Dispute Resolution in the 
World Trade Organisation

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how little use is presently made of these techniques
Dispute Resolution in Context

Diplomatic Resolution versus Legal Resolution

An essential choice to be made in any systems for resolving international disputes is the extent to which diplomatic rather than legal means are to be used. It is convenient first to enumerate the range of diplomatic approaches available. These are:

**Negotiation**
This is distinguished by the absence of a third party who could impose or even suggest a solution. A duty to negotiate is normally understood to mean a duty to negotiate in good faith so as to offer some prospect that the negotiations will be fruitful. There is however no legal definition of the term, a fact which may cause problems where international agreements provide for a court to have jurisdiction only where disputes cannot be settled by negotiation.

**Good Offices**
This is the most limited form of third party involvement. It means that a third party (in this context another state) encourages the parties to negotiate or to resume negotiations and/or provides them with additional channels of communication. A third state may offer good offices on its own initiative, or one or both parties to the dispute may request this service.

**Mediation**
This is one step up from Good Offices. It involves an active participation by the mediator in transmitting and interpreting each party's proposals to the other. Usually the mediator also makes informal settlement proposals based on what each party has told him. Mediation requires the active consent of both parties. The mediator's proposals are never binding on the parties unless they both accept them. The proposals are aimed at finding an effective solution to the dispute. Consequently they need not conform strictly to the legal rights of the parties, though obviously those rights will normally form an essential background to the solution of the case.

**Inquiry and fact-finding**
One aspect of international disputes may be disagreement as to the relevant facts. A possible approach to this problem is to ask a third party to investigate and provide the parties with an impartial evaluation. The parties should agree in advance whether this evaluation is to be binding.

**Conciliation**
This falls only one step short of formal arbitration. It is more formal than mediation because it involves the use of a formal process in which the conciliators investigate the dispute and then put formal proposals for settlement to each side. Investigation of the dispute involves looking at fact and law, as well as other non-legal aspects of the situation.
Conciliation is normally conducted on a confidential basis, since states find it easier to make concessions if these are not publicised. If the conciliators’ proposals are accepted, they are normally reduced to writing as a record of the agreement. In practice conciliation in the sense used here is rarely encountered, perhaps because it is unlikely to prove successful in those cases where the earlier, less formal methods of dispute settlement have failed. In general it may be said that the diplomatic methods of dispute resolution are characterised by informality, confidentiality and their attention to political and diplomatic aspects of the problem rather than a concentration on strict legal aspects.

Arbitration

We move now into a consideration of the legal, rather than the diplomatic, methods of dispute resolution. Arbitration has the advantages of allowing the parties to choose their own arbiters, thus potentially achieving expertise in the subject area. It can also be quicker than formal legal proceedings and some degree of confidentiality can be maintained.

Judicial Decision

This is the final method to be considered, and is obviously the most formal approach. It tends to be slow, expensive, uncertain and public. Nevertheless, it is historically the method adopted by legal systems at least for the resolution of private law disputes.

The History of GATT

The origins of GATT lie in the 1947 agreements on trade liberalisation and tariff reduction. Within the GATT framework dispute resolution has always been an important element. The basic GATT provisions are Article XXII and XXIII, which were amended in 1955. Since then there have been supplementary agreements on the rules and procedures relating to dispute settlement in 1958, 1966, 1979, 1982 and 1984. It is worth saying that Arts XXII and XXIII are too succinct to establish detailed dispute resolution procedures. Considerable attention was given to the dispute resolution procedures in the Kennedy Round (1964-1967) and the Tokyo Round (1973-1979). The Uruguay Round, the eighth round of multilateral negotiations under GATT, also had dispute resolution as one of its areas of activity.

Dispute Resolution under GATT
The basic provisions are in GATT Arts XXII and XXIII. These allow the successive or alternative use of diplomatic and legal dispute resolution methods.

Art XXII allows for consultations between members on any matter, not just on those which relate specifically to breaches of the GATT rules. However, it does not contemplate formalised techniques of dispute resolution. It is possible to proceed direct from Art XXII consultations to a Panel, where it appears that no purpose is likely to be served by invoking Art XXIII:2 consultations as an intermediate step.

