CHAPTER VIII
FREE MOVEMENT OF GOODS: EXTERNAL TRADE

A-THE CUSTOMS UNION AND EXTERNAL TRADE

The effect of the customs union and the world trade is that the external trade of the member state is governed by common rules. Thus the Community constitutes a single trade unit surrounded by a common customs barrier and capable alone, to the exclusion of the member states, to enter into international agreements regulating trade. The system rests upon the twin principles of Common Customs Tariff and Common Commercial Policy whose elements will be analysed below. The member states are duty bound to adhere to these principles.

B-COMMON CUSTOMS TARIFF (CCT)

The CCT consists of the rules on nomenclature or classification of goods, origin and valuation of goods as well as customs procedures. The CCT has replaced the national tariffs. Since the Community has ratified the International Convention on the Harmonized Description and Coding System, which replaced the Brussels Convention of 1950 on Nomenclature for the Calssification of Goods in Customs Tariffs within the system of GATT, the "Harmonised System" applies as from 1 January 1988[1]. The Commission also adopted the combined nomenclature (CN)[2] classifying numerous products and Regulation 3513/92[3] which provides that tariff classification information issued by the customs authorities of a member state is to be valid throughout the Community. It means, as far as the member states are concerned, that they are bound by the CCT nomenclature and explanatory notes and tariff notices issued by the Customs Co-operation Council (established by an international convention ratified by the ECJ) and can no longer enact autonomous provisions in this field[4]. Moreover the interpretation of the CCT is now within the exclusive jurisdiction of the ECJ whose case law provides a useful guidance for the national authorities.

The second element of the CCT consists of the rules on the origin of goods comprised at present in Regulation 3860/87[5] which relates to the Regulation on the no-

igin by the ECJ complements the text. If the imported goods have been produced partially in the Community they are regarded as originating in the member state in which the last substantial process or operation was completed. However a new problem has come to light due to the so-called "screwdriver technique", i.e. importation of components to be assembled in the Community at the minimum effort and presenting the end product as a Community product[6].

Regulation 1769/89[7] prescribes the standard form and size of the certificate of origin required for customs purposes.

The third element of the CCT consists of the rules for the valuation of goods based on Regulation 803/68[8] substantially amended by Regulation 1224/80[9] and subsequently updated. The system (based on GATT Customs Valuation Code of 1979) provides for five main valuation methods, i.e. (a) the transaction value of the goods, (b) the transaction value of identical goods, (c) the transaction value of similar goods, (d) the deductive value and (e) the computed value, to be successfully applied until the appropriate method has been found. Failing that any "reasonable" means of valuation may be applied. Here again the case law of the ECJ helps with the interpretation of the rules.

Goods imported into the Community are released for free circulation on the completion of the requisite formalities governed, at present, by Council Directive 79/696[10] subject to special measures and special provisions applicable to Euratom and Coal and Steel products.

C-COMMON COMMERCIAL POLICY (CCP)

The first element of the CCP is the regulation of external trade by means of international agreements. The effect of accession and association treaties has already been noted. It remains now to consider the rules affecting trade agreements.

By virtue of substitution the Community has taken place of the member states within GATT. It follows that the Community in its own right and on behalf of the member states participates in the work of GATT. The competence of the member states has been taken over by the Community and they have no longer a concurrent right in this respect. In the event of joining the Community Turkey would have to accept this position.

Since, by virtue of article 113 of the EEC Treaty, the Community has taken responsibility for the negotiation and conclusion of trade agreements the member states can no longer pursue an independent policy in this field. They participate, however, through the Council of Ministers in the decision-making process and, in the course of negotiations, represent their interests in a special committee appointed by the Council to assist the Commission.

By virtue of article 234 of the EEC Treaty the member states remain obligated under the existing trade agreements to which they were parties before joining the Community but have to adjust their obligations to their duties to the Community when such agreements come to an end or become subject to renewal or extension. New agreements negotiated by the Community are binding upon the member states though certain types of co-operation agreements[11] expressly allow the member states to negotiate a special regime within the framework of such agreements.

