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DISPUTE SETTLEMENT

Communication from Switzerland

The following paper has been received from the delegation of Switzerland, as a contribution to the debate which is taking place in both the Council and the Preparatory Committee.

1. The dispute settlement mechanism is one of characteristic elements of GATT. On its proper operation depends the efficacious and equitable application of the rules and principles set forth in the General Agreement and in the various instruments negotiated under its auspices. Accordingly, like other contracting parties, Switzerland, which has a major interest in this mechanism, shares the concerns that have emerged in recent years in this regard. That is why the Swiss delegation is making the following proposals with respect to a matter that is fundamental for the future of GATT.

2. The Swiss delegation is convinced that, in its conception, the dispute settlement mechanism, as established under the relevant Understanding adopted on 28 November 1979, is adequate. It would seem unavailing, therefore, to try to solve the difficulties that have arisen by strengthening the judicial character of the mechanism or tightening some of its procedural elements. Indeed, such amendments would not push back the intrinsic limits of the provisions concerned, nor make the latter more effective in practice. The fundamental cause of these difficulties lies rather in the behaviour of contracting parties and, in particular, when parties to a dispute, the way in which they have recourse to the above-mentioned mechanism and respond to its results.

3. The Swiss delegation is of the opinion, therefore, that above all, governments of contracting parties should reaffirm their political will to resort to the GATT mechanisms in order to settle their differences while undertaking to use those mechanisms judiciously and accept, in good faith, the conclusions resulting from the procedures they set in motion. This undertaking could then be supplemented by concrete decisions which would strengthen its effects in practice and would bear on:

- conciliation, and
- follow-up action, by the parties to a dispute, on panel reports.

Quite clearly, such an approach would in no way obviate the need for the relevant GATT bodies, and in particular Panel members and the secretariat, to do everything possible to allow the procedures to move forward and be completed promptly and in the best possible conditions of objectivity and equity.

4. The dispute settlement must not be envisaged as inevitably leading to a confrontation between the parties concerned, nor be "considered as contentious acts", but must be engaged "in good faith in an effort to resolve the disputes" (Understanding, paragraph 9). That is why they leave the door open to conciliation at any time. Nevertheless, in general there are no precise rules in this regard - and rightly so. By definition, conciliation implies on the part of those concerned a readiness and flexibility which rules cannot generate, still less impose, in their absence.

It would be desirable, nevertheless, for the dispute settlement mechanism to facilitate and encourage conciliation and offer the best possible conditions for arriving at amicable solutions.

Quite clearly this effort, which could imply taking a position - albeit preliminary and based on appearances - cannot validly be entrusted to whichever body (Council or Committee) will have to take the final decision after completion of a procedure. That is why, in the view of the Swiss delegation, it would be desirable to designate a separate authority (Chairman of the competent body, or a group of "wise men" for example) with the task, in respect of each particular case brought before the Council or a Committee, of contacting the parties concerned in order to ascertain the object, conduct and results of consultations, then of lending good offices with a view to facilitating and encouraging development of a mutually satisfactory solution, in particular on the basis of any requests or offers by the parties or, if need be, his or its own proposals. Before any decision to establish a panel or working party, this conciliation authority would in addition report to the body to which the case is referred to ensure that all possibilities for arriving at an amicable solution have indeed been exhausted at that stage. According to the results obtained, this report would cover the content of any mutually accepted solution or, failing this, would record that the necessary efforts for reaching such a solution have indeed been undertaken, it being understood that this report would be presented in a form that would not be disadvantageous for the parties concerned.

5. As regards follow-up action on panel reports, the Swiss delegation proposes the insertion of a new procedural stage between adoption of the report by the competent body (Council or Committee) and its final decision. This phase would give the party concerned an opportunity to indicate, within a specified and reasonable period of time, by what means and by what date it expects to be in a position to rectify the infringements mentioned in the report. This communication would have the status of a firm proposal. According to its content, the competent body could either refuse it, accept it on certain conditions, or accept it without making any supplementary recommendations, on the understanding that that body would exercise surveillance over implementation in the same way and with the same consequences as in a case of a recommendation.

This way of proceeding would not prevent the competent body (Council or Committee) from expressing its views, at the appropriate time, on any recommendations made by the panel. Nor would it constitute an obligation for the parties to the disputes concerned, but would give them an opportunity to take back the initiative and above all, demonstrate their readiness to co-operate within GATT to the full extent of their possibilities and in accordance with the letter and the spirit of the General Agreement.