Common Market Law Review **31**: 229–234, 1994.

GUEST EDITORIAL

Uruguay Round

From the moment they began to face genuine difficulties – in the run-up to the Brussels Ministerial Conference in December 1990 – the Uruguay Round trade negotiations have regularly been in the headlines. Everything worth knowing should therefore have been written long ago. Surprisingly enough, this does not appear to be the case.

It is of course quite difficult to spell out in a few words the essence of seven years of extremely tough negotiations which eventually led to a highly technical legal text of more than 500 pages. I would like to stress here the dimension which I personally think to be most important although it is usually neglected by commentators: the Uruguay Round was an unprecedented exercise in international economic rule-making.

1. *Two new treaties*

The Round's importance for international treaty-making is of course obvious when one bears in mind that its Final Act encompasses two entirely new legally binding international treaties: the Agreement on Trade Related Intellectual Property Rights – the so-called "TRIPs Agreement" – and the General Agreement on Trade in Services, which is widely known under its shorthand "GATS".

Protection of *intellectual property* rights insofar as they have a bearing on international trade was the objective set for the negotiations on TRIPs. From the point of view of international trade, the stakes are easy to grasp. The main purpose of intellectual property rights is usually

to grant to their owner an exclusivity in the commercial exploitation of the protected product. This exclusivity permits the IPR owner to sell the product at prices well above mere production costs, the differences being intended to cover the expenses incurred in innovation, research or respect of high quality criteria. As a consequence, when adequate protection is not granted, the price of the genuine product makes it uncompetitive as compared with usually cheap counterfeited goods. On the international level, this price disadvantage might operate in the same way as a genuine restriction, not to say prohibition, on imports.

Intended to address only the interface between IPR protection and trade, the Agreement on TRIPs adopts for the multilateral trading system the so-called "directive approach" introduced by European Community law: the stuff of which the Single Market was made. In order to avoid spelling out all the regulatory details necessary to a measure, the "directive approach" limits itself to defining the objectives that should be secured through national legislation. The great advantage of this avenue is its flexibility. By leaving a greater margin of manoeuvre to the implementing body or State, legislation adopted pursuant to a directive is usually better suited to the subject matter and more easily accepted by the public than overly detailed regulations.

On this pattern, the Agreement on TRIPs defines precise substantive objectives for the protection of copyright and related rights, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits and business secrets as well as for the control of anti-competitive practices in contractual licences. Furthermore, it states that signatories are committed to granting IPR owners who are nationals of another participating country access to administrative and judicial procedures enabling them to have their rights enforced. Finally, the inclusion of the Agreement on TRIPs in the multilateral trading rules administered by the future World Trade Organization gives participating countries the possibility to resort to GATT dispute settlement procedures if another signatory does not fulfil its commitments under TRIPs. Due to the fact that a dispute settlement under GATT may eventually lead to the imposition of trade sanctions on the party found responsible for a breach of trade rules, the Agreement on TRIPs is more likely to be genuinely applied than the usual international conventions

on intellectual property merely listed by the World Intellectual Property Organization.

Unlike intellectual property, there was however nothing on the international level on which to build in the field of trade in *services* from the legal point of view. The rules that have come out of the exercise had to be devised from scratch. However, since trade liberalization was the objective, the negotiators were quite naturally inclined to inspire themselves from the liberalization principles to which the success of the GATT with respect to international trade in goods is clearly attributable.

Principles like most-favoured-nation treatment and transparency, the most prominent general obligations that will be binding upon all GATS signatories from the moment the agreements come into force, are therefore no newcomers for international trade experts. But if GATT principles have certainly been helpful, world trade in services could not be regulated by mere transposition of rules pertinent to goods into the field of services. Trade in services does not by any means always involve the physical crossing of an international border. In order to take account properly of the realities of trade in services, the very definition of such trade had to comprise, besides the supply of a service from the territory of one Member into the territory of any other Member ("cross-border" supply), also such important "modes of delivery" as supply by commercial or physical presence in the territory of other signatories and provision in the territory of one Member to the service consumer of any other signatory.

Given the complexity of the mechanisms for the provision of services, trade liberalization cannot simply be achieved by the binding of border restrictions at some negotiated level, as is the case of trade in goods. Negotiators had to innovate, and ended up with a consensus to express concrete liberalization measures through pledges to grant mainly "national treatment" and/or "market access", as the case may be, on specific activities. In line with the precedent set by GATT, the Uruguay Round negotiations on services therefore resulted in the acceptance of a framework agreement spelling out the general rules, the General Agreement on Trade in Services, supplemented by "schedules of initial commitments" in which the concrete steps every single Member commits itself to take are lodged with WTO in a legally binding form.

