

THE EUROPEAN COMMON MARKET AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A STUDY IN COMPATIBILITY

JAMES JAY ALLEN*

When the European Common Market¹ first came into existence, it attracted world-wide publicity. Amid praise from all sides, and particularly from the United States, came an increasing flood of apprehension concerning the effect this new Community might have on patterns of world trade. As the first transitional steps provided for by the Rome Treaty were put into effect, the anxiety increased. That the formation of the European Economic Community (E.E.C.) would eventually produce significant economic and political changes seemed evident: some are already observable. The formation of the European Free Trade Area (E.F.T.A.) was a direct result of the putting into effect of the Rome Treaty. This grouping, brought into being more as a bargaining counter to the Common Market than as a serious attempt to construct a free-trade area, will seek progressively closer identification with the E.E.C. Greece has already joined the Common Market and Great Britain is now giving favorable consideration to doing so; many consider her membership only a matter of time. Such a step would have far-reaching ramifications for the British Commonwealth. Other members of the E.F.T.A. and the Organization for Economic Cooperation and Development (O.E.C.D.) can be expected to follow suit. In addition, plans for customs unions and free-trade areas are blossoming forth around the globe. How such groupings will relate to the General Agreement on Tariffs and Trade (G.A.T.T.), which makes provision for customs unions and free-trade areas under certain conditions, will also have widespread repercussions, especially with regard to the world's newly developed countries.

The General Agreement on Tariffs and Trade² is a multilateral trade agreement whose members, called "contracting parties," include all of the free world's major trading nations.³ The agreement consists of a schedule of tariff commitments, a group of common rules of trade, and an organization to promote negotiations, to

* B.A. 1953, Cornell University; LL.B., LL.M. 1958, Georgetown University. Attorney, Office of the Assistant General Counsel for International Affairs, Department of Defense. Member of the District of Columbia bar. Author, *THE EUROPEAN COMMON MARKET AND GATT* (1961), on which the present article is, in part, based.

The views expressed in this article are those of the writer, and do not purport to be those of the Department of Defense.

¹ The Treaty establishing the European Economic Community and connected documents are found in a publication of that title published by the Secretariat of the Interim Committee for the Common Market and European Atomic Energy Community (Euratom), Brussels in 1957.

² This multilateral agreement was signed on October 30, 1947. For the text of the agreement, see 61 Stat. pt. 5, at 6 *et seq.* (1947), T.I.A.S. No. 1700, as renewed, *id.* No. 2886.

³ These nations jointly account for over 80% of world trade.

settle disputes, and to administer the provisions of the G.A.T.T.⁴ The code of conduct set forth in the general trade provisions of the G.A.T.T. was created to protect the value of tariff concessions made, to reduce trade restrictions and controls other than tariffs, and to secure the largest possible observance of the principle of nondiscrimination in trade matters.⁵ Prior to the Fall of 1960, three rounds of tariff negotiations⁶ between the contracting parties resulted in the reduction or binding of the tariffs on over 59,000 items, affecting well over half the total of world trade.⁷

One of the chief underlying principles of the General Agreement on Tariffs and Trade is the most-favored-nation doctrine. Under article one, a contracting party must unconditionally extend to all contracting parties the tariff and other trade concessions granted to any country. However, article twenty-four expressly permits a customs union to exist and grants an exception to the most-favored-nation rule as long as certain requirements are fulfilled. This derogation⁸ of article one was provided because the G.A.T.T. signatories believed that the propensity of customs unions to liberalize trade, both within the customs area and eventually for the whole trading world, outweighed the initial disadvantage of depriving the other contracting parties of the benefit of the trade reductions made between the members of the union. With regard to the contracting parties of the G.A.T.T., therefore, it is of material importance that the Common Market adhere closely to the conditions set out in article twenty-four. The purpose of this paper is to analyze in legal terms the compatibility of the E.E.C. Treaty with the provisions of the G.A.T.T.⁹

Article XXIV(7) of the G.A.T.T. lays down the procedure by which the compatibility of an aspiring customs union is to be tested and approved.¹⁰ Countries seeking to form such a union shall, states this paragraph, promptly notify the contracting parties and make available such information as will enable them to decide whether the proposed agreement is "likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to agreement or that such period is . . . a reasonable one." If these results are not likely, the parties to such an agreement are forbidden from putting it into force, or main-

⁴ For a detailed and thorough analysis of G.A.T.T., see SEYID MUHAMMAD, *THE LEGAL FRAMEWORK OF WORLD TRADE* (1958).

