THE GATT DISPUTE SETTLEMENT SYSTEM : A CRITICAL REVIEW

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Md. Naushad Siddiqui

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ABBEREVIATIONS

BOP: Balance of payments.

CAP: Common Agricultural Policy (of the EEC).

CONTRACTING PARTIES: When capitalised, the term is used to signfy contracting parties acting jointly.

CTD: Committee on Trade and Development. A GATT body which handles issues of particular interest to developing countries.

EEC: European Economic Community, a customs union formed under the treaty of Rome.

EFTA: European Free Trade Association.

FOGS: Functioning of the GATT system.

GATT: General Agreement on Tariffs and Trade.

GNG: Group of Negotiations on goods.

GNS: Group of Negotiations on Services.

GSP: Generalised System of Preferences.

IBRD: International Bank for Reconstruction and Development.

IMF: International Monetary Fund.

IPR: Intellectual Property Right.

MFA: Multifibre Arrangement.

MFN: Most Favoured Nation.

MTN: Multilateral Trade Negotiations.

NTB: Non-Tariff Barrier.

NTM: Non-tariff measure.

OMA: Orderly Marketing Arrangement.

QR: Quantitative Restriction.

TNC: Trade Negotiations Committee.

TNCs: Transnational Corporations.

TRIMs: Trade-related investment measures.

TRIPs: Trade-related Intellectual Property Rights.

UNCTAD: UN Conference on Trade and Development.

VER/VRA: Voluntary Export Restraint/Voluntary Restraint Arrangement.

WIPO: World Intellectual Property Organisation.

C H A P T E R - I

INTRODUCTION

The General Agreement on Tariffs and Trade [GATT] has an unusual negotiating history. Both its substantive obligations and its enforcement procedures were drawn from the unfinished text of a much longer and more ambitious international agreement, the Charter of the International Trade Organization [ITO]. Participants for the ITO Charter negotiations , realizing that the negotiations for a permanent governing body would continue for some time, turned to the immediate need for tariff reductions to revive trade. They settled upon the General Agreement, which embdied all tariff restraints and trade agreements reached upon that point therefore, GATT's negotiating history is to be found primarily in the larger and more complex negotiations which produced the ITO Charter.

1.1 The Genesis of GATT

The post-war design for international trade policy was animated by a single minded concern to avoid repeating the disastrous errors of the 1920s and 30s. The trade policy officials of the United States and United Kingdom were more or less convinced of the need to put limits on the extent of government interference in international trade, an interference which in the 1920s was at least partially to blame for the severity

of the Great Depression in the early 1930s. Those were the years during which economic nationalism had reigned supreme. Restrictions by one country had led to restrictions by another, and this restrictionism threatened to smother world trade.[1] For instance, many countries in late twenties and early thirties, particularly the United States and United Kingdom, enacted legislation which emphasized the expansion of their exports and imposed trade barriers on imports by raising tariff duties to unprecedented levels. The most notorious among these legislations was the United States' Smoot-Hawley Act of 1930.[2] In the same way the United Kingdom abandoned free trade and adopted a general tariff in 1932. The nations of the British Commonwealth, meeting in the following year, established the system of Imperial Preference. This system provided for preferential access for British goods to the markets of commonwealth countries and vice versa.[3]

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1. A. Hoda., Developing Countries in the International Trading System [New Delhi: Allied Publishers Pvt. Ltd., 1987], p.1

2. Robert, E. Hudec, The GATT Legal System and World Trade Diplomacy [New York: Praeger, 1975], p.5.

3. Jay Culbert, "War-time Anglo-American Talks and the Making of the GATT," The World Economy, Vol. 10, No.4, 1987, p.383.

Moreover, during the war the United States leaders stressed the importance of economic co-operation to the preservation of the peace. Harry Hawkins of the State Department's Division on Commercial Policy, in a 1944 Speech, noted that nations which are economic enemies are not likely to remain political friends.[4]

Thus, to prevent restrictionist tendencies and to achieve primary economic objectives such as raising standards of living, promoting and maintaining high levels of employment and maximising world income, it was considered necessary for governments to surrender some of their rights in the matter of trade policy. It was thought that an inter-governmental body such as the proposed ITO, by setting out detailed codes of conduct, would protect governments from their own worst instincts.

The war-time discussion between the United States and United Kingdom which laid the groundwork for the 1946-48 GATT/ITO negotiations were largely held under Article VII of the US and UK Lend Lease Agreement of 1943.[5] Basically, in the series of international conferences during those days United States took primary initiative. These initiatives by the United

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4 John, H. Jackson, World Trade and the Law of GATT [Indianapolis: Bobbs Merill, 1969], p.38.

5. Hudec, n, 2, pp. 7-8.

States were mainly taken under the Reciprocal Trade Agreement Act of 1934. This Act was secured partly by the elections of 1932 which swept Democratic majorities into both chambers of Congress and partly by the intense lobbying efforts of Cordell Hull, who was Secretary of State in the Roosevelt Administration from 1933 to 1944.[6] According to this Act, the United States Congress delegated the responsibility for handling the specifics of trade to the executive branch. Thus, the Congress authorized the President [which meant in practice the State Department] to enter into agreements with other countries to Lower tariff on a reciprocal basis.

During the period from 1934 to 1945, 32 such trade agreements were negotiated and accepted by the United States. Almost all the clauses in GATT can be traced to one or another of the clauses contained in these trade agreements.[7] In 1945, after lengthy hearings and considerable debate, Congress extended the authority of the President for another three year period, until June 12, 1948. It was basically under the authority of this Act that the United States accepted GATT.[8]

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6. Jay Culbert, n. 3, p.383

7. Jackson, n.4, p.37.

8. ibid

However, the first major step in this direction was taken at Bretton Woods on 22 July 1944, when the United Nations Monetary and Financial Conference adopted the Articles of Agreement of the International Monetary Fund [IMF] and International Bank for Reconstruction and Development [IBRD]. One of the main aims of the IMF Agreement was to facilitate expansion of international trade by promoting exchange stability, eliminating restrictions on current payments and making resources available to members for financing deficits in the balance of payments.[9]

But it was immediately realized that the expansion of world trade cannot be achieved through the instrumentality of funds alone. This led to a proposal by the United States Government for the establishment of an International Trade Organization in 1945. Accordingly, it published a draft of a proposal for such an organization. The proposal was accepted by the United Nations Economic and Social Council [ECOSOC] in early 1946. A "United Nations Conference on Trade and Employment" was officially convened, and a Preparatory Committee, consisting of 18 key governments, was appointed to prepare a draft Charter for consideration by the plenary Conference,[10] and for conducting negotiations for the reduction of tariffs.

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9. Hoda, n.1, p.1.

10. Hudec, n.2, p.9.

The main U.N. Conference was preceeded by three preparatory conferences in 1946-47. The first session of the Preparatory Committee, held at London in October-November 1946, produced the first draft of the Charter. It also prepared the outlines of a procedure for holding multilateral tariff negotiations and suggested that a separate agreement be drawn to safeguard the value of tariff concessions. At the meeting of the Drafting Committee, in Lake Success, New York, from January 20 to February 25, 1947, the first full draft of GATT was prepared and some of the provisions of the draft Charter were modified.

The GATT discussions at New York focused on the question of which articles of the ITO were to be included in the GATT. In addition, the Committee at New York indicated three types of articles that would not be included in GATT, namely: [1] articles involving purely domestic policy; [2] articles that depended on the existence of ITO; and [3] articles that did not establish immediate obligations on international trade but which would have come into play only after a period of grace.[11]

At the Second Session of the Preparatory Committee, held at Geneva in April-October 1947, the preparatory draft of the ITO Charter was completed

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11. Jackson, n.4, p. 43.

and on October 30, 1947 the Final Act of the "General Agreement on Tariffs and Trade" was signed by 23 governments.[12]

The actual U.N. Conference on Trade and Employment was held in Havana, Cuba, from November 1947 to March 1948, where the Final Act establishing the text of the ITO Charter was signed by 54 countries on 24 March 1948.

The original GATT text contains three parts. Part I consists of only the first two articles. It thus contained principally the most-favoured nation obligation and tariff commitments and includes the schedules of tariff concessions. Part II, including Articles III through XXIII, contains the commercial policy provisions that constitute the GATT's substantive code of good behaviour in trade matters.[13] Part III covers mainly organisational matters.

During the Geneva conference there was a general keenness among delegations for GATT to enter into force immediately. This objective forced them to limit the Agreement in many ways in order to facilitate the process of ratification. The dominant

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12. Hudec, n.2, p.45.

13. Kenneth, W. Dam, "The GATT as an International Organisation", Journal of World Trade Law, vol. 3, 1969, p.380

concern was the problem of certain governments, notably United States ratification, where, in order to sidestep Congressional ratification, the GATT had to be framed as a "trade agreement".

To circumvent these difficultis, an imaginative legal device was adopted. The governments with the exception of the most-favoured nation obligation and the tarrif concessions, could accept the legal obligations of the General Agreement "provisionally". This was achieved through the Protocol of Provisional Application. And further, Part II was to be applied "to the fullest extent not inconsistent with the existing legislation".[14] It implied that the existing legislation conflicting with specific provisions of Part II would thus not constitute a violation of the General Agreement. And with these two above mentioned conditions, the governments undertook to apply the General Agreement on or after 1 January 1948 provisionally.

Whereas the ITO Charter was to enter into force on its acceptance by a majority of the governments signing the Final Act of the U.N. Conference on Trade and Emplyment; in the event of the requisite number of signatories not accepting it was to enter into force upon the acceptance of at least 20 signatories.

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14. Robert, E. Hudec, "The GATT Legal System: A Diplomat's Jurisprudence", Journal of World Trade Law, Vol.4, 1970, p. 632.

However, neither condition was fulfilled and finally in December 1950, the United States executive branch announced that it would not resubmit the ITO Charter to Congress for approval.

The failure of the ITO's ratification made the GATT's position even more precarious, since it was drafted with the express assumption that an ITO would materialize. Thus, GATT was not originally intended to be a comprehensive world organization. It was only a temporary side affair meant to serve the particular interests of the major commercial powers who wanted a prompt reduction of tariffs among themselves.[15]

1.2 GATT's Substantive Rules:

The first three Articles of the General Agreement contain the foundation upon which the rest of its text is built. Article I begins with the Most-Favoured Nation [MFN] principle and thus required that:

"any advantage, favour, privilege of immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territory of all other contracting parties". Thus, the MFN principle

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15. Hudec, n.2, p. 50.

requires an importing party to give equal status to all contracting parties. However, despite the MFN principle the GATT does not exclude all discriminatory trade policies. It has provided a number of exceptions, for instance, the inclusion of a grandfather clause permitting continued application of an existing preferential trade arrangements [Article 1, para 2]. The most significant exception to the MFN principle set out in the GATT is contained in Article XXIV which states conditions under which GATT signatories may form economic unions and free trade areas.[16]

Article II expresses the preference of the GATT system for tariffs as the accepted means of restriction of trade and focuses reduction of those tariffs by setting up a system of tariff schedules based on concessions negotiated in successive Rounds of multilateral trade negotiations.

The Article II tariff reduction process was the focus of the first six Rounds.[17] However, by the Tokyo Round of the 1970s they were no longer considered as

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16. Sumitra Chisti, Restructuring of International Economic Relations: Uruguay Round and the Developing Countries [New Delhi: Concept Publishing Company, 1991], p. 55.

17. The preceding six rounds of GATT multilateral trade negotiations were Geneva Round [1947]; Annecy Round [1949]; Torguay Round [1951]; Geneva Round [1956]; Dillon Round [1960-61]; and Kennedy Round[1964-67].

the principal barriers to international trade. Consequently, in the Tokyo Round the negotiations focussed on the reduction of non-tariff barriers, which were more harmful than the conventional trade barriers. Presently, in the Uruguay Round this effort has been further joined by a focus on the expansion of GATT rules to cover trade in services, trade related investment measures and intellectual properly rights, as well as on agricultural trade barriers, particularly those in the United States and the European Community.[18]

Article III requires a party to extend any trade advantage or restiction given to domestic producers to all importers. Like the MFN principle, this requirement of equal treatment of foreign and domestic producers is an assertion of the principle of non-discrimination. But Article I para 1, merely imposes an obligation not to discriminate between foreign states, whereas Article III provides for complete equality of treatment of foreign and domestic products with respect to internal charges and regulations.

