

EDITORIAL COMMENT

Strengthening GATT

Is it because of the stagnation of the internal development of the Community that the external relations receive so much more attention now than some years ago, or is it because the importance of the external relations has increased?

We live in a time of recession in which unemployment is the most important problem. This is not so much because automation has made work unnecessary; there is still much work to be done. In education, social service, government and recreation we could fruitfully employ many more people. There are jobs, but they have to be paid and the payment causes the problems. Payment for general services burdens the national economy and damages our competitive position on the world market. We must be cheap if we want to export and we cannot be cheap if we burden our national economy with expensive education, recreation or government. Of course, prices could be raised. Our cars and our computers would also be sold if they were twice as expensive, provided that no one else sells cars or computers any cheaper. Our problem can be solved, but only in international cooperation. We urgently need world wide rules on trade, on production, perhaps even on prices. But who is to make these rules and who is to implement them?

The most important forum for international trade is the General Agreement on Tariffs and Trade (GATT). It could be used to regulate international trade in such a way that full employment would be stimulated, but then it needs to be strengthened.

Who can strengthen GATT? For many products only three producers are important: the U.S., Japan and the Community. Which of them should take the lead? The U.S., because it has the strongest market? Japan, because it is the most active exporter? Or should it be the Community? Of the three trading blocks the Community has by far the widest experience in international cooperation. Many of our Member States have long traditions in international trade and together we

faced all the problems of supra-national markets in our mutual effort to create a common market. Would it not, therefore, be logical that the Community should take the lead in striving at a world trading order, or at the strengthening of the GATT? Must the Community always remain passive in world affairs because of its lack of coherence and its inability to settle its internal affairs?

In the present issue we offer two articles and a book review concerning GATT. Both articles plead for a stronger GATT and especially for granting direct effect to GATT provisions within the Community. Such direct effect would be an important step to exercising a stricter review of the observation of GATT obligations by the Community. Better observation of GATT obligations would help to strengthen GATT, and a strengthening of GATT would serve the long term interest of everybody, including the Community. Considering the need for universal cooperation and the possibilities of GATT it seems rather obvious that a strict application of the GATT rules would be helpful. These rules were considered necessary, they were made to be applied and they are clear enough for direct application. According to Pescatore direct effect depends less on the intrinsic qualities of the rules concerned than on the *possumus* or *non possumus* of the judges.¹ If they can apply a rule of law, judges should do so. The Court of Justice accepted that GATT-law forms part of Community law, but it did not apply GATT-law. It found several reasons for not granting direct effect to provisions of the GATT which are described and criticized both by Petersmann and by Mastellone.

One of the most frequent excuses for not applying the law, which we know from Community experience, is: "The others do not apply it either", and then one, or two, or twenty, violations by others are quoted, whilst many more loyal applications of the law are forgotten. This reasoning is widely used in GATT. GATT obligations are frequently violated by all Contracting Parties and those violations are used to justify further violations. How to improve this situation? Here, the Community could set an example. It could initiate a more loyal application of GATT. The Court of Justice ruled that each contracting

1. Pescatore in 8 EL Rev. (June 1983), p. 177.

party of GATT is responsible for executing fully the commitments which it has undertaken but that it is normally free to determine how to do that.² One of the means to do so is to grant direct effect to the GATT obligations. Since the *Van Gend en Loos* case we have learned from Community law that the vigilance of individuals concerned to protect their rights amounts to a most effective supervision of treaty obligations. We could use this experience in GATT. It would be in the interest of GATT, and therefore in the long term interest of the Community to stimulate the effective supervision by individuals. It is vital that GATT must be strengthened; it is rather obvious that nobody can do this any better than the Community. It is understandable, therefore, that our authors plead for a direct application of GATT rules in Community law. Even if, in the short term, this would be to the detriment of some of our industries, it would serve the interest of our consumers and it would eventually lead to a stronger GATT.

But who is to take such steps with respect to GATT? Should it not be our Governments with the help of the Commission? They determine the trade policy of the Community, they are largely responsible for the success or failure of the GATT. They should initiate measures for stronger international rules. They could even suggest in a resolution that GATT obligations should have force of law inside the Community. But they fail to do so. When cases on external trade are brought before the Court of Justice the Governments and often even the Commission plead against applying the international rules within the Community legal order. They did so for the agreements with the EFTA countries and they did so for the GATT.

Should the Court of Justice ignore this unanimous position of the Governments? Should it take account of the fact that Governments are often under pressure from weak industries defending their own short term interests, or – as Jackson puts it in his review of McGovern's book³ – that Governments are tempted to impose burdens on those who do not vote, in order to gain benefits for those who do vote? Should the Court, therefore, protect the consumers and general long

2. See the article by Petersmann, *infra* p. 425, at note 64.

3. See below, p. 623.

term interests by granting direct effect to the GATT obligations against the wishes of the Governments?

We are getting used to the Court of Justice carrying the burden of the further development of the Community because of impotence of the governing institutions, but we may not expect the Court to carry on alone. The Court cannot govern Europe. Our Governments should take up their duties to the Community and through the Community to the world as a whole. The world, as well as Europe, need a Community which can take action, where the Governments do more than trying to steal marches upon each other.

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