

## THE USA, THE EEC, AND THE GATT: THE ROAD NOT TAKEN

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I first became aware of the General Agreement on Tariffs and Trade ("GATT") on January 1, 1962 — New Year's Day — when everyone else was sleeping off New Year's Eve parties. The fifth, or Dillon Round, of periodic trade negotiations under the auspices of the GATT — the first round in which the European Economic Community ("EEC") had participated as a unit — had essentially been completed, but President Kennedy had not formally signed off on the result of the negotiations. Some time between Christmas 1961 and New Year's Day 1962, Orville Freeman, the U.S. Secretary of Agriculture, had sent a brief to the President, urging him not to accept the outcome of the Dillon Round. In particular, Secretary Freeman urged against acceptance of the nominally separate negotiations under Article XXIV(6) of the GATT, which were supposed to compensate outsiders such as the United States and (at the time) the United Kingdom for disadvantages resulting from the formation of the customs union. Secretary Freeman warned the President that the EEC was creating a Common Agricultural Policy ("CAP") that was protectionist not only in effect but in objective. In his view, the United States, as a major supplier of wheat, corn, and other products of agriculture, had a great deal to lose from the CAP, and should assert its rights — and its power — before it was too late.

On the other side, George Ball, the Under Secretary of State, wanted to avoid a break between the EEC and the United States at all costs. A break over agriculture, he feared, might well doom the "bold new instrument of American trade policy" that President Kennedy was to announce in his State of the Union message a few weeks later,<sup>1</sup> a Trade Expansion Act designed to

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<sup>1</sup> See PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1962 14 (1963). Under Secretary Ball had outlined the need for new negotiating authority "sufficiently broad in scope to meet the opportunity and challenge of the European Community" in a speech to the National Foreign Trade

authorize and stimulate a new round of trade negotiations.

At the time, I was a junior member of the Office of Legal Adviser of the State Department, but as Special Assistant I was supposed to be ready for anything, at any time. This time my job was not to become an expert on GATT, but to gather together the various experts from Geneva, Brussels, and several offices in the State Department and prepare a document in plain English that would persuade President Kennedy to find in favor of State rather than Agriculture.<sup>2</sup> Under Secretary Ball, himself a lawyer, thought a lawyer's brief, freed from the jargon of the GATT experts, would do the job. Of course, Under Secretary Ball wrote the final version of the memorandum put before the President. My role was only to write the first draft.

The outcome was that President Kennedy sided with the State Department. The Dillon Round concluded without an agreement on agriculture, except for some vague reference to further negotiations on the basis of previous negotiating rights.<sup>3</sup> The Trade Expansion Act of 1962 was adopted in the fall of 1962, authorizing the strategy of overcoming the potential diversionary effect of the customs union created by the EEC by reducing all barriers to international trade.<sup>4</sup> On the whole, that strategy was a success, in that the European Common Market did not become a protectionist bloc — agriculture excepted. As for the CAP, it formally entered into effect on July 1, 1962, without serious challenge.

At the time, I knew too little, and like any lawyer, was easily persuaded of the correctness of my client's position. Over the years, as I learned more about the subject and moved from the

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Council a few weeks earlier. Brendan M. Jones, *Freer U.S. Policy on Trade Asked by Kennedy Aid*, N.Y. TIMES, Nov. 2, 1961, at 1, 17.

<sup>2</sup> Note that at the time there was no Office of U.S. Trade Representative. That office, originally known as the Office of the Special Representative for Trade Negotiations ("STR"), was created at congressional initiative in the Trade Expansion Act of 1962, precisely to provide a balance between competing domestic and international interests in formulating U.S. trade policy. See Trade Expansion Act of 1962, Pub. L. No. 87-794, § 241, 76 Stat. 872, 878 (1962).

<sup>3</sup> See Agreement Between the United States and the European Economic Community and Member States with Respect to Corn, Sorghum, Ordinary Wheat, Rice and Poultry, Mar. 7, 1962, 13 U.S.T. 960, T.I.A.S. No. 5034, 445 U.N.T.S. 199. See also Joint Declaration and Agreement with Respect to Quality Wheat, Mar. 7, 1962, 13 U.S.T. 958, 964, T.I.A.S. No. 5033, 5035.

<sup>4</sup> See generally Trade Expansion Act of 1962.

role of advocate to the role of academic observer, I have often wondered whether the State Department's position, and President Kennedy's acceptance of that position, was right.

As a legal matter, the proposed challenge to the CAP would have been fairly persuasive. The centerpiece of the CAP was the variable levy, in effect a duty on imports measured not by their price or value, but by the difference between their price and the "threshold price" related to a target price determined solely by the EEC.<sup>5</sup> Article VII of the GATT says that tariffs are to be based on actual value of imported merchandise — the reverse of the variable levy, which increases as the import price falls. Furthermore, under Article II of the GATT, duties are supposed to be bound, or at least eligible to be bound, pursuant to negotiation; by definition the *variable* levy does not lend itself to binding. Finally, even if the variable levy and associated devices were not technically in violation of Article XI, which (with some exceptions) prohibits quantitative restrictions, a policy aimed at autonomy and indeed autarchy was surely contrary to the spirit of the GATT.<sup>6</sup>

The CAP was clearly central to the European Common Market, and the variable levy was central to the CAP. If the European Communities (as they were then called) had to choose between complying with the GATT and insisting on its design for the CAP, one can well imagine that the CAP would have prevailed, and the GATT would have been gravely wounded.