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18. Ronald A. Brand, "Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930", Journal of World Trade Law, vol.24, No.3, p.9.

1.3 The GATT Dispute Settlement Framework

Maintenance of a stable and open world trading system requires an effective process for containing and resolving conflicts between governments. The GATT is no exception in this regard. It contains elaborate provisions for resolution of differences between the contracting parties, including a procedure for third party-adjudication of complaints. These articles of GATT provide that in certain matters there is only provision for bilateral discussion, whereas, certain articles which govern specific obligations provide for multilateral consultation after bilateral efforts have failed while others provide only for multilateral consultation.[19] And in some other cases, there is provision for compensatory withdrawal or suspension of concessions or obligations.

Thus, from the above mentioned facts it is clear that GATT does not have a uniform dispute settlement procedure. Basically, there is no single sharply defined dispute - settlement procedure in GATT that can be readily distinguished from the remainder of the GATT activity.[20] There are over 30 such procedures. In

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19. Hoda, n.1, p. 165.

20. John, H. Jackson, "GATT as an Instrument for the Settlement of Trade Disputes", Procedings of the American Society of International Law, vol. 61, 1967, p. 144.

certain matters the GATT articles envisage bilateral discussion.[21] For instance, paragraph 5 of Article II says that "If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule announced to this Agreement, it shall bring the matter directly to the attention of the other contracting party". Similarly, second paragraph of Article XIX states that a contracting party which invokes this article "shall afford those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect to the proposed action".

Some of the GATT articles provide for multilateral consultations if bialateral consultations have failed to resolve the differences.[22]

In various other cases GATT contains provisions for compensatory withdrawal or suspension of concessions or obligations. These include the renegotiations under Article XXVIII:4, as well as

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21. GATT Articles II: 5, VI: 7, XIX:2, XXVII and XXVIII:1,2 & 3.

22. GATT Articles XII:4[d], XVIII:7, XVIII:12[d], and XXVIII:4.

compensation under Articles II:5, XIX:3, XVIII:21 etc. For example, paragraph 21 of Article XVIII says that "while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party of such substantially equivalent concession or obligations under this Agreement".

There are two provisions of Article XXV, namely paragraph 1 and 5, which are of vital importance to pursue practical dispute resolution in certain circumstances. One is enabling joint action by the Contracting Parties[23] to facilitate the objectives of GATT and another authorizing waivers from GATT obligations in certain circumstances.[24]

Sometimes, in GATT certain dispute settlement procedures are followed which have no specific authority in the treaty itself. For instance, early in the history of GATT, there were occasions of interpretative difficulty which were submitted to the Chairman of the Contracting Parties for a ruling. His ruling was then usually adopted by the Contracting

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23. When the members of the GATT act collectively they are referred to as Contracting Parties.

24. Jackson, n. 4, p. 165.

Parties as a whole.[25]

It is very difficult to ascertain where dispute settlement leaves off and either trade bargaining or policy formulation begins. For instance, when we consider trade bargaining, at some point trade bargaining becomes a dispute. Likewise, sometimes disputes themselves lead to trade bargaining. For instance, in the case of a Danish complaint against Italy involving Italian cheese tariffs, the panel that considers the complaint recommended on Article XXVIII[26] renegotiation as a means of resolving dispute.[27]

In certain circumstances, the issues raised in a case by an aggrieved party themselves become the subject of controversy, which are normally resolved by the Chairman of the Dispute Settlement Council. For example, in 1982, when the Contracting Parties decided to established a dispute settlement panel under Article XXIII to examine the practice by Canada of accepting local purchase and export undertakings from foreign firms wishing to invest in Canada, several contracting parties voiced concern that the case might lead to an examination of the Canadian foreign investment legislation as such, and hence was a matter

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25. ibid.

26. GATT, Text of the General Agreement [Geneva, 1986], pp 46-48.

27. Jackson, n. 18, p. 145.

that fell outside the purview of the General Agreement. Accordingly, the Chairman suggested and the Council so decided that the Panel would be limited in its activities and findings to within the four corners of GATT.[28]

Besides these Provisions, there are two articles of the GATT which are central to all considerations of dispute settlement. These are Articles XXII and XXIII. These articles provide for the general system of conciliation and dispute settlement. Moreover, there are the specific dispute settlement procedures which have been provided in most of the agreements negotiated in the course of the Tokyo Round. Developing countries are in many ways entitled to special rules of procedures. And finally, the Mid-term Reveiw as well as the proposed Dunkel Draft Text [DDT] of the ongoing Uruguay Round of multilateral trade negotiations are also having elaborate provisions for GATT's dispute settlement mechanism. We have highlighted these provisions at length in the second and third Chapters respectively.

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28. GATT, Basic Instruments and Selected Documents, henceforth BISD, 30th Supplement [Geneva, 1984], p. 141.

1.4 Objective of the Study

As indicated earlier, the General Agreement was drafted and implemented only as an interim measure to protect the value of the tariff concessions made during negotiations over the ITO and the general expectation was that the GATT would be soon absorbed in the larger framework of the ITO. The fact that the ITO failed, however, has developed a number of complications for GATT; for example the signatories had never anticipated that GATT would operate as a chief instrument for regulating international trade capable of handling major disputes through well defined dispute settlement procedures and mechanisms. Thus, since the inception of the GATT, there has been concern among various governments that the GATT's dispute settlement system is woefully inadequate. Many governments, especially, the developing countries even hesitated or refused to invoke the procedures of the GATT dispute settlement. This is partly because of the imbalance of power between the disputing parties. For instance, a developing country, even if it is allowed to retaliate against a large country, appropriately doubts that such retaliation would have any effect on the developed country. Likewise, there are various inoperative rules of the GATT, which have undermined the smooth functioning of the dispute settlement system. So in order to make them more effective, various measures

have been taken over the years to strengthen the system.

Hence in our study we shall examine the dispute settlement machinery of GATT as it exists today. Our main concern will be to critically evaluate from the perspective of the developing countries the GATT's principal dispute settlement provisions i.e. Article XXII and XXIII and the reforms which have been made during the various rounds of multilateral trade negotiations.

1.5 Scope of the Study

The immediately following Chapter will examine the rules and procedures of the GATT dispute settlement mechanism. In this context we shall also describe GATT's principal dispute settlement provisions i.e, Articles XXII and XXIII. Our next step will be to critically discuss reforms which have been made in various Rounds of Multilateral Trade Negotiations till the Tokyo Round.

In the third Chapter we shall examine in detail the scope and effectiveness of the reforms proposed in the Uruguay Round of Negotiations.

In describing the above mentioned aspects we shall also examine some cases which have been decided under the GATT dispute settlement system. However, our study

will not deal in detail with them or provide a comprehensive review which is outside the scope of the dissertation. Essentially, the idea behind reviewing a few select cases will be to broadly indicate how they have contributed in the development of the dispute settlement system.

The study will be based on primary as well as secondary sources. Primary sources are essentially those contained in GATT's Basic Instruments and Selected Documents [BISD]. Secondary sources are books as well as relevant articles.

C H A P T E R - I I

THE GATT DISPUTE SETTLEMENT SYSTEM:

A HISTORICAL REVIEW

As noted in the introductory Chapter GATT does not have a uniform dispute settlement procedure. There are several articles, with clauses dealing with the resolution of disputes. These articles of GATT provide that in certain matters there is only provision for bilateral discussions, where as certain articles provide for multilateral consultations after bilateral efforts have failed to produce satisfactory result. Besides these articles, however, there are Articles XXII and XXIII of the GATT, which specifically deal with the procedure for the resolution of differences between the contracting parties. Article XXII provides that parties are obligated to consult on GATT matters when any other member so requests. Article XXIII provides for third party - adjudication of complaints when a dispute is not resolved through consultation procedures under Article XXII.

However, Article XXIII of the GATT has got special importance. The main reason for establishing an adjudicatory body is to create pressures that will influence contracting parties to act in conformity with certain agreed objectives. Infact during the 1950's contracting parties invoked GATT dispute settlement frequently, and the system achieved reputation. A total of 40 complaints were

filed in the period 1952-58, thirty resulted in settlements satisfactory to the complainants. Of the remaining ten, one ended with a ruling for the defendant, five ended in impasse, and four simply disappeared without a trace. [1]

2.1: ARTICLES XXII AND XXIII: GATT's PRINCIPAL DISPUTE SETTLEMENT PROVISIONS

Articles XXII and XXIII which embody the consultation and dispute clauses in GATT had their genesis in the 1945 United States proposals of the general desire to have an International Trade Organization [ITO]. The ITO included among its functions the duty "to interpret the provisions, to consult with members, regarding disputes and to provides a mechanism for the settlement of such disputes".[2] The first U.S. Draft ITO Charter contained a three-step procedure for the settlement of disputes consisting of: [1] complaints were to be investigated and ruled upon by the 18-member Executive Board; [2] Rulings of the executive Board could be appealed to the plenary Conference; and [3] Rulings of the Conference in turn could be appealed to the International Court of Justice [ICJ], but with a condition i.e, the appeals were allowed only "if the Conference consented," [3]

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1. Robert, E. Hudec, The GATT Legal System and World Trade Diplomacy [New York: Praeger, 1975], pp.95-96.
2. John, H.Jackson, World Trade and the Law of GATT [Indianapolis: Bobbs Merill, 1969], pp. 166-67.
3. Hudec, n. 1 p. 23.

Several delegations including the Netherland, Belgium and France expressed concern regarding consent requirement and contended that this requirement should be deleted and appeal to the ICJ be made a matter of right. But the United States and the United Kingdom were adamant on their stand and argued infavour of consent limitations. They said that making of rulings under the Charter should be the function of the ITO and not of an outside body such as ICJ, whose proper function is to determine questions of law and not to appraise economies economic facts. [4] Because the judges simply could not be well acquainted with the realities of international economic life, therefore, disputes over economic qustions should be handled by economic experts only.

However, later on a compromise was reached between the delegations. It was agreed that legal questions could be appealed to the ICJ as a matter of right. However, such appeal would always take the form of a request by the ITO itself for an advisory opinion. And the parties to the dispute would not appear as litigants before the Court.

These provisions were later elaborated in the Geneva draft of the ITO Charter in a separate Chapter which also established a three part dispute settlement procedure consisting of: [1] consultation between the parties: [2] referral of the dispute to the ITO with the possibility of arbitration; and [3] referral to the ICJ. The dispute settlement procedure contained in the final text of the

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4. Ibid., p.24.

General Agreement is almost similar to the Geneva draft of the ITO Charter. A simplified consultation provision taken from the Geneva draft became Article XXII of the GATT and Article XXIII was derived from its referral clauses. All references to the ITO were replaced with references to the Contracting Parties, and referral of disputes to the ICJ was deleted altogther. Because the delegates felt that the short lifespan of the General Agreement did not justify going through the complex formalities of establishing ICJ jurisdictions.

Since the adoption of the General Agreement in 1947, Articles XXII and XXIII have been amended only once. In 1955, at the Ninth Session of the Contracting Parties, Article XXII was amended by adding a provision for joint consultations with contracting parties if bilateral consultations do not produce a satisfactory result. [5] The amendments to Article XXIII were of a minor technical nature.

Article XXII simply but usefully provides that parties are obligated to consult on GATT matters when any other member so requests. It runs in full as follows:

Article XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall

5. GATT, BISD, 3rd supp. [1955], p. 250.

afford adequate opportunity for consultation regarding such representations as may be made buy another wntracting party with respect to any matter affecting the operation of this Agreement.

2. The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1. [6]

In 1958, the Contracting Parties adopted certain procedures which stated that any contracting party requesting consultations under paragraph 2 of Article XXII must inform the Director - General of the GATT in order to allow notifications of all other contracting parties.[7] These procedures were aimed at ensuring that any contracting party or parties having substantial trade interest in the matter had a right to join it. Despite the notification obligation, imposed by the 1958 procedures, the contracting parties have generally continued to treat these consultations as private affairs.[8]

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6. GATT, Text of the General Agreement [Geneva, 1986], p.39.