The second element of the CCP consists of various protective measures taken by the Community which are binding upon the member states. These include:

(a) Anti-dumping and countervailing measures which are governed at present by Council Regulation 2423/88[12] based on article 113(1) of the EEC Treaty and the GATT Anti-dumping Code as well as the provisions of GATT to control the effect of subsidized exports. The Regulation lays down substantive and procedure rules for the examination and determination of complaints against dumping and importation of subsidised products. The object is to protect the Community industry from material or theatened injury caused by influx of dumped or subsidised products. The procedural rules applicable to anti-dumping apply also to anti-subsidy.

The proceedings start with a complaint to the Commission or a member state of a person or body acting on behalf of a Community industry. The investigations are carried out by the Commission which consults an advisory committee consisting of representatives of the member states chaired by a representative of the Commission. The Commission must give all parties concerned opportunity to present their case and after consultations comes to a decision. If the allegations are proved the Commission will either accept an undertaking to the effect that the position will be remedied or impose a provisional anti-dumping duty or a provisional countervailing duty, as appropriate. On a proposal from the Commission a definitive anti-dumping or countervailing duty will be imposed by the Council by means of a regulation which, as a Community act, is subject to administrative and judicial review[13].

(b) Under the escape clause of article XIX of GATT a party to the Agreement may impose quantitative restrictions on imports of products coming in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products. This power is exercised by the Community in respect of the Community territory and the member states have to co-operate accordingly.

At present the protective measures (which usually take the form of import quotas in volume or both in volume and value) are comprised in three Community instruments, i.e. Regulation 1765/82[14], applicable to trade with state-trading countries; Regulation 1766/82[15] applicable to trade with the People's Republic of China; and Regulation 288/82[16] applicable to all third countries except Cuba. Protective measures may be instituted by the Commission, the Council of Ministers and the member states according to the procedure laid down in Regulation 288/82. An advisory committee consisting of the representatives of the member states chaired by a representative of the Commission advises the Commission on the measures to be taken. Such measures are subject to administrative and, ultimately, judicial review at the instance of the member states. Private parties, whether importers or exporters, have no right to demand such review.

(c) The New Commercial Policy Instrument, enacted by Regulation 2641/84[17]on the pattern of the U.S. Trade Agreements Act 1979, purports to afford protection against "illicit commercial practice", It complements the existing arsenal of protective measures especially in relation to the common organization of agricultural markets and goods processed from agricultural products. It does not apply to products covered by the ECSC Treaty.

The Regulation enables the Community to adopt certain retaliatory measures, i.e.

(1) the suspension or withdrawal of any concession resulting from commercial policy negotiations;

(2) the increase of existing customs duties or the introduction of other charges on imports;

(3) the introduction of quantitative restrictions or any other measures affecting trade with the third country concerned.

The proceedings, governed by Regulation 2641/84 may be initiated by the Commission upon the complaint of Community producer or a member state but not upon the Commission's own initiative, which is advised by an advisory committee consisting of representatives of the member states chaired by a representative of the Commission. The Commission examines the complaint, which must be substantiated, and having heard the parties concerned including the third country involved will (if satisfied that the complaint has been proved) recommend to the Council of Ministers what measures ought to be taken. The decision of the Council is subject to judicial review by the ECJ at the instance of the Commission or the member states and, probably also by the Community importers if the judgment in an anti-dumping case[18] can be applied by analogy. Because the measures are directed against particular third countries in the context of the CCP a recourse by means of a direct action either by these countries or their exporters seems impossible. This, however, does not exclude the possibility of an action by a foreign exporter before the courts of a member state which may refer the matter to the ECJ for a preliminary ruling under article 177 of the EEC Treaty.

In conclusion, in the light of protective measures the member states have a duty of vigilance, informing the Commission and participating in the relevant procedures. As a corollary they must establish an internal machinery and procedure to discharge their obligations. What, specifically, must be done by Turkey in this context?