In any event, the challenge that Secretary Freeman wanted to bring was never brought.<sup>7</sup> It could certainly be said that in the tension between GATT as a code of rules and the GATT as a

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<sup>5</sup> For a detailed and roughly contemporaneous account of the variable levy system, see Kenneth W. Dam, *The European Common Market in Agriculture*, 67 COLUM. L. REV. 209 (1967).

<sup>6</sup> Cf. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 520-21 (1969). Jackson wrote that "spiritual violations" do not assume the status of concrete inconsistencies with the GATT — a statement that I might not have agreed with. *Id.* He was surely correct, however, in pointing out that in the context of the CAP "the law has not kept pace with the technology of trade protection." *Id.*

<sup>7</sup> A largely symbolic surrogate challenge was brought by the United States in the fall of 1963, the so-called Chicken War, which ended in a partial victory for the United States in that it was permitted to raise some duties by way of retaliation, but did nothing to alter, or even criticize, the CAP. See 2 ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* 249 (1968).

forum for accommodation of trade conflicts, the pendulum swung in the latter direction. The GATT, however, grew stronger, not exactly step by step, but round by round, each one coming close to failure but achieving substantial agreement at the last minute. The Kennedy Round (1964-67) began to address substantive rules; the Tokyo Round (1973-79) (almost called the Nixon Round) took on a larger agenda of nontariff issues and achieved agreement on some of them; and the Uruguay Round (1986-94) took on a still larger agenda, moving beyond trade in goods to intellectual property, trade-related investment measures, and (at least in concept) exchange of services. In each round, the CAP was a major source of contention, and in each round the parties decided at the end — the very end — to settle for a modest improvement and not to risk sacrificing the greater achievements in other areas for the sake of agriculture or principle.

All of this is well known. Yet, everyone likes to play “what if. . . .?”<sup>8</sup> On one hand, the CAP of the EEC, which had not formally entered into effect as of early 1962, became entrenched and led to an ever greater misallocation of resources, as well as a continuing drain on the budgets of all the member states of the EEC. Moreover, there is no denying that the tolerance of the CAP by the United States and other outsiders led to some measure of loss of respect for the GATT as a source of law. *What if* the United States had made a serious effort in 1962 to understand the CAP, and had insisted on regular negotiation of the target price for wheat and feed grains, the major determinants of the many elements of the CAP?<sup>9</sup> *What if* the target prices had been subject to international scrutiny each time a new member state was admitted to the EEC? Would Europe’s agricultural system today be more rational, more efficient, more consistent with the doctrine of comparative advantage?

On the other hand, would the maturing of the GATT have

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<sup>8</sup> See, e.g., IF IT HAD HAPPENED OTHERWISE, (J.C. Squire ed., 1932) (containing contributions by Winston Churchill, *If Lee Had Not Won the Battle of Gettysburg*; Harold Nicolson, *If Byron Had Become King of Greece*; André Maurois, *If Louis XVI Had Had an Atom of Firmness*; and eight other essays in similar vein).

<sup>9</sup> As of summer 1962, France’s threshold price for wheat was 66% above the landed price for imports, and Germany’s threshold price was about 106% above landed prices. See GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 204 (1965).

been frustrated before it really got started? After all, the growth from a fragile forum for tariff cutting and tariff binding into a full-fledged organization with rules, adjudication and enforcement powers, and an ever widening jurisdiction, took more than thirty years as it was. We will never know. The footnote to history which I have described here, however, may serve as a reminder that the development of the international law of international trade has not been along an inevitable path. There were in fact, quite a few forks in the in the road. A friend of mine advises: "When you see a fork in the road, take it." That is what President Kennedy did in 1962. The rest is history.<sup>10</sup>

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<sup>10</sup> I have not seen the Freeman-Ball contest for the mind of President Kennedy discussed in any book or article, either about President Kennedy or about the trade negotiations. See, e.g., JOHN W. EVANS, *THE KENNEDY ROUND IN AMERICAN TRADE POLICY* 146-47 (1971); ERNEST H. PREEG, *TRADERS AND DIPLOMATS* 39-56 (1970); ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS* 846-47 (1965); THEODORE SORENSEN, *KENNEDY* 410-12 (1965). Nor does Under Secretary Ball mention it in his memoirs. See GEORGE BALL, *THE PAST HAS ANOTHER PATTERN* (1982). The suggestion that an opportunity was missed to tighten agricultural trade rules in the Dillon Round before finalization of the CAP is made "with the benefit of hindsight" in ROBERT L. PAARLBERG, *FIXING FARM TRADE* 47 (1988), but without reference to the debate within the U.S. administration in the early months of 1962.

As for Secretary Freeman, by March 1962, he had gotten the message, though perhaps with a hint of uneasiness. In testifying in favor of the Trade Expansion Act before the House Ways and Means Committee, Secretary Freeman said:

The Common Market poses the biggest and most immediate challenge in our efforts to keep open the flow of our farm products to foreign consumers. . . .

We have gone about as far as we can go in our negotiations with the Common Market under existing legislation. . . .

. . . An important element of [the common agricultural] policy with which we have to deal is a system of variable import levies. . . . This system can be used to promote a policy of self-sufficiency. This is the root of our problem in negotiations with the EEC . . . .

From the point of view of American agriculture, we must be very firm in negotiations with the Common Market, making sure we get full value for every concession we make. Perhaps the biggest test of Atlantic trade cooperation in the next few years is going to be the test of agricultural trade policy. . . .

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We must throw our weight behind those forces in Western Europe who argue that heavy import duties will be detrimental to their own economic interest.

*Trade Expansion Act of 1962: Hearings Before the House Comm. on Ways and Means, 87th Cong., 2d Sess. 835, 841-43 (1962) (testimony of Secretary of Agriculture Orville L. Freeman).*