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# Obstacles to Transatlantic Trade

by Hajo Hasenpflug, Dr Dietrich Kebschull, Hamburg \*

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**Early this year the US Administration made reference to "a marked improvement in the relations between the EC and the USA over the period of the last three years" – an astonishing statement in the light of the mounting non-tariff obstacles to trade between the EC and the USA.**

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**T**he economic relations between the USA and the states of the European Community are marked by a continuing expansion of their goods exchanges which is imparting decisive impulses to world trade, for the USA and the Community are accounting for about 50 p.c. of all world exports. Their trade relations are however put in jeopardy by moves of the US protectionists who have once again become more active, as they always do in election years. On the other hand it would be unfair not to mention that the EC is not upholding the free trade banner either – certainly not in the agricultural sector.

It is a striking fact that, as a rule, it is no longer the tariff rates which cause disputes about trade policy although they are, despite the 35 p.c. cut agreed in the Kennedy Round, still a great impediment to international commerce: no more than half the industrial goods imported into the EC enter duty-free, and in the USA little more than a quarter is exempt. The *level of duties* on imports of industrial goods into the USA averages 6.2 to 10.9 p.c., depending upon the method of calculation. It is thus appreciably higher than in the EC which however also still charges duty rates averaging 3.9 to 6.9 p.c. The highest tariff rates are between 15 and 30 p.c.; in the USA they are about twice as common as in the Community.

Other trade impediments than import duties are however evoking more criticism. They are known as non-tariff obstacles to trade. Consisting of statutory and administrative regulations and practices on the national and Community level, they tend to distort the volume, composition and regional distribution of the trade in goods and services, as do of course import duties.

The importance of these import and export impediments may be gauged at a first glance from their large number. In the overenthusiastic belief that free trade could be achieved by tariff cuts

alone they were in the past greatly neglected: no fewer than 854 non-tariff obstacles to trade have been listed in five divisions and 30 sub-divisions for consideration in the current GATT round.

The following are the most important non-tariff obstacles with a bearing on the transatlantic relations:

- ☐ Quantitative restrictions on imports;
- ☐ Import levies;
- ☐ Quantitative restrictions on exports;
- ☐ Tariff value determination;
- ☐ Public procurement policy;
- ☐ Subsidies and grants-in-aid;
- ☐ Antidumping measures.

Quantitative import restrictions and equalisation levies are of relatively limited importance in the EC–USA trade in industrial goods although they may in the longer term be increasingly reinforced by "voluntary" self-restraint agreements. In the agricultural sphere however where the USA has introduced import restrictions for a variety of products – which since 1955 have been sanctioned by a GATT "waiver" – they are having an immense impact. The US restrictions apply to wheat, wheat products, cotton, groundnuts, dairy products and (through the United States Sugar Act) sugar.

The EC in turn is protecting its producers by means of import levies which are an established part of – by now – 20 agricultural market orders. A system of protection which is almost without parallel in the world and quite incompatible with the basic liberal principle of foreign commerce in the western world, has been established through variable import levies by means of which the import price for the agricultural products can be raised to the desired level. The effectiveness of this system is increased by heavy subsidization of agricultural exports from the EC.

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The quantitative restrictions on exports, unlike those on imports, have not received much attention in the 25 years of GATT's history, and for this reason were not even mentioned in the Tokyo declaration inaugurating the current GATT round. They only attained importance as a result of the restrictions placed by the USA on exports of soy beans and other feeding stuffs on July 2, 1973 — and of course the action of the OPEC states. Last year it was feared that wheat might be subjected to a similar restriction. Measures of this kind could possibly be tolerated for a limited period, but there must be no restraint on access to raw materials and the freedom of enterprises to make dispositions. GATT must first of all establish clear regulations so as to guarantee that the interests of countries depending upon imports receive consideration. In the case of the soy beans this was not done.

#### **Problematic Tariff Value Determination**

The determination of tariff values is a very important non-tariff obstacle to trade in EC—USA relations. It has given rise to many disputes in the past, concerning the tariff classification of various categories of merchandise, on the one hand, and the determination of their value for duty purposes, on the other.

The USA and the EC have been using entirely different tariff classifications until now. The EC's external tariff for about 3,000 items follows the Brussels Tariff Nomenclature (BTN) which contains 1,079 principal items. The US tariff, on the other hand, lists over 10,000 items. As the individual tariff rates differ, this creates considerable uncertainty among exporters about what duty is likely to be levied, mainly because a particular kind of merchandise may be included under various headings.

The Brussels schedule is applied today in most countries of the world. The USA has also indicated its willingness to adopt it but so far has not gone beyond more or less vague promises.