⁵ For a very readable, but less exhaustive account of G.A.T.T. organization and operation, see UNITED STATES COUNCIL, *INTERNATIONAL CHAMBER OF COMMERCE, G.A.T.T.: AN ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (1955).

⁶ These negotiations were held at Geneva in 1947, Annecy in 1949, and Torquay in 1950-1951.

⁷ UNITED STATES COUNCIL, *op. cit. supra* note 5, at 17.

⁸ Since article twenty-four does represent a derogation of the general principles embodied in article one, it "should be interpreted strictly and construed according to its wording to obtain its clear intent and purpose." G.A.T.T., *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 104, Appendix A (Note submitted by the Delegation of Ceylon) (6th Supp. 1958) [hereinafter cited as G.A.T.T., B.I.S.D.].

⁹ No attempt is made here to analyze the effects of the E.E.C. in economic terms.

¹⁰ All of the members of the E.E.C.—Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands—are also contracting parties to G.A.T.T. Of course, if all members were not also members of G.A.T.T., they could form customs unions, free-trade areas, or even preferential systems with no interference from the G.A.T.T. contracting parties. If only some of the prospective members of the grouping were G.A.T.T. members, as is the case with the Rome Treaty Overseas Territories, a special situation would arise which would require different treatment. With respect to this problem, see MUHAMMAD, *op. cit. supra* note 4, at 249-50.

taining it in effect, as the case may be, unless they are prepared to modify it in accordance with recommendations made by the contracting parties.

The contracting parties first dealt with the E.E.C. Treaty at G.A.T.T.'s eleventh Session late in 1956, when the Community was still in the negotiating stages.¹¹ Between the eleventh and twelfth Sessions, an intersessional committee was appointed by the contracting parties to meet at Geneva with the express purpose of exploring the European Economic Community agreement.¹² As a result of the preparatory work completed at this conference, the contracting parties launched into a full scale discussion of legal compatibility at G.A.T.T.'s twelfth Session. However, because the transitional provisions of the E.E.C. Treaty tend to paint purposes and objectives in broad, sweeping strokes, yet leaving the details of implementation for future action, it was not possible to reach a definitive decision until such implementing action was taken. Most of the members of the G.A.T.T. Sub-Group felt that the Rome Treaty plan for the elimination of internal trade barriers was fairly detailed and complete.¹³ On the other hand, the contracting parties were not in a position to judge the consistency of the E.E.C. external tariff with the General Agreement, because the common level of duties had not yet been published.¹⁴ And, although not satisfied that the Rome Treaty provisions might not entail action inconsistent with the General Agreement, the Sub-Group noted that the provisions with respect to quantitative restrictions at least were not mandatory in the external sphere and imposed on Community members no obligation to take action incompatible with the G.A.T.T. However, since some uncertainties in the implementation of these provisions existed, the Sub-Group believed that the six E.E.C. Member States should be subject to consultation procedures as would any other G.A.T.T. member.¹⁵

The contracting parties were equally indecisive in the area of agriculture. Due to the large area of discretion left to the institutions of the Member States and the lack of a sufficiently precise plan showing how the agricultural provisions of the Rome Treaty would be applied, both in regard to the trade of third countries with members of the Community, and in regard to the removal of trade barriers between the Member States, the majority of the G.A.T.T. Sub-Group "decided that it was not able to determine either that the agricultural provisions of the Rome Treaty or their implementation would be consistent with the provisions of the General Agreement."¹⁶ Thus, although "the particular measures envisaged under the Treaty carried a strong presumption of increased external barriers and a substitution of new internal barriers in place of existing tariffs and other measures,"¹⁷ it was considered

¹¹ See *European Customs Union and Free Trade Area*, 35 DEP'T STATE BULL. 896 (1956).

¹² See Corse, *The Common Market and the GATT*, 36 *id.* 863.

¹³ G.A.T.T., B.I.S.D. at 81.

¹⁴ *Id.* at 76. The rates of the products on List F were determined by negotiation and not by application of the arithmetical average, and were, therefore, not then available for inspection. E.E.C. Treaty art. 19(4).

¹⁵ G.A.T.T., B.I.S.D. at 81.

¹⁶ *Id.* at 88.

