Editorial

IN this issue we publish an account of the dispute in GATT between Australia and the European Community on the subject of the latter's sugar export refunds. The Australian delegate was reduced to declaring "If GATT were to do nothing about our complaint, other contracting parties, including Australia, would be left at best with a diminished sense of obligation and commitment in the framework of GATT rules." This is strong diplomatic language from a contracting party of the General Agreement, and must cause concern for future confidence in the organization.

Institutions composed of sovereign states often suffer from a creeping paralysis which results in their gradual degeneration. This is particularly the case with the United Nations Organization. And unless there is constant innovation and renewal the consequence is likely to be an institution having all the semblance of life, but which is practically moribund.

By a happy mischance the U.S. Congress failed to approve the establishment of the International Trade Organization and it was stillborn. From its toils was rescued the General Agreement on Tariffs and Trade, intended to be a subsidiary agreement to the ITO, but which was put into force on its own by the Protocol of Provisional Application in 1947. Not only has the GATT endured, but it has become the head of the corner of the international trade institutions. Under the very capable initial guidance of Sir Eric Wyndham White and his colleagues it has become an organ of great influence and effect. If the degree of protectionism in world trade is measured by an absolute standard the present level may seem high. On the other hand, if the realistic comparison to be made is with the stagnation of trade in the thirties, the present state of affairs must indicate that the institution has been a signal success.

When the GATT organization was first started there was considerable distrust of lawyers, for it was felt that GATT was a club inhabited by diplomats of impeccable reputation who would ensure that its affairs would be conducted with all seemly propriety. Should any unhappy differences arise they would be settled privately according to the feelings of the general consensus. In this way it was possible to keep the General Agreement flexible and thus to assure its survival. It was difficult to foresee in 1947, for example, that Article XXIV would be applicable to such large customs unions and free trade areas as the European Community and EFTA. Thus it was that some derogation in these and other fields became tolerated, and this, together with the concept that the better solutions were to be found in the economic rather than the legalistic field, resulted in a preference for conciliation on the basis of an agreed compromise rather than a decision on a legal basis.

Professor Hudec has now performed a timely public service by drawing attention to the present state of dispute settlement in GATT.[1] He emphasises that with the introduction of the panel system into the Tokyo Round codes, and the revision of the Article XXIII procedure, there will probably be an increasing number of disputes referred for settlement, and unless the GATT rules are

[1]. Robert E. Hudec, "GATT Dispute Settlement After the The Tokyo Round: An Unfinished Business", 13 *Cornell Int. Law J.* (1980) p. 145.

suitably modified there is likely to be a further reluctance to make the dispute settlement procedure effective. He refers particularly to the safeguard clause under Article XIX, the restrictions on agricultural imports under Article XI, and the most-favoured-nation clause itself.

The present situation is reminiscent of the Organization for European Economic Co-operation (OEEC), as it then was, in earlier days when it was attempting to eliminate the internal tariffs and quotas in Europe. Such a task proved too much for what was essentially a diplomatic conference in permanent session. Bilateral negotiations led to much "horse-trading". Disputes were difficult to settle, and it was sometimes impossible for the parties to agree even upon the precise nature of their dispute. The practical solution was only to be found in the establishment of the EEC with its supranational institutions, including a Court, and a fixed timetable laid down for the elimination of tariffs and quantitative restrictions.

The solution of a Court naturally presents itself, and Professor Hudec is already complaining that lawyers are becoming involved in the disputes. "The particular danger," he writes, "is that lawyers, because of their technical expertise, may come to exercise an influence over proceedings out of proportion to their knowledge of GATT affairs." It is also, of course, a particular danger that lawyers may support the rule of law. It would however in present circumstances, with governments hard pressed to resist further protectionism, be unrealistic to expect any great initiative to be taken in this direction. Two things, however seem to be necessary. The first is an immediate step to improve the process of dispute settlement, as has already been suggested by Professor John H. Jackson in these pages,[2] while the second is to prepare a long-term programme for an effective mechanism for the regulation of international economic affairs, which might well include a Court of Justice.

One matter needs to be mentioned. It seems to be fairly clear that in the present dispute the EEC has been guilty of some prevarication. While the European Community has many things to be proud of, its sugar policy is scarcely one of them, and it seems wrong that the Community should persist in its present tactics in the face of so much criticism in GATT. After all, the Community is more than merely an instrument to preserve the material interests of its members. It represents a concept which should rise above this. It is the keeper of the conscience of Europe. It is dignified with a Court of Justice of considerable eminence dedicated to the rule of law, and it should give to others the same treatment that it would insist upon for itself. We believe that the establishment of an international legal order is an essential interest of the European Community which it ought to be seen to be furthering, rather than pushing sugar exports which few seem to want.

[2]. "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT", 13 *J.W.T.L.* (1979) p. 1.