Art XXIII by contrast is a dispute resolution mechanism. Art XXIII:1 allows for violation complaints (i.e. where the complaining party can point to a breach of a specific obligation under GATT) and non-violation complaints (i.e. where there is no specific breach, but it is nevertheless alleged that action by another party is depriving the complaining party of some benefits which were intended to result from the GATT. This may include the existence of some situation rather than the taking of any specific measures). An example is the 1985 case where the USA successfully complained that production aids introduced by the EC in respect of certain products were inconsistent with the tariff reductions for imported products of the same kind which had recently been agreed. In practice about 95% of complaints are violation complaints, only 5% being non-violation complaints.

There is a presumption that any infringement constitutes a case of "nullification or impairment" of GATT benefits. In other words there is no need to prove what lawyers call "special damage". This is justified on the basis that such infringements may be assumed to give rise to increased transaction costs and to create uncertainties which may adversely affect investment plans, even where it cannot be shown that there is any effect on current trade volumes. Thus the burden is on the offending party to rebut the presumption of impairment. This presumption does not apply in non-violation cases.

In recognition of the general aim of GATT to promote non-discriminatory undistorted competition, the GATT rules allow third parties not directly affected by bilaterally agreed quantitative export restraints to request the withdrawal of trade measures inconsistent with multilateral GATT obligations.

In dispute settlement proceedings the first objective is to secure withdrawal of offending measures. In other words specific performance of the GATT is the objective. In support of this GATT Art X:3 requires members to maintain tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters.

The general dispute settlement procedure is usually carried out in three stages. First, written representations are made by the complaining party to the other party or parties concerned. This is followed by formal bilateral consultations (Arts XXII:1, XXIII:1) and, very occasionally by plurilateral consultations. At this stage the diplomatic methods of dispute resolution identified above are employed in sequence, though in practice good offices and conciliation are rarely encountered. This is thought to reflect a preference on the part of members for binding resolutions of cases in accordance with established legal principles.

If the diplomatic methods of dispute resolution are unsuccessful, the second stage is to refer the matter to the GATT Council, which investigates and makes a report with recommendations for resolving the case. Council will establish a panel of three or five persons to look into the matter and report from the point of view of the legal provisions and from the point of view of establishing the facts of the dispute. Panel members must be impartial and independent. Written submissions are allowed, but proceedings are held
in secret in order to maintain the confidentiality of the process. The report is submitted to the parties before being sent to the Council. It is not permitted to link complaints and counter-complaints relating to separate matters.
The report of the Panel remains purely advisory and non-binding until accepted by the GATT Council.
The third stage is the consideration of the Panel’s Report by the GATT Council. This must be done promptly and appropriate action must be taken within a reasonable period of time. In practice Panel reports have normally been accepted without amendment or extensive discussion, despite the development of a practice which requires unanimous agreement for their adoption (the rules actually say that a simple majority is enough). However, there are a number of cases of blocking of reports. Some are blocks by disaffected losing parties. Others are cases where the complaining party blocks, others again where lapse of time has made implementation of the Report impracticable for technical or political reasons.

There is then a legal obligation to withdraw measures which have been found to be inconsistent with GATT. One possible follow-up in cases where offenders do not proceed to withdraw the incompatible measures is to request authorisation to suspend the operation of obligations or concessions towards the other party. Such requests have very rarely been made, and have not been implemented even when authority has been granted, perhaps in recognition of the fact that trade restrictions are detrimental primarily to the party which introduces them. There is thought to be only one case where retaliation was authorised, whilst in at least five further cases requests for authorisation were denied.

Retaliation measures must be authorised by the Contracting Parties i.e. unilateral retaliation is not permitted. Retaliation may be authorised only if the circumstances are serious enough to justify such action.

Note also GATT Art XXI, which contains very limited provisions allowing derogations from GATT obligations on security grounds. As far as is known, these are the only derogations with the GATT recognises. This is an important point, because it emphasises the seriousness with which GATT obligations are to be treated. A GATT member is not allowed to pick and choose which obligations will be accepted.

However, despite the narrow wording of Art XXI, it is not uncommon for members to raise the question of whether a dispute is GATT-relevant i.e. whether it falls within the GATT provisions or whether it can be exempted under Art XXI.

