

The Liberalization of the Trade in Goods under the ASEAN-China Free Trade Agreement

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On the 20th of July 2005,² China and the 10 members of the Association of Southeast Asian Nations (ASEAN)³ began to reduce tariffs for about 7000 industrial goods traded amongst the Parties, as part of the project to build an ASEAN-China Free Trade Area (ACFTA) by 2010/2015.⁴ These tariff reductions had been agreed to under the “Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People’s Republic of China” (the “ACFTA-GA”), signed in Vientiane, Lao PDR, on the 29th of November 2004⁵ and effective as of the 1st of January 2005.⁶ The ACFTA-GA contains 23 chapters and three annexes. In addition to the modalities for the liberalization of trade in the about 7000 industrial goods, it includes the formal recognition of China as a full market economy by the ASEAN states. Tariff reductions on a broad range of agricultural goods had already previously been implemented under the so-called “Early Harvest Programme” set out in the “Framework Agreement on Comprehensive Economic Co-operation” (ACFTA-FA) which had been concluded among the parties on the 5th of November 2002 and has been effective as of the 1st of July 2003.⁷ Upon completion the ACFTA will become the third

largest regional trade agreement (RTA)⁸ in terms of raise of economy and volume of trade with an estimated regional GDP of about USD 2 trillion and a total trade volume of ca. USD 1.23 trillion.⁹ With a combined population of 1.7 billion people, ACFTA in addition would be the overall largest RTA in terms of population.

I. The Broader Legal Context

The ACFTA-GA forms the centrepiece within the general legal framework for economic cooperation agreed upon by China and ASEAN on the 5th of November 2002 through conclusion of the “Framework Agreement on Comprehensive Economic Co-operation” (the “ACFTA-FA”).¹⁰ The latter sets out the basic blueprint for comprehensive economic integration between the parties which shall eventually encompass not only the liberalization of trade in goods, but also the liberalization and facilitation of trade in services and investment¹¹ as well as economic cooperation in a greater number of areas.¹²

The ACFTA-FA was amended at the October 2003 China-ASEAN Summit held in Bali, Indonesia, by the “Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation” (the “ACFTA-Protocol”).¹³ The ACFTA-Protocol forms an integral part of the ACFTA-FA¹⁴ and incorporates several specifications thereto. In particular, it details the “Early Harvest Programme” (EHP),

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² The tariff reductions were originally supposed to start by July 1, 2005. This deadline was however postponed at the 19th meeting of the ACFTA Trade Negotiation Committee due to implementation difficulties communicated by China.

³ The following countries are members of ASEAN: Singapore, Malaysia, the Philippines, Thailand, Indonesia, Brunei, Cambodia, Lao PDR, Myanmar, and Vietnam. The first six countries, which are the older and more developed members of the group, are usually referred to as the ASEAN-6, while the other four countries are all younger and less developed members, which are collectively referred to as the “CLMV”.

⁴ The deadline of 2010 applies to China and the ASEAN-6. The CLMV countries are granted five additional years to implement their ACFTA tariff reduction commitments.

⁵ Due to the inability of the parties to agree on the maximum number of tariffs to be included in the sensitive list of products (see below) the original deadline for the termination of negotiations, the 30th of June 2004, could not be kept.

⁶ See Art. 23(1) ACFTA-GA. The ACFTA was notified to the WTO under Art. 2 lit. c of the so-called “Enabling Clause” on 21 December 2004. See WT/COMTD/N/20; WT/COMTD/51.

⁷ Art. 16(1) ACFTA-FA.

⁸ In addition to free trade areas, the term “RTA”, in particular, refers to customs unions, common markets and economic unions.

⁹ ASEAN-China Experts Group on Economic Cooperation, Forging Closer ASEAN-China Economic Relations in the Twenty-First Century, 2; available at the official ASEAN website <http://www.aseansec.org>.

¹⁰ The ACFTA-FA is effective as of July 1, 2003. See Art. 16(1) ACFTA-FA.

¹¹ The scope and schedules for the liberalization of the trade in services as well as investment are still under negotiation. Progress in this field is expected to be slow and is likely to occur on a bilateral rather than a regional basis.

¹² In the context of liberalization, the ACFTA-FA provides for special and differential treatment (S & D) with regards to the newer, and less developed ASEAN members. In addition, it enshrines the general principle of flexibility with respect to any sensitive areas of the Parties.

¹³ Available at <http://aseansec.org>. The ACFTA-Protocol is effective as of the date of signature, that is the 6th of October 2003. See Art. 8(1) 2003 Protocol.

¹⁴ See Art. 8(1) 2003 Protocol.

which provided for tariff reductions on a broad range of agricultural products before the ACFTA-GA came into force.¹⁵ The current legal framework for economic cooperation between China and ASEAN is finally complemented by a dispute settlement agreement which applies to all conflicts arising under the ACFTA-FA or any of the agreements subsequently agreed to in its context, including the ACFTA-GA (the "Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation").