¹⁷ *Ibid.*

proper to take action under article XXIV(7) of the G.A.T.T. at a later stage.¹⁸ In the meantime, it was recommended that the Committee set up suitable machinery "to follow and consider together with the Six the measures to be taken in the course of establishing the common agricultural policy and organization and the relationship of these measures with the provisions of the General Agreement."¹⁹

No definite conclusions were reached with regard to the Association of the Overseas Territories and its compatibility with the General Agreement. Upon the request of a number of delegations who wanted to examine the practical problems of the arrangement and its external effects on a product-by-product basis, the G.A.T.T. Sub-Group recommended an investigation dealing with individual products.²⁰

One hopeful indication that the United States and other non-Common Market countries might be able to avoid the trade-diverting effects of the Community external common tariff, is set out in E.E.C. Treaty article eighteen, where the Member States²¹

declare their willingness to contribute to the development of international commerce and the reduction of barriers to trade by entering into reciprocal and mutually advantageous arrangements directed to the reduction of customs duties below the general level which they could claim as a result of the establishment of a customs union between themselves.

There can be little doubt that tariff concessions agreed upon as a result of such negotiations would ease the adjustment which the United States and all countries would be compelled to make as the internal trade barriers of the common market were gradually removed and the outer duties—remolded into a common customs tariff—remained approximately the same. However, this method would avail the United States nothing if the executive department of the American Government were not authorized by legislation to enter into reciprocal tariff negotiations.²² In gaining the extension of the Trade Agreements Act²³ for the eleventh time since 1934,²⁴ this time for an unprecedented four years (June 30, 1958, through June 30, 1962), it is interesting to note that the Department of State, in presenting its case, wielded the club of possible Common Market discrimination against the United States to good advantage in easing the renewal of the Act through a reluctant Congress.²⁵

¹⁸ This paragraph lays down certain requirements that an incipient customs union must fulfill, and the contracting parties must oversee, before the grouping is regularized with respect to the G.A.T.T.

¹⁹ G.A.T.T., B.I.S.D. at 88.

²⁰ *Id.* at 102.

²¹ The representative of the E.E.C. at the twelfth Session of the G.A.T.T. confirmed this intention. G.A.T.T., B.I.S.D. at 74.

²² Such authorizing legislation is necessary because under the United States Constitution, the Congress "shall have the power to regulate commerce with foreign nations." U.S. CONST. art. I, § 8, cl. 3.

²³ 46 Stat. 696 (1930), as added by 48 Stat. 943 (1934), as amended, 19 U.S.C. § 1351 (1958).

²⁴ The task of extending the reciprocal trade agreements legislation has never been easy, principally because local interests, exerting powerful pressure through their elected representatives, are loath to permit a volume of imports that would compete to their disadvantage on the home market. Even the latest extension (1958), states that the Act shall not be construed as either approval or disapproval of the G.A.T.T. 72 Stat. 680, 19 U.S.C. § 1351(a)(1)(A) (1958).

²⁵ See, e.g., Secretary of State Dulles' statement before the Senate Committee on Finance, *Vital*

Under article twenty-four another step is available to non-Common Market members who are contracting parties of the G.A.T.T. to ameliorate the effect of the Community's common external tariff. If a duty, raised by a member of the customs union in order to conform to the common level of external tariffs of the Community, should be inconsistent with article two²⁶ of the General Agreement (that is, a duty previously "bound" or reduced in tariff negotiations already held by the G.A.T.T.), the injured contracting parties can seek compensatory adjustment under G.A.T.T. article twenty-eight. If such negotiations fail to achieve a satisfactory adjustment, the contracting party is entitled to withdraw or modify the concession originally given. Such negotiations under article XXIV(6) have been under way since the fall of 1960. The fourth general round of tariff negotiations began in the fall of 1960. Still to come—and of material significance to G.A.T.T. members—are negotiations with the Common Market as a whole to seek reductions of the common external tariff on products of importance to non-members of the the Community. After this negotiation, the contracting parties will be in a position to take up the various aspects of compatibility of the Rome Treaty to the General Agreement pursuant to article XXIV(7).

In discussing the question of compatibility, five major and pertinent areas of the E.E.C. Treaty must be examined: the internal characteristics of the common market, the common external tariff, quantitative restrictions, the agricultural provisions, and finally, the Association of the Overseas Territories.