Obviously, the fact that the United States were not willing in the end to accept the general MFN obligation for activities in financial services was extremely disappointing.

2. *Improving of existing GATT rules*

But the European Union was at least able to secure a formal commitment on a work programme on financial services. After one year, it might well be that the concrete liberalization results in this economically important sector will be substantially improved. And such disappointments should not obscure the fact that, once the Uruguay Round results are in force, the mechanics for the progressive liberalization of international trade in services will be set, in a fully operational way.

To have given to two new and original international treaties is certainly the most important legal achievement of the Uruguay Round. However, these treaties do not exhaust the rule-making dimension of the negotiations. The provisions of the main GATT articles as well as those of the most important GATT codes were reviewed in depth. Work in this area resulted in a major overhaul of the Subsidy Code in particular. As for safeguards, a new Code on the interpretation of GATT Article XIX has been negotiated.

Unlike the approach chosen for intellectual property, the improvement of GATT rules required considerably greater detail in the legal texts. The sometimes loose formulation of the original GATT provisions had led over the years to an accumulation of interpretations such that obvious infringements against the spirit could be deemed compatible with the texts themselves. It is this kind of problem that the patient and detailed work of the Uruguay Round negotiators was meant to eliminate.

3. *The setting-up of a quasi jurisdictional system*

From the outset, the strength of the GATT has been its dispute settlement system. Unusually for international public law, the General

Agreement on Tariffs and Trade contains a rather effective means for resolution of disputes between its parties. The system is based on an objective examination of the case by a panel of independent experts in trade law. These experts report to the GATT Council on the existence of a breach of GATT rules, adding recommendations as to the means to terminate such infringements. Unlike the usual arbitration procedure, the GATT panel report is made binding by a decision of the GATT Council. If a party fails to comply with the recommendations, it could have trade sanctions imposed on it.

The problem with this procedure was that the Council decision required a vote by consensus – a usual requirement under international law, designed to protect state sovereignty. However, the trouble was that the country which lost the panel had to be part of the consensus, being thus, simultaneously, a judge and a party in its own case.

This irrational aspect is responsible for the "blocking" of some panel reports, the interested party refusing to join the consensus. There are, by the way, astonishingly few cases of blocking, mainly because of pressure within the GATT Council to avoid such an act of naked self-interest. However, the possibility of blocking acted as a permanent threat to the credibility of the system.

How to avoid a veto without overriding National Sovereignty? The Uruguay Round resolved the problem requiring parties to a dispute to abandon their voting right by setting up a permanent appeals body, composed of high level experts in international trade law. When the Round's results are effective, a party challenging a panel report will be entitled to put the case before the Appeals body. The ruling of this organ will be final, unless the GATT Council chooses to reject it by consensus.

Quite an original compromise has thus been found between legitimate concerns on sovereignty, expressed by the rule of consensus, and the needs of effectiveness, materialized in the binding and final nature of the ruling of an independent judicial body.

4. *Future work in WTO*

In the course of the Uruguay Round, three different approaches to international rule-making have thus been taken: the directive approach for intellectual property, the elaboration of fundamental principles for services and lastly the drafting of precise provisions on the model of EC regulations as far as the codes on anti-dumping, subsidies and safeguards are concerned. The choice between these different approaches was made according to the concrete requirements of each subject matter.

During the Uruguay Round, some experience has therefore been gathered on ways to proceed that will have to be applied fairly shortly. Next on the rule-making agenda, the conciliation between trade requirements and environmental concerns appears well suited to the directive type approach pioneered in the field of TRIPs. Basic standards could well be derived from existing environmental conventions, an approach already put forward by the Community in the relevant GATT working group.

When, the time is ripe to address the most important issue of trade and competition, the WTO Members will probably have to resort to the basic principle approach followed with respect to services.

In both cases, it seems reasonable to assume that practice acquired in the Round will facilitate future substantive work.

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If asked to characterize the outcome of the Uruguay Round trade negotiations, as a politician I would certainly have to stress the unprecedented impact on liberalization of international trade. However, as a lawyer, I am inclined to prefer the rule-making dimension of these negotiations. Creativity and innovation will lead to some progress in international law. Insofar as the rule of law contains and opposes mere strength and power, these negotiations are a notable step on the road towards civilization.

Sir Leon Brittan