European Foreign Affairs Review **2**:287–289, 1997

Guest Editorial

The European Union and the WTO Dark Room

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The strengthening of the GATT dispute settlement procedure agreed at the end of the Uruguay Round is expected to increase the 'legalization' of international trade disputes. The key change introduced by the WTO Understanding on Rules and Procedures governing the Settlement of Disputes ('the DSU') is that members may no longer unilaterally choose not to adopt panel reports. Under the new system, there is a right of appeal on a point of law but ultimately a panel report may only be rejected by unanimity.

Already the first two years of the Dispute Settlement Body ('DSU') have produced seventy panels. The USA has been a major user. However, the US approach to the dispute process raises a number of issues of concern. For example, the photofilm case instigated by Kodak illustrates certain discrepancies between US policy and practice as well as the opportunities available for unmeritorious claims under the DSU.

In 1995, Kodak which has 70 per cent of the US film and photographic film market, filed a complaint under section 301 of the 1974 US Trade Act against Fuji which has 70 per cent of the Japanese market.

The complaint concerned access to the Japanese film market. In 1996, an election year, the USA initiated a WTO dispute settlement procedure. It went in with all guns blazing; alleging that Japanese government measures constituted violations of the GATT, GATS and an obscure 1960 decision on Arrangements for Consultations on Restrictive Business Practices. Consultations were requested under each trade instrument.

After twelve months, the battle lines have somewhat changed. The USA thus far only has requested a panel under the GATT concerning Japanese distribution guidelines, a planning law known as the Large Stores Law and various Japanese laws on product promotion. Interestingly, the only substantive violation of the GATT alleged by the USA against Japan is that MITI's distribution guidelines breached the

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national treatment provision of Article III:4. Consultations under the 1960 decision (the only remedy available), have not progressed following a request by Japan for reciprocal consultations on the US film market. The Japanese allege that the US film market has substantial barriers of its own for imported film.

The key issue is market access. The USA claims that Japanese government distribution guidelines accord its imports less favourable treatment than Fuji's Japanese products. However, the USA is not able to cite any Japanese government measure which treats imports differently from domestic products. All measures cited treat both in the same way. The one Japanese government measure that could affect imported products differently – import tariffs – is set at zero for photographic film. In contrast, all Japanese imports are subject to a 3.7 per cent US tax.

Kodak's real concern is that its vertically integrated distribution system (used in Japan as in the rest of the global film market) is less effective than Fuji's distribution system. Fuji uses four independent wholesalers in Japan. Kodak says it cannot use the same wholesalers. It alleges that this somehow violates international trading rules. However, Kodak does not deny that single brand wholesale distribution is the norm all over the world. Indeed, Kodak fails to explain why single brand wholesale distribution is perfectly acceptable in the USA but not in Japan.

Since the Article III case is weak, the USA relies heavily on a non-violation claim alleging that the benefits of Japanese tariff concessions agreed during the Kennedy and Tokyo GATT rounds had been 'nullified or impaired' under Article XXIII:1(b) of the GATT.

The chronology of the US allegations itself reveals that the conditions for the application of Article XXIII:1(b) cannot be satisfied. First, single brand distribution was already established in the Japanese photographic film market before adoption of any of the government measures complained about by the USA. There is, therefore, no causal connection between the government measures at issue and the competitive condition (single brand distribution) complained about by the USA. Second, for a nullification and impairment claim to succeed, it must be shown that a government measure subsequent to the tariff concession nullified and impaired the benefit of the concession. In the present case, the tariff concessions at issue were made during the Tokyo and Uruguay Rounds which concluded in 1979 and 1994 respectively. The Japanese government distribution measures under attack, however, were adopted in 1970 or before. Bearing in mind that past panels on this article have only rarely succeeded and then only in clear cases where tariff concessions have been counterbalanced by subsequent subsidies to the domestic industry, the present case is flimsy.

The US non-violation complaint essentially concerns competition issues such as non-price vertical restraints and promotion practices. But the USA may not raise competition issues under the GATT non-violation rule. The most it could do is to promote the Working Group established to study the interaction between trade and competition policy by the Singapore WTO ministerial meeting. However, the USA has been consistently reluctant to see the WTO address competition issues. It only supported the Singapore Working Group after its mandate had been limited. It has also argued for very narrow legalistic interpretations of GATT obligations by panels. Moreover, it is clear from the WTO Singapore Declaration itself that competition is not already covered by the GATT.

As one of the two third parties involved in the case, the EU lodged its submissions on 10 April 1997. It appears from the press release issued by the EU Commission that the EU sees the case as an opportunity to expose competition law issues to the GATT. But the EU, like the USA, must await the outcome of the new WTO working group on trade and competition policy. The EU's arguments favouring the USA against Japan are consistent with EU trade policy objectives to increase Japanese market access. This approach also reflects the EU policy on distribution services in the context of GATS. However, EU support for the USA may backfire. The US interpretation of the Japanese town planning and promotional laws at issue could equally apply to equivalent EU Member State laws. European Court rulings in recent years saying that national marketing rules which are not directed against imports are not subject to the EU's own free trade rules might also be put in doubt.

The photofilm case indicates that the DSU consultation process prior to the establishment of a panel may not be sufficient to prevent claims clearly lacking merit or unarguable defences. In particular, the DSU requirement that the parties must enter consultations 'in good faith' in an attempt to resolve a dispute appears to be an inadequate preliminary vetting process.

It may prove necessary to introduce preliminary procedures to test the admissibility of panel requests or the arguability of defences. In particular, where it cannot be shown that there is any measure to which alleged nullification and impairment can be linked under Article XXIII, there should be a procedure that permits such a request to be declared inadmissible at the outset.