I

INTERNAL OPERATIONS OF THE EUROPEAN COMMON MARKET

Incompatibility must be based either on a Treaty provision of the customs union which absolutely requires certain action to be taken that would violate the G.A.T.T., or on a course of action taken under a permissive provision of the Treaty but which is inconsistent with provisions of the General Agreement. The transition period for the progressive establishment of the Common Market is twelve years, divided into three stages of four years each.²⁷ All stages of the transition period may be extended by a "decision of the Council acting by means of a unanimous vote on a proposal of

Importance of Extension of the Trade Agreement Act, 39 DEP'T STATE BULL. 34 (1958); Undersecretary Dillon's remarks, *Extending the Reciprocal Trade Agreements Legislation*, 38 DEP'T STATE BULL. 629 (1958). The approach employed was to suggest that during the next five years the E.E.C., under the Rome Treaty provisions, would be making long-term decisions concerning the level of the European common external tariffs and the commercial policies which the Community would adopt. Therefore, argued the State Department spokesmen, the trade agreements program must be renewed for five years so the United States would have the authority to enter into negotiations with the E.E.C. and thereby mitigate the adverse effects these anticipated actions were expected to produce. This approach was then taken up by the legislation's supporters in Congress. See, e.g., 104 CONG. REC. 1499 (1958) (remarks of Senator Douglas).

²⁶ The concessions made in the general tariff negotiations are incorporated in schedules of tariff rates, which article two makes an integral part of the Agreement. This article also contains various provisions designed to prevent impairment of the value of the concessions.

²⁷ E.E.C. Treaty art. 8(1).

the Commission,"²⁸ but in no case shall such provisions prolong the transition period beyond a total of fifteen years.²⁹ At that time all quantitative restrictions and tariff duties must have been abolished.³⁰ Of course, if for any reason the internal duties and quotas on agricultural products are not eliminated during the transition period, there is little doubt that the Community will not have complied with G.A.T.T. article XXIV(5)(a), which requires that such barriers be removed from substantially all the trade between the constituent member countries. A published decision of the Council of Ministers of May 12, 1960,³¹ indicates that the Community had only partially complied with the Treaty provisions up to that time.

There are, to be sure, several escape clauses interspersed throughout the E.E.C. Treaty provisions.³² But these provisions, even if employed, will not extend the transitional period beyond fifteen years or preclude the elimination of tariff duties and quotas. In fact, in a *Declaration of Intention Concerning Internal Acceleration* attached to the decision of May 12, 1960, the Council of Ministers confirmed plans to proceed as rapidly as possible with the acceleration of economic integration in all sectors.³³ Therefore, the internal market provided in the E.E.C. Treaty appears by its terms to provide for the elimination of barriers to substantially all the trade between the constituent territories³⁴ and ensure its formation within the period contemplated by the parties,³⁵ as required by article twenty-four of the General Agreement.

II

THE COMMON EXTERNAL CUSTOMS TARIFF

The basic relationship of a customs union to the General Agreement has already been mentioned. The heart of the G.A.T.T. Agreement is the most-favored-nation clause. However, the customs union need not extend to the other contracting parties the trade reductions granted to each other, provided that "the duties and other regulations of commerce . . . 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."³⁶ This provision does not require that the common tariff on each product be subjected to the specifications of this requirement. It is sufficient that the common tariff duties of the customs union comply as a whole.

Article nineteen of the Rome Treaty lays down the general rule that the outer tariff for each product be computed by means of an arithmetical average. It was

²⁸ *Id.* art. 8(6).

²⁹ *Ibid.*

³⁰ *Id.* arts. 33, 14, respectively.

³¹ Press Release, Office for the European Communities, Washington, D.C. (May 13, 1960).

³² E.E.C. Treaty arts. 8(3), 8(5), 8(6), 14(7), 107 (1, 2).

³³ Press Release, *supra* note 31.

³⁴ G.A.T.T. art. 24(8)(a)(i).

³⁵ *Id.* art. 24(7)(b).

³⁶ *Id.* art. 24(5)(a).

at first feared that such a method would not meet the requirements of the General Agreement because it fails to take into account the volume of trade of the constituent member countries. For example, in a case where the Benelux import duty on plate glass was sixteen per cent and the Italian tariff on the same commodity thirty-one per cent,³⁷ the arithmetical average would be approximately twenty-four per cent. However, since Benelux accounts for 31.3 per cent of the imports of the six Common Market countries and Italy only 14.2 per cent,³⁸ it is obvious that almost twice as many foreign exporters are suffering from the tariff increase in Benelux as are benefiting from its decrease in Italy.³⁹ It was partially a situation of this type that led the contracting parties to declare that "an automatic application of a formula, whether arithmetic average or otherwise, could not be accepted . . . [T]he matter should be approached by examining individual commodities on a country by country basis."⁴⁰ However, this assertion would appear to be in error. Article XXIV(5)(a), if it is to have any meaning at all, requires a certain standard to be observed for the outer tariff duties of the customs union as a whole. Before reaching a finding with respect to compatibility, the contracting parties must determine what that standard is and then apply it to the external common tariff of the E.E.C.