D- CUSTOMS LEGISLATION IN TURKEY[19]

The position as regards the classification, origin and valuation of goods for customs purposes in Turkey is as follows:

a) Classification of Goods:

After the ratification of the 1983 Convention creating a Harmonized Description and Coding System by the leading trading nations, including the EC, Turkey adhered to the Convention passing Law 3501[20] which replaced the system under Law 474 of 1964 based on the Brussels Convention. This alteration was enacted by Law 3502 under the title of "Legislation on Tariff Schedule for Customs Entry". This regulation has been applied since January 1, 1989. The adaptation of the "Harmonized System" creates a considerable easiness for Turkey in its relations with the EC and with-

in the framework of GATT. Furthermore, in accordance with Article 2 of Law 3502, any further changes to be made by the Customs Cooperation Council depending on the new circumstances, may easily be incorporated into Turkish system without a need to pass a new Law.

The difference with regard to the classification of goods for customs purposes between the EC and Turkey stems not from the procedural aspects but from the different rates of customs duties towards various third country groups and this would have to be remedied in a customs union between Turkey and the EC.

b) Valuation of Goods:

The GATT Customs Valuation Code of 1979 provides a successive valuation method in which the following technique is applicable in case of the non-applicability of the preceding one. Accordingly, the "transaction value" that is the price actually paid or payable for the goods when sold for export to the country of exportation is the starting point. Turkey ratified the "Agreement on the Application of Article VII of GATT" (The Valuation Code) in 1988 by Law 3447[21] However, Turkey depending upon the authorization in the Agreement within GATT, postponed the application of the rules of the Code for 5 years until September 1993 in order to make the necessary adjustments.

The existing rules are based on Article 65 of Customs Law 1615[22] which was partly modified by Law 2817 in 1983. According to Article 65, paragraph 1:

"The customs value of an imported product shall be the normal price at the date when the obligation to pay starts."

Under the current legislation the concept of transaction value does not exist but its equivalent is the "normal price". Its elements are described in Article 65 of Law and in Article 243 of the Customs Regulation in detail. Similar to the technique applied in determining the transaction value in EC Reg. 1224/80, no duties or other charges payable in Turkey are included in the determination of normal price.

Another similarity with the Community is that the expenses i.e. commissions, brokerage, cost of packing and any royalties not included in the price but incurred by the buyer are added to the normal price.

In case the normal price is not available, Article 11 stipulates that if the necessary documents are not or could not be provided by the parties involved, i.e. the taxpayer, agency or broker, the value is determined by the Customs Administration's initiative considering the price of identical or, if not, similar goods and assessed accordingly.

Considering that the rules in the Community relevant to the valuation are substantially based on agreements, particularly the GATT Valuation Code to which Turkey is also a party, the existing differences in the procedures and terminology will disappear as soon as Turkey adopts the definitive application of the Code in 1993.

c)Rules of Origin:

The non-existence of an internationally agreed concept of origin creates difficulties in international trade. However, a good is generally considered to be originating in the conutry in which it has acquired its nature and characteristics rather than the one from where it is shipped. This notion seems to be prevaling also in Turkish legislation.

Article 67 of the Customs Law 1615 and the Customs Regulation of 1973 which was subject to a significant amendement in 1984[23] constitute the principle legal source for the rules of origin.

It is listed in Article 67 of the Law 1615 and Article 261 of the Customs Regulation that;

-minerals extracted in the territory of the country;

-agricultural products harvested, live animals born and raised therein; and products from these animals as well as the products of hunting and fishing carried on therein;

-products of fishing and other products taken from sea by vessels registered or recorded in that country and flying its flag as well as the products from these obtained on board factory ships;

-products taken from sea-bed or beneath the sea-bed outside the territorial waters if the country has exclusive rights to use them;

-waste and scrap products derived from manufacturing operations and used articles;

are regarded as originating in Turkey.This definition consists of the same concepts and very similar wording to the related article of the EC legislation (Art. 3, Reg. 802/68 absorbed in Reg. 3860/87).

