GATT Machinery for Dispute Settlement

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1. Dispute settlement in GATT is a matter of great complexity, involving juridical questions of the nature of GATT "law", and the nuances of customary procedures as they have grown up and continue to evolve. Brevity thus unavoidably does some violence to the nature of the subject. Within these limitations, however, it may be useful to split the subject into treaty enforcement; dispute avoidance; and dispute settlement, narrowly defined.

2. The first of these, treaty enforcement, is not emphasised by signatories, partly because over the years the conditions of international trade have tended to evolve in such a way as to make elements of the treaty moribund or ineffective, and partly because of the pragmatic bias of the GATT - as a system less of definitive law than of procedures designed to avoid disputes, and strike a balance of rights and obligations between the parties. Where major issues are at stake, such as the conformity of some regional arrangements with the GATT, there may be no settlement of the difference, which is simply shelved. Other questions of treaty compliance, like the modalities of application of Article XIX (safeguards), are temporarily patched up with ambiguous terminology and made the subject of international negotiations. Yet others, where breaches in the rules have been admitted (mainly in respect of quantitative restrictions), have been resolved by corrective action when the trade situation allowed it, followed (for example, in the Tokyo Round) by interpretive protocols.

3. As regards dispute avoidance, an important technique of GATT has involved the use of the waiver. Until recently, for example, the Generalized System of Preferences had to be accomodated under a waiver from the most-favoured nation principle of Article 1. Waivers are freely given to developing countries, or where developing country interests are at stake. Alteration of the substantive GATT "law", or its elaboration and codification as occurred in certain areas as a result of the Tokyo Round, could also be conducive to the avoidance of disputes, by clarifying

existing provisions and making procedures more open. However, it is doubtful if some of the most important of the codes will prove to have been fully successful in this respect.

4. The evolution of GATT procedures in recent years has tended in the direction of a continual management of trade problems with the intention that disputes would be headed-off, and differences settled before they had had time to become disputes. An example of this type of development is provided by the Consultative Group of Eighteen, which came into existence during the period of the Tokyo Round and was made a permanent organ at its conclusion. It facilitates a high-level exchange of views on the development of the trading system, and it was this Group which, in 1981, first put out the suggestion for a Ministerial Meeting of GATT in 1982, to head-off a number of threats to the GATT system that could not adequately be dealt with by internal procedures or legal process.

5. The kernel of dispute settlement, narrowly defined, lies in Articles XXII and XXIII of the GATT. These were the subject of an Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, which was the fourth and last of the "Framework" texts adopted by the Contracting Parties at the close of the Tokyo Round. This Understanding sets out in its annex an "Agreed Description of the Customary Practice in the GATT in the Field of Dispute Settlement (Article XXIII:2)", including the customary elements of the procedures regarding working parties and panels of experts.

6. The Contracting Parties adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties. This procedure provides, among other things, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure. Panel members serve in their individual capacities.

7. The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters. In this connexion, panels have consulted regularly with the parties to the dispute and have given them adequate opportunity to develop a mutually satisfactory solution. Panels have taken appropriate account of the particular interests of developing countries. In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the Contracting Parties in making recommendations or in giving rulings as envisaged in Article XXIII:2.

8. In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. Nullification or impairment can take place without there being a breach of GATT rules. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. Where a claim of nullification or impairment is upheld, settlement usually involves the grant or offer of compensating benefits. Where compensating benefits are refused as inadequate, the complainant may simply "reserve its rights". Only very rarely are countermeasures, involving suspension of the application of former concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, comtemplated. Cases taken under Article XXIII:2 have led to such action in only one case.

9. As is clear from the Agreed Description of the Customary Practice in GATT in the Field of Dispute Settlement, the object of GATT is conciliation, not the enforcement of penalties. Panel and working party procedures are used for conciliation. These may recommend penalties, and the Contracting Parties (or the Council of Representatives on its behalf) may authorise the imposition of penalties. These would be intended to be some form of retaliation in proportion to the degree of nullification and impairment. The Contracting Parties would be loth to take such a step in view of the strain this would place on GATT procedures. Major countries would be loth to agree to penalties against themselves, and decision-taking customarily proceeds by consensus.

10. Working parties, composed of government officials, are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally, working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries that are parties to the dispute are always members of the Working Party and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party's report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the Contracting Parties may take a final decision.

