

COMMISSION OF THE EUROPEAN COMMUNITIES

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POSSIBLE US COUNTERVAILING ACTION AGAINST REMISSION OF VAT ON E.C. EXPORTS

(Communication from the Commission to the Council)

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OF VAT ON E.C. EXPORTS

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1. The Commission draws attention to this issue for its far-reaching economic and political implications and invites the Council to share its analysis and conclusions as set out below.

The US court case

2. The Commission believes that a dangerous body of jurisprudence is in the making in the US in regard to the remission of indirect taxes to foreign exporters. On the basis of US countervailing duty legislation dating back to 1897, a US customs court has recently ruled against the rebate of the Japanese commodity tax ("Zenith" case). This Court seems likely to build on this precedent when it comes to judge a complaint lodged by US Steel against the remission of VAT to EC steel exporters.
3. The Commission considers that the Community must now face up to what it believes is the serious risk that these customs court decisions would not be reversed at a later stage, in the US Customs and Patent Appeals Court or even in the US Supreme Court.
4. The judicial timetable for the Community case is still far from clear. But a decision against the Community could be reached in the New York Customs Court at almost any point between the end of June (if "summary judgement" on the precedent of the "Zenith" decision is granted) and the autumn of 1977 (if the case against the Community is pursued on a normal timetable). From that point, and pending the outcome of appeals in the higher courts, US customs appraisement on EC steel exports would be withheld. Thereafter, a decision in the Appeals Court might be expected at the end of this year or early in 1978; and a final decision in the Supreme Court later in 1978.

The trade at stake

5. In the event of an adverse final judgement in the US courts, the US Treasury will find itself under court order to impose countervailing duties (equivalent to the tax remitted in each individual case) on roughly a billion dollars worth of EC steel trade. The issue seems unlikely to stop there. Indirectly, almost all the Community's trade could be affected by reference to the same principle of law, if other protectionist US lobbies wished to jump on the band-waggon.

6. The trade impact will still be serious enough to warrant concern, even if the immediate damage does not go beyond a temporary withholding of customs appraisement. At a time when it is of the first importance to restore business confidence, which has suffered during the economic recession, the uncertainties created will nevertheless further discourage trade; and exporters will be subject to costly bonding requirements.
7. The threat applies not only to the EC and Japan but also to the trading world at large. Most US trade partners remit indirect taxes on exports.

The GATT case

8. The developing US jurisprudence referred to above is in violation of GATT Article VI § 4 and the note to Article XVI. This has been confirmed in the working group set up by the GATT Council to consider Japan's complaint in the Zenith case. But the Customs Court's findings include the following: "...GATT is a trade agreement, which if in conflict with the law of Congress..., must yield to the latter."
9. Under the Trade Act of 1974, the US Administration is instructed to take action as may be necessary to secure the revision of GATT articles with respect to the "treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily on direct rather than indirect taxes for revenue needs" (Section 121 § a (5)).

The US Government attitude

10. The Treasury has rejected the US Steel complaint as a matter of principle and from the outset. Indeed, the US Government have made it clear that they disapprove of such countervailing action against the remission of indirect taxes. During President Jenkins' visit to Washington in April, President Carter himself indicated his desire to see the case settled satisfactorily.
11. Nevertheless, if defeated in the courts and compelled to look for remedies requiring Congressional consent, the Administration will, however, clearly be under pressure to seek some form of trade-off involving negotiations on fiscal border adjustments.

The Community attitude

12. It is therefore important for the Community to avoid any ambiguity as to the nature of the problem. It is not for the US Administration to point to the Courts or to the Congress. The incompatibility of US domestic law and US international obligations is for the United States as such to resolve. The Community does not have to pay a price to secure US respect for such obligations.
13. In particular there can be no question whatsoever of making the Community's value-added tax negotiable.
14. It therefore falls to the American Administration to take the necessary remedial action. If this requires fresh US legislation, the Community will look to the Administration to start preparing the ground accordingly, and in the interval to make use of every available procedural device to delay an adverse court decision.

Contingency planning

15. Meanwhile the Community must be ready for all contingencies. This is not to over-dramatize the situation; the Commission indeed remains confident in the US Administration's desire to avert the danger. But it is clear that, if US countervailing duties are applied to our exports, retaliatory measures cannot be avoided, in order to restore the balance of trade advantages under the rules of the GATT.
16. The Commission will therefore be ready to present rapidly to the Council whatever detailed proposals the developing situation may warrant. The Commission will seek an adequate and credible response in keeping with the nature of the challenge, which is still limited to the field of customs administration; and will wish to avoid an escalation of retaliatory measures. (1)

17. Whatever efforts the Community and the US may make to keep this conflict within reasonable bounds, it is clear that the implementation by the US of trade restrictions of such a fundamental character, against clearly established international rules could not remain without incidence on the pursuit of the Multilateral Trade Negotiations.

Immediate action

18. The Community will closely co-ordinate its own efforts with interested third countries and in particular with Japan. The Commission has established the appropriate links to this effect.
19. In direct contacts with US decision-makers, a constant effort will be made to explain the danger and to stimulate preventive action. An educational campaign will therefore be launched with the help of the Community's information services with a particular view to mobilizing US trade lobbies (agricultural as well as industrial) likely to be interested in the avoidance of a major trade conflict.

Proposal to the Council

20. The Commission invites the Council to endorse the foregoing analysis and conclusions. It will submit further communications on this subject as appropriate.