II. Trade Liberalization

The ACFTA-GA together with its 3 annexes contains, in principle, all relevant rules for the liberalization of trade in goods, including (1) the terms and modalities for tariff reductions; (2) the relevant rules of origin; (3) provisions on the removal of non-tariff barriers; and (4) provisions on safeguard measures. It does however not apply to the terms and modalities of tariff reductions for agricultural products already covered under the EHP, that is goods in Chapters 01-08 of the Harmonized System (HS).¹⁶ For these, the relevant aspects of tariff reductions are regulated in the ACFTA-FA¹⁷ and the ACFTA-Protocol,¹⁸ while all other matters in the context of the EHP¹⁹ follow the general rules as laid out in the ACFTA-GA.

1. Tariff reduction and elimination

As mentioned above, the product coverage for tariff reduction and elimination and the relevant schedules for the liberalization of trade in goods between China and the ASEAN states are found in two different legal agreements: with respect to agricultural products (HS 01-08) in the ACFTA-FA as revised by the ACFTA-Protocol, and with respect to industrial products (HS 09-97) in the ACFTA-GA. Tariff reduction requirements under the EHP and the ACFTA-GA differ with respect to the technique of product coverage as well as to the schedules for tariff elimination.

With regard to product coverage, the EHP uses a negative list approach under which generally all tariff lines in the HS categories 01-08 are subject to tariff reductions, unless explicitly excluded. The ACFTA-GA, on the contrary, follows a positive list approach. Accordingly, each party determines in principle item-by-item what products it wishes to

include in the tariff reduction and elimination programme.

Concerning the schedule of tariff reductions, the EHP establishes one general schedule but allows for additional bilateral lists for accelerated tariff reductions.²⁰ The ACFTA-GA does not provide for the possibility of separate bilateral arrangements,²¹ but instead establishes two common tracks for tariff reductions, the "Normal Track" and the "Sensitive Track". The latter requires less demanding tariff reductions compared to the "Normal Track".²² Commitments for the reduction or elimination of tariffs undertaken by one party apply to all the other parties, subject to Annex 1 (Normal Track) and 2 (Sensitive Track) of the GA.²³

a) The "Early Harvest Programme"

The Early Harvest Programme (EHP) sets out a progressive reduction of tariffs before the onset of ACFTA. This early preferential treatment covers in principle all products under Chapters 01-08 of the HS code (Harmonized System) at the 8/9 digit level, which refer to unprocessed agricultural and primary products.²⁴ While China made available EHP tariff treatment on all of these product categories,²⁵ many ASEAN countries, on the contrary, made use of the opportunity to exclude products from the early liberalization under the EHP.²⁶ In addition to the general EHP, some individual ASEAN countries such as Malaysia, Thailand, Brunei, as well as Singapore and China have agreed on more product coverage for each other as part of the EHP.

The EHP commenced on the 1st of January 2004, and shall be fully implemented with tariffs progressively being reduced to zero percent on all the products under the EHP, the latest by the 1st of January 2006 for China as well as the ASEAN-6 members except for the Philippines,²⁷ and by 2010 for the CLMV countries.²⁸ Tariff rates for Chinese products under the EHP have already reached the zero percent level in 2005, except for products whose applied M

¹⁵ See in more detail below.

¹⁶ See Art. 3(2) ACFTA-GA.

¹⁷ See Art. 6 ACFTA-FA.

¹⁸ See above under (I) and note 9.

¹⁹ Including issues (2) to (4).

²⁰ See Art. 6(3)(a) ACFTA-FA and Annex 1 ACFTA-FA as well as Art. 6(3)(a)(iii) ACFTA-FA and Annex 2 ACFTA-FA.

²¹ However, under the ACFTA-GA each Party may at any time unilaterally accelerate its tariff reductions if it wishes so, Art. 3 of Annex 1 ACFTA-GA. Increases in the tariff rates are, on the contrary, only allowed, if so provided for by the ACFTA-GA, see Art. 5 of Annex 1 ACFTA-GA.

²² See Art. 3(2) (a) and (b) ACFTA-GA.

²³ Art. 3(3) ACFTA-GA.

²⁴ In detail: (Ch. 01) Live Animals, (Ch. 02) Meat and edible meat offal, (Ch. 3) fish, (Ch. 04) dairy produce, (Ch. 05) other animal products, (Ch. 06) live trees, (Ch. 07) edible vegetables, (Ch. 08) edible fruits and nuts. See Art. 6(3)(a)(i) ACFTA-FA.

²⁵ See Annex 1(2)(c) ACFTA-FA (n.v., as amended by the ACFTA-Protocol).

