Editorial

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GATT's Fortieth Birthday

This year the General Agreement on Tariffs and Trade (GATT), created in 1947, celebrates its fortieth birthday. It stands with the World Bank and the International Monetary Fund as one of the three institutions established at Bretton Woods that have meant so much to the western world.

Although the Bank and the Fund have always been firmly based, GATT started off as the ailing sibling. It was not intended to stand alone, but to form an integral part of the International Trade Organization (ITO), which was negotiated in 1946 at Havana but never ratified by the US Congress. As a result, the GATT emerged as an agreement without any organization and was then only provisionally brought into force.

In spite of this, the makers of GATT have contrived to prove it a success. It served to guide the growth of international trade during the early years, and recently it has had a marked effect in steadying the protectionist tendencies of the participants. There is also now good reason to hope that the contracting parties will break new ground during the Uruguay Round negotiations that will add substantially to the liberalization process.

Nevertheless, underneath the aura of birthday congratulations there are two central issues which need to be resolved if the GATT is to have a healthy future.

The first is whether some means will be found to ensure that the participating governments fulfil their legal obligations under the Agreement; and the second, which follows from the first, is whether there will be a sensible and effective dispute settlement procedure.

If these two matters can be settled satisfactorily, it is likely that everything else will fall into place. Otherwise the present degeneration will continue, with the result that either the performance of the Agreement will become increasingly permissive or else the illegalities will be made legitimate.

To appreciate the extent of the current malaise, all it needs is to examine the Ministerial Declaration following the 1982 meeting. At that time the spectre of future international trade chaos was seemingly haunting the participants.

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Some extracts from the Declaration read as follows:

> "The contracting parties to the General Agreement on Tariffs and Trade have met at ministerial level on 24–29 November 1982. They recognize that the multilateral trading system, of which the general agreement is the legal foundation, is seriously endangered . . . Existing strains have been aggravated by differences of perception regarding the balance of rights and obligations under the GATT . . . There are also concerns over the manner in which the obligations are being fulfilled. Disagreements persist over the interpretation of some important provisions and over their application. Disciplines governing the restriction of trade through safeguard measures are inadequate . . ."

Although the Ministers expressed their determination to improve their performance, little seems to have been achieved, for in the Leutwiler report,[1] published two years later in March 1985, this group of high-level experts write:

> "The trading rules set under the General Agreement on Tariffs and Trade are increasingly ignored or evaded . . . the trading system itself, the rule of law embodied in the [GATT] is suffering serious and continuous erosion . . . Countries have abused the system's flexibility and have sought advantage through national measures not adequately dealt with in negotiations or the GATT rules . . ."

The reason for this is not difficult to find. Briefly, it is a common experience that governments left to themselves exhibit a remarkable tenacity in pushing their own short-term objectives, whilc individually retaining as much freedom of action as possible.

Some of the trouble might have been avoided if the General Agreement had been incorporated in the ITO. The Organization would have embraced business practices and commodities as well as international trade. There would have been a general conference meeting once a year with decisions taken by majority vote (although waivers would require two-thirds), but the principal functions would have been delegated to the executive board of 18 members, eight of which would have been the major trading countries for the time being, with the rest elected on a geographical basis. Had the ITO been established in 1946 the eight members would have been the United States, Canada, Britain, France, Benelux, China and India. In addition, the executive board would have been assisted by three commissions to act as "think-tanks", each consisting of not more than seven suitably qualified individuals and of which one commission would have dealt with commercial policy.

Differences, if not settled by the parties themselves or by arbitration could thus be referred to the executive board for investigation and *decision on whether any nullification or impairment exists,* subject to further reference to the conference and the International Court of Justice. There would also be a director general empowered to write the annual report, assisted by a staff.

The establishment of the ITO is of course not the only way the contracting parties might be induced to perform better. Other techniques have been employed elsewhere. In the Organization for Economic Cooperation and Development

[1] *Trade Policies for a Better Future. Proposals for Action.* GATT, Geneva, March 1985.

(OECD, formerly OEEC), particularly where the convertibility of currencies was at issue, a system of surveillance was effective. In the UN family increasing influence is being exerted by non-governmental organizations (NGOs), especially in the field of human rights and ecology. NGOs however have no *locus standi* in GATT, and although producers and manufacturers are well represented by their governments (and indeed are often regarded as "clients") the consumers, who suffer most from protectionism, are without representation. The ultimate solution, supervening on the failure of the then OEEC to eliminate quotas and customs duties, was the establishment of the European Community. It is not denied that the GATT secretariat has made great efforts to improve the system and that the Director General has had the distinct advantage of being free to appoint such a competent staff, without reference to geographical distribution, but the result is clearly insufficient.

It is only inside the European Community that the progress of liberalization has been satisfactory enough to contemplate the creation of a genuine common market in 1992.

In view of this, and of the expanding power and increasing opportunity the EC has to influence world events, it is appropriate to examine the conduct of the Community in GATT, although the result is scarcely reassuring.

With regard to the first question raised here, concerning the observance of GATT rules, the Ministerial Declaration of 1982 included the following:

> "7. In drawing up the work program and priorities for the 1980s, the contracting parties undertake, individually and jointly:
> (i) To make determined efforts to ensure that trade policies and measures are consistent with GATT principles and rules and to resist protectionist pressure in the formulation and implementation of national trade policy and in proposing legislation, *and also to refrain from taking or maintaining any measures inconsistent with GATT* and to make determined efforts to avoid measures which would limit or distort international trade." (emphasis added)

Sad to say, Mr. Haferkamp, on behalf of the European Commission, put a gloss on this in a Declaration immediately following:

> "As regards the undertaking in paragraph 7(i) to refrain from taking or maintaining any measures inconsistent with GATT, the Community considers this undertaking to mean that its best efforts will be deployed to avoid taking or maintaining such measures."