7. GATT, BISD, 7th supp. [1959], p.24.

8. A.Hoda, Developing Countries in the International Trading System [New Delhi: Allied Publishers Pvt, Ltd.1987], p.166.

Article XXIII

Article XXIII of GATT, dealing with "Nullification or Impairment," is the most significant and difficult article which provides the framework for the dispute settlement procedures. It may be invokved if a contracting party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired, or that the attainment of any of its objectives is being impeded as a result of:

[a]. The failure of another contracting party to carry out its obligations under GATT, or

[b]. The applications by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or

[c]. The existence of any other situation. [9]

The outlines of Article XXIII can be summarized as follows: If any contracting party believes a benefit it should get under GATT has been "nullified or impaired" as a result of another contracting party's breach or other measures, then it may seek consultation and if that fails, the complainant may ask the plenary GATT body to authorize [by majority] suspension of GATT obligations [a sort of "retaliation"] as a response.[10]

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9. For Article XXIII See No. 6, pp. 39-40.

10. John, H. Jackson, "The Jurisprudence of International Trade: The DISC Case in GATT," American Journal of International Law, Vol, 72, 1978, p.754.

While paragraph 1 of Article XXIII is similar to Article XXII in that it provides for a consultation mechanism, however, it differs in two important respects. First, Article XXII provides a very broad authorization for consultation with respect to any matter affecting the operation of this Agreement, where as paragraph 1 of Article XXIII requires an allegation that a benefit under the Agreement is being nullified or impaired. Secondly, Article XXIII: 1 requires written representations by the contracting party invoking the consultation procedure, where as Article XXII does not.

A unique feature of Article XXIII is that a party can invoke this provision even without the breach of GATT obligation. The central criterion for Article XXIII is "nullification or impairment". Thus failure to carry out a GATT obligation is neither necessary nor a sufficient prerequisite to an Article XXIII action. However, detailed justification is necessary to prove nullification or impairment in cases where breach of GATT obligations is not involved. If nullicication or impairment of benefits is *prima facie* presumed in cases involving allegations of breach of GATT obligations, then the theory is that the burden shifts to the infringing country to show under GATT Article XXIII that there has been no nullification or impairment. This broad definition leaves room for extensive interpretation and consequently, much debate among the contracting parties. Because even in a *prima facie* case, the

ultimate test under the Article XXIII procedures depends on the ambiguities of the phrase "nullification or impairment". For example, it is still not clear to what extent the breach by country A of a rule gives rise to rights to another country B claiming potential or future harm from the illegal action.[11] On the other hand, the *prima facie* concept may be abused to lead a panel to brand a country's action as Article XXIII "nullificiation or impairment" when only a minor technical breach of a rule has occurred and the culprit cannot prove that no possible nullification or impairment has or could occur.[12]

Article XXIII paragraph 1, provides for bilateral consultations whenever a nullification or impairment of a GATT benefit is alleged. If no satisfactory adjustment is reached within a reasonable time under paragraph 1 of Article XXIII, the matter may be referred to the Contracling Parties. Then the Contracting Parties, investigate the matter and make appropriate recommendation or give a ruling in the matter. It is in this context that the practice has developed of setting up a panel to assist the contracting Parties and which had been codified at the end of the Tokyo Round in the "Understanding Regarding Notification, Consultation, Dispute settlement and Surveillance" adopted on 28 November 1979 [1979

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11. John, H.Jackson, "Governmental Dispute in International Trade Relations: A Proposal in the Context of GATT," Journal of World Trade Law, Vol,13 No.1, 1979,pp. 6-7.

12. Ibid.

Understanding], to which an "Agreed description of the Customary Practice of the GATT in the field of Dispute Settlement" is attached.[13]

Although, the creation of panels to consider the complaints is a welcome innovation, in recent years it is posing a number of problems. For example, it has become increasingly difficult to obtain the services of appropriately trusted persons to sit on these panels. This is due to the tradition of selecting them from the officials who represent their Governments in GATT. Though these persons act in their individual capacity, nevertheless their action in a particular case is generally influenced by their governments' foreign economic policy.

The panels have also been weakened with tasks that are probably beyond their competence. Although, the pool of potential panelists consisted solely of a Group of bureaucrats who are familiar with GATT law, they lack the specific expertise to deal with the new problems created by changing and growing technology. This limitation has promoted a lack of confidence in panel resolution.[14]

Basically, disputes are assigned to panels of three to five experts drawn from countries having no direct interest

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13. GATT, BISD, 26th supp. [1980], pp. 210-18.

14. Shaun, A. Ingersoll, "Current Efficacy of the GATT Dispute Settlement process," Texas International Law Journal, Vol. 22, 1987, p. 100.

in the matter. The panels' take is to prepare a report to assist the Contracting Parties in discharging their responsibilities under Article XXIII:2.[15] This report includes an assessment of the facts and the applicability of the relevant provisions of the General Agreement. It is the practice for both the parties to be invited to file their written submissions simultaneously. Any third contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heared by the panel.[16]

The panels submit their reports to the Contracting Parties on the basis of which the Contracting Parties make their findings and recommendations. Although the panel's reports have the value of an advisory opinion in practice the Council usually adopts the reports as they are. Adoption of the report is decided on the basis of consensus in which disputant parties also participate. This implies that the losing party could refuse to accept the recommendations and prevent adoption of the Report in the Council. However, because of the fear of organized community condemnation the losing party normally accepts the Report. But the losing party has a number of other techniques by which it can withhold its consent at one or more of the successive phases of the panel procedure and therefore delay the proceedings.

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15. GATT, BISD, n. 18, para 16, p.213

16. Ibid., para 15, p.213.

For instance, a losing party can insist that the parties have not sufficiently explored the disputed matter in bilateral consultations, or they can link the disputed matter with other trade problems.[17] And finally, when the Council approves the creation of panel, the defendant government has an opportunity to contest the panel's composition, usually by objecting to some of the panel members proposed by the secretariat.

If recommendations are not implemented then the remedy envisaged in Article XXIII:2 is authorization of discriminatory retaliation. Retaliation serves as GATT's only weapon of final enforcement. However, this sanction was not invented by the framers of the Charter. It has existed from time immemorial.[18] The provisions of Article XXIII approve retaliation only if a contracting party discriminales to an extent "Serious enough to justify action". Retaliation has been authorized only once in GATT's history. In 1952, in a case between United States Vs Netherlands, GATT found U.S dairy policies to be in violation of Article XXIII. When the United States refused to comply with the ruling, GATT permitted the Netherlands to limit wheat imports from the United States.[19]

Despite the basic institutional infirmity as well as inoperative rules of GATT, which have undermined the smooth

17. Jackson, n.1, p.36.

18. Hudec, n. 6, p.36.

19. GATT, BISD, 1st supp, [1953], p.32.

functioning of the dispute settlement system, various measures have been taken over the years to strengthen the System in order to make them more effective. These reforms may be classified into various phases, namely reforms prior to the Tokyo Round, reforms made during and after the Tokyo Rounds. And finally, the proposed reforms during the Uruguay Round of Negotations which we have discussed at length in the third Chapter. Proposals for reform of the dispute settlement procedures have also been made by the developing countries.

Before examining the reforms of the GATT dispute settlement system which have been made during various rounds of multilateral trade negotiations, it would be appropriate to describe, albeit briefly, the divergent policy perspectives which influenced their direction, and which have always contained a certain amount of tension among themselves. On the one hand, some GATT members were of the opinion that there should be more lelgalistic and ruleoriented procedure for the settlement of dispute which would discourage the breach of GATT rules, resulting in more precise decisions on the merits of disputes and insure greater compliance with them than does the present consensus System. On the other hand, in the past, most of the developed contracting parties preferred a more pragmatic in which disputes are resolved through negotiations and compriromises. Especially, during the 1960's consultation style diplomacy was glorigied as the ideal method for the

settlement of trade dispute.

The rejection of a legalist model during the 1960's can be traced to two important development. a major devlopment was that several of the original GATT rules, written, in 1947, were becoming inoperative. The most important area where the GATT rules appeared inoperative and troublesome was related to the agricultural trade. For instance, Article XVI pragraph 1 requires of a contracting party that maintains export subsidies to notify all other contracting parties of the extent, nature, and effects of their policy. It further provides that where serious prejudice to the interest of other parties " is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the Contracting Parties, the possibility of limiting the subsidization." The first highly visible breach of this provision ooccured in United States Vs Netherlands, the 1951 dairy quota case. [20] In this conflict, the United States ignored GATT subsidy reduction recommendations and demanded complete waiver of any obligations in the area. [21]

Similarly, the European Community's Common Agricultural Policy [CAP] has been subject to numerous complaints. for

20. Ingersoll, n,14, p.93.

21. Ibid.

instance, in European Communities Refunds on Exports of Sugar [22] case, the Government of Australia Complaint that the System of Sugar export Subsidies granted or maintained by the European Community unity were inconsistent under Article XVI of the General Agreement. Because EC had not complied with the terms of Article XVI:1 in that it had failed to provide adequate information in regard to the extent and nature of the Subsidization on the quantity of sugar exported, and the circumstances making the subsidization necessary. [23]

Another important area where the rule's are inadequate, involved GATT Article XIX, the "escape clause" or "Safeguards" provisons. Article XIX authorizes government to impose emergence barriers against imports that are causing serious injury to domestic industries. Although governments still appeared to respect the central requirements of "Serious injury," but many of the lesser criteria of Article XIX has virtually been forgotten.[24]

Moreover, the contracting parties found that the 1947 rules had failed to regulate certain non-tariff barriers [NTBs] which were as harmful as the more conventional trade barriers that were regulated in the General Agreement. Although the GATT might have renegotiatted the rules to meet this problem, it instead developed the practice of

22. GATT, Basic Instruments and Selected Documents, henceforth BISD,26th supp. [Geneva, 1980], p.290.

23. Ibid. pp.291-92.

24. Robert, E. Hudec, "GATT Dispute Settlement after the Tokyo Round: An Unfinished business," Cornell International Law Journal, Vol, 13, 1980, p.161.

persuading everyone to concentrate on "practical Solutions".

The second development that contributed to the antilegalist approach was a change in the structure of political power within the GATT. The formation of the EEC and the economic resurgence of Japan transformed the GATT power structure into a triad of economic superpowers, each of which felt more comfortable with, and entitled to, a less restrictive form of regulation.[25]

The reason for preferring a more pragmatic approach or less restrictive form of regulation by the developed countries was that in the case of a dispute between the countries, even if it involved breach of a GATT rule, the dispute could be settled from the point of view who has got effective paper, economic or otherwise than from the point of view of determining whwther a rule has been breached.

Presently, they are not taking this position because they believe that more effective regulation in new areas of intellectual property rights, investment measures and trade in services demand legalistic procedures.

2.2 **Reforms Prior to Tokyo Round Negotiations**

In the beginning, complaints were referred either to the Chairman of the Session of the Contracting Parties or to a Working Party. The practice of referring a complaint

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25. Ibid., pp. 152-53.

to a panel of experts did not begin until 1952. Thus, the substitution of panels for working parties constituted a significant change in the GATT dispute settlement mechanism. Because it gives less importance to political bargaining and moved toward a more legalistic and adjudicative method of dispute resolution. [26]

One other reform prior to the Tokyo round is worth noting i.e., in 1955 at the Ninth Session of the Contracting Parties, Article XXII was amended by adding a second paragraph, which provides for joint consultations if bilateral consultations do not produce satisfactory results. Basically, the initiative was taken by Brazil and Uruguay mainly because of the difficulties which had surfaced as a result of recourse by Uruguay to Article XXIII in 1962. They proposed that Article XXIII be altered for the benefit of the developing countries with the following elements : 1) greater technical assistance to developing countries in dispute actions ; 2) third party prosecution of developing country complaints; 3) Firm deadlines at each stage of the dispute settlement process; 4) involvement of the Director-general in the consultation process; and 5) recognition of the right of developing countries to request financial compensation from developed countries, or to implement provisional retaliatory measures pending the formal disposition of their claims and the automatic release of the aggrieved developing country from the GATT obligations in serious cases.

