

GENERAL AGREEMENT ON TARIFFS AND TRADE

CONFIDENTIAL

MTN/INF/27
19 June 1978

Special Distribution

Multilateral Trade Negotiations

NOTE BY THE SECRETARIAT

It is the understanding of the secretariat that the attached text reflects the present state of thinking of certain delegations on settlement/management of disputes.

It is circulated in order to facilitate further discussions and negotiations.

UNDERSTANDING CONCERNING SETTLEMENT/MANAGEMENT OF DISPUTES

Introduction

1. The provisions of Article XXIII:2 constitute an important element of the General Agreement as they help to ensure observance by contracting parties of their GATT commitments. GATT procedures for the settlement of disputes based on these provisions have evolved in a pragmatic way and have worked reasonably well on the whole, taking into account the present degree of international co-operation reached in the GATT. The success with which they have functioned has depended as much on the willingness of contracting parties to refrain from imposing on the arrangements more than they can reasonably sustain as on their readiness to abstain from recourse to tactics designed to obstruct or delay. The future workability of the present procedures will continue to depend primarily on the will of governments to operate these procedures in accordance with the spirit of the GATT. But it appears appropriate that in the light of past experience some improvements and precisions be made to the set of unwritten practices of dispute settlement under the GATT, thereby further improving upon the existing system in a pragmatic way in the light of the evolution of circumstances.

2. It is therefore suggested that an understanding be elaborated which would consist of the following three elements:

- A. an agreed description of the customary practice of the GATT in the field of dispute settlement (Article XXIII:2);

- B. a formal declaration in which the CONTRACTING PARTIES (i) reaffirm their confidence in the traditional dispute settlement procedure, (ii) recognize that its satisfactory functioning depends to a large extent on their will to implement it, and (iii) recognize that the mechanism has shown its usefulness and does not therefore need to be modified in any major way but (iv) that it calls for some improvements and refinements on certain points;
 - C. an agreement on these improvements and refinements, reflecting recent experience of the dispute settlement practices in the GATT.
- A. An agreed description of the customary practice of the GATT in the field of a dispute settlement (Article XXIII:2)
1. Any dispute which has not been settled bilaterally may be referred to the CONTRACTING PARTIES which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.¹ The CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the more frequent procedure.
 2. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and developing contracting parties. This procedure provides inter alia for the Director-General to employ his good offices with a view to facilitating a solution for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure.
 3. The function of a panel is to review the facts of a case, and the applicability of GATT provisions, and to perform the rôle of conciliation in giving advice with a view to assisting the parties concerned to reach a mutually satisfactory solution. In cases of failure by the parties to reach a mutually satisfactory settlement, panels have assisted the CONTRACTING PARTIES in making recommendations or in giving rulings, as envisaged in Article XXIII:2.

¹At the Review Session (1955) the proposal to institutionalize the procedures of panels was not adopted by CONTRACTING PARTIES mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT conciliation mechanism.

4. The first objective of a complaining country is usually to secure the withdrawal of the measures concerned in the absence of a mutually agreed solution. The last resort which Article XXIII provides to the country invoking this procedure is the possibility to suspend the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting¹ party, subject to authorization by the CONTRACTING PARTIES of such measures.

5. In practice, there has been recourse to Article XXIII in general only when a benefit accruing to a contracting party under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment; there is normally a presumption that such a breach has an adverse impact on other contracting parties, and in such cases it is up to the other contracting parties to rebut the charge. However, paragraph 1(b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement. If a contracting party brings an Article XXIII case in respect of measures which do not conflict with the provisions of the General Agreement it would be called upon to provide a detailed justification.

6. Concerning the customary elements of working parties and panels procedures, the following elements have to be noted:

- (i) working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally to examine, in the light of the relevant provisions of the General Agreement, the matter and to report to the Council. Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the working party and have the same status as other delegations. The report of the working party represents the views of all its members and therefore records different views if necessary. Since the tendency is

¹Cases taken under Article XXIII:2 have led to such actions in only one case.

to strive for unanimity, there is generally some measure of negotiation and compromise in the formulation of the working party's report. Usually the Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision.

- (ii) In the case of disputes, brought forth under Article XXIII:2, the CONTRACTING PARTIES are obliged to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. The practice has been for the Council to give a favourable response to the request of a contracting party to establish a panel with a view to studying a case brought forward under Article XXIII:2. However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council. The terms of reference are discussed and approved by the Council. In most cases these terms of reference are "to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII".
- (iii) Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council.
- (iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invites the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party, not directly party to the dispute, which has expressed in the GATT Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the GATT secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects.