*Issues in the Uruguay Round*

Would it be desirable to have an explicit recognition or institutionalisation of mutually agreed arbitration?
Would it be better to have a wider range of possible mechanisms available to members? This might accommodate the differing views of members on the question of legal versus diplomatic techniques.

Is there a need for procedural and institutional safeguards to ensure that bilateral agreements do not undermine the multilateral GATT system and the rights of third parties?

Is there a need for additional (and more favourable) mechanisms for less developed countries?

Is there a need for additional consultation requirements? What about tighter time-limits in the context of Art XXIII?

Should the use of good offices, conciliation and mediation be made mandatory, given how little use is presently made of these techniques?

Should the role of the Council be strengthened? How could this be done? Should there be some special sub-committee of the Council, or should it have special powers when sitting as a DRB? Should the legal effects of a Council decision to adopt a report be clarified?

Should the principle of a "right to a panel" be explicitly recognised? Or should the Council retain the right to refuse to create a Panel if there is no consensus that the complaint is GATT-relevant or if everyone apart from the complaining party considers that a Panel is premature and that it would be better to go on with alternative methods for the time being.

Should there be an explicit requirement that Art XXIII:2 complaints (i.e. non-violation complaints) be substantiated with a written summary of the facts and an explanation of their GATT relevance.

Should the choice of the most appropriate method of dispute resolution be left to the complaining party.

Should the complaining party propose the terms of reference of the panel? And should it have the right to insist on the "standard terms of reference" unless the parties can agree on alternative terms of reference.

Would it be desirable to re-activate the requirement (which still existed on paper) to maintain an informal list of suitable governmental and non-governmental persons to serve on Panels? Should the Director-General be given a power to nominate Panels in default of agreement between the parties?

How can the Panel process be further professionalised so as to increase the quality of work and reports produced by Panels? This is especially difficult given the lack of familiarity of most Panel members with the development of the GATT processes over more than 40 years.

Should the processes of the Panel be more formalised with the adoption of standard working practices and more precise (and possibly shorter) deadlines?
Is there a need for better rules on interim protection and retaliatory measures?

What should be done about the availability of bilateral dispute resolution measures in conjunction with the GATT systems?

How can confidentiality of reports be better assured in the period prior to their circulation to all contracting parties?

What about the status of Panel reports? Do they normally get adopted, or is a more positive decision by the Council required? What is to be done about the consensus or consensus minus interested parties rule?

Do Panel reports constitute legally-binding precedent on the interpretation of GATT? What is their status in future cases as regards factual questions?

Should there be a requirement that parties objecting to the adoption of a report state their reasons in writing?

The World Trade Organisation

The World Trade Organisation ("WTO") is the major product of the Uruguay Round of GATT. The Uruguay Round lasted a long time, was exceedingly complex and for much of its life was widely regarded as being destined to failure. Only at a very late stage did it become apparent that this round of negotiations was going to produce a radical development in the legal order governing world trade.

The Uruguay Round consists of 22 principal instruments (21 Agreements and 1 Understanding) plus associated Ministerial Decisions and Declarations. The Understanding is on the subject of Rules and Procedures Governing the Settlement of Disputes. The WTO Agreement, which may be regarded as the Master Agreement, from which all the others depend, establishes the structure of the WTO. At the top of this structure is the Ministerial Conference, which has overall authority and which sets WTO policy. However, this Conference is not in permanent session - the intervals between its meetings may be up to two years. - and in these intervals continuing authority is vested in the General Council of the WTO. There are then various subordinate Councils which regulate particular agreements, such as the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property.

The WTO is also responsible for administering the dispute resolution procedure, and, most importantly in the present context, the General Council will act as the Dispute Settlement Body.

An oddity of the system is that the provisions on dispute resolution are, uniquely, contained in an Understanding rather than an Agreement. At first sight this might be
thought to imply that the terms of the Understanding are not intended to have legal force. It is thought, however, that this view is mistaken. The main WTO Agreement, which all WTO members have to sign, incorporates by reference all 22 documents, including the Understanding, and it thus appears that the Understanding is meant to have legal force despite its title.