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26. Jackson, n.8 p.174

In response to these proposals, the Contracting Parties adopted the 1966 decision on special procedures for the developing countries under Article XXIII.[27] The 1966 decision introduced various new procedures for the settlement of disputes in cases where the dispute is raised by a developing country against a developed country. It says that when consultations between a developing and developed contracting party do not lead to a satisfactory adjustment, then the developing country may refer the matter to the Director-General with a possibility of mediation. [28] The mediation efforts of the Director-General have to continue for a period of two months before the matter can be brought to the notice of the Contracting Parties or Council for constitution of a panel. The members of the panel shall act in their personal capacity and shall be appointed with the consent of the concerned contracting parties. Paragraph 5 of the 1966 decision says that the panel shall submit its finding and recommendations to the Contracting Parties or Council within a period of sixty days. It further states that the contracting party to which a recommendation is made by the Contracting Parties has ninety days to report on the action taken in pursuance of the recommendations.

If the Contracting Parties find on examination of this report that the development contracting party has still not

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27. GAT, BISD, 14th Supp. (1966), pp. 18-20.

28. Ibid., para 1, pp. 18-19.

complied in full with the relevant recommendations and the complaining developing country continues to suffer from nullification or impairment of any benefit under GATT, then the Contracting Parties may authorize retaliation besides considering what further measure should be taken to resolve the matter. [29] Despite these improvements, however, it can be concluded that the special procedure for developing countries are very modest and to some extent of a cosmetic nature. This is made clear by the refusal to include the proposed right to request financial compensation or to institute provisional retaliation. Moreover, the developing countries themselves have used the special procedure only once so far.

2.3 The Impact of Tokyo Round on the Dispute Settlement Process

The Tokyo Round of Negotiations was launched with a Ministerial Declaration at Tokyo on 14 Sep. 1973. However, in reality the negotiations began when the United States Congress approved it under the Trade Act of 1974, the authorizing legislation for the Tokyo Round Negotiations.

The Ministerial Declaration did not mention the problem of dispute settlement procedures as one of its negotiating objectives. However, it did contain a general reference which relates the subject, i.e., the negotiating objectives included the reduction and elimination of nontariff trade barriers and

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29. Ibid., para p. 20.

Submission of NTBs to " more effective international discipline".[30] The actual negotiations began in early 1975, when the negotiators realized that writing rules would be a waste of time unless a strong enforcement procedure accompanied the Code. As a result, the text of each Code contained its own dispute settlement procedure.

Article XXIII, the GATT's general dispute settlement procedure did not appear on the negotiating agenda until November 1976, when the developing countries raised the issue of Article XXIII reforms as one of the interest to them. Basically, the main concern of the developing countries was the retaliatory withdrawal of concession which is the ultimate remedy provided under Article XXIII. Infact their concern was true in a sense that a developing country will think twice before invoking Article XXIII against a developed country due to their political and economic disparities. That is why the developing countries made proposals for retaliation against the developed countries by the entire GATT membership and the award of money damages to injured developing coutries. However, the proposal for "joint action" was altogether rejected by the developed countries. And infact there is no evidence whether the developing countries seriously pursued the matter or not.

Despite their difference, however, the participants in the Tokyo Round of Negotiations did adopt two documents

30. GATT, BISD, 20th Supp. (1973), p.19

setting out guidelines for the dispute settlement process : the Understanding regarding Notification, Consultation, and Dispute Settlement and Surveillance (the 1979 Understanding) and the Agreed Description of the Customary Practice of the GATT in the Field of Dispute settlement [31]

These documents basically codified the dispute settlement procedures which have been evolved through customary practice s well as attempted to expedite the dispute resolution process. These are summed up below.

Regarding consultations, the Understanding provides that the contracting parties should attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. It further contains an optional provision for conciliation by an appropriate body or individual in the event of failure of bilateral consultation. [32] The provision for mediation by an appropriate body is almost on the lines of the 1966 procedure for the developing countries, but there is an important difference i.e., the Understanding does not provide for any specific time limit for the stage.

The Understanding does not establish a right to the constitution of a panel. It merely says that if a contracting party invoking Article XXIII : 2 requests the establishment of a panel or working party then the Contracting Parties would decide on its establishment in

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31. GATT, BISD, n.18, pp.210-18.

32. Ibid., para 8, p. 211.

accordance with standing practice. The standing practice in this regard is not to deny the request for constitution of a panel. However, it does not mean that the Contracting Parties always grant such requests. But the 1966 decision for the developing countries provides the contracting parties an explicit right to a panel procedure when no mutual arrangement is reached.

When a panel is set up, then the Director-General should propose the composition of the panel, of three or five members depending on the case, to the Contracting Parties for approval. The Understanding further provides that in order to facilitate the constitution of panels, the Directore General should maintain an informal indicative list of governmental and non-governmental persons who could be available to serve on panels. A time limit of thirty stipulated for the constitution of the panel, and it is further provided that parties to the dispute would respond to the nominations of panel members by the Director-General within seven working days and would not oppose nominations except for compelling reasons.[33] Members of panels would serve in their individual capacities. It means that they are expected to act impartially without instructions from their governments.

The task of a panel is to investigate the dispute in the light of the rules of the GATT, prepare a report and make such findings as will assist the Contracting Parties in making

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33. Ibid., para 12, p.212

recommendations and rulings. The Understanding provides that third parties who have made known to the Council that they have a substantial interest in the matter will be having an opportunity to be heard by the panel.

The description of the customary practice annexed to the Understanding mentions that the proceedings of the panels should be completed within a reasonable period of time extneding from three to nine months. However, the Understanding provides that in cases of urgency, the panel should deliver its report within three months following its establishment. But before releasing its final report to the Contracting Parties, the panel must submit the descriptive parts to the parties concerned together with the panel's conclusions and recommendations. [34] This provision is included in the Understanding in order to encourage the parties to reach a mutually satisfactory solution before the panel releases its report to the contracting parties.

The understanding says that on receipt of the panel report the Contracting Parties would give it prompt consideration and take appropriate action within a reasonable period of time. As regards to compliance with the recommendations, it provides that the Contracting Parties will keep under surveillance any matter on which they have made recommendations or given rulings. In the event of non-compliance within a reasonable period of time, the aggrieved party may ask the Contracting Parties to make suitable efforts with a view to finding an appropriate resolution.

34. Ibid., para 18, p.213

The Tokyo Round also produced a series of agreements referred to as the Codes, which deal with the problem of nontariff barriers (NTBs). [35] Each of the Codes contained its own dispute settlement procedure. If a dispute arises then the Codes provide for progression of disputes from consultation through conciliation to establishment of panels as it is provided in the 1979 Understanding. These Codes also provide the same criteria for invoking the dispute settlement procedure which is given under Article XXIII, i.e., a party to the Code must allege nullification or impairment of benefits, or an impediment to the attainment of any objective under the code. The most important feature of the Codes are that they provide specific deadlines for each phase of dispute resolution.

However, a comparison between the dispute settlement provisions of the Subsidies Code, the most rigorous among the NTBs Codes and the 1979 Understanding best illustrates

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35. The Tokyo Round Codes are the Agreement on Technical Barriers to Trade (Standards code), GATT, BISD, 25th Sup. (1980), P.8; Agreement on Government Procurement, GATT, BISD, 26th supp. (1980), p.33; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Subsides Code), GATT, BISD, 26th Supp. (1980), p. 56; Arrangement Regarding Bovine Meat, GATT, BISD, 26th Supp. (1980), p.84; International Dairy Arrangement, BISD, 25thSupp. (1980), p. 91; Agreement on Implementation of Article VII of the GATT, BISD, 26th Supp. (1980), p. 116; Agreement on Import Licensing Procedures, BISD, 26th Supp. (1980), p.154; Agreement on Trade in Civil Aircraft, BISD, 26th Supp. (1980), p.171; and Agreement on Implementation of Article VI of the GATT (Antidumping Code), BISD, 26th Supp. (1980, p.171.

the maximum range of differences between the Codes and Article XXIII procedures.

Both the Subsidies Code and the Understanding require complaining parties to seek voluntary settlements before invoking the panel procedure. However, Article 13 clauses 1 and 2 of the Code sets thirty or sixty-day time limits on bilateral consultations. Then any signatory party to such consultation may refer the matter to the Subsidies Committee for Conciliation. But the Understanding says nothing about the time to be spent on consultations. It merely says that the parties should attempt to conclude consultations expeditiously. [36]

Article 18 clause 1 of the Code states that the Committee shall establish a panel when a party makes a request after expiration of the time limits on consultations and conciliation. It means that the Code provides the parties an explicit right to a panel procedure, while the Understanding merely indicates that the normal practice is to grant a request for a panel. [37]

The Subsidies Code authorizes the Chairman of the Committee to propose the names of the panel members as soon as complainant makes a formal request. It further provides that membership of the panel be established within only thirty days of the request. The Understanding sets no time

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36. GATT, BISD, n.18, para 4, p.211.

37. Ibid., para 10, p.212.

limits for the Contracting Parties to authorize the creation of a panel. It only states that the constitution of the panel should occur "normally not later than thirty days" after the authorizing decision by the Contracting Parties.[38]

Article 18 clause 1 of the Code states that the panel should deliver its findings to the Committee within sixty days after its establishment. However, the Understanding provides that the time required by panels will vary on a case by case basis. Such as, panels should aim to deliver their findings without undue delay, and in cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established. The Code requires that the Committee shall consider the panel report as soon as possible and its recommendations should be presented to the parties within thirty days after the panel issues its report. The Understanding merely provides that the reports of panels should be given prompt consideration by the Contracting Parties.

The 1982 Ministerial Declaration affirmed the 1979 Understanding and declared that major procedural changes are unnecessary. However, the 1982 Declaration did alter a few procedures set out in the Understating, in order to expedite the process. For example, the Declaration provides that the parties to a dispute could seek the good offices of

38. Ibid., para 11, p.212.

the Director-General to facilitate a confidential conciliation, without prejudicing their right to refer the matter to the Contracting Parties under Article XXIII:2. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. [39] To improve the panel process, the Declaration provides, that the Secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters. It also provides that where experts are not drawn from Geneva they would be called from outside to serve on panels, and any expenses, including travel and subsistence allowance, shall be met from the GATT budget. The Declaration however, reaffirmed that consensus will continue to be traditional method of resolving dispute, but it futher provided that obstruction in the process of dispute settlement shall be avoided.[40]

2.4: An Assessment

Over the years the GATT dispute settlement procedure has developed in the direction of increasing legal control. This trend is highlighted by the codification effort reflected in the 1979 Understanding and by the introduction of stricter rules in a number of nontariff barriers [NTB's] codes.

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39. GATT, BISD, 29th supp. [1983], p.14.

40. Ibid, p.16.

The dispute settlement and surveillance procedures of the Tokyo Round Codes have operated well because of the establishment of a Committee for each of the codes and the care taken in defining the procedures to be applied for the resolution of differences. Infact, in recent years, conciliation and settlement of trade disputes have crowded the agenda of several Tokyo Round Committees. The upsurge of disputes have forced these Committees, which normally meet only twice or thrice a year. The Subsidies Committee alone has established three dispute settlement panels in the past months and has conciliated one dispute. [41] In recent years, Article XXIII procedure has also worked better than is generally perceived. The available statistical information reveals that 82 complaints had been initiated under GATT Article XXIII since January 1980, bringing the total number of complaints under the dispute settlement provision to 140 till 1989.[42] Thus, 60 percent of all disputes have been brought in during the most recent decade of GATT's forty-year history. Of these 82 disputes, 37 had led to submission of panel report. The other disputes had been settled through bilateral consultations without involving the Contracting Parties and some of them were not pursued. The panels on the average, had submitted their reports to the parties within about eight months of their constitution which is well within the nine-month time limit imposed by the 1979 Understanding.

41. Focus, GATT Newsletter, No,84, September, 1991 pp.1,8.

42. Focus, GATT Newsletter, No,67, December, 1989, p.3.

Notwithstanding the overall satisfactory performance of shortcomings were the GATT dispute Settlement System, there were still a number of shortcomings, which could be improved. These specifically, the lack of automatic access to panels, delays in appointing them, slow consideration of the cases due to the absence of strict time limits for the various stages of the procedures, an inadequate panel selection process, often a lack of competent and neutral panelists and the poor equality of the panel reports. Decision-making by consensus which allows blockage by the losing party, and difficulties and delays in implementing panel reports are also undermining the system. This explains why the issue is placed on the aganda of the Uruguay Round. After all, an efficient dispute settlement procedure is by no means a luxury for an international institution like the GATT.