Such a statement, no doubt welcome to the other participants, serves only to encourage disorder, and it comes amiss from the Community, which is based on the concept of the *Rechtsstaat,* where "best efforts" will not do, and where member states operate under law subject to the control of the European Court. The Community is not a nation state. It is more than one, and better than one, and does not have to play national games. It is also disheartening that the Commission should allow itself to be the bearer of this message for, without the strict application of the Rome Treaty so stoutly upheld by the Court in the early days, the legal competences of the Commission would surely have been torn away from it long since by some of the governments of the member states.

The European Court has considered the General Agreement and declared it to be binding on the Community: but for the Court's finding of lack of precision in its terms and its flexibility in implementation the Court might well have declared the Agreement to be self-executing. This might have led to individuals being given a right of action if their expected benefits under the Agreement were impaired by the Commission.[2]

As regards the dispute settlement procedure, the present practice, which is based in principle on "consensus" whereby the party subject to the complaint participates at every stage of the process, has led to obstruction and delay. At present the dispute panels are manned, somewhat reluctantly, by GATT diplomats who may one day find themselves faced with complaints.
As one commentator has written:[3]

> "Despite the attempts to improve the settlement of disputes, a contracting party determined to prevent an adverse ruling still has plenty of opportunity to follow delaying tactics, block the adoption by the Council or refuse to comply."

The Ministerial Declaration dealt at length with dispute settlement, but reaffirmed that consensus would continue to be the traditional method of resolving disputes, although it was agreed that obstruction should be avoided. The Declaration of the Community laid particular emphasis on consensus. Dispute settlement will be one of the topics dealt with in the Uruguay Round, and it should be noted that the Community has already made its position clear. In the Newsletter of the European Communities, *Dialogue,* for 5 November 1987 it is stated:

> "On Disputes settlement a number of submissions are on the table, basically aiming at refining the existing procedures rather than changing the fundamental principles upon which the disputes settlement procedure in GATT relies. *The EC advocates in any event that the rule of consensus in this procedure should be maintained.*" (emphasis added)

Dispute settlement is clearly a delicate problem and it seems unfortunate that the Community should be insisting on what may be the "least best" solution so early in the negotiations.

With regard to the functioning of the GATT system, the Ministerial Declaration on the Uruguay Round called for negotiations including those "to improve the overall effectiveness and decision-making of GATT as an institution, including, *inter alia,* through involvement of Ministers", in respect of which the Community, in the same issue of *Dialogue,* commented:

> "The Community has called for prudence in any institutional reorganisation of GATT, the unique character of GATT, which regulates trade on a contractual basis through a multilateral forum rather than an organisation, must be preserved throughout the negotiations."

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[2] *Third International Fruit Co.* (1972) ECR 122; *Carl Schlüter v. Hauptzollamt Lörrach,* Case 9/73. (1973) ECR 1135.

[3] I. Garcia Bercero, *Trade Laws, GATT and the Management of Trade Disputes between the US and the EEC,* in F. G. Jacobs (ed.) Yearbook of European Law 5, 1985, Clarendon Press, Oxford, 1986, at p.188.

It looks too much as if the Community is content to settle down to the mixture as before, for experience has shown that GATT does not regulate trade on a contractual basis, as governments do not fulfil their contractual obligations.

All the difficulties involved in making GATT into an effective instrument were carefully considered by the independent Leutwiler group which has made a number of important proposals. Little has been heard of the report since it was published and more should be made of it. Now is the time for its proposals to be added to the negotiations.

The most important proposal concerns the elimination of practices inconsistent with GATT rules. It is suggested that these should be identified and gradually phased out over several years. Such a solution was found to be workable for removing tariffs and quotas under the Rome Treaty and the EFTA Convention and, if applied in 1990, it could at least bring GATT back onto the rails of legality by the end of the century. This would give sufficient time for the painful process of structural adjustment to work its way through the national economies. This seems to be a commitment adopted in the Uruguay Ministerial Declaration and it remains to be seen whether it will be implemented.

The second proposal of importance deals with dispute settlement. It is proposed that a small roster of individual experts in GATT matters, independent of governments, should be built up to examine disputes. The group also advocates that use should be made of the right of third contracting parties to bring complaints against actions that impede the objectives of the Agreement.

The Uruguay negotiations are being carried out by governments alone, among which producers are well represented. No non-governmental organizations are entitled to be present, as would be the case with United Nations bodies. There will be no representation of consumers, for whom more imports mean lower prices. Nor will development agencies, anxious to reduce protectionism aimed at the Third World, be entitled to present their views. Nor will unofficial associations, representing various aspects of the public interest, such as the strengthening of international law or the improvement of world order, be permitted to be heard.

The situation requires as much attention now as it did at Bretton Woods 40 years ago; there is a great danger that the opportunity offered by the Uruguay Round may be missed. The European Community alone seems to have enough strength and influence to put some backbone into GATT and it will incur heavy responsibility for the future if it fails to respond to the present challenge. It is a situation which cannot be left to trade experts alone, and one which requires a worthy response from the Community as a whole.