

## **THE SIGNIFICANCE OF THE GATT DISPUTE SETTLEMENT MECHANISM**

The GATT was established at the beginning of its history as a mutual- tariff reduction agreement under the International Trade Organization charter. And also the GATT was never thought to be as an international organisation by its members. The original intention of the GATT was to be placed as a legal framework for International Trade Organization. Read, R says about the GATT dispute settlement system, “The GATT was established in the wake of the International Trade Organizations’ failure and contained a more limited array of measures derived from the Havana charter for the settlement of disputes between its contracting parties. The principle GATT articles dealing with dispute settlement are the article XXII on consultation and XXIII on nullification and impairment.”<sup>1</sup>

However International Trade Organization was never ratified by United States. So it did not come to the life. As a result of this, the GATT slowly replaced with International Trade Organization by taking over its functions and during the period GATT became the main body of the international trade procedures.

Since its beginning of GATT, there was a controversy about dispute settlement system. One group argued that, the dispute settlement system must be ‘diplomacy or power oriented’ direction. Another group dictated it to be a ‘rule- oriented’ system. The former maintained that, the trade disputes would be resolved by negotiation. According to latter, it can be possible to make objective rulings to resolve a trade disputes. Evidence of this that, evolution of GATT resulted to the working parties shifted to the panel procedures.

In the earlier stage, the GATT dispute settlement system was having a several weaknesses, because the GATT came to the life with its birth defects. For instance, there was an ambiguity about GATT decision-making procedures. The relevant articles of GATT were brief and did not specify a clear procedure. In the beginning of the GATT,

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<sup>1</sup> Read, R, Trade Dispute Settlement Mechanism: the WTO dispute settlement understanding in the wake of the GATT- Lancaster University Management School, Working papers 2005/012

dispute settlement system was informal. There was a plenary meeting of the contracting parties over the trade disputes. In addition, the GATT dispute settlement system was an inefficient and the principle of consensus was ambiguous. As a result of this, the contracting party can block the dispute procedure easily.

Furthermore, the system was having a problem about its institutional structures and also its provisional nature. According to Hudec, 'its operating procedures were quite ill-defined its legal ruling were written in vague language that suggested more than it said, and both its procedures and its ruling left plenty of room for negotiation.'<sup>1</sup>

Moreover, the countries representatives mostly were same persons, dominated by the United States and the United Kingdom. The GATT secretariat did not have a legal background. They were diplomats or economist. This situation resulted to the lack of expert legal analysis in the work of the panels.

As a result of these, the contracting parties were losing their respect to the system. However, the system survived, because of the commitment of its members to support the GATT framework. In addition, according to Hoffman; after 1952, the dispute settlement system became more formalized. The panel procedure was established and also independent expert acting in the process, and not representatives of the member states.<sup>2</sup>

The GATT made no provision for dispute settlement procedures. However, article XXII and XXIII was the central provisions of the GATT dispute settlement procedures. Article XXII provides for consultations and article XXIII provides for nullification or impairment of a benefit. Together, these two articles provide a procedure to resolve of the trade disputes through consultations. However, these two articles were very brief by comparison most of the international organisation dispute settlement systems.

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<sup>1</sup> R. Hudec, 'the New WTO Dispute Settlement Procedure' Minnesota Journal of Global Trade, [1994], 4

<sup>2</sup> J. Hoffman, Should Trade Disputes be handled in the World Trade Organisation or in a Unilateral Way? - American University, [1999]

In the beginning of the GATT, first step for the dispute settlement system is a request for consultations. According to article XXII that, 'A party can request consultations with any other party with respect to any matter affecting the operation of agreement.' The trade disputes were being held by the working parties. Their decision was made by consensus after negotiating to disputes. When they cannot find a mutually agreement to the dispute, the complaining party would request a panel procedures for examination of the disputes.