11. Each of the codes on non-tariff measures, resulting from the Tokyo Round, is provided with a Committee of Signatories, having a role in dispute settlement analogous to that of the GATT Council (acting for the Contracting Parties) in relation to normal Article XXIII:2 cases. Dispute settlement procedures under the codes all follow more or less a standard model similar to those applicable under Article XXIII. The agreements on Customs valuation, goverment procurement, technical barriers to trade, subsidies and anti-dumping provide that, if a dispute cannot be settled directly between the parties, it may be referred by either party to a committee composed of all the signatories to the Agreement concerned. This committee will seek to conciliate a solution. If this fails, either party can have the dispute referred to a panel set up by the committee, which will report on the matter. Based on the panel's findings, the committee may make recommendations to any of the parties to the dispute. If its recommendations are not complied with, the committee usually is empowered (if it sees fit) to

authorize a suspension of obligations of one or more of the signatories to the agreement towards any other signatory, or other appropriate countermeasures. The agreements on Customs valuation and technical barriers to trade provide additionally for technical experts to assist in a consultative role in dispute settlement.

12. The Textiles Surveillance Body (TSB) has a particular role to play in dispute settlement for the GATT Textiles Committee, which is the administering organ of the Arrangement Regarding International Trade in Textiles (MFA). The December, 1981 Protocol extending the MFA reaffirms "that the terms of the Arrangement regarding the competence of the Textiles Committee and the Textiles Surveillance Body are maintained". This preambular reaffirmation may have seemed called for in view of the criticism that had hitherto been directed at those bodies, especially by developing countries that had felt the TSB lacked "teeth". The TSB is composed of developed and developing countries having a rotating membership, but with a permanent representation for some. Dispute settlement leads from the Textiles Surveillance Body to the Textiles Committee, thence to the GATT Council and, if agreement still eludes the parties, to the Contracting Parties particularly under Article XXIII procedures of GATT.

Australia-EEC Dispute

13. In addition to what has been stated above, several of the Articles of GATT have more particularised dispute settlement procedures. For example, the recent complaint by Australia in the matter of the EEC sugar regime was brought under Article XVI, on subsidies. This Article, as well as Article XXIII, are part of the subject matter of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (known as the code on subsidies and countervailing measures). The Australian complaint was laid before the code had been drafted, and some of the concepts in the report of the Panel on this case are found also in the code.

14. Australia and Brazil, in the matter of the EEC sugar régime, decided to see how far they could go towards redress of their similar complaints by using to the utmost the existing machinery

for dispute settlement. The panels appointed to hear their "sugar" complaints had reported that, since there was no fixed budgetary limit on how much could be spent by the EEC on export refunds for sugar, there was no element in the system and its application that would prevent the EEC from obtaining more than an equitable share of world export trade in sugar, which was a point at issue. However, the panels were "not in a position" to reach a definite conclusion that the increased share that was observed had resulted in the EEC "having more than an equitable share of world trade in that product".[1] Article 10:3 of the new subsidies code attempts to reduce the ambiguity in the notion of equitable shares, and adds a price desideratum, but the problem of causality remains, the burden of proof lying with the complainant.

15. The September, 1981 meeting of the GATT Council was essentially devoted to a review of the situation regarding the question of EEC refunds on exports of sugar - the subject of the Australian complaint - following the notification by the EEC of its new sugar regulations as well as the 1981/82 sugar intervention price. The Council decided, without prejudice to the rights and obligations of contracting parties under the General Agreement, to establish a Working Party to conduct a review of the situation and to report to the Council not later than 1 March 1982. The Working Party submitted a Report to the GATT Council, which met on 31 March. At that meeting the EEC delegate maintained that under the Community's new sugar regime, with its co-responsibility concept, all elements of export subsidy had been eliminated; but the complainants protested that procedural devices had been used to block substantive discussion of an issue which remained unresolved. The Chairman regretted that the Council had been unable to reach a satisfactory solution; there was no alternative in his opinion but to regard the two cases as closed. He suggested, however, that Council meetings to consider notification and surveillance procedures under GATT should look at the problems of dispute settlement in the light of this experience.Subsequently,Australia,the Argentine

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1. For a detailed discussion of this issue, see Colin Phegan: "GATT Article XVI:3 Export Subsidies and 'Equitable Shares'", Journal of World Trade Law, May-June 1982.

Brazil, Colombia, Cuba, Dominican Republic, India, Nicaragua, Peru and the Philippines together lodged with the GATT Council a fresh complaint against the Community's sugar export refund scheme.

Wider Implications of the Australian Complaint

16. Of present concern is the wider question of whether the dispute settlement mechanisms of GATT are "effective", and if not, what avenues could be explored in an attempt to improve procedures. Particularly at issue is the question of whether "smaller" countries can expect to get even-handed justice in disputes with the big battalions.

17. This is no new issue as regards either textiles or agriculture. Developing countries in general had hitherto tended towards the view that the Textiles Surveillance Body had been largely "ineffective" because the more powerful trading countries - in this case again including the EEC as the world's largest textile importer would not cede a sufficient degree of national sovereignty in trade matters to make it so. Much the same applied in the field of agriculture (see below).

