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Negotiating Group on Dispute Settlement

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COMMUNICATION FROM THE NORDIC COUNTRIES

The following communication has been received on 18 September 1987 from the delegation of Norway on behalf of the Nordic Countries with the request that it be circulated to members of the Group.

IMPROVEMENT OF THE DISPUTE SETTLEMENT SYSTEM

GENERAL

Experience shows that disputes brought before the GATT are multifarious and often comprise trade problems that have not been fully addressed in the past and for which no precedents exist. The dispute settlement system in GATT should therefore be designed so as to respond adequately to the different nature of dispute cases. This suggests that the parties to a dispute should have the choice between a number of alternative and/or complementary techniques and mechanisms.

In the following the Nordic countries present some views on how the dispute settlement system may be improved so as to make it more flexible and efficient.

MEDIATION

The dispute settlement system should more explicitly spell out that the parties - if they so agree - can have recourse to mediation through the good offices of the Director General or another competent person. Mediation could take place at any time following failure of finding a mutual acceptable solution in bilateral consultations or during the panel proceedings. If

mediation is initiated when a panel is in the process of addressing the dispute the panel proceedings shall continue in parallel with the mediation efforts.

ARBITRATION

Although widely used in international commercial relations arbitration has only sparingly been resorted to in GATT. This may be due to the fact that some aspects of arbitration are not easily compatible with the decision-making process in GATT.

Most disputes relate not only to the parties directly involved but also to third parties. Furthermore it is the sole responsibility of the CONTRACTING PARTIES to decide on the conformity of a particular measure with the General Agreement.

The Nordic countries still think that a GATT arbitration instrument properly adjusted to GATT working methods could - in clearly defined cases - be available to parties in a dispute.

However, in order to ensure coherence of the GATT system the legal observations referred to above must be taken fully into account. One approach could be to let the COUNCIL/CONTRACTING PARTIES - as for panels - endorse the initiation of an arbitration procedure in a particular case as well as to address the solution arrived at by the arbitration body.

PANELS - TERMS OF REFERENCE

As a principal rule and in keeping with customary practice panels should be given a standard terms of reference. A standard text would have to be negotiated mainly on the basis of the three alternative texts contained in the secretariat note MTN.GNG/NG 13/W/4 page 102.

At the request of either party to a dispute departures from the standard terms could be agreed upon. If the parties fail to agree to such departures within e.g. 3 weeks from the time of the establishment of the panel, the standard term shall apply.

COMPOSITION OF PANELS

As a principal rule a panel shall be composed of 3 persons. At the request of either party a composition of 5 persons may be agreed upon. If no such agreement to extend the number of panelists is reached within e.g. 3 weeks from the time of the establishment of the panel it shall be composed of 3 persons.

Parties to a dispute should be free to choose panelists being either government officials or/and persons on an approved list of non-governmental experts.

If the parties fail to reach agreement on the panel composition within e.g. 3 weeks from the time the Council decided to establish a panel the Director General is automatically authorised to appoint persons from the roster of non-governmental experts and/or the names of officials mentioned above. Prior to such appointment of panelists which shall be made within e.g. one week the DG is obliged to consult with the parties concerned and the Chairman of the Council.

The roster of non-governmental experts is made permanent as a part of a comprehensive negotiated solution on dispute settlement. The composition of the roster is decided upon by the Council for a period of e.g. 2 years.

PANELS - TIMETABLES AND INTERNAL WORKING PROCEDURES

As a principal rule the dispute settlement process from the time of establishment of the panel until the distribution of its report shall not exceed - e.g. 7-10 months.

As indicated above maximum 1 month - in most cases less may elapse from the time of the establishment until the constitution of a panel. This leaves the panel with 6-9 months to carry out its substantive work. The panels shall at the outset provide the parties to the dispute with a calendar for its work within the above time frame - or less - and with the internal working procedures adopted by the panel. These internal working procedures shall be based on the standard working procedures reproduced in MTN.GNG/NG 13/W/4 page 48.

If circumstances make it impossible for the panel to complete its work within the timeframe set the Council shall be informed accordingly at its earliest convenience accompanied by a brief explanation of the reasons for the delay and estimate of the time needed for the completion of the panel's report.

SUBSEQUENT NEGOTIATING PROCESS - PROCEDURES

It appears appropriate that this Group elaborates an improved and consolidated instrument for dispute settlement in GATT. Existing texts and proposals from participants constitute an excellent basis for negotiations. Such an instrument will be an adequate way of expressing the participants' strengthened commitments to abide by the dispute settlement system in GATT.