Furthermore, the most defective things during the dispute settlement procedure were the 'blockage' of the defendant party. The GATT decision-making procedure was leading a principle of consensus. That's mean one of the contracting party could easily block the process of the dispute settlement procedure. The GATT contracting parties has to adopt their decision by 'consensus', which means all contracting parties must be agree on the panel report. For instance, this situation happened in both bananas disputes. The European Communities blocked the adoption of panel reports. The requirement of the consensus made the GATT system less effective. As a result of this, many trade disputes remained unsolved.

In spite of this, the GATT has evolved into an experienced organization; especially their dispute settlement system became the most important mechanism of the GATT. During the GATT history, the system worked quite well. In order to make an effective and enforceable GATT rules, firstly, in 1979, The Understanding on Dispute Settlement established a consistent set of rules. Secondly, in 1989 was established the Dispute Settlement Procedures Improvements gave the complainants to right to a panel and defendants could no longer block panel reports. Lastly, establishing an Appellate body gave to the system a more confidence.

Furthermore, Ministerial Declaration of the Uruguay Round made a significant improvement upon the dispute settlement system. According to this, 'In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognising the contribution that would be made by

more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.’<sup>1</sup>

Article XXIII was the central provision of the dispute settlement mechanism in GATT. However, it was ambiguous, because it called ‘nullification or impairment’ the basis of a complaint instead of calling a ‘breach of the GATT obligation.’

The most important features for the dispute settlement have evolved into the procedure during the GATT history in practices. Such as, the contracting parties duty is not only investigate and recommendation, but also to give a ruling on the issue. According to Uruguay Recourse to article XXIII says about it, ‘Paragraph 2 of article XXIII provides, apart form promptly investigating any matter so referred to them, for two kinds of action by the contracting parties, namely;

- 1- They shall make appropriate recommendations or give a ruling on the matter.
- 2- They may authorize the suspension of concessions or obligations.

The action stated under [1] is obligatory and must be taken in all cases where there can be an ‘appropriate’ recommendation or ruling. The action under [2] is to be taken at the discretion of the contracts parties in defined circumstances.’<sup>2</sup>However, second action can be taken only, when the situation quite serious to limit the applicability of the provision to cases where there is nullification or impairment.

In the earlier stage of GATT, breach of obligation did not a condition of the dispute settlement procedure. However, in 1962 panel made a decision that a breach of GATT obligation would be considered a ‘prima facie nullification or impairment.’<sup>3</sup>

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<sup>1</sup> Ministerial Declaration of the Uruguay Round [Punta del Esta Declaration] GATT doc. GATT/ 1396 September 25,1986

<sup>2</sup> Report of the Panel on Uruguay Recourse to Article XXIII, GATT doc. L/ 1923

<sup>3</sup> Report of the Panel on Uruguay Recourse to Article XXIII, GATT doc. L/ 1923

According to BISD [11S/ 99] that, ‘in cases where there is a clear infringement of the provisions of the General Agreement or in other words, where measures are applied in conflict with the provisions of the GATT... , the action would, prima facia, constitute a case of nullification or impairment.<sup>1</sup>

As a result of this, the panel has focused on the legal principles of rule application much more than has done it before. And also the procedure has worked better than might be expected. Moreover, recent development of this is that, according to U.S Taxes on Petroleum case; the procedure of article XXIII applied to cases of nullifications or impairment and that it was established GATT practice, that, even if a measure was considered prima facia to constitute a case of nullifications and impairment under article XXIII, the party against whom the action had been brought could rebut the allegation of nullification or impairment.<sup>2</sup>

In conclusion, the establishment of the GATT was the failure of the International Trade Organisation. As I explained, the GATT came to the life with its shortcomings. The GATT also made no provisions to the dispute settlement mechanism. However, this mechanism was unique; it worked better than it was expected. As a matter of fact, the GATT dispute settlement system was a bridge among the world trading countries over the trade disputes, even if it did not have a detailed provisions about dispute settlement procedures. Moreover, it was a foundation of the WTO which is the most important and respectful trade organization in the world.

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<sup>1</sup> EEC- Restrictions on Imports of Dessert Apples- Complaint by Chile, GATT doc. L/ 6491

<sup>2</sup> Unites States, Taxes on Petroleum and Certain Imported Substances, GATT doc. L/ 6175