²⁶ See Annex 1 ACFTA-FA (n.v., as amended by the ACFTA-Protocol) at 2 (b) (Cambodia), (e) (Lao PDR), (f) (Malaysia), and (k) (Vietnam).

tariff rates were above 15 percent as of the 1st of July 2003.²⁹ The individual ASEAN states and China may at any time accelerate their respective schedules of tariff reductions, either unilaterally³⁰ or through bilateral agreements. Such agreements shall be open for accession by any of the other ASEAN states.³¹ The biggest concessions under the EHP were made by China. Similar to the case of the Closer Economic Partnership Agreement (CEPA) between the Chinese Mainland and the Special Administrative Regions of Hong Kong and Macao,³² China apparently aimed to give ASEAN states a head start over other competitors for which improved market access to the Chinese mainland followed slower schedules as provided for in China's WTO accession agreements. The EHP is also a characteristic example of China's general step-by-step approach to trade negotiations which consists in first tackling issues which are comparatively easy to implement, while setting aside the more complicated matters for later negotiations.

b) The "Normal Track"

The "Normal Track" includes industrial products for which tariff rates shall be gradually reduced or eliminated in accordance with the modalities set out in Annex 1 of the ACFTA-GA.³³ The list of these products is contained in Appendix 1 of Annex 1 of the GA.³⁴

The elimination of tariffs for products in the normal track is supposed to be carried out over a period from the 1st of July 2005 (now postponed to the 20th of July) to the 1st of January 2010 by the ASEAN 6 and China, and from the 1st of July 2005 to the 1st of January 2015 for the CLMV.³⁵ However, tariffs on a maximum of 150 (ASEAN 6 and China) and 250

(CLMV) tariff lines may be maintained beyond these deadlines, but must then be eliminated by no later than the 1st of January 2012 (ASEAN 6 and China) or the 1st of January 2018 (CLMV).³⁶ The ASEAN 6 and China had to reduce tariff rates to between 0 to 5 % by the 20th of July 2005 for at least 40 % of the tariff lines in the Normal Track, and by 2007 for at least 60 % of these tariff lines.³⁷ In the case of the CLMV, reductions to the 0-5 % level shall be achieved with respect to at least 50 % of the tariff lines in the Normal Track, no later than the 1st of January 2009 (Vietnam), the 1st of January 2010 (Lao PDR and Myanmar), and the 1st of January 2012 (Cambodia).³⁸ All newer ASEAN Members, except for Vietnam,³⁹ shall have eliminated their respective tariffs on 40 % of their Normal Track tariff lines the latest by the 1st of January 2013.

With respect to tariff lines placed by a party in the Normal Track, a party enjoys the tariff concessions other parties have made for the same tariff line in either the Normal or the Sensitive Track - as specified in and applied pursuant to the relevant schedules either in Annex 1 or Annex 2 of the GA - as long as it adheres to its own commitments for tariff reduction and elimination for a particular tariff line.⁴⁰

c) The "Sensitive Track"

The "Sensitive Track" for industrial goods allows for longer transition periods for tariff reductions as well as more elevated final levels, in order to protect, to a varied extent, a limited amount of goods traded between China and the ASEAN states.⁴¹ This is an expression of the practice of flexibility enshrined as a key principle in the ACFTA-GA. However, there has been a maximum ceiling to the number of tariff lines that a party was allowed to place in the Sensitive Track.⁴² The ASEAN- 6 and China were subject to a maximum ceiling of 400 tariff lines at the HS 6-digit level, and 10% of the total import value, based on 2001 trade statistics, while the CLMV were allowed

²⁷ A slightly different timeline applies to the Philippines which concluded their EHP with China only on the 27th of April 2005 during the state visit of Chinese President Hu Jintao to Manila. The late conclusion was possible on the basis of Art. 6(3)(a)(iv) ACFTA-GA (n.v.). Originally, the Philippines had argued that its agricultural sector could not withstand the quick liberalization under the EHP. See *Antkiewicz & Whalley, China's New Regional Trade Agreements*, NBER Working Paper Series, Working Paper 10992, December 2004, 11.

²⁸ The exact schedules are set out in Annex 3 ACFTA-GA.

²⁹ See Art. 6(2)(b) ACFTA-GA and Art. B(i) of Annex 3 of the ACFTA-GA (n.v.).

³⁰ Art. 6(3)(b)(i)(1) ACFTA-GA (n.v.).

³¹ Art. 6(3)(b)(i)(2-8) ACFTA-GA (n.v.). An example of such an acceleration agreement is the "China-Thailand Agreement on Accelerated Tariff Elimination under the Early Harvest Programme" concluded on the 17th of June 2003 which provided for the elimination of tariffs on all vegetable and fruit products by no later than 1st of October 2003. Singapore acceded to this agreement on 3rd of June 2004.

³² The so-called CEPA I agreements were signed on the 29th of June 2003 with Hong Kong, and on the 18th of October 2003 with Macao, followed by CEPA II agreements in August 2004.