Nor has there been much progress in regard to the tariff value determination. During the Kennedy Round the USA promised to amend its system to bring it into line with the internationally customary arrangements. But nothing has in fact been done in this respect. The impediment to trade of the US tariff value determination arises from the following methods:

According to the Brussels agreement on tariff values the customs duty is to be based on the price which the imported merchandise would command at the place of importation. That is normally the cost price of the producer plus the costs of transport and insurance (cif basis). The

USA (as well as Canada and Australia) however starts from the producer's price excluding the cost of transport (fob basis), which would not create particular problems were there not numerous different regulations concerning the determination of the value in the country or at the border as well.

These regulations were uniformized by the Customs Simplification Act of 1956 but in all cases in which the effective duty charge was reduced by more than 5 p.c. the goods in question were included in a so-called Final List. Goods on this list can be subjected to any of at least five different valuation methods, and the exporter does not know beforehand which of these will be chosen. Usually it is the higher of the "foreign value" (in the exporting country) or the "export value" (in the major markets of the country in which the goods are sold). But if these values cannot be ascertained, it is the usual price in the USA less the costs of transport, etc., (US value) which is applied. And if this is also impracticable, the valuation is based on the cost of the materials and labour (costs of production).

#### **Manipulated Wholesale Prices**

Also possible however is recourse to the American Selling Price System. This was introduced as early as 1922 so as to protect the US dyestuffs industry, which was being established at that time, from the European industry. It is still being applied today to the imports of various chemical products: instead of the fob value it uses a price obtained by American wholesalers for comparable US products. Where there are several comparable American prices, the customs authorities may at their discretion choose the one which seems to them to be most apposite. In practice this is often the highest price encountered in the market. Since no sales need have been effected at this price, the US industry can manipulate the American Selling Price within wide margins. The charge has therefore been brought against the US chemical industry that its official price lists in many instances do not represent the prices at which sales are actually made.

The American Selling Price System has another discriminatory aspect beside impairing the competitive position of foreign suppliers by high duty protection: the dilatory process of tariff value determination may cause delivery dates to be missed. In order to determine the tariff value of imported merchandise the customs authority in the USA must know its chemical structure, and if the product is unknown, it must be analysed which sometimes requires extensive and prolonged analytical processes in the customs laboratories.

### **Discriminatory Procurement Policy**

The public procurement policy is also used as a means of providing strong protection. According to an OECD study the attitude of the USA with its Federal "Buy American Act" of 1933 and its supplements is unquestionably showing the greatest antipathy to foreign trade. A typical example is the "Buy American Clause" of October 1972, which lays down that the Defense Department must not buy armaments or equipment containing high-quality steels or precious metals of foreign origin. The reference to equipment is especially important for under this heading are included not only weapons but motor vehicles, office equipment, computers, etc.

Apart from the direct effect of discrimination in favour of domestic products it must be feared to have an indirect negative effect on the use of foreign high-grade steels and precious metals in manufactures for private consumption. Big combines, like Ford and General Motors, made no distinction in their production processes in the past between high-grade steels and precious metals of domestic or foreign origin for use in civilian or military vehicles. To make sure that they will not be passed over by the Pentagon in the framework of its procurement policy, industries whose production includes armament products such as trucks may now cut down on the purchase of foreign steels and precious metals — also for civilian manufactures — which would extend the discriminatory effect of the "Buy American Clause" further.

### **Export Subsidization Conflicting with GATT**

The discriminatory procurement practices are not the last item on the list of non-tariff obstacles to trade. Actual or alleged export subsidies, and antidumping measures taken in this connection, are potentially a material source of conflict in EC-USA relations. The refunding of indirect taxes for exports has been a bone of contention for some considerable time. The USA has made the charge that the states of the European Community are subsidizing their exports substantially by Value Added Tax offsets which relieve exports of the VAT burden and place a corresponding charge on imports. The VAT offsets in the EC states are however compatible with GATT which lays down clearly in Articles II and VII that indirect, as distinct from direct, taxes may be compensated for at the border.

The USA, which unlike the EC states relies mainly on direct taxation, has allowed US firms to set up so-called Domestic International Sales Corporations (DISCs) because it considers the present GATT regulation to be discriminatory. The

1971 Revenue Act of December 10 of that year allowed US firms to form special foreign trade companies whose retained profits are exempt from Corporation Tax provided that at least 95 p.c. of their activities are concerned or connected with the export business. They enjoy, besides, deferment of the tax on 50 p.c. of their distributed profits for as long as the profit is left with the DISC and continues to be used for export transactions or export promotion. By early 1974 as many as 3,400 firms had availed themselves of this facility and formed DISCs.