The WTO Dispute Resolution System

The Covered Agreements

The dispute resolution procedures apply to disputes arising under a number of the detailed agreements arising out of the Uruguay Round. These agreements are:
- General Agreement on Tariffs and Trade 1994
- Agreement on Trade-Related Investment Measures
- General Agreement on Trade in Services
- Agreement on Trade-Related Aspects of Intellectual Property

The Aims of the Dispute Resolution Process

It is very important for lawyers to understand that the dispute resolution process is not the kind of adversarial arbitration arrangement with which lawyers generally are familiar. The approach is one of mediation rather than arbitration. Thus, the objective is to achieve an agreed positive settlement, rather than to make a decision hostile to one of the parties.

The Dispute Resolution Procedures

There are three bodies which need to be considered in this context, the Panel, the Appellate Body and the General Council.

The Panel is the primary mechanism for dispute resolution. It is to consist of persons acceptable to the members. These may be persons experienced in the theory and practice of the law of international trade. A criticism levelled at the former practice was that there was too great a tendency to use government officials, whose impartiality might sometimes be open to question. These criticisms tended to disappear after 1984 as it became more common to use independent experts.

Amicable constructive settlement is still the primary objective. However, the DRU imposes tighter procedures with stricter and shorter time limits than had existed before.
The role of the Panel is also increased because of the rule that its reports are accepted unless unanimously rejected.

The appellate Body is a new organ. A party aggrieved by a recommendation of the Panel may appeal to the Appellate Body. This has a standing membership of seven, three of whom act in any given case. It remains to be seen to what extent the Appellate Body will be willing to review findings of fact made by the Panel.

The Report of the Panel, together with anything produced by the Appellate Body, is submitted to the Council, which must then deliberate, but which now accepts the Report unless there is a unanimous rejection of it. The Council remains the formal decision-making body, and recommendations of the Panel have no effect unless and until accepted by the Council.

Once the report is accepted, all parties come under an obligation to honour it and to implement its findings. Failure to do so may lead to retaliatory measures if authorised by the Council. In principle these should be in the same sector as that of the offending measures, but the WTO Agreement does now expressly contemplate cross-retaliation if retaliation in the primary area is in the circumstances an inadequate response.

The Issues Revisited

This is a convenient point to revisit some of the issues which were identified above as being relevant to the Uruguay round deliberations. For convenience there are reproduced here.

Would it be desirable to have an explicit recognition or institutionalisation of mutually agreed arbitration?
This has not been seriously pursued.

Would it be better to have a wider range of possible mechanisms available to members?
This might accommodate the differing views of members on the question of legal versus diplomatic techniques.
Is there a need for procedural and institutional safeguards to ensure that bilateral agreements do not undermine the multilateral GATT system and the rights of third parties?

Is there a need for additional (and more favourable) mechanisms for less developed countries?
This has been adopted. See below.

Is there a need for additional consultation requirements? What about tighter time-limits in the context of Art XXIII?

Should the use of good offices, conciliation and mediation be made mandatory, given how little use is presently made of these techniques?
Apparently not adopted

Should the role of the Council be strengthened? How could this be done? Should there be some special sub-committee of the Council, or should it have special powers when sitting as a DRB? Should the legal effects of a Council decision to adopt a report be clarified?

The new multi-role structure deals with this point. Should the principle of a "right to a panel" be explicitly recognised? Or should the Council retain the right to refuse to create a Panel if there is no consensus that the complaint is GATT-relevant or if everyone apart from the complaining party considers that a Panel is premature and that it would be better to go on with alternative methods for the time being.

The existing fudge has been retained.

Should there be an explicit requirement that Art XXIII:2 complaints (i.e. non-violation complaints) be substantiated with a written summary of the facts and an explanation of their GATT relevance.

Not adopted

Should the choice of the most appropriate method of dispute resolution be left to the complaining party.

Not adopted

Should the complaining party propose the terms of reference of the panel? And should it have the right to insist on the "standard terms of reference" unless the parties can agree on alternative terms of reference.

Not adopted

Would it be desirable to re-activate the requirement (which still existed on paper) to maintain an informal list of suitable governmental and non-governmental persons to serve on Panels? Should the Director-General be given a power to nominate Panels in default of agreement between the parties?

