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STATUS OF WORK IN PANELS AND IMPLEMENTATION OF PANEL REPORTS

Statement by the Director-General introducing his report in the documents C/178 and C/178/Corr.1

1. Since my previous report in November 1990 there has been a marked increase in dispute settlement activity. In the last six months five new panels have been established (including one under a Tokyo Round agreement) compared to only one in the whole of 1990. In addition, there are two outstanding requests for panels. In the same period, two panel reports have been adopted by the Council and have thus been moved off our agenda.

2. While the dispute settlement system continues to work on the whole reasonably well, some of the recent cases have exposed certain weaknesses of the current dispute settlement procedures.

Forum-shopping

3. One of these weaknesses results from the fact that there are altogether eight different dispute settlement procedures under the General Agreement and the Tokyo Round agreements, and that a panel may, in principle, examine the matter before it only in the light of the provisions of the agreement under which it was established. In recent years, there have been more and more dispute settlement cases in which one of the parties claimed that the matter of the dispute was covered not only by the agreement under which the panel was established but also by another agreement. This has led to time-consuming debates about the proper forum for the resolution of the dispute and to claims that GATT panels were sometimes working on an incomplete legal basis. The situation has caused problems both for the contracting parties that brought complaints and for the contracting parties complained against. In one case, a contracting party had to request the establishment of two panels[1] to examine a matter: one under the Subsidies Agreement to examine its rights under that legal instrument and another under the General Agreement to examine its rights under the most-favoured-nation clause. One contracting party is presently holding consultations[2] on a set of measures concerning a single product under three different agreements: the General Agreement, the Subsidies Agreement and the Anti-Dumping Agreement. There have been a number of cases where the party complained against was of the opinion that it was unable to assert

[1] SCM/94; SCM/M/40,44,46,48 and 51; DS18/2,3; and C/M/249, item 10.

[2] DS24/1.

all its legal defences under the GATT legal system because the panel's mandate was limited to the agreement under which it was established. Whether these claims were justified or not is not a matter on which I should take a stand, but I consider it disturbing that the current procedures do not permit panels to examine such claims. The problem that I am describing is frequently referred to as that of "forum-shopping". However, "norm-shopping" would probably be a more appropriate term because the problem is not so much that the procedures allow to a certain extent contracting parties to select the forum that will decide the dispute but rather the legal provisions on the basis of which the dispute will be decided. I think that we have reached a point where the credibility and proper functioning of the GATT dispute settlement process is in danger, and I would therefore suggest that contracting parties address this problem in a constructive way.

Incomplete or conditional implementation of panel recommendations

4. Another danger to the integrity of the dispute settlement system results from the increasing number of cases of incomplete or conditional implementation of recommendations of panel reports. In my previous report I alerted the Council to the problem of parties conditioning the implementation of panel reports on the outcome of the Uruguay Round. There are now five panel reports[3] whose recommendations have been treated in this way.

5. I do not wish in my remarks to preempt the Chairman of the Council, who has undertaken consultations on this issue and will be reporting to you shortly on his results. However, it bears repeating that the purpose of the dispute settlement procedures is clearly to uphold existing legal obligations. The results of past negotiations are thereby secured, and parties gain the confidence to negotiate future concessions in good faith. Contracting parties should be aware that making the implementation of panel reports conditional on some future state of affairs could set an unfortunate precedent for dispute settlement in the GATT.

6. I hope therefore that contracting parties will re-examine their positions in this regard with a view to maintaining and restoring the integrity of the dispute settlement system.

Inaction in Certain Panel Cases

7. I would like to mention one other issue where improvements could be made to the dispute settlement process. It concerns the continued inaction in certain panel cases. Two panel reports[4], approximately five years after their submission to the CONTRACTING PARTIES, remain unadopted. Clearly, these should be acted upon by the Council or withdrawn by the complainant. I consider the inaction in these cases particularly regrettable because in both cases the measure complained

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[3] BISD 36S/345; BISD 36S/68; L/6627; L/6657; and BISD 35S/163.

[4] L/5863 and L/6053.

against has been withdrawn. Two other panels, one established in 1985[5], the other in 1987[6], have not proceeded. I have decided to drop them from my Report, but they are formally still in existence. The panel process, once initiated, should proceed in a timely manner from establishment through to adoption of the report. Contracting parties may therefore wish to consider whether a decision should be taken that a complaint on which no action has been taken for a year would be deemed withdrawn.

Identification of the Matter of the Dispute

8. I have noted that in some recent disputes the complaining contracting party, in its request for consultations or the establishment of a panel, has only vaguely or incompletely identified the matter of the dispute. In one case, the party which had brought the complaint indicated in its request for a panel that it was, with respect to one of the matters on which it was seeking panel findings, still examining the practices of the contracting party complained against[7]. In another case, a party requested a panel to make findings on a measure that had been mentioned neither in the request for consultations nor in that for the establishment of a panel. Such incomplete requests for consultations or for panels run counter to the spirit of the GATT dispute settlement procedures. The purpose of the requirement of prior bilateral consultations is to ensure that the party complained against is given an opportunity to modify its practices before being subjected to a panel proceeding. Bilateral consultations cannot fulfil this function if the party bringing the complaint does not clearly identify the measures of concern to it and the legal basis of its claims. The request for the establishment of a panel must also be sufficiently clear to enable third contracting parties to decide whether they wish to exercise their right to become a co-complainant or to submit their views to the panel. Vague requests for the establishment of panels impair these rights of third parties in the dispute settlement process. I would therefore like to urge contracting parties to identify in the future clearly the specific measures complained against and the legal basis of their complaints.

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[5] C/M/186, item 6.

[6] SR.43/5, sub-point 20(b) (ii) of Report of the Council.

[7] DS23/3, page 3.