If all the external tariffs of the Community were computed by means of an arithmetical average, there would certainly be considerable doubt whether the General Agreement would be complied with. However, this is not the case. Specifically provided exceptions to the rule are contained in a series of "lists" lettered from A to G which are computed by various formulae or, in the case of products on List F, are fixed by the mutual agreement of the parties.⁴¹ All such outer tariff duties towards which the Member States will adjust their individual duties according to a transition schedule have already been published.⁴² Although no finding has been made in this respect, it appears that the over-all level of external tariff duties will be well below the level that would exist if an arithmetical average were used in combination with a weighted system to take into account the volume of trade. The chances for compatibility with the General Agreement, therefore, appear reasonably good.

III

QUANTITATIVE RESTRICTIONS

Even if tariff barriers of the Common Market are placed at sufficiently low levels, little trade would result if the volume of imports into the Community area

³⁷ The figures given are the correct duties for the respective countries for the year 1956. U.N. ECONOMIC COMM'N FOR EUROPE, ECONOMIC SURVEY OF EUROPE IN 1957 ch. 4, at 12, U.N. Doc. No. E/ECE/283, (1958) [hereinafter referred to as E.C.E. REPORT 1957].

³⁸ EMIL STRAUSS, COMMON SENSE ABOUT THE COMMON MARKET 94 (1959).

³⁹ This might not be the case for plate glass, since these figures refer to trade as a whole.

⁴⁰ G.A.T.T., B.I.S.D. at 72.

⁴¹ E.E.C. Treaty art. 19. For a detailed treatment of the tariff structure of the E.E.C., see Gerhard, *Tariffs and Trade in the Common Market*, *supra*, at 539.

⁴² *Id.* art. 23.

was restricted by quotas on a substantial number of commodities. Generally speaking, G.A.T.T. places two requirements on quantitative restrictions: one dealing with internal restrictions, and the other concerning quotas placed on imports from third countries. Under the first requirement the customs union must eliminate such quotas from substantially all the trade between the constituent territories of the union.⁴³ In addition, the customs union must be formed "within the period contemplated by the parties to the agreement" or within a reasonable time.⁴⁴ The compliance of the Rome Treaty provisions with these requirements has been discussed in a previous section.⁴⁵

With respect to quantitative restrictions placed on imports from third countries, the first question is whether a customs union may maintain a common level of quotas against nonmembers pursuant to article XXIV(5)(a). It appears that the phrase contained in this paragraph, "duties and other regulations of commerce," excludes this interpretation in view of the fact that paragraph 8(a)-(i) of this article, concerning the reduction of internal trade barriers, uses the language, "duties and other restrictive regulations of commerce." The latter phrase by the use of the word "restrictive" clearly applies to import quotas. Paragraph 5(a), however, omits this word, and thereby excludes quantitative restrictions from the operation of this provision. Thus, the normal G.A.T.T. requirements would govern.⁴⁶

The conclusion that a customs union may not establish an external common level of quantitative restrictions is far-reaching. The Community members are obligated generally to extend to other contracting parties the reductions in import quotas made as to each other under E.E.C. Treaty article thirty-three. This is so because quantitative restrictions are prohibited by the G.A.T.T. unless pursuant to specifically provided exceptions and, moreover, are subject to the operation of the most-favored-nation clause.⁴⁷ Although it is true that the Common Market countries eliminated, through the *Code of Liberalization of the Organization for European Economic Cooperation*, more than eighty-five per cent of their quantitative restrictions, there is considerable doubt that they will be willing to extend to nonmembers the remaining few, but crucial, quotas that they grant to each other.⁴⁸ If they choose not to do so, and assuming that these restrictions cannot be justified under balance of payments or other legitimate G.A.T.T. exceptions, the Member States will have violated the General Agreement and will require a waiver under G.A.T.T. article XXV(5)(a).⁴⁹

⁴³ G.A.T.T. art. 24(8)(a)(i).

⁴⁴ *Id.* art. 24(7)(9b).

⁴⁵ See pp. 563-64 *supra*.