³³ See Annex 1 ACFTA-GA: „Modality for Tariff Reduction and Elimination for Tariff Lines Placed in the Normal Track“.

³⁴ See Appendix 1, Annex 1 ACFTA-GA: „List of Products Scheduled for Tariff Elimination no later than the 1st of January 2012 for ASEAN 6 and China, and the 1st of January 2018 for CLMV“.

³⁵ See Art. 3(4)(a)(i) ACFTA-GA, Annex 2 Art. 1 ACFTA-GA. Among the CLMV countries, the schedules are identical for Cambodia, Lao PDR and Myanmar (Annex 2 Art. 1 (iii) ACFTA-GA), while Vietnam has a slightly different schedule (Annex 2 Art. 1 (ii) ACFTA-GA).

³⁶ See Art. 6(a)(iii) and (b)(iv) of Annex 2 ACFTA-GA. CLMV countries may keep ACFTA preferential tariff rates as high as 60 percent in 2005, while the maximum level allowed for the ASEAN-6 countries and China for the same initial year is at 20 percent. See the tables in Annex 1 (1)(i)(ii) ACFTA-GA.

³⁷ See Art. 6(a)(i) and (ii) of Annex 1 ACFTA-GA.

³⁸ See Art. 6(a)(b)(i) of Annex 1 ACFTA-GA.

³⁹ According to Art. 6(b)(iii) of Annex 1 ACFTA-GA Vietnam's percentage of Normal Tariff lines for which tariffs are to be eliminated by 2013 is to be negotiated separately.

⁴⁰ Art. 2 of Annex 1 ACFTA-GA.

⁴¹ See Annex 2 ACFTA-GA "Modality for Tariff Reduction/Elimination for Tariff Lines Placed in the Sensitive Track".

⁴² See Art. 1 of Annex 2 ACFTA-GA.

to include a maximum of 500 tariff lines at the HS 6 digit level.⁴³

The Sensitive Track is sub-divided into the “normal” Sensitive List (SL) [see Appendix 1 to Annex 2 GA] and the Highly Sensitive List (HSL) [see Appendix 2 to Annex 2 GA].⁴⁴ Applied MFN tariff rates on tariff lines placed in the SL of the ASEAN-6 and China must be reduced to 20 % by the 1st of January 2012 and subsequently to 0-5 % by no later than the 1st of January 2018.⁴⁵ In the case of the newer ASEAN countries, these MFN tariff rates must generally be lowered to 20 % by the 1st of January 2015⁴⁶ and to between 0 and 5 % by the 1st of January 2020.⁴⁷ The applied MFN tariffs on products in the HSL, in contrast, must only be reduced to a maximum of 50 % by the 1st of January 2015 (ASEAN- 6 and China), and by the 1st of January 2018 (CLMV), without any further tariff reduction commitments.⁴⁸ Tariff lines placed in the HSL are again subject to a maximum ceiling.⁴⁹ In detail, the Parties may not place more than 40 % of the total number of tariff lines in the HSL, or 100 tariff lines at the HS 6-digit level for the ASEAN- 6 and China, and 150 tariff lines for Cambodia, Lao PDR and Myanmar⁵⁰, whichever is lower.⁵¹

2. Rules of Origin

Preferential treatment, both under the EHP and under the ACFTA-GA,⁵² is only available for those products which fulfil the relevant ACFTA rules of origin (ROOs). The ACFTA-ROOs are set out in Annex 3 of the ACFTA-GA. They are similar to those imposed under the current ROOs of the ASEAN Free Trade Area (AFTA-CEPT), while differing considerably from the Chinese non-preferential ROOs.⁵³

a) Origin Criteria

Under the ACFTA-ROOs, products are deemed to be originating in the ACFTA, and are thus eligible for preferential tariff treatment, if they are (1) either wholly obtained or produced⁵⁴ or (2) if they meet the general⁵⁵ or the specific⁵⁶ origin criteria for products not-wholly obtained or produced.⁵⁷

The list of products considered to be wholly produced or obtained in a party is contained in Rule 3 of the ACFTA-ROOs. Examples are plant and plant products harvested, picked or gathered in China or the ASEAN states, live animals born and raised there, products obtained from live animals without further processing, etc. Minimal operations and processes in the sense of Rule 7 of the ACFTA-ROOs⁵⁸ are not to be taken into account for determining whether a good has been wholly obtained in one country.

The general ROO criterion for all other goods is based on a value added requirement.⁵⁹ Accordingly, a product is deemed to be originating if it meets either the requirements for “Single Country Content” or for “ACFTA Cumulative Content”. The former accords preferential tariff treatment if “not less than 40 percent of the content of a product originates from any Party”, meaning any one specific country among the ACFTA members (= minimum local content of 40 %). The latter requires for conferring origin that “the total value of the materials, part or produce originating from outside of the territory of a Party (i.e. non ACFTA)⁶⁰ does not exceed 60% of the FOB value of the product so produced or obtained, provided that the final process of the manufacture is performed within the territory of the Party.”⁶¹ This means essentially, that at least 40 percent of the content of a product must originate from an ACFTA member and/or China cumulatively (= minimum ACFTA content of 40 %).

