Article 10 (Article 5)

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this treaty.

Article 133 (Article 113)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as thy are not covered by these paragraphs.

Article 300 (Article 228)

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commissions to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases where the first subparagraph of paragraph 2 provides that the Council shall act unanimously.

2. Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.

(…)

3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement cover a field for which the procedure referred to in 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time-limit which the Council may lay down according to the urgency or the matter. In the absence of an opinion within that time-limit, the Council may act.

(…)

6. The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only n accordance with Article N of the Treaty on European Union.

7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.

Article 310 (Article 238)

The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Supplement D: The Constitution of the Commonwealth of Australia. Excerpts

51. Legislative powers of the Parliament The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

(i.) Trade and commerce with other countries, and among the States:
(ii.) Taxation; but not so as to discriminate between the States:
(…)
(vi.) The naval and military defence of the Commonwealth…
(…)
(x.) Fisheries in Australian waters beyond territorial limits:
(…)
(xii.) Currency, coinage, and legal tender:
(…)
(xxix.) External affairs:

52. Exclusive powers of the Parliament The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to –

(…)
(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament. [This refers, *inter alia*, to s 90 below.]

90. Exclusive power over customs, excise, and bounties On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. (…)

109. Inconsistency of laws When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

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