⁴⁶ See generally, G.A.T.T. arts. 11-14.

⁴⁷ MUHAMMAD, *op. cit. supra* note 4, at 212.

⁴⁸ It is important to remember that the liberalization of import restrictions will not automatically benefit United States exports to Europe, since such goods must still compete with similar products produced either there or in other third countries.

⁴⁹ G.A.T.T. art. 24 could be employed here. It is provided in that paragraph that the "[C]ontracting Parties may, by a two-thirds majority, approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article."

The Rome Treaty abolishes all internal quotas by the end of the transition period.⁵⁰ However, Member States are under few restraints in setting quantitative restrictions for nonmember countries. Although article III(5), states that Member States shall aim at securing uniformity between themselves at as high a level as possible in respect to their quota liberalization lists regarding third countries,⁵¹ the only machinery available to oversee this obligation consists of appropriate recommendations by the Commission to the Member States. Then, if Member States do "abolish or reduce quantitative restrictions in regard to third countries, they shall inform the Commission beforehand and shall accord identical treatment to the other Member States."⁵² However, as the G.A.T.T. Sub-Group noted, the E.E.C. Treaty provisions in the external sphere are not mandatory and impose on Member States no obligation to take action which would be inconsistent with G.A.T.T. Articles.⁵³

IV

AGRICULTURAL PROVISIONS

The criteria for judging the compatibility of the agricultural provisions are those standards laid down for a customs union's internal market, the external common customs tariff, and quantitative restrictions. The Common Market's agricultural provisions⁵⁴ do not appear to prevent the internal progressive elimination of tariff duties and quantitative restrictions. Instead, these provisions superimpose a massive combination of cartel-like competences and a Community economic complex over the common market for agricultural products to allow the internal reduction of barriers to take place with as little discomfort to the member countries as possible. It appears doubtful that tariff duties and import quotas will be eliminated between the trade of the Rome Treaty members to the extent necessary so that the reduction of trade barriers on the products of the Common Market as a whole will meet the requirements of G.A.T.T. article XXIV(8)(a)-(i). The decision of the Council of Ministers of May 12, 1960,⁵⁵ clearly shows what is already evident from the Treaty provisions themselves—that the Community has a difficult path ahead in attempting to bring the agricultural sector to a parallel status with the free market for non-agricultural products.

Two devices for easing the transition of member countries to a common market for agricultural products are "minimum prices" and "long term contracts." Article

⁵⁰ E.E.C. Treaty art. 30.

⁵¹ The United States has advocated that quantitative restrictions for balance-of-payments purposes should be justified on an individual country basis. "This does not, in the mean time, rule out the possibility of a common liberalization list, but we believe that any such list should represent a floor rather than a ceiling on liberalization. In short, each member of the Community should continue to liberalize over and above any such common list as rapidly as the balance-of-payments position of that member warrants." 36 DEP'T STATE BULL. 928-9 (1957).

⁵² E.E.C. Treaty art. III(5).

⁵³ However, since uncertainties in the implementation of these provisions existed, the Sub-Group believed that the Six should be subject to consultation procedures as would any other G.A.T.T. member. G.A.T.T., B.I.S.D. at 80-81.

⁵⁴ E.E.C. Treaty arts. 38-47.

⁵⁵ Press Release, *supra* note 31.

forty-four of the E.E.C. Treaty provides that Member States are permitted, during the transitional period, to apply a system of minimum prices below which imports may either be temporarily suspended, or reduced, or made conditional on the import prices being above the minimum price fixed.⁶⁶ Although this article requires that such minimum prices must be applied "in a nondiscriminatory manner,"⁶⁷ this relates only to the trade among the Member States and does not imply a similar commitment as to imports from third countries.⁶⁸ Assuming that the application of this system leads to a displacement of the trade with outside countries, would such a result be illegal under the General Agreement? It is the view of this writer that they would not. Since the General Agreement allows a period specified by the parties or a reasonable time for the formation of a customs union, a system of "minimum prices" designed to assist such formation by facilitating the internal reduction of trade barriers⁶⁹ would not be incompatible with the G.A.T.T. provided such a system was imposed only during the Common Market transitional period.⁶⁰