- (v) The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made. Panels have submitted the descriptive part of their report to the parties concerned with a view to obtaining their comments and have also sometimes given them a broad outline of their conclusions before submitting them to the CONTRACTING PARTIES. This practice has helped to promote bilateral settlements of the matter between the parties concerned before the panel has published its conclusions, and where this procedure has been successful the report of the panel has been confined to reporting that a settlement has been reached.
- (vi) Where it is explicitly required by the terms of reference established by the CONTRACTING PARTIES, panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. In other cases, the panel has formulated draft recommendations addressed to the parties. In yet other cases, the panel was invited to give a technical opinion on some precise aspect of a matter (e.g. on the modalities of a withdrawal or suspension in regard to the volume of trade involved). The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret.
- (vii) Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending three to nine months.
- (viii) The report of any panel is in the nature of an advisory opinion on the basis of which the CONTRACTING PARTIES can make a definitive ruling or recommendation. Except in cases where a mutually satisfactory solution has been developed, written reports have therefore been submitted to the Council for consideration and adoption with findings of fact, the applicability of relevant GATT provisions and the basic rationale set forth. In cases where the parties concerned have reached a mutually acceptable solution reports have limited themselves to describing the facts and to noting that the parties concerned have reached an agreement. The Council has normally completed its review of the matter and adopted reports within a short period of time following the submission of the report.

B. Declaration by the CONTRACTING PARTIES

- (i) The CONTRACTING PARTIES recognize that the emphasis in the GATT for managing disputes (Article XXIII, paragraph 2) has been, and should continue to be, on consultations among any interested parties with a view to developing mutually acceptable solutions to such disputes.
- (ii) The CONTRACTING PARTIES reaffirm their confidence in the traditional dispute settlement mechanism based on provisions of Article XXIII, paragraph 2 as it has evolved pragmatically in the GATT, bearing in mind that the characteristics of individual cases which may arise can differ widely. They confirm the practices described in Section A above and recognize that the efficient functioning of the system depends on their will to abide by these practices.
- (iii) The CONTRACTING PARTIES also recognize that the improvements and refinements set out in Section C below should be brought into dispute settlement procedures with a view to improving the mechanism.

C. Improvements and refinements to the procedure for dispute settlement

The CONTRACTING PARTIES agree that the following additional improvements and precisions to the GATT dispute settlement system should be brought into the dispute settlement procedures:

In general

- (i) The introduction of a complaint against a party should not be intended or considered as an aggressive or contentious action. Rather, it should be presumed that all parties will engage in these procedures in a "good-faith" effort to resolve disputes.
- (ii) The introduction of complaints on matters of little substance or complaints concerning matters which do not lend themselves to the dispute settlement mechanism because they more properly pertain to bilateral or plurilateral negotiations between the parties concerned should be avoided. For such matters other procedures may be preferable such as the working party mechanism of multilateral consultations which have also shown their usefulness.
- (iii) Although free to use whatever procedures they deem appropriate in order to discharge their responsibilities, the contracting parties should continue to consider that panels are normally the appropriate mechanism for reviewing disputes.

In particular

- (i) Complaints and counter-complaints in regard to distinct matters should not be linked.
- (ii) It seems preferable to the extent possible to provide for five members in a panel in order to ensure the presence of a wide spectrum of opinions and to facilitate the independence of the members, particularly in complex and politically delicate cases.
- (iii) In the light of the difficulties which have arisen in the composition of panels, the parties concerned should seek, with the assistance as appropriate/necessary of the GATT secretariat, to reach an understanding on names. In cases of difficulty they would endeavour to refrain from rejecting nominations. They also agree to respond to nominations within a short period of time which should normally not exceed /x/ working days. Furthermore, in order to facilitate the setting up of panels, the GATT secretariat is requested to compile every year a list of governmental experts who participate or have participated in GATT activities, and who would be available for serving on panels. In this connexion it is agreed that each contracting party would indicate at the beginning of every year to the GATT secretariat the name of one or two governmental experts whom they would be willing to make available for such work. This would not prevent the choice of a person whose name is not on this list as a member of a panel. If the parties concerned agree, they may also nominate non-governmental experts.
- (iv) A principal rôle of panels shall be to review the facts of the case and the applicability of GATT provisions.
- (v) To encourage development of mutually satisfactory solutions between the parties and to enable the Panel to take note of the observations of the parties and take them into account when it deems appropriate, outlines of the conclusions of Panels should be presented to the parties concerned prior to final consideration by the Panel and submission to the CONTRACTING PARTIES.
- (vi) Where the parties have failed to come to a satisfactory solution the Panel shall submit its findings in a written form.
- (vii) The time required by panels will necessarily vary with the particular cases. However as a general matter, panels should aim to deliver their findings without undue delays taking into account the obligation of contracting parties to ensure prompt settlement in cases of urgency.

* * *

This understanding concerning the general mechanism of dispute settlement in the GATT may, mutatis mutandis, constitute a basis for the procedures of dispute settlement to be defined in different MTN codes or arrangements on non-tariff measures, and to be adjusted where appropriate to the precise needs and characteristics of these codes or arrangements.