CHAPTER III

SCOPE AND EFFECTIVENESS OF REFORMS PROPOSED IN URUGUAY ROUND NEGOTIATIONS

As we have seen in the preceding chapter, the GATT dispute settlement system has been improved over the years on a number of occasions. However, today most members of the GATT are of the opinion that further improvements are necessary to make the system more flexible, efficient and effective. For this reason, during the Uruguay Round of negotiations that began at Punta del Este on 15 September 1986, among the various subjects for discussions, there was a paragraph in the Ministerial Declaration concerning "Dispute Settlement" where it is stated that,

> "in order to ensure prompt and effective resolution of disputes to the benefit of all parties, negotiations shall aim to improve and strengthen the rules and procedure of dispute settlement process, while recognizing the contribution that would be be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring the procedures that would facilitate compliance with adopted recommendations"[1]

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1. Focus, GATT Newsletter, No. 43, Jan - Feb. 1987, p.6.

The negotiations over this item are carried out in a special negotiating group. They have already resulted in the decision, "Improvement to the GATT Dispute Settlement Rules and Procedures" which was adopted on April 12, 1989 [2] [hereinafter cited as "The Improvements"].

It stated that the improvements, which aim to ensure prompt and effective resolution of disputes to the benefits of all contracting parties, shall be applied on a trial basis from 1 May 1989 to the end of the Uruguay Round in respect of complaints brought during that period under Articles XXII or XXIII[3]. It means not only complaints which reached the stage of requesting a panel but also those, which had been at the stage of consultation before that date, fall outside the operation of the new provisions.

Finally, the proposed Dunkel Draft Text [DDT] has also contained a number of provisions for the settlement of disputes,[4] which is prepared by the Chairman of the Trade Negotiating Committee [TNC] Mr. Arthur Dunkel.

Basically, the draft is not entirely prepared by Arthur Dunkel. In many areas, agreements had been arrived at in Brussels in December 1990. In such cases, the draft

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2. GATT, Basic Instruments and Selected Documents, henceforth BISD, 36th Supplement [Geneva, 1990], pp.61-67.

3. Ibid., para 3, pp. 61-62.

4. "Understanding on Rules and Procedures Governing the Settlement of Disputes Under Article XXII and XXIII of the GATT," henceforth "Understanding," MTN, TNC/W/FA, 20 December 1991. p.s.2.

reproduces the agreement as it is. However, in some areas where no consensus could be arrived at in Brussels, the Dunkel text offers compromising solutions. The draft was taken up for consideration on January 13, 1992 by the participating countries.

However, before examining the new rules and procedures of the dispute settlement mechanism as well as various panels which have been established during the ongoing Uruguay Round trade negotiations, we shall describe the special features of this round; for there are many features which have made it unique in comparison with the preceding seven rounds of multilateral trade negotiations.

3.1: URUGUAY ROUND: SPECIAL FEATURES.

The Uruguay Round is so called because it was launched on the basis of a ministerial declaration signed in Punta del Este, a holiday resort in Uruguay on 15 September 1986. It is the most complicated and ambitious of any post-war multilateral trade negotiations [MTNs], and is unlike the seven rounds of GATT MTNs, which had sought to liberalise international trade in 'goods' through tariff cuts and lowering of non-tariff barriers [NTBs] [5].

In terms of the ministerial declaration, the Uruguay Round listed out fifteen areas for negotiations. A Trade Negotiations Committee was set up to oversee the negotiations, Arthur Dunkel being the Chairman of this Committee. A Group of Negotiations on Goods [GNG] and a

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5. C. Raghavan, "Uruguay Round after Montreal," Mainstream [New Delhi], Feb. 18, 1989, p.19.

Group of Negotiations in Services [GNS] were set up under the TNC. Of the 15 original areas, fourteen pertaining to trade in goods were under the purview of the GNG for instances, tariffs, non-tariff measures, textiles and clothing, agriculture, functioning of GATT system [FOGS], dispute settlement, trade related intellectual measures [TRIMS], trade related intellectual proprities etc. As a result of resistance on the part of politically and economically significant countries of the South, including India and Brazil, Negotiations on liberalising trade in services were placed in a separate track [6].

The new round was initiated on the insistence of the United States, basically for rewriting the rules of international economic relations, which includes many new areas such as intellectual property rights, investment right of the foreign investors and services. These new areas have been never dealt before within GATT, and whose link with the GATT has been obtained by prefixing the words 'trade in' or 'trade related' before them [7]. Infact at the 1985 Special Session of the Contracting Parties, which was convened to consider a proposal for a new round of trade negotiations including trade in services, the issue of the GATT competence moved to the centre of the debate.

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6. Ibid.

7. Ibid.

Several delegations particularly from the developing countries opposed the inclusion of new areas under the auspices of GATT. They argued that the provisions of the General Agreement show that it has competence for trade in goods and therefore it could not be stretched to authorize consideration or to deal with questions beyond its mandate. The developed countries, specifically, United States and the European Community contended that the GATT is free to determine the scope of its activities.[8]

However, to determine whether GATT's competence covers the disputed subject matters and the new areas under its ambit or not, we have to examine the provisions of the General Agreement attributing competences, as well as various cases which have been decided under it.

As the history suggests, the GATT signatories had never anticipated or rather never intended that it would operate as a large independent international oroganization. Therefore, the General Agreement confers the decision making power to only one organ i.e. the assembly of the contracting parties, acting jointly. And when they act jointly, they are designated in the General Agreement as the Contracting Parties written in capital letters [9].

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8. Frieder Roessler, "The Competence of GATT," Journal of world Trade Law, Vol, 21, No.3, 1987, p.73.

9. Article XXV:1, of the GATT.

The basic provision which deals with the competence of Contracting Parties is Article XXV: 1, which runs as follows:

Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitation the operation and furthering the objectives of this Agreement.

Likewise Article XXIII:2, provides that the Contracting Parties may make rulings and recommendations if any benefit accruing to the contracting party under the General Agreement is being nullified or impaired as a result of any situation. Thus, the question of competence of the GATT means the comnptence of the Contracting Parties.

However, the power of the Contracting Parties are not unlimited. According to Article XXV:1, the Contracting Parties must act either to "facilitate the operation" or to "further the objectives" of the General Agreement. And the objectives of the General Agreement are given in its preamble. The Contracting Parties have in the years before the Urnguay round not used their powers to extend their jurisdiction beyond the framework set out in the General Agreement, which can be illustrated with the help of the various decisions of the Contracting Parties in which they have defined their jurisdiction.

In a case relating to Canada's administration of the Foreign Investment Review Act (FIRA), the United States in 1982, requested the government of Canada for consultation under Article XXII:1 of the General Agreement. Among the issues which the U.S. wished to raise in the consultation was the practice of the government of Canada to enter into agreements with foreign investors, according to which they have to give preference to the purchase of Canadian goods and to meet certain export performance requirements. Since the consultation did not lead to solution, the U.S. government referred the matter to the Contracting Parties in accordance with Article XXIII:2. At the Council meeting, a number of delegations expressed doubts whether the disputes between the US and Canada was one for which the GATT had competence since it involved investment legislation, a subject not covered by the GATT. Accordingly, the Chairman suggested and the Council so decided, that the Panel would be limited in its activities and findings to within the four corners of GATT[10]. The Contracting Parties have always confined themselves to examining the trade aspects of the disputes. For instance, in a case relating to the United States' prohibition of tuna and tuna products from Canada, the Government of Canada complained that the action taken by the Government of United States on 31 August 1979, wsa dicriminatory and contrary to the obligations of the United States under the GATT and impaired benefits accruing to Canada under the GATT. The Government of Canada at the same time requested, parsuant to Article XXIII:2, the

establishment of the panel to examine the compatibility with the General Agreement of the United States prohibition of imports of tuna and tuna products from Canada. The GATT Council agreed to establish a panel when no mutual solution was reached between the parties. The Panel stressed that its findings and conclusions apply only to trade aspects of the matter under the dispute and were not intended to have any bearing whatsoever on other aspects including those concerning questions of fishery jurisdiction.[11]

From the above discussed cases it is clear that the Contracting Parties have so far avoided to going beyond the ambit of the GATT.

However, the developing countries were dragged to negotiate on the 'new areas' because of the pressure applied by the United States and the countries of the North. Infact, the developed countries could not have succeeded in including these areas under the GATT, but took advantage of the fact that the developing countries were divided and disorganised on these issues. Some of them remained silent or even sided with the United States, because they were expecting some sort of benefit in return[12].

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10. GATT, BISD, 30th Supp.(1984), p. 141.

11. GATT, BISD, 29th Supp.(1983), pp.91,109.

12. C.Raghavan, RECOLONIZATION: GATT, the Uruguay Round & Third World (Third World Network: Penang, Malaysia, 1991) pp. 77-78.

Though the United Nations and the UNCTAD were the appropriate bodies to deal with the new areas the GATT was chosen only because the developed countries knew that the developing countries did not have the advantage of being organised there, as in the United Nations System, as the Group of 77. Moreover, GATT offered leverage for pressure by the West, as it could use GATT's provisions for trade sanctions across the board, including cross-retaliation[13].

The Punta del Este Ministerial Declaration had set out a time frame of four years for the Uruguay Round. Thus, the negotiations were scheduled to end in December 1990. But an impasse was reached in Brussels in December 1990 over the negotiations on the US-EC differences on the issue of subsidization of agricultural exports. But they moved forward on other issues where they had a common front against the Third World.

However, four years of negotiations upto the autumn of 1991 in GATT left many issues unresolved. It was then that Mr. Arthur Dunkel, the Director General of GATT, presented his draft of the Final Act of the Uruguay Round, as a packages on a "take it or leave it" basis[14].

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13. Surendra, J.Patel, "Statement to the Cabinet Sub-Committee on Mr.Arthur Dunkel's Draft of the Final Act on Uruguay Round of GATT Negotiation,"in National Working Group on Patent Laws, Dunkel Draft Text: Threat to Economic Sovereignty, (New Delhi, n.d.), p.78.

.14. Ibid., p. 79.

The proposed Dunkel text covers wide varieties of subjects, but our discussion will merely touch upon those areas which are most controversial and having detrimental effect on the developing countries particularly, India.

The proposed Dunkel text in several ways goes against India's interests. If these proposals are accepted by India, it would mean not only intrusion into its economic freedom but a humiliating surrender of its economic sovereignty[15].

The proposed text on Trade Related Intellectual Property Rights (TRIPS) will create a globally uniform system on patents, which will require major changes in the Indian Patent "Act of 1970. It also seeks to introduce a system where the onus probandi shifted to the alleged violator of a patent law; in the normal course the burden of proof lies on the person who alleges. It would also allow for 'product patents' in many areas, instead of 'process patents'. A product patent prevents others from making the same product through any other process,thus giving the patent holder an absolute monopoly. The patenting of seeds, plants and biogenetic substances will also harm our agricultural growth prospects.

The text on the General Agreement on Trade in Services (GATS) demands total freedom of movement for transnational corporations (TNCs) in the service sector, such as banking

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15. Indian Express, New Delhi, February 7, 1992.

and insurance, without putting any restrictions on their behaviour while forcing us to open our doors to the foreign service companies. The text is silent on areas in which India has a comparative advantage, e.g. in onsultancy services, in professional skills and even in labour services[16].

3.2 THE 1989 DECISION ON DISPUTE SETTLEMENT

Renegotiation of the GATT dispute settlement procedures has been mentioned in the Punta del Este Declaration as one of the purposes of the Uruguay Round Basically, during the ongoing trade negotiations the GATT's dispute Settlement procedures have been improved or rather reformed twice.

Firstly, on 12 April 1989, the Contracting Parties adopted the text named as "Improvements". These changes in the system were adopted on trial basis to be applied from 1 May 1989, until the termination of the Round. It means the Improvements are temporary and will be kept under review during the remainder of the Round for the purpose of deciding on their permanent adoption. And secondly, Arthur Dunkel's proposed Final Act on the Uruguay Round has also contained a number of provisions for improvements to the dispute settlement mechanism.