Adopted

How can the Panel process be further professionalised so as to increase the quality of work and reports produced by Panels? This is especially difficult given the lack of familiarity of most Panel members with the development of the GATT processes over more than 40 years.

More use of experts.

Should the processes of the Panel be more formalised with the adoption of standard working practices and more precise (and possibly shorter) deadlines?

Shorter deadlines adopted

Is there a need for better rules on interim protection and retaliatory measures?

Retaliatory measures rules have been refined.
What should be done about the availability of bilateral dispute resolution measures in conjunction with the GATT systems?

How can confidentiality of reports be better assured in the period prior to their circulation to all contracting parties?

What about the status of Panel reports? Do they normally get adopted, or is a more positive decision by the Council required? What is to be done about the consensus or consensus minus interested parties rule?

Negative consensus adopted.

Do Panel reports constitute legally-binding precedent on the interpretation of GATT? What is their status in future cases as regards factual questions?

Existing practice unchanged
Should there be a requirement that parties objecting to the adoption of a report state their reasons in writing?

Not adopted

Developing and Least-Developed Countries

In accordance with long-standing GATT practice, there are special arrangements for developing and least-developed countries. Developing countries are allowed to take advantage of an arrangement which provides for an expedited resolution of cases which they bring against developed countries. This arrangement recognises the reality that in such cases the developing country may be unable to sustain the economic consequences of breach of WTO Rules for a lengthy period, so that speed is required. In the case of least-developed countries the WTO Rules call on all members to exercise restraint in starting dispute resolution procedures and, in particular, to consider carefully whether the use of the dispute resolution procedure against a least-developed country is likely to be conducive to promoting the objectives of the WTO.

The Position of Iran

The crucial question to be considered at this conference is whether it would be to Iran's advantage to join the WTO. To some extent this may be thought to depend upon political and cultural considerations, and to this extent it is not for an outsider to comment. The following comments are therefore restricted to issues relating specifically to the dispute resolution process.

First, it would be a mistake to suppose that this process is simply a device to enable large states to impose their will upon smaller states. The countries of the Middle East no doubt have their own particular concerns about this method of regulating world trade, but they are by no means the only small countries which might legitimately be worried about the attitudes and behaviour of their largest trading partners. Enough of these smaller
countries were represented at the Uruguay Round negotiations to ensure that the dispute resolution process is set up in a way which is not conducive to this kind of international bullying.

On the other hand it must be admitted that larger members of WTO will have their own expectations and agenda, and it would not be entirely surprising if some of them were to try to use the WTO as a way of gaining collateral advantages.

The question of the status of decisions of the DSB must also be considered. As has been shown, one important change introduced by the new rules is that such decisions are normally going to be confirmed, since overturning them in the General Council requires unanimity. There is no doubt that this change greatly increases the status and importance of the DSB. It is intended to ensure that the basic free trade rules are taken very seriously, though of course this change in procedures is to some extent offset by the conciliatory approach which the DSB is required to adopt. Nevertheless, the culture of the WTO is clearly going to be that the DSB must be respected. It is implicit in that observation that its decisions, once confirmed by the General Council, must normally be implemented. Enforcement of such decisions of course raises a very familiar problem of public international law, namely the lack of any true enforcement mechanism. Ultimately, it is possible for any member of WTO to refuse to honour a decision of the DSB, though the new rules allow a broader range of retaliatory measures in such cases than did the old rules. The difficulty is of course that persistent disregard of WTO decisions is scarcely consistent with continued membership and is likely to cause more problems in terms of political ill will than would a simple continued refusal to join, which has at least the merit of honesty of approach.

It is suggested that these observations help us to focus on what is in the end the vital question for Iran. Membership of the WTO is really only appropriate for states which are willing to endorse sincerely the principles of free trade (remembering that the WTO now covers services as well as goods). This in turn implies a relatively open attitude towards those goods and services and towards dealings with the rest of the world generally. Such an attitude is not necessarily appropriate (economically or culturally) or even possible for all states at all times, and the question for Iran is whether it now wishes to adopt that philosophy in the conduct of its international relations. One important issue in the examination of that question must be whether Iran sees important markets for its products being closed to it as a result of non-membership of WTO, since the major economic advantage of membership must be an increase in the potential for exports.