If there is no direct shipment from the country where the product in question was produced or manufactured but traded via a third conutry, the former is still assumed to be the conutry of origin. It is obvious that a product wholly obtanied or produced in only one country is considered as originating in that country, since there is no contrary statement in the Turkish legislation.

As regards goods produced in more than one conutry Article 67 of Custom Law 1615 and Articles 240 and 261 of Customs Regulation state that; "in order for a product to be regarded as originating in country where it was subject to further process or operation it is necessary that its value has increased 100 percent due to the processes and operations involved or its tariff heading should have differed attributable to these reasons or it had been subject to essential operations and finishing so that it can be regarded as having undergone a substantial change". Not with standing the similarity this definition does not provide an identical wording with that applied in EC. However, the provisions concerning the information to be included in the certificate of origin are not different from their counterparts in the Community legislation.

On the other hand the basic differences in Turkish and Community legislation in this respect are twofold:

a) there is no provision in Turkish Law concerning the assembly plants established in Turkey in order to deal with the so called the screwdriver technique.

b) no special criterion is listed in Turkish Law giving the difinition of processes or operations that define the origin of a product.

Different techniques referred by the Community with respect to different countries depending on the legal status of their ties with the EC are to be accepted by Turkey in case of her accession.

E - COMMERCIAL POLICY

Concerning the protective measures in EC's commercial policy, the situation in Turkey is as follows:

a) Dumping and Subsidies:

With respect to the importation of dumped or subsidized products into Turkey a Legislation on the Prevention of Unfair Competition in Importation was enacted in June 1989[24] which repealed Article 21 of Customs Law 1615.This Law" covers the procedures and, rules relating to the administrative, financial, economic and other measures to be taken with a view to protecting an industry against unfair competition and/or preventing the impairment of the market due to dumped and/or subsidized imports".

Pursuant to the disposition of Law 3577 a Decree and a Regulation were appended in September 1989 and entered into force on October 1, 1989. Whereby certain duties have been assigned to a Board of Evaluation of Unfair Competition in Importation and the General Directorate of Importation under the Undersecreteriat of Treasury and Foreign Trade (Articles 5 and 6).

Turkish legislation includes substantially the same provisions and procedures that EC Regulation 2423/88 on dumped and subsidized goods stipulates. Harmony exist between the two except for minor differences. The same criteria are applied in the determination of the normal value and export price and the comparison techniques. Rules pertaining to the subsidies as well as the determination of injury caused by the dumped or subsidized products are harmonious except that in the EC legislation, in exceptional situations, the Community may for production purposes be divided into two or more competitive markets and producers within each market regarded as Community industry. There is no such a provision in Law 3577.

In the EC there is a requirement that the value of the parts or materials used in the assembly or production operation which originate in the country of exportation must be less than 50 % of the value of all other parts or materials. Such requirement does not exist in Turkey. Therefore the so-called "screwdriver technique" is unknown to the Turkish Law.

b)Rules for Imports:

As far as foreign trade is concerned, the law enacted in 1984 regulates the financial charges on the operations concerning foreign trade: Law Concerning the Regulation

of Foreign Trade[25]. Its purpose and scope are stated in Article 1 as follows:

"Imposition and abrogation of supplementary financial obligations other than customs duties and similar obligations, with a view to regulating foreign trade to the benefit of the economy, on the imports, exports and other commercial dealings and the usage of funds created thereupon, are implemented in accordance with the provisions of this Law".

The imports are administered by a Decision on Import Regime that was taken pursuant to Articles 19 and 20 of Customs Law 1615, Article 2 of Law 474 concerning the Tariff Schedule for Customs Entry and the provisions of Law 2976 on the Regulation of Foreign Trade.

The Import Regime is a complex one and was frequently subjected to amendments. The previous Decision on the Import Regime[26] has also been subject to certain modifications during the last 3 years. The present Decision on the Import Regime[27] lays down that the objective is "to regulate importation to the benefit of the country". According to the Decision import into Turkey "... is administered in accordance with the provisions of the Decision as well as the regulations and communications issued pursuant to this Decision, instructions forwarded to the related institutions and multilateral or bilateral international agreements". (Article 1). It is also stated in Article 3 that:

"States, undertakings or firms establishing conditions or having practices which might impair the balance of trade and payments in Turkey, or those which do not fulfil their obligations arising from the agreements and concerting discriminatory practices which might not be compatible with the general principle of the Import Regime in trade relations with Turkey, will be subject to appropriate measures".