Regarding selected products listed in Attachment B of Annex 3 of the ACFTA-GA, product specific ROOs were agreed upon.⁶² The product specific

⁴³ See Art. 1 of Annex 2 ACFTA-GA. Vietnam was additionally supposed to be subject to a ceiling of import value, which was to be determined by the 31st of December 2004 but appears to not have been specified yet.

⁴⁴ See Annex 2 Art. 2 ACFTA-GA.

⁴⁵ See Art. 3(i) of Annex 2 ACFTA-GA.

⁴⁶ Vietnam, however, has committed to reach a comparatively lower tariff level by then.

⁴⁷ See Art. 3(ii) of Annex 2 ACFTA-GA.

⁴⁸ See Art. 3(iii) of Annex 2 ACFTA-GA.

⁴⁹ See Art. 2 of Annex 2 ACFTA-GA.

⁵⁰ The ceiling in the case of Vietnam was to be determined by the 31st of December 2004, but the relevant outcome does not seem to be publicly available as yet.

⁵¹ See Art. 2 of Annex 2 ACFTA-GA. The Parties have made varied use of the SL/HSL. E.g., Brunei has placed 66 tariff lines at the 6-digit level into the sensitive list (e.g. different types of motor vehicles), and 34 into the HSL, while Cambodia has placed 350 tariff lines at the 6-digit level into the sensitive list, and 150 into the HSL (e.g. specified furniture items, soap and tobacco). China placed 161 tariff lines at the 6-digit level into the SL, and 100 into HSL (certain types of flour, tobacco products, paper products, and motor-vehicles). For the other Parties the usage of the SL/HSL is as follows: Indonesia 349 (SL)/ 50 (HSL) (e.g., certain types of engines, sports footwear, and spirits), Laos 88 (SL)/ 30 (HSL) (certain alcohol products, motor vehicles and autoparts), Malaysia 272 (SL)/ 96 (HSL) (e.g. fowls, specified milk and egg products, tobacco, iron and steel products, cars), Myanmar 271 (SL)/ none (HSL), the Philippines 267 (SL)/ 77 (HSL) (fowls, different vegetables, rice, specified engines), Singapore 1 (SL) (= Samsu products)/ 1 (HSL) (certain types of beer), Thailand 242 (SL)/ 100 (HSL) (e.g. certain fruits, vegetables, tea, engines), Vietnam (not yet specified).

⁵² See Art. 5 ACFTA-GA.

⁵³ In contrast to the ACFTA-ROO as well as the AFTA CEPT, the Chinese non-preferential ROOs use the change in tariff heading (CTH) rule – and not the value-added rule – as the main origin conferring criterion, while the value-added rule as well as the processing rule are only supplementary criteria. See Decree No. 416 of the State Council of the PR China, The Regulations of the PRC on Rules of Origin of Import and Export Commodities, adopted at the 61st Standing Meeting of the State Council on the 18th of August 2004, and effective as of the 1st of January 2005.

⁵⁴ See Rule 3 of the ACFTA ROOs.

⁵⁵ See Rules 4 and 5 of the ACFTA ROOs.

rules generally constitute an alternative criterion for conferring origin in addition to the general value added rule (see Attachment B lit. B of the ACFTA ROOs). They thus extend the range of products able to qualify for preferential ACFTA treatment. Hence, traders can base their claim for origin on these specific criteria instead of the general value-added criterion. These specific criteria require for conferring the origin status of a Party, that a product has undergone "substantial transformation". Depending on the product in case, such substantial transformation is assumed to have taken place either if a change in tariff classification of the product has occurred⁶³ or, with respect to certain textile and textile products only, if a specific manufacturing or processing operation on these products has been undertaken.⁶⁴

In respect of six tariff lines, listed in lit. A of the ACFTA ROOs, and concerning different forms of animal hair,⁶⁵ the product-specific ROOs are however of an exclusive nature and are thus the sole criterion for conferring ACFTA origin.

b) Administrative Procedures

In order for their products to enjoy preferential treatment, traders generally need to obtain a Certificate of Origin (called Form E) which is issued by a government authority designated by the exporting Party and notified to the other Parties of the ACFTA-GA in accordance with the Operational Certification Procedures set out in Attachment A to Annex 3 ACFTA-GA.⁶⁶ Products originating in the exporting Party, and not exceeding USD 200,00 FOB, do however not require a Certificate of Origin when consigned or when sent by mail. In such a case, a simplified declaration by the exporter confirming the origin of the product within the exporting Party is sufficient.⁶⁷

Any disputes over origin determination, classification of products or other similar matters are to be solved through consultations by the respective

government authorities in the importing and exporting Parties concerned. The outcome of such consultations is then also to be communicated to all other Parties.⁶⁸ It is important to note that this procedure only applies in the case of disagreement between the exporting and the importing government authorities, e.g., when the importing authority is questioning the correctness of the certificate of origin granted by the exporting country.