18. At this level, and put in this way, the question is seen to be essentially political. That many disputes are, at bottom, not strictly legal but rather political, was part of the rationale for creation of the Consultative Group of Eighteen. And at the October, 1981 meeting of the Consultative Group, which considered agricultural trade in the light of national agricultural policies and relevant provisions of GATT, "it was the American policy and the waiver that the Americans had enjoyed since 1955 that produced the greatest criticism", according to one press report. It is worth taking a backward look at that year to help in an understanding of the attitudes to GATT of a number of primary producing and other countries.

19. In 1955 the United States requested, and obtained, a waiver of its commitments under the General Agreement insofar as such commitments might be regarded as inconsistent with action which that country would be required to take under Section 22 of the Agricultural Adjustment Act of 1933. Translated into more overtly

political terms this might be said to be a recognition in GATT of the primacy of the Congress in the formulation of US farm policies. It was at about this time that heavy US farm surplus disposals under the Public Law 480 "Food for Peace" programme were cutting into third-party commercial markets, and calling forth the first strong official public denunciation in Australia of the unbalanced way the respective agricultural and industrial obligations of GATT were being respected.

20. Against this background of political and, in some countries, constitutional constraints on the formulation of foreign economic policy, it would be difficult to imagine that a fully satisfactory redress for the asymmetry of GATT obligations would be likely to come from improvements to the GATT's dispute settlement machinery alone, or from a tightening of the legal drafting of the General Agreement itself. As regards surplus disposals, talks in GATT led to "gentlemen's agreements" laying down acceptable principles. These evolved through the years and as a result of the Tokyo Round there has been a partial codification of arrangements for bovine meat and dairy products. The Tokyo Round, however, failed to agree to a proposed "multilateral agricultural framework", in which national policies could have been confronted; so the quasi-political aspects of international agricultural trade and related farm policies now rest with the Consultative Group of Eighteen.

Conclusions

21. The basic intention of this paper has been to introduce some of the issues and to pose the question whether a tightening of the legal drafting of GATT, or an improvement of the procedural or institutional arrangements of GATT, would be likely to give more teeth to the enforcement aspects of dispute settlement. It seems to be that, in this area of international relations, a nice balance needs to be struck between political pressures that cannot realistically be avoided, and a too cavalier treatment of legal forms and precedents in GATT. It should be the aim to increase respect for the latter, especially if GATT is to be of equal help to developing countries and also to some of the smaller developed ones. Most suggestions for improvement have thus focused on panel and working party procedures and composition, including timing,

publicity and burden of proof - as well as on the unsuitability of parts of the text of GATT for judicial process.

22. By the circumstances of its origin the GATT is sometimes referred to as a "non-organisation". It started as a legal document, with a small secretariat to service its provisions (e.g. for tariff negotiations). It does not. like the IMF and IBRD, have financial sanctions to enforce its persuasions. The General Agreement contains no provision for reference of either actual disputes or questions of interpretation to the International Court of Justice, nor is there any provision for the establishment of an internal tribunal to resolve actual disputes or to promulgate authoritative rulings. After exhaustion of committee, panel and working party procedures, recourse can only be had to the Contracting Parties, i.e. to the whole membership, and is therefore a consciously political rather than a judicial process.

23. Presumably also because of its origin, the GATT secretariat has always adopted a low profile, seeing its role as facilitating an accomodation of interests, a balance of rights and obligations, and the use of its good offices to find consensus, or bilateral agreement. The prestige of the Director-General has grown over the years, and his office is increasingly occupied in questions involving differences between developed and developing countries. The bureaucratic powers of the secretariat have risen as a result of the creation of a new committee structure to service the codes on non-tariff measures. The secretariat is also being increasingly asked by Committees to prepare authoritative background documentation. Though the creation of anything like the original concept of the ITO would no longer have political validity, a question to be posed would be whether a consciously expanded role for the GATT secretariat, for example as principals rather than agents in panel procedures, might not be the natural way forward.[1]

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1. Not all would necessarily agree with the above. See, for example, the suggestion by C.F. Teese, in The World Economy, Trade Policy Research Centre, March 1982. "More emphasis should be given to automaticity of panels. Panels should be nominated, as far as possible, from a permanent group of non-Geneva-based experts. Panels should be encouraged to go further than simply finding that a breach of GATT rules exists and should be prepared to develop a scheme of arrangement which would lead to the amelioration and eventual elimination of damage."

24. Against the above suggestion would be the possibility that the secretariat would by this means be destroying its own credentials to impartiality: steps would clearly need to be taken to ensure that this did not happen. In favour of the idea would be the need to link the GATT's great reservoir of expertise (which is of course already freely available to existing panels and working parties) directly with the exercise of an impartial and genuinely international judgement.