Article forty-five of the E.E.C. Treaty permits the development of exchanges in regard to certain products⁶¹ to "be pursued by the conclusion of long-term agreements or contracts between exporting and importing Member States."⁶² Such contracts shall be concluded during the first stage of the progressive development of the Common Market and shall be allowed until the substitution for the national organizations of the common agricultural organization. Although due account must be taken of "traditional trade currents,"⁶³ the effect of the long-term contracts would seem to be the diversion of trade from third countries to within the Common Market. If this occurs, would such a consequence be illegal under the General Agreement? Subject to certain limitations, no illegality is perceived. The purpose of long-term contracts is to facilitate the abolition of quantitative restrictions and import duties in cases where the E.E.C. Treaty provisions conflict with national regulations.⁶⁴ Since these contracts would only be applied to a limited number of

⁶⁶ The Treaty states that the system of minimum prices "shall be permitted to apply to certain products." E.E.C. Treaty art. 44(1).

⁶⁷ *Ibid.*

⁶⁸ G.A.T.T., B.I.S.D. at 83.

⁶⁹ Such non-discrimination is required by G.A.T.T. art. 24(8)(a)(i).

⁶⁰ This would even be true if the minimum prices were deemed to be restrictive in character as quantitative restrictions, or protective like customs duties, since G.A.T.T. art. 24(8)(a)(i), in requiring that barriers be reduced from substantially all trade does not prescribe the schedule that should be followed in achieving this goal. However, minimum prices acting in this way could be taken into account to discern whether, at any particular moment, a liberalization as to "substantially all the trade" was in effect.

⁶¹ "[F]or which there exist in certain Member States . . . provisions designed to guarantee to national producers a sale of their production, and . . . a need of imports . . ." E.E.C. Treaty art. 45(1).

⁶² *Ibid.*

⁶³ The United States delegate at G.A.T.T.'s Twelfth Session declared that if this provision were followed, the Community would further G.A.T.T.'s objective of expanding multilateral trade. "In our view policies and programs which take into account the interests of other countries will also be those most likely to contribute to the Community's agricultural objectives." Frank, *United States Statement on the European Economic Community*, 38 DEP'T STATE BULL. 926, 929 (1958).

⁶⁴ E.E.C. Treaty art. 45(1).

products,⁶⁵ and until such time as the national organizations are replaced by a common agricultural organization (possibly in the second stage),⁶⁶ and because the General Agreement grants a reasonable time (or a time period specified by the parties which is considered reasonable) for the formation of a customs union which, by G.A.T.T.'s definition, must eliminate the duties and quantitative restrictions from substantially all internal trade,⁶⁷ it appears doubtful that such contracts are incompatible with the General Agreement.

V

THE ASSOCIATION OF OVERSEAS TERRITORIES

The E.E.C. Overseas Territories provisions, in that they look to the economic and social development of the countries and territories of the constituent members, closely parallel the aims and purposes of the General Agreement, as set out in its preamble. However, no section of the Treaty establishing the European Economic Community has caused greater concern than has this one. Not only does this section appear plainly incompatible with G.A.T.T. provisions with respect to preferences not accorded nonmembers, but the unparalleled opportunity for trade diversion, especially at the expense of the newly developed countries, makes this system a primary target for regulation and control by the contracting parties. The Association reflects the desire both to allow the Common Market countries to share in the benefits of the dependent overseas territories—held by and large by France—and to further “the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development which they expect.”⁶⁸

The main charge leveled at the Association of Overseas Territories is that it represents a preference arrangement forbidden by the General Agreement. Article 1(2) of the G.A.T.T. permits certain listed existing preferences to continue, so long as the margin of preference meets G.A.T.T. requirements.⁶⁹ An extension of preferences not permitted by the G.A.T.T. can come about in two ways. First, the G.A.T.T.-prescribed level for existing preferences⁷⁰ could be altered; second, the preferential arrangement could be extended to new territories or countries. Both courses of action are prohibited by the General Agreement. Under article 133 of the E.E.C. Treaty, imports from the overseas territories are to benefit by the progressive and total abolition of customs duties scheduled to take place in conformity with the Treaty provisions,⁷¹ while at the same time the overseas countries and territories

⁶⁵ To be the subject of a long-term contract, the products must fulfill two requirements under the E.E.C. Treaty: (1) they must appear on List II of the Annex to the Treaty and (2) they must fit into the classes of national legislation described in article 45(1).

⁶⁶ *Id.* art. 45(1).

⁶⁷ G.A.T.T. art. 24(8)(a)(i).

⁶⁸ E.E.C. Treaty art. 131.

⁶⁹ G.A.T.T. art. 1(4).