3. Non-Tariff Barriers

Pursuant to Art. 8(1) ACFTA-GA, the Parties which are WTO-members undertake not to maintain any quantitative restrictions at any time unless otherwise permitted by WTO disciplines.⁶⁹ The non-WTO members of ASEAN commit to phase out their quantitative restrictions three years (Vietnam: four years) from the date of entry into force of the ACFTA-GA, or in accordance with their accession commitments to the WTO, whichever is earlier. Non-tariff barriers other than quantitative restrictions must be identified by the ACFTA parties soon after the entry into force of the ACFTA-GA, and a time frame for elimination of these non-tariff barriers is to be mutually agreed upon by all Parties.⁷⁰

Furthermore, each party must accord national treatment to the products of all other Parties in accordance with Art. III of GATT 1994, which is, *mutatis mutandis*, incorporated into the ACFTA-GA and forms an integral part thereof.⁷¹

4. Safeguard Measures

Art. 9 ACFTA-GA allows, under certain circumstances, for the usage of safeguard measures to allow

⁶⁶ See Rule 6 of the ACFTA ROOs.

⁶⁷ See Rule 2 of the ACFTA ROOs.

⁶⁸ These are processes undertaken by themselves or in combination with each other for (a) ensuring preservation of goods in good condition for the purposes of transport or storage, (b) facilitating shipment or transportation, and (c) packaging or presenting goods for sale.

⁶⁹ See Rule 4 of the ACFTA-ROOs.

⁶⁰ "Originating material" is deemed to be a material whose country of origin is the same country as the country in which the material is used in production. See Rule 4(d) of ACFTA ROOs.

⁶¹ See Rule 4(a)(ii) ACFTA ROOs. The calculation formula with respect to the total value is laid out in Rule 4(b) and the value of the non-originating materials needs to be determined according to Rule 4(c)(ii) ACFTA ROOs.

⁶² See also Rule 6 ACFTA ROOs ("Product Specific Criteria") which refers to Attachment B.

⁶³ See Attachment B, B.1 of the ACFTA ROOs, concerning, e.g., certain types of fish such as salmon and herring, certain types of bags and cases, certain clothing accessories (e.g. belts, gloves) and certain furskins.

⁶⁴ Such alternative ROOs are available for the following product categories: (1) certain fibre and yarns, for which manufacture must occur through the process of fibre-making, spinning, twisting, texturizing or braiding from a blend of different fibres (See Attachment B, B.2(a) of the ACFTA ROOs), (2) certain fabric/carpets and other textile floor coverings as well as special yarns, twine, cordage and ropes and cables and articles thereof, for which manufacture must occur from polymer, fibres, yarns and raw or unbleached fabrics through defined production techniques (See Attachment B, B.2(b) of the ACFTA ROOs), and (3) certain articles of apparel and clothing accessories and other made up textile articles, where manufacture must take place through the processes of cutting and assembly of parts into a complete article (for apparel and tents) and incorporating embroidery or embellishment or printing from either raw or unbleached or finished fabric (See Attachment B, B.2(c) of the ACFTA ROOs).

⁶⁵ These are the products with HS Codes 5103.20, 5103.30, 5104.00, 5105.31, 5105.39 and 5105.40. The limitation of the term "substantial transformation" under ACFTA to a change in tariff classification and specific manufacturing and processing operations is uncommon. In international practice, the term "substantial transformation" usually regards the entirety of origin criteria for goods not-wholly obtained in a Party.

⁶⁶ See Rule 13 of ACFTA ROOs.

⁶⁷ See Rule 14 of ACFTA ROOs.

⁶⁸ See Rule 22 of ACFTA ROOs.

⁶⁹ The ACFTA Members committed to make information on their respective quantitative restrictions available upon implementation of the GA. See Art. 8(3) ACFTA-GA.

⁷⁰ Art. 8(2) ACFTA-GA.

Parties to protect their domestic industries against injury from the liberalization of trade in goods under the ACFTA-GA.