Before evaluating the changes proposed in the Final Act of the Uruguay Round, we shall examine the rules and procedures of the dispute settlement adopted on 12 April 1989.

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16. Surendra Patel, n. 13, p.85.

Consultation

As a general rule a dispute between the two contracting parties begins with a phase of consultation. In this connection Article XXIII:2, says that matter is to be referred to the Contracting Parties only after no satisfactory adjustment is effected between the parties concerned within a reasonable period of time.

However, provisions of the "Improvements" place the consultation in a quite different position. The "Improvements" requires that the contracting party to which the request for consultation is made, shall respond to it within ten days after its receipt and shall enter into the consultation within 30 days from the date of the request[17]. Shorter time limits are set in cases of urgency[18]. Parties to the dispute shall settle it through consultations within 60 days from the date of the request. After that the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may also request that a panel or a working party be established during the sixty day period, if the parties jointly consider that consultations have failed to settle the dispute.

The purpose of setting strict time limits for the

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17. GATT, BISD, n.2, Section C, para1,p.62.

18. Ibid., Section C, para 4.

consultations phase is to accelerate the procedures for the settlement of disputes by providing for the complaining party to request for the establishment of a panel under Article XXIII:2, when the consultations fail to settle a dispute within 60 days.

Good Offices, Conciliation, Mediation

These three procedures i.e., good offices, conciliation and mediation is to be applied as a voluntary phase of a dispute settlement, which may begin and may be terminated at any time. And when terminated the complaining party can proceed with a request for the establishment of a panel or working party under Article XXIII:2 of the General Agreement[19].

This concept is, however, not free from doubts. For instance, the Improvements do not determine who may undertake good offices, mediation or conciliation. It should be assumed that it may be an individual, a group of individuals, a State or a group of States or an organ of GATT[20]. The only name which has been mentioned in this regard is of the Director-General, who may, acting in a *ex-officio* capacity, offer his good offices, conciliation or mediation.

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19. Ibid., Section D, para 1, pp. 62-63.

20. Eric Canal-Forges and Rudolf Ostrihansky, "New Developments in the GATT Dispute Settlement Procedures," Journal of World Trade, vol. 24, No.2, 1990, p.71.

Arbitration

Originally, the GATT System did not provide for arbitration, but the introduction of optional arbitration is perceived as a major development. According to the Improvements, the parties can settle certain disputes that concern issues that are clearly defined by both the parties through the means of arbitration. Resort to arbitration shall be subject to mutual agreement among the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all contracting parties suffiently in advance. Other parties may become parties to an arbitration, subject to the agreement of the original parties to the dispute. An award is binding upon parties[21].

Although the inclusion of arbitration in the Improvements may be considered as a change, these provisions do not contain much legal substance. Because the panel system already operates as a quasi-arbitral tribunal[22].

Penel and Working Party Procedures

Various changes have been made to make the panel and working party procedures more effective.

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21. GATT, BISD, n.2, Section E, p.63.

22. J.G. Castle, " The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures," The International and Comparative Law Quarterly, Vol. 38, part 4, 1989, p.845.

The Improvements differ from the previous acts in imposing stricter time limits for the establishment of a panel or working party. It says that the decision to establish a panel or working party must be taken at the earliest at the Council meeting following that at which the request first appeared, unless at that meeting the Council decides othersie. It further says that request shall be made in writing, and shall contain relevant information: a summary of the factual and legal basis of the claim; and an indication whether consultations were held[23].

Standard terms of reference are applicable, unless both parties to the dispute agree otherwise within 20 days of the establishment of the panel[24].

A Panel shall be composed of well-qualified governmental or non-governmental individuals or both. In principle, a panel is composed of three members, unless the parties to the dispute agree within ten days from the establishment of the panel, to a panel composed of five members[25].

Inclusion of the roster of non-governmental panelists should be appreciated because non-governmental individuals may be able to devote more time to becoming familiar with

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23. GATT, BISD, n.2, Section F(a), p.63:

24. Ibid., Section F (b), pp. 63-64.

25. Ibid., Section C.

details of the case and the practices of the GATT. Moreover, for parties to the dispute, it may be easier to agree on non-governmental panelists.

Special procedures are also adopted for multiple complaints. Thus, a single panel may be established to examine several complaints relating to the same matter.

Provision is also made for the protection of the third party interests. The Improvements say that any third contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to it.

Adoption of Panel Reports

The Improvements contain provision aimed at avoiding the non-adoption of panel reports. It says that the reports shall not be considered for adoption by the Council until thirty days after they have been issued to the Contracting Parties. Contracting parties having objections to panel reports shall give at least ten days notice prior to the Council meeting. These provisions should prevent the raising of frivolous objections to panel reports[26]. On the controversial question of consensus, it is reiterated that the parties to a dispute have the right to participate fully in the consideration of the panel.

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26. Eric Canal - Forgues and Rudolf, n. 20, p. 78.

However, the delaying of the process of dispute settlement shall be avoided. This statement seems to have a moral and political but not a legal value.

The Improvements provide for a maximum duration of a dispute settlement, that is the period from the request for consultation under Article XXII:1 or XXIII:1 until the Council makes a decision shalls not, unless the parties agree otherwise, exceed 15 months.

Surveillance of Implementation of Recommendations and Rulings

Prompt compliance with recommendations or rulings of the Contracting Parties under Article XXIII is essential in order to ensure effective resolution of disputes. It further makes obligatory on the part of parties involved that they shall inform the Council of their intentions in respect of implementation of the recommendations or rulings. And if it is impracticable to comply immediately with the recommendations or rulings, the contracting party shall have a reasonable period of time in which to do so.

The Improvements, however, does not state what should be considered as a reasonable period of time. Though the concept is controversial it should be accepted for practical purposes, because compliance with the recommendations and

rulings may require legislative action by the contracting party concerned. Taking into account the variety of legal systems and parliamentary practices of all contracting parties, it is impossible to determine the duration in which the party concerned would be able to comply with the rulings and recommendations[27]. It has to be decided on a case-by-case basis. For instance, in the Norwegiar Apple Panel[28], the U.S. government claimed that the Norwegian restrictions on imports of apples and pears were inconsistent with Article XI:1 of the General Agreement. Norway argued that the Royal Decree of 1950, which established the system in question implemented a 1934 Act. It further argued that thus the system was covered by the protocol of Provisional Application of 1947 under which GATT members undertake to apply Part II (which include Article XI also) "to the fullest extent not inconsistent with existing legislation."

The panelists found that the 1934 Act to which Norway referred to was not mandatory in character and was therefore not covered by the existing legislation clause of the Protocol of Provisional Application of the General Agreement of 1947.

While the Norwegian government was ready to bring measures in question into conformity with the panel's recommendations, it pointed out that the task, both

27. Ibid., pp. 78-79.

28. Focus, GATT Newsletter, No. 62, June 1989, p.7.

technically and politically, would be difficult because the case had raised considerable concern among its farmers

3.3 Dispute Settlement Rules and Procedures of the Dunkel Draft Text.

The proposed Final Act of the Uruguay Round, among it various subjects also includes the provisions relating to the GATT dispute settlement mechanism. However, it is worth noting that the changes proposed for the dispute settlement procedures in the Dunkel text is based on the experiences gained during the application of the procedures contained in the decision of the Council of 12 April 1989.

Notwithstanding this fact, the proposed text except for few changes, contains almost similar procedures relating to the various stages of the dispute settlement mechanism as provided in the Improvements. However, the notable changes in the proposed text are the introduction of an Appellate Body to hear appeals from panel cases and inclusion of the provisions for cross-retaliation.

The text begins with a declaration that the GATT dispute settlement system serves to preserve the rights and obligations of the contracting parties. It is the central element in providing security and predictability to the multilateral trading system and in no way the recommendations and rulings under Article XXIII add to or diminish the rights and obligations provided in the General Agreement[29]. Existing rules and procedures will continue to

be enforced but the new rules shall be applied only with respect to new requests made under Articles XXII and XXIII on or after the date of entry into force of this Understanding. It further says that, if a complaint is brought by a developing country, then that party may choose to apply as an alternative to this Understanding, the provisions of the Decision of the Contracting Parties of 5 April 1966[30].

However, it should be noted in this regard that the developing countries may not use the 1966 decision on special procedures for them under Article XXIII, as an alternative to the understanding against the background of the fact that, they had used it only once since its inception[31], because they consider that the 1966 Decision is in no way beneficial to them.

As mentioned earlier, the proposed understanding contained almost similar procedures for various phases of dispute settlement mechanism as provided in the Improvements. Thus, we shall be confined to those provisions only which have been introduced for the first time in the understanding.

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29. Understanding, n.4, para 2, p.S.2

30. GATT, BISD, 14th Supp. (1966), p. 18.

31. A.Hoda, Developing Countries in the International Trading System (New Delhi: Allied Publishers, 1987), p.184.

Regarding consultation, the Understanding provides that in cases of urgency, if the consultation fails to settle the dispute within a period of twenty days after the request, the complaining party may request the establishment of a panel, whereas in the Improvements the period is 30 days[32]. Further it says that the panel and the appellate body shall make every effort to accelerate the proceedings in these cases.

Basically, changes in this respect are proposed because of the experiences in the past two years, in which most of the trade disputes were related to the agricultural matters, particularly, perishable commodities and it was found that unnecessary hardship is caused to the concerned parties because of the delay involved in the consultations process.

The major change proposed in respect to the panel and working party procedures is the deletion of the word 'working party'. This development may be against the background that at present the normal practice is to establish panels. In fact, the working parties consisting of five to twenty delegations of various countries, including the parties to the dispute[33], were the usual way of a dispute settlement during the first

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32. Understanding, n.4, para 8, p. S.5.

33. GATT, BISD, 26th Supp. (1980), pp. 216-17.

years of GATT. The last working party formed to date was in 1975[34].

The Understanding provides that the panels shall be composed of well-qualified governmental and non-governmental individuals. It further says that to assist the selection of panelists the Secretariat shall maintain an indicative list of individuals from which panelists may be drawn. Panel shall be nominated by the GATT Secretariat itself and the parties shall not oppose nominations except for compelling reasons.

Special provisions govern the composition of a panel when a developing country is party to a dispute. It says that when a dispute arises between developing and developed contracting parties, then the panel shall include at least one member from a developing country[35].

However, the above mentioned provisions in no way serve the interest of the developing countries, because it still leaves a majority of the panel members, who are supposed to be three in all, to be nominated by the GATT Secretariat. The developing countries, particularly, India should not be willing to have disputes relating to sovereign space to be decided by a body dominated by

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34. Eric Canal - Forgues and Rudolf, n.20, p. 72.

35. Understanding, n.4, para 10, p. S.8.

members of the developed world and what is worse, nominated by the GATT Secretariat[36].

In order to provide sufficient time for the members of the Council to consider panel reports, the reports shall not be considered for adoption by the Council until twenty days after they have been issued to the contracting parties. However, the period mentioned in the Improvements is 30 days. Within sixty days of the issuance of a panel report to the contracting parties, the report shall be adopted at a Council meeting unless one of the parties formally notifies the Council of its decision to appeal or the Council decides by consensus not to adopt the report. If a party has notified its intention to appeal, then the report by the panel shall not be considered for adoption by the Council until after completion of the appeal. The adoption procedure is without prejudice to the right of contracting parties to express their views on a panel report.

A Standing Appellate Body shall be established by the Contracting Parties, who shall hear appeals from panel cases[37]. The Appellate Body membership shall be broadly representative of membership in GATT and shall be appointed by the Contracting Parties. It shall be composed of seven members only three of whom shall sit

36. Economic Times, New Delhi, February 3, 1992.

37. Understanding, n. 4., p.S.13.

to decide the case. Normally, the parties to the dispute have right to appeal, but if the third parties have notified the Council of a Substantial interest in the matter, may make written submissions to, and may be given an opportunity to be heared by the Appellate Body.