This provision may seem to be a broad and a protectionist one enabling the authorities to act under certain circumstances. On the other hand, the importation of nearly all the products into Turkey was liberalized excluding a few of those of which importation is either prohibited or subject to licence. Article 6 of the Decision clearly states that "the importation of old, used, renovated products as well as those which are defective, substandard, law quality and the scrap materials is subject to licence".

A prospective membership of Turkey into the EC and the customs union entails the simplification and harmonization of legislation concerning the regulation of foreign

trade in Turkey. The following have been done as far as imports and customs are concerned:

1- 8 different rates of duties applicable to "various" products originating from different countries have been reduced to two; mainly,

i) duty applied to products from the EC and EFTA,

ii) duty applicable to products originating from countries other than the EC and EFTA,

2- The charges having equivalent effect to customs duties (i.e. stamp duty, municipality duty and transport infrastructure duty) have been abolished as of January 1, 1993.

3- "Supporting and Price Stability Fund", a charge previously applied to imported products has been abrogated in accordance with Article 17 of the Decision on the Import Regime. (92/3902).

However, the imported products -with certain exceptions stipulated in Article 13 of the Decision on the Import Regime are still subjected to "Mass Housing Fund" which is deemed to be a charge having an equivalent effect. This causes the allegations that Turkey exerts a covered protection and offsets the losses she incurred by the reduction of customs duties. Therefore, this fund must be eliminated in the proposed customs union between EC and Turkey.

In case of accession to the EC Turkey shall no longer have the right to enter independently of the EC, into undertakings in its commercial relations with third countries and can not conclude trade agreements alone, since such decisions are to be taken at the Community level owing to the reason that the commercial policy is within the exclusive competence of the Community. (See, Case 22/70, Commission v. Council (ERTA Case), (1971), ECR 263).

The trade agreements already enacted by the EC, before Turkey's entry will be binding on Turkey.

NOTES

1 Council Reg. 2658/87, O.J.1987, L.256/1

2 Reg.2502/92 O.J.1992, L.267

3 O.J. 1992 L.355; the Community Customs law is now comprised in Customs Code (Regulation 2913/92, OJ 1993, L.302)

4 Case 74/69: HZA Bremen-Freihafen v Kron (1970) ECR 451 at 463

5 O.J.1987, L.363/30

6 Case C-26/88:Brother International v HZA Giessen (1990) 3CMLR 658; Japan v EEC, Re Screwdriver Assembly, GATT Economic Panel (1990) 2CMLR 639

7 O.J.1989, L.174/11

8 O.J. 1968, Sp.Ed.(II) p.436

9 O.J.1980, L.134/1

10 O.J.1979, L.205/19 and Commission Dir.82/57,O.J.1982,L.28/28

11 E.g. EC-Canada Agreement of 1976

12 O.J. 1988, L.209/1

13 See Case 191/82:FEDIOL v EC Commission (1983) ECR 2913

14 O.J.1982, L.195/1

15 O.J.1982, L.195/21

16 O.J.1982, L.35/1

17 O.J.1984, L.252/1

18 Case 191/82 FEDIOL v EC Commission (1983) ECR 2913

19 The following parts of this Chapter were written by M.Sait Akman

20 Dated November 10, 1988

21 Dated May 12, 1988

22 Dated July 19, 1972 Official Gazette, August, 1,1972 No.14263

23Official Gazette 11.4.1984 No, 18369

24 Law 3577, Official Gazette July 1, 1989

25 Law 2976, Official Gazette, February 15, 1984 No.18313

26 89/14910, Official Gazette, January 17, 1990, No.20405

27 92/3902, Official Gazette, December 31, 1992, No.21452.