Art. 9(1) ACFTA-GA, first of all, reaffirms with respect to the WTO-Members among the ACFTA parties the existing rights and obligations under Art. XIX of the GATT 1994 and the WTO Agreement on Safeguards. Art. 9(2-12) ACFTA-GA, in addition, lays out the terms of ACFTA-specific safeguards as an alternative safeguard mechanism.⁷² ACFTA safeguard measures with respect to a certain product are permitted within the transition period for that product only. The transition period starts on the date of entry into force of the ACFTA-GA, which was the 1st of January 2005, and ends five years from the date of completion of tariff elimination/reduction for the product concerned.⁷³

The application of ACFTA safeguards requires, first, that imports of a Party of any particular product from the other Parties increased in such quantities, absolute or relative to domestic production, and under such conditions so as to cause or threaten to cause serious injury to the domestic industry of the importing Party that produces like or directly competitive products. Secondly, this increase must have taken place as an effect of the obligation incurred by a Party, including tariff concessions under the EHP, by itself or together with unforeseen developments.⁷⁴ Third, the particular product's share of imports in the importing country must have been larger than 3% of the total imports from the Parties.⁷⁵ Under the above named three conditions, a party is then allowed to impose a safeguard measure in the form of increasing the tariff rate applicable to the product concerned to the WTO MFN tariff rate applied to such product at the time when the measure is taken.⁷⁶

Safeguard measures may last for an initial period of up to 3 years and can be extended for a maximum period of 1 year. In any case, and notwithstanding the duration of an ACFTA safeguard measure, such measures must terminate at the end of the transition period for the product concerned.⁷⁷ In applying an ACFTA safeguard measure, the Parties are to follow the rules for the application of safeguards measures

in accordance with the WTO Agreement on Safeguards, with the exception of quantitative restriction measures contained in Art. 5, as well as Articles 9 (special rules for developing countries), 13 (surveillance by Committee on Safeguards) and 14 (dispute settlement).⁷⁸ The other provisions of the WTO Agreement on Safeguards are, *mutatis mutandis*, incorporated into the GA.⁷⁹

The ACFTA-specific safeguard provisions might have been primarily introduced in order to allow ASEAN countries to protect themselves against a flood of cheap imports from China. Businesses must take into account the risk attached to the availability of such safeguard measures, which can potentially interrupt the process of liberalization. This is especially relevant for companies considering to do all their manufacturing processes in China and aiming to supply Southeast Asia from there. In consequence, a diversification of production locations might be advisable to limit the danger of supply chain disruptions.

5. General and Security Exceptions

General and security exceptions to the trade liberalization commitments under ACFTA are specified in Art. 12 and 13 ACFTA GA.⁸⁰ Art. 12 ACFTA-GA, regarding general exceptions, is identical in wording with Art. XX of the GATT 1994. Art. 13 ACFTA-GA on security exceptions basically corresponds to Art. XXI of the GATT 1994, but includes an additional sub-paragraph to paragraph 2 of Art. XXI GATT 1994, permitting to take security-related actions so as to protect critical communication infrastructure from deliberate attempts intended to disable or degrade such infrastructure.⁸¹

III. Administration and Dispute Settlement

In the absence of a permanent body, ACFTA is administered jointly by the ASEAN Economic Ministers (AEM) and the Chinese Ministry of Commerce (MOFCOM), with the support of the ASEAN Senior Economic Ministers (SEOM) and the ASEAN Secretariat.⁸² Negotiations on the further progress of eco-

⁷¹ Art. 2 ACFTA-GA.

⁷² A Party which applies ACFTA-specific safeguard measures is precluded from simultaneous recourse to safeguard measures under the WTO Agreement on Safeguards. See Art. 9(11) ACFTA-GA.

⁷³ Art. 9(2) ACFTA-GA.

⁷⁴ Art. 9(3) ACFTA-GA. In contrast, Art. XIX:1 lit. a of the GATT 1994 only permits safeguard measures if both, unforeseen developments and the effect of the obligations incurred by a Party, lead to a drastic increase of imports which threaten to cause serious injury to the domestic industry of the importing Party.

⁷⁵ Art. 9(7) ACFTA-GA.

⁷⁶ Art. 9(4) ACFTA-GA.

⁷⁷ Art. 9(5) ACFTA-GA. The tariff rate for a product upon termination of a safeguard measure on that product must be the rate that, according to that Party's tariff reduction and elimination schedule, would have been in effect on the 1st of January of the year in which the safeguard measure is terminated. See Art. 9(9) ACFTA-GA.

⁷⁸ Art. 9(6) (sentence 1) ACFTA-GA.

⁷⁹ Art. 9(6) (sentence 2) ACFTA-GA. The functions of the "Council for Trade in Goods" or the "Committee on Safeguards", as stipulated in the incorporated provisions of the WTO Agreement on Safeguards, are carried out by the AEM-MOFCOM or the SEOM-MOFCOM, as appropriate, as long as no permanent body for ACFTA has been established. See Art. 9(12) ACFTA-GA.

⁸⁰ With respect to all areas of ACFTA, see also the provision on general and security exceptions in the ACFTA-FA (Art. 10 ACFTA-FA).

⁸¹ See Art. 13(b)(iii) ACFTA-GA.

⁸² See Art. 16 ACFTA-GA.

conomic integration in ACFTA in general are carried out by the ASEAN-China Trade Negotiation Committee.