As a general rule, the proceedings shall not exceed sixty days from the date that a party formally notifies its intent to appeal from to the date the Appellate Body issues its decisions on. However, when the Appellate Body considers that it cannot provide its report within sixty days, it shall inform the Council in writing of the reasons for delay together with an estimate of the period within which it will submit its report. In no case however, the proceedings shall exceed ninety days.

An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel. Thus, the Appellate Body shall not deal with the factual aspects of a dispute.

The report of the Appellate Body shall be adopted by the Council and unconditionally accepted by the parties involved unless the Council decides by consensus not to adopt the report within thirty days following its issuance to the contracting parties.

The Understanding provide that the maximum duration of a dispute settlement shall be nine months where the report is not appealed or twelve months where the report is

appealed. However, where the panel or Appellate Body has extended the time for providing its report, the additional time shall be added to the above periods. [38]

As regards the compliance with the recommendations and ratings, the Understanding says that if it is impracticable to comply immediately with the recommendations and rulings, the concerned contracting party shall have reasonable period of time in which to do so. Unlike the Improvements, it has also defined the reasonable period of time. It provides that the period of time to implement panel or Appellate Body recommendations should not exceed beyond fifteen months from the adoption of a panel or Appellate Body report.

However, that time may be shorter or longer, depending upon the particular circumstances. But the total time shall not exceed eighteen months. However, if the parties agree that it is highly improbable to comply with the rulings and recommendations within eighteen months, then the period may be extended.

Interestingly, the difference between recommendations and rulings of the Council is not explained in the Understanding. The legal value of these decisions is still unclear, i.e. whether they are legally binding or not. In general international law, the notion of

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38.Ibid., para18, p.S.15.

recommendations is confined to non-binding legal acts,and the notion of rulings to the binding ones. This difference, however, has been yet been confirmed by GATT practice.

Integrated Dispute Settlement System

The most controversial change proposed in the Dunkel draft are provisions relating to the suspension of concessions, provided under the Integrated Dispute Settlement System (IDSS). [39]

It provides that in considering what concessions or other obligations to suspend, in the event that the recommendations and ruling are not implemented, the complaining party shall apply three principles. Firstly, as a general rule the party should first seek to suspend concessions or other obligations in the same sector. Secondly, if the party considers that it is not practicable or effective to suspend consessions or other obligations in the same sector, then it may seek to suspend concessions or other obligations in other sectors under the same agreement. Finally, when the party considers the circumstances are serious enough, then it may seek to suspend concessions or other obligations under another agreement.[40] Thus, from the last principle, we can make out clearly that the text

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39. IDSS, MTN. TNC/W/FA,P.T. 5.

40. Ibid.

authorizes a complaining party to cross-retaliation across sectors.

Infact, the proposed draft extends the retaliatory clauses of national laws which are bilateral in nature to a multilateral level. There is a striking parallel between the provisions of Special 301 of the United States' Omnibus Trade and Competitiveness Act, of 1988 and that of the Dunkel draft. Like Special 301, the draft stands for cross-retaliation across sector.

According to Special 301, if the rights of the United States are infringed upon in a particular area, say intellectual property rights, it can retaliate in an entirely different sector, e.g., goods. The Draft proposes to legalise such bilateral position at multilateral level and, thus, frees the developed nations even from the condemnations they attract in case they take bilateral retaliatory measures. Lastly, it should be noted that [40]. Ibid the developing countries in the absence of adequate economic power and their vulnerabilities would not be in a position to resort to cross-retaliatory measures against the developed countries. [41]

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41. Economic Times, n.36.

3.4 GATT DISPUTE SETTLEMENT AND TRADE - ENVIRONMENT MEASURES.

The link between trade and environmental policies could be traced back to the beginning of the preparatory work for the conference on the Human Environment (1972 Stockholm Conference), where the Secretary General of the Conference requested the GATT Secretariat to make a contribution in this respect. In response to the request, the GATT Secretariat prepared a study entitled "Industry Pollution and International Trade".

It suggested that as contracting parties carried a special responsibility in this area they should try to ensure that the efforts of governments to combat pollution did not result in the introduction of new barriers to trade or impede the removal of existing barriers.

Earlier, at the November 1971 GATT Council meeting, the Council agreed to the establishment of a Group on Environmental Measures and International Trade whose main function was "to examine upon request any specific matter relevant to the trade policy aspects of measures to control pollution and to protect the human environment especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of the developing countries". [42]

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42. Focus, GATT Newsletter, No. 85, October 1991, p.3

In 1982, at the Ministerial meeting of the Contracting Parties, it was agreed that GATT should examine the measures that need to be taken to bring under control export of products which are prohibited from being sold in the domestic markets of the exporting countries on the grounds that they are harmful to human, animal or plant life or health or the environment of its territory. This resulted in the establishment of the Working Group on Export of Domestically Prohibited Goods and Other Hazardous Substances in July 1989. This Group is considering a draft Decision on Products Banned or Severely Restricted in the Domestic Market.

The decision aims to increase transparency by creating a notification system through which contracting parties will notify to the GATT Secretariat all products that are banned or severely restricted from domestic sale but for which no equivalent action has been taken on the export side.[43]

Despite the various efforts made by the GATT delegations to regulate international trade in order to protect the environment, it should be noted that there is no single GATT Article which expressly authorizes or regulates trade measures taken specifically for environmental protection. However, in certain circumstances, where trade measures would otherwise be inconsistent with the General

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43. Ibid.

Agreement, these measures may be permitted under strictly defined exceptions in 'Article XX.

According to Article XX, "..... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health ...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...."

Article XX, however, sets two conditions. First, the measure should "not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Second, it should not be "a disguised restriction on international trade."

Up to mid - 1991, five cases involving Article XX have been examined by GATT panels in which the countries maintaining the measures had argued that they were taken on environmental grounds (e.g. conservation of natural resources, control of pollution and protection of human health). In all of these cases the United States was involved either as applicant (two times) or as respondent (three times)[44]. However, here we are examining only those

44. These cases are:Canada Vs. United States - US prohibition of

cases which have highlighted the inherent inadequacies of Article XX as well as incompetency of panelists to deal with the cases related to environmental trade measures.

In the case of Thailand's restriction on importation of cigarettes, U.S. government argued that Section 27 of Thailand's Tobacco Act of 1966, which says that importation and exportation of tobacco, including cigarettes is prohibited except by license of the Thai authorities is inconsistent with Articles III and XI of the General Agreement. Because Thailand had not accorded imported cigarettes the same treatment as cigarettes of local origin with respect to matters under government control. On the other hand, Thailand argued that prohibition of foreign cigarettes where neccessary in order to protect human life or health within the meaning of Article XX [b]. Besides this argument, Thailand submitted that United States' cigarettes were more harmful than Thai cigarettes because of the alleged use of unknown chemicals and dangerous addictive materials, such as cocoa and dear tongue.

Footnote contd...

imports of tuna and tuna products from Canada (Panel report adopted on 22 February 1982), See Jan Klabbers, "Jurisprudence in International Trade Law: Article XX of GATT," JWTL, Vol. 26, No.2, 1992, p. 66; Canada, EC, Mexico Vs. United States - US taxes on petroleum and certain imported substances (panel report adopted on 17 June 1987), See Focus, No. 48,June 1987; United States Vs. Canada - Canadian measures affecting exports of unprocessed herring and salmon (Panel report adopted on 22 March 1988), See Focus, No. 54, 1988; United States Vs. Thailand - Thai restrictions on importation of cigarettes (report adopted on 7 November 1990), see Focus No. 76, November 1990; Mexico Vs. United States - US restrictions on imports of tuna (report adopted in December), see Focus, N.86, December 1991.

But the panelists found that the practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes were inconsistent with Article XI:1 and were not justified within the meaning of Article XX(b) of the General Agreement. The ruling in this case was surprising. A careful interpretation and application of Article XX would have helped conclude that cigarettes present strong cases for exception. But the panelists had separated the health concerns from trade issues. Medical and scientific research has proved that cigarettes are unhealthy products that can cause cancer and numerous other smoking related diseases. Basically, the developed countries, like to United States are expanding cigarette exports to remedy declining markets in their own countries because of the increased awareness of health risks associated with smoking. Therefore, the targeted countries are developing countries. These countries face more danger from cigarettes because of the lack of awareness of the health risks from smoking.

In addition, the recommendations of the GATT panel against Thailand on this issue has allowed U.S. cigarette manufacturers a better opportunity to export their unhealthy products to the world population. The wealth of the U.S. cigarette manufacturers needed to be weighed against the health and well being of the world's citizens. Moreover, Article XX of the General Agreement itself is subject to criticism and consequently raises serious doubts regarding

its application. For instance, the two conditions, i.e., the environmental trade measures by a contracting party should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and secondly that it should not be a disguised restriction on international trade are very vague. Article XX or other GATT provisions do not provide any clear guidelines or definitions of the terms "arbitrary and unjustified discrimination" or "disguised restriction on international trade". The answer to these questions are subject to controversy.

In another case relating to the United States restrictions on imports of tuna, Mexico asked for a dispute settlement panel and contended that the U.S. Marine Mammal Protection Act (MMPA) was contrary to Articles XI,XIII and III of the General Agreement. Basically, MMPA sets dolphin protection standards for the domestic fishing fleet and for countries whose fishing boats catch yellofin tuna in a particular part of the Pacific Ocean. If a countries violates MMPA then the U.S. government can embargo all imports of fish from that country.

The United States government had argued that the import embargo could be justified under Article XX(g), which permits measures that would otherwise be inconsistent with GATT obligation to protect animal health and exhaustible natural resources. The panel found that Article XX does not

permit a contracting party to take trade measures for the purpose of attempting to enforce its own domestic laws regarding animal health or an exhaustible natural resource outside its jurisdiction. The panel further said that if the U.S. arguments were accepted, then any country could ban imports of a product from a country merely because the exporting country pursue environmental, health and social policies different from its own.

The panelists further suggested that if the GATT members wished to permit environmental trade restrictions such as the U.S. dolphin protection law, then they would need to agree on limits to prevent abuse. Since Article XX does not provide such limits, the panelists stated that it would be better to amend or supplement the provisions of the General Agreement.

3.5 AN ASSESSMENT.

Renegotiation of the GATT dispute settlement mechanism has been mentioned by the Punta del Este Declaration as one of the purposes of the Uruguay Round. Consequently, during the ongoing trade negotiations the system was imporved twice. Firstly, on 12 April 1989, the Contracting Parties adopted the text named as "The Improvements", which were to be applied on trial basis from 1 May 1989, until the termination of the Round.

The Improvements to the dispute settlement rules and procedures represent the more adjudicatory approach. It is

made clear from the fact that the emphasis is placed on panle proceedings rather than on phase of consultations. The most important innovations are the adoption of arbitration as an alternative means of dispute settlement and the shorter time-limits applicable to the various phases of a panel. The other cahnges are the introduction of standard terms of reference, the decisive power for the Director General to appoint the members of a panel [in a case of lack of agreement between the disputing parties], and automatic surveillance of implementation of recommendations or rulings. However, not all the initiatives aimed at strengthening the rule-based system have been accepted in the Improvements. This is made clear by the refusal to adopt the consenus-minus-two rule. Panel decisions are also not fully binding and enforceable.

Finally, the Dunkel Draft Text [DDT] also contains provisions for the improvements to the dispute settlement mechanism. However, it should be noted that changes proposed in the Dunkel text is based on the experiences gained during the application of the procedures contained in the decision of the Council of 12 April 1989. Despite this fact the text contained almost sismilar procedures as it is provided in the Improovements. The notable changes proposed in the Dunkel text is the deletion of the word "working party". This development may be against the background that at present the normal practice is to establish panels instead of working party to consider a complaint. Special provisions

are introduced for the composition of a panel when a developing country is party to a dispute. It states that when a dispute is between a developing and developed contracting parties, then the panel shall include at least one member from a developing country. However, these provisions will hardly serve the interest of the developing countries. Because it still leaves a majority of the panel members from the developed countries.

The most controversial changes in the proposed text is the intoduction of an Appellate Body to hear appeals from panel cases and provisions related to the suspension of concessions, provided under the Integrated Dispute Settlement System. Thus, from the last principle, it is clear that the text authorizes a complaining party for cross-retaliation across-sector. Infact, the text extends the retaliatory clauses of national laws which are bilateral in nature to a multilateral level, such as provisions of Special 301 of the United States' Ommibus Trade and Competitiveness Act, of 1988.