The EC states and Canada have accused the USA in GATT of subsidizing its exports contrary to GATT regulations, claiming that the tax privileges for the DISCs, which were usually export divisions of firms before they were set up as separate entities, were tantamount to exemption from or deferment of direct taxes. They have been pointing out in particular that the USA had in late 1960 accepted an interpretative note concerning Article XVI of GATT which forbade the exemption from direct taxes of export transactions by industrial and commercial enterprises.

### **Objectionable Antidumping Measures**

The US protectionists made the biggest headlines last year when they commenced several antidumping inquiries against European products — sheet glass, cheese, canned ham, steel products and automobiles. While one may well understand the inquiries relating to cheese and canned ham, two agricultural products the price of which has been brought down to the world market level by subsidies paid out of European tax monies in order to stimulate exports, the applications for the industrial products reflect a profoundly protectionist attitude. The Community and other trading nations have long been complaining that the US attitude to antidumping inquiries was not consistent with GATT. In 1968 an Antidumping Code was put in effect by GATT with US consent for the purpose of speeding up inquiries into dumping. Moreover, it is laid down in Article VI of GATT that antidumping measures may be taken only if material injury is or may be caused to an existing industry.

According to the antidumping regulations of the US Treasury Department the objective conditions of dumping exist if the export price of merchandise traded with the USA is lower than the comparable price of merchandise of the same kind for consumption in the exporting country. If dumping is established by the US Treasury Department under the valuation rules, it passes the case on to the US Tariff Commission under Section 201a of the Antidumping Act of 1921 to determine whether the dumping threatens to cause

injury to a domestic industry. In determining injury the Tariff Commission in all decisions up to 1967 applied a "material injury" standard: the injury had to be substantial. On this relatively strict standard an injury was established in only 11 of 49 investigatory proceedings between 1955 and 1966. In 1967 however the Tariff Commission abandoned the "material injury" standard, replacing it by the "de minimis" standard according to which any, even a slight economic disruption is to be regarded as causing injury in the meaning of the law. The Tariff Commission has consequently in almost all the cases placed before it since 1967 reached the conclusion that injury is being caused or threatens to be caused to a domestic industry.

The change-over from the "material injury" standard to the "de minimis" standard also applies to the determination of the cause of the dumping: while the Commission had stipulated in connection with previous decisions that the dumping imports must be the principal cause of the injury, since 1971 this need no longer be proved. The Tariff Commission is satisfied if it can be established that the dumping imports are more than an inconsiderable factor in causing injury.

This narrow interpretation of the Antidumping Act by the US Tariff Commission is undoubtedly contrary to the provisions of the Antidumping Code agreed internationally — with US consent — in the framework of GATT as all contracting parties undertook under this Code to resort to antidumping measures only if the dumping imports are proved to be the "principal cause" of „material injury" to a domestic industry.

The best international agreements are bound to fail in their purpose as long as governments will accept international regulations as international law but the legislative bodies boycott their observance. This is especially true of the situation in the USA, for the Antidumping Code is (purely) an intergovernmental agreement in the achieve-

ment of which the US Administration participated without special Congress authorization, merely by virtue of its general competence for foreign affairs. Under US constitutional law the Congress may however, irrespective of the international commitments into which the executive has entered, decide by legislative act that the "executive agreement" shall not be binding for the interpretation of a national law: the US Congress has made use of this facility in regard to the Anti-dumping Code; it decided in the Renegotiations Amendment Act of 1968 that the Treasury Department and the Tariff Commission must observe the provisions of the Antidumping Code only in as much as they are consistent with the US Anti-dumping Act of 1921.

### **Uncertain Prospects**

To sum up, it may be stated that the non-tariff obstacles to trade contain much incendiary material, especially in regard to the trade between the EC and the USA. The concept of a liberal foreign trade is turning into a farce, especially bearing in mind that the USA and, on the EC side, the Federal Republic of Germany are presenting almost identical arguments in support of unhampered goods exchanges in a New International Economic Order and fearing for the very existence of the free international trade order because of the demands voiced by the developing countries at various UN meetings.

In a precarious economic world situation as the present the prospects for the trade between the EC and the USA must be judged to be most uncertain. No great prophetic gifts are needed to foresee that these questions will attain increasing importance with regard to international trade agreements in the next few years. Whatever progress may be made in individual areas will at best be gradual and require long negotiations. In the agricultural sector it will probably be impossible to achieve even small advances.

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