All disputes in the context of the liberalization of trade in goods among China and the ASEAN states are, unless otherwise provided for⁸³, handled according to the rules of the ACFTA Dispute Settlement Agreement (the ACFTA-DSM) as a general dispute avoidance and settlement mechanism for all violation disputes⁸⁴ arising under the ACFTA-FA as well as all current and future legal instruments agreed pursuant to it. The ACFTA-DSM may be invoked in respect of measures taken by central, regional or local governments or authorities within the territory of a Party.⁸⁵ It is however important to mention that only the "Parties" to the ACFTA agreements, that is the signatory states themselves, have the authority to bring a complaint before the ACFTA-DSM for resolution. Private parties may thus not directly access the ACFTA-DSM.

The ACFTA-DSM provides for three kinds of mechanisms with respect to resolving disputes: (1) consultation, (2) conciliation or mediation, and (3) arbitration. Conciliation or mediation may be sought at any time of a dispute, while arbitration is only available once a dispute could not successfully be settled through consultations. To elaborate further on the individual procedures is however beyond the scope of this article.

The ACFTA-DSM does not prejudice any right of the Parties to have recourse to dispute settlement under any other treaty to which they are parties.⁸⁶ However, unless the Parties expressly agree to the use of more than one dispute settlement forum,⁸⁷ once the complaining party has selected one forum to initiate dispute settlement proceedings,⁸⁸ this forum shall be used to the exclusion of any other for such dispute.⁸⁹ How effective the ACFTA-DSM will be remains to be seen.

IV. Recognition of China's Market Economy Status

In Art. 14 ACFTA-GA, each of the ASEAN Member States officially recognizes China as a full market economy and, from the date of signature of the

ACFTA-GA (November 29, 2004), commits to refrain from applying in the trade with China those provisions in China's WTO Accession Commitments⁹⁰ which lay the basis for a special treatment of China due to its categorization as a non-market economy, and which essentially lower the criteria for allowing investigations against unfair trade practices of China.⁹¹ A similar provision as in Art. 14 ACFTA-GA was also included in the Closer Economic Partnership Agreement (CEPA I) between Mainland China and the Hong Kong SAR (Art. 4).

V. Outlook: Significance for East Asia and Beyond

With the implementation of the ACFTA-GA, tariff reductions between China and the ASEAN states are now under way on both agricultural and industrial products. Compared to smaller RTAs that have been established in the region in recent years, such as the FTA between Japan and Singapore⁹² or between South Korea and Singapore,⁹³ the extent of tariff reductions as well as the overall scope of economic integration between China and the ASEAN states appears still rather limited. However, ACFTA is not only, or not primarily, a tool for achieving economic objectives. Rather, it is also, or above all, a means for fostering mutual trust and a sense of "community feeling" between the members of this large and greatly diverse region.

⁸³ Art. 2 (1) and (3) ACFTA-DSM.

⁸⁴ The ACFTA-DSM does not cover non-violation disputes. See footnote 1 to Art. 4(1) ACFTA-DSM.

⁸⁵ See Art. 2(4) ACFTA-DSM.

⁸⁶ See Art. 2(4) ACFTA-DSM.

⁸⁷ See Art. 2(7) ACFTA-DSM.

⁸⁸ The complaining Party is deemed to have selected a forum when it requests the establishment of, or refers a dispute to, a dispute settlement panel or tribunal in accordance with the ACFTA-DSM or any other agreement to which the parties to a dispute are parties. See Art. 2 (8) ACFTA-DSM.

⁸⁹ See Art. 2(6) ACFTA-DSM.

⁹⁰ These provisions are (1) Section 15 of the Accession Protocol which establishes special criteria for the application of Art. VI of the GATT 1994, the Antidumping Agreement and the SCM Agreement in proceedings involving exports of Chinese origin to another WTO Member; (2) Art. 16 Accession Protocol which stipulates a 12 year long transitional product-specific safeguard mechanism with respect to imports of Chinese origin into the territory of any WTO Member, and (3) Para. 242 Working Party Report containing special provisions, applicable until the 31st of December 2008, for China's trade in textiles and clothing products. See on the special China-specific WTO safeguards, e.g., Yifan ZHU, Schutzmaßnahmen im GATT/WTO-Recht und ihre Bedeutung für China, ZChinR 1/2005, 1, 3 et seq.

⁹¹ The Accession Protocol is available online at <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf>>. The report of the working party (WT/MIN(01)/3, 10 November 2001) is available at <http://www.wto.org/english/thewto_e/acc_e/wp_acc_china_e.doc>.

⁹² See the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, concluded on the 13th of January 2002. This was the first bilateral free trade agreement ever signed in East Asia.

⁹³ See the Free Trade Agreement between the Government of the Republic of Korea and the Government of the Republic of Singapore, signed on the 4th of August 2005.