CHAPTER-IV

SUMMARY & CONCLUSIONS

The General Agreement on Tariffs and Trade came into being in 1948 as a temporary arrangement to protect the value of tariff concessions made during negotiations over the International Trade Organization [ITO]. The general expectation was that the GATT would be soon absorbed in the larger framework of the ITO. However, the ITO never came into existence due to the refusal of the U.S Congress to ratify the Charter. Briefly, the wide-ranging powers of the ITO frightened the Senators in the United States; ratification would have meant ceding to the ITO some part of U.S sovereignty. But its commercial policy provisions survived in the GATT.

The original GATT text contain three Parts. Part I consists of only the first two articles. It contained principlly the most-favoured nation clause [MFN clause] and tariff commitments and includes the schedules of tariff concessions. Part II embodies provisions relating to general commercial policy and non-tariff measures. Part III covers mainly organisational matters.

The GATT contracting parties wanted to put the Genreal Agreement into force immediately and this objective forced them to limit it in many ways in order to facilitate the process of ratification. The dominant

concern was the problem of U.S ratification, where, in order to sidestep Congressional ratification, the GATT had to be framed as a "trade agreement". Two important limitations followed from these concerns. First, with the exception of the MFN obligation and the tariff conce-ssions, governments could only accept the legal obligations of the General Agreement "provisionally" and fruther, only to the "fullest extent not inconsistent with the existing legislation". As a result, the General Agreement has remained for over 40 years as a provisional treaty, a contract among governments acceding to it, and not a definitive treaty with its own institutional arrangements.

It, therefore, attributes decision - making authority to only one organ i.e. the assembly of the contracting parties acting jointly. This organ in the General Agreement is designated as the Contracting Parties written in capital letters. All other organs of the GATT draw their existence and powers from Contracting Parties. Despite this fact it can-not be concluded that the GATT possesses international legal personality. However, during the years that have elapsed since the failure of the establishment of an ITO, the GATT has increasingly assumed the functions of an international trade organization. In its relations with the United Nations *de facto* it recieves the same treatment as the specialized agencies

of the United Nations.[1]

Like other international agreements the General Agreement also contains elaborate provisions for resolution of differences between the contracting parties. Indeed, dispute settlement mechanism is in many ways the heart of the GATT system. There is no central dispute settlement mechanisam in GATT. In fact, it contains several articles with clauses dealing with the resolution of disputes. For instance Articles 11:5, VI:7, XIX:2, XXVIII and XXVIII obligate the contracting parties to consult in specific instances. Whereas Articles XII:4 (d), XVIII:7 and XVIII: 12 (d) of the GATT provide formultilateral consultations if bilateral consultations have failed to resolve the differences. Likewise there are various provisions for compensatory withdrawal or suspension of concessions. These include the renegotiations under Article XXVIII, as well as compensation uder Articles XIX, XII and II.

However, Articles XXII and XXIII supplemented by the 1979 Understanding, regarding Notification, Consultation, Dispute Settlement and Surviellance and Improvements to the GATT Dispute Settlement Rules and Procedures, which was adoped on 12

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1. Ernst - Ulrich Petersmann, "International Governmental Trade Organizations -- GATT and UNCTAD," International Encyclopedia of Comparative Law, Vol. XVII, 1981, p.10.

April 1989, [hereinafter cited as "The Improvements"] are the most important.[2]

The consultation and dispute settlement provisions in Article XXII and XXIII of the General Agreement were derived from the U.S proposals that ITO functions include interpreting the provisons of the Charter, consulting with members regarding disputes, and providing a meachanism for the settlement of such disputes. These provisions were later elaborated in the Geneva Draft of the ITO Charter which also included a provision for appeal to the International Court of Justice (ICJ). The dispute settlement procedures of the GATT is almost similar to the Geneva draft of the ITO Charter. However, there is no provision for appeal to the ICJ. The absence of ICJ jurisdiction is a matter of practical convenience. It is likely that the delegates simply concluded that the short lifespan of the General Agreement did not justify going through the complex formalities of establishing ICJ jurisdiction.

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2. Other important GATT dispute settlement decisions include Procedures for Article XXIII and LDC's, GATT, BISD, 14th Supp. [1966], p.18; Ministerial Declaration adopted on 29 November 1982 [L/5424], BISD, 29th Supp. [1983], pp.9-13; Action by Contracting Parites on Dispute Settlement Procedures, adopted on 30 November 1984 [L/5752], BISD , 31st Supp. [1985], p.9; Ministerial Declaration of 20 September 1986 on the Uruguay Round BISD, 33rd Supp, [1987], pp. 19, 44-45.

The first principle of the GATT dispute settlement mechanism is that a negotiated solution is the best solution. Consequently, Article XXII as amended in 1955 provides for consultations with respect to any matter affecting the operation of the GATT. This is the diplomatic solution. The process of consultation is again provided in Article XXIII:1, but here with a specific list of types of claims that may be considered. For instance, before invoking this article the aggrieved party should make an allegation that a benefit under the Agreement is being "nullified or impaired".

If no mututal solution is reached after consultations, then Article XXIII:2 sets up the procedure for referral to the Contracting Parties. It provides for investigation, recommendations and possible authorization of suspension of the application of concessions or other obligations by the complaining contracting party. It is at the Article XXIII:2 stage that the practice for the establishment of a panel has been evolved to consider the complaint. This practice has become a system in which disputes are assinged to panels of three or five experts and which is formally acknowledged in the 1979 Understanding. The panel's task is to prepare a report to assist the Contracting Parties in discharging their responsibilities under Article XXIII:2. This report includes an assessment of

the facts and the applicability of the relevant provisions of the General Agreement. The panels submit their report to the Contracting Parties on the basis of which Contracting Paties make their findings and recommendations. Although the panel's reports have the value of an advisory opinion in practice the Council usually adopts the report as it is.

The GATT dispute settlement mechanism has reflected fundamental differences in the approach in which the developed and the developing countries perceived the process within the GATT. The developing countries have focused on the GATT as a system of rules by which the international trading system is to operate, with violations of those rules to be exposed by specific findings and ensure greater compliance with them than does thepresent consensus system. While the developed countries prticularly, the United States and the European Community have brought most of the cases under the GATT dispute settlement process they have tended to speak of it in terms of "conciliation", where they have stressed on negotiated settlement rather than the enforcement obligation. Presently, they are not taking this position because of the proposal for increased legalization of the GATT process in the Uruguay Round, especially the new areas of intellectual property rights, services and investment measures demand more legalistic procedures.

The dispute settlement rules and procedures served governments well during the first decade or two of the GATT existence. However, during the last two decades, there has been growing criticism that the rules and procedures of the General Agreement are losing their credibility. Some of the criticism has been aimed at the substance of the rules, such as they are out of date or leave loopholes which render them ineffective or worse. Moreover, the contracting parties found that the 1947 rules had failed to regulate certain nontariff trade barriers [NTB's] which were as harmful as the more conventional trade barriers that were regulated in the General Agreement. Therefore, in order to make these rules upto-date and effective, a number of measures have been taken during various GATT's multilateral trade negotiations.

The question of GATT legal reform occupied a significant part of the Tokyo Round agenda. As a result, it produced two documents on the subject namely, the 1979 Understanding and the Agreed Description of the Customary Practice of th GATT in the Field of Dispute Settlement. These documents basically codified the dispute settlement precedures which have been evloved through customary practices such as establishment of a panel to consider a complaint as well as attempted to expedite the dispute resolution process.

The Tokyo Round also produced a series of agreements referred to as the Codes, which dealt with the problem of non-tariff barriers [NTB's]. Each of the Codes establishes a Committee or Council, composed of Code signatories, which report to the Contrating Parties of the GATT. The provisions of the Codes apply only to those GATT member countries which sign them. Each of the Codes sets out its own dispute resolution mechanism. They provide for: (1) mandatory consultations between the parties to a dispute; (2) conciliation mediated by administering Council or Committes, if consultations are unsucessful; (3) proceedings before a panel, if the dispute is still unresolved; and (4) the issuance of approprite rulings, findings or recommendations by the Council. The Codes contain the same jurisdictional requirement as provided in Article XXIII i.e. in order to invoke the dispute settlement process, a party to the Code must allege nullification or impairment of benefits, or an impediment to the attainment of any objective under the Code. The most important feature of the Codes are that they provide specific deadlines for each phase of dispute resolution.

There is two major differences between the Codes and the 1979 Understanding. Firstly, the Codes provide the parties an explcit right to a panel procedure,while

the Understanding merely indicates that the normal practice is to grant a request for a panel. Secondly, certain Codes, such a Subsidies Code, establish stricter deadline for each pahse of the dispute resolution process, whereas 1979 Understanding does not provide any specific time limit.

These procedures have been further refined in the Uruguay Round of Trade Negotiations. However, before examining the new rules and procedures of the dispute settlement mechanism we shall describe the special features of this Round. Because there are many features which have made it unique in comparison with the preceding seven rounds of multilateral trade negotiations. For instance, the new round included many new areas such as intellectual porperty rights, investment measures and services, which had been never dealt before within GATT and whose link with the GATT has obtained by prefixing the words "trade in" or "trade related" before them. The Ministerial Declaration had set out a time frame of four years for the Uraguay Round. However, four years of negotiations upto the autumn of 1991 in GATT left many issues unresloved. It was then that Mr. Arthur Dunkel, the Director General of GATT, offered a draft of the Final Act of the Uruguay Round. The proposed text covers wide varieties of subjects including the above mentioned new areas.

If these new areas are incorporated into the GATT

framework then the developing countries particularly India will have to liberalise or open up their national economies. This will allow transnational corporations [TNC's] not only to export into the developing countries, but to invest and set up base in these countries, and to be treated like locally - owned companies, with hardly any state conrols over them. This freedom will be grantd not only in manufacturing sector but also in the service sectors such as banking, insurance etc. The text on intellectual property rights will create a globally uniform system on patents which seeks to introduce "product patents" in many areas, instead of "process patents". This will severely hamper the possibility of developing countries from developing their own technological capacity, and would grant monopoly power over technology to the TNC's.[3]

In fact this goes against the principle of "free trade" which the developed countries are using as an argument to open the market of the developing countries. This contradiction exposes the double standards that underlie the industrial countries' self-interest in pushing for the adoption of new areas into the GATT. They use liberalism or free trade as an intellectual weapon to push for the liberalisation of

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3. Martin Khor Kok Peng, The Uruguay Round and Third World Sovereignty (Third World Network: Penang, Malaysia, 1990). pp. 7-8

investment measures to the developing countries; but they simultaneously want to restrict the free flow of technological capacity to the developing countries by imposing patent obligations and intellectual property rights regimes onto the developing countries.[4]

During the ongoing trade negotiations the GATT's dispute settlement procedures have been improved or rather reformed twice. Firstly, these procedures have been refined in the Uruguay Round midterm decisions of the Contracting Parties, with more specific procedures adopted on trial basis pending the completion of the Round e.g., "The Improvements." The Improvements of the GATT dispute settlement rules and procedures are very modest. This is made clear by the refusal to adopt the "consensus-minus-two" rule. However, the most important innovations are the adoption of arbitration as an alternative means of dispute settlement and the shorter time limits applicable to the various phases of a panel in order to expedite the dispute resolution process.

Lastly, the proposed final Act of the Dunkel Draft Text is also having elaborate provisions for the resolution of difference between the contracting parties. It should be noted that the proposed text contains almost similar procedures for various phases

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4. Ibid.

of dispute resolution process as provided in the Improvements. The notable changes however, include the introduction of an Appellate Body to hear appeals from panel decisions and suspension of concessions provided under the Integerated Dispute Settlement System. Thus, from the last principle it is clear that the text authorizes a complaining party for cross-retaliation across-sectors. In fact, the proposed draft extends the retaliatory clauses of national laws which are bilateral in nature to a multilateral level, like Special 301 of the United States Trade and Competitiveness Act of 1988. The draft also stands for cross-retaliation across-sectors, thus globalising the Special 301 principle.

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