⁷⁰ *Ibid.*

⁷¹ E.E.C. Treaty art. 133(1).

are permitted to levy tariffs "which correspond to the needs of their development and to the requirements of their industrialization or which, being of a fiscal nature, have the object of contributing to their budgets."⁷² This would seem to demonstrate an extension of tariff preferences violative per se of the General Agreement; the reduction of duties by the countries maintaining the preferences and unlimited use of tariff duties by the territories.⁷³

The problem, however, cannot be reduced to such simple terms. The General Agreement makes specific provision for the creation of a free-trade area, which the Overseas Territories purport to be.⁷⁴ It requires that such a grouping reduce substantially all trade barriers within a reasonable period of time. Therefore, if it can be shown that the overseas territories as a whole will comply with paragraph 8(b) of article twenty-four,⁷⁵ a charge that preferences were created or extended could not at the same time be put forward. It would be illogical and inconsistent to assert that a free-trade area meeting G.A.T.T. requirements for the reduction of internal barriers in a reasonable time, would simultaneously be violating article one of the General Agreement by extending preferential arrangements. However, until a definition of the term "substantially all the trade" has been formulated and the statistical criteria selected to be measured against the definition adopted, no finding could be reached regarding compliance with the "substantially all the trade" requirement, or, subsequently, that the overseas territories represented an extension of preferences. Even if an unpermissible increment of protective trade barriers was determined to exist after the application of a definition of "substantially all the trade" and selected statistical criteria, such duties could still be justified if permitted by G.A.T.T. article eighteen, which allows the imposition of import restrictions under certain conditions in order to promote economic development. If not so justified under that article, that portion remaining could truly be said to be violative of paragraph 8(b) of article twenty-four and an extension of preferences forbidden by G.A.T.T. article I(2).

CONCLUSION

As the previous analysis has indicated, the G.A.T.T. may find some aspects of the Rome Treaty or courses of action taken pursuant to its provisions to be inconsistent with article twenty-four of the General Agreement. However, a narrow

⁷² *Id.* art. 133(3).

⁷³ To be sure, the alleged extension of preference could come after the E.E.C. began reducing tariff duties under Treaty provisions if the provisions are permissive. In fact, certain reductions have already been made. However, since the first reductions were also extended to all other contracting parties to the G.A.T.T., it could hardly be claimed that this represented an extension of preferences. However, for reductions not also granted to other G.A.T.T. contracting parties, an extension of preferences might be considered to have taken place.

⁷⁴ The chief difference between a customs union and a free-trade area is that the latter does not impose a system of common external tariff duties for each product.

⁷⁵ This paragraph provides that "the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade areas . . . 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 . . ." G.A.T.T. art. 24(8)(b).

and legalistic approach, at least from the standpoint of the United States, would not be in the national interest. If the G.A.T.T. were too juridical in its appraisal and too demanding in its requirements, the Community could conceivably find it more profitable to withdraw from the organization altogether.⁷⁶ The United States has the North Atlantic Treaty Organization to bear in mind; the political and strategic interest in a stable and prosperous Europe, able to take its place as a full partner of the West in its continuing struggle with the Communist bloc, more than compensates for any slight amount of discrimination or technical inconsistency with the G.A.T.T. A subsidiary interest, all too often forgotten, is that at long last France and Germany, who thrice in ninety years have involved Europe and the world in turmoil, are finally united in the eminently constructive pursuit of restoring Europe to its rightful place in the power constellation of nations. Moreover, the United States, which for so long has strongly supported the economic integration of Europe, should strongly support a development which promises to bring an even greater degree of European unity in the future. Such a course can and should be pursued by the United States, while at the same time using its vast influence to prevent discrimination and trade diversion with respect to the newly developed countries which it is committed to assist. With regard to Rome Treaty provisions or implementations thereof, which are determined to be contrary to G.A.T.T. article twenty-four, the United States should be prepared, within reason, to regularize the inconsistencies, either by approving Common Market proposals which do not fully comply with the requirements of paragraphs five to nine of that article,⁷⁷ or by granting a waiver of the obligations contained in those paragraphs.⁷⁸

⁷⁶ *Id.* art. 31, permits any contracting party to withdraw from the Agreement, upon six months notice in writing, any time after January 1, 1951.

⁷⁷ See *id.* art. 24(10), which permits such action by a two-thirds vote.

⁷⁸ *Id.* art. 25(5)(a), provides that the contracting parties may, by a two-thirds majority vote, grant waivers from its obligations in exceptional circumstances.