MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

COMMUNICATION FROM THE EEC

The delegation of the EEC distributed the following communication during the meeting of the Group on 21 September 1987 with the request that it be circulated to members of the Group.

COMMUNICATION FROM THE EUROPEAN ECONOMIC COMMUNITY

The Community recognizes the importance for the credibility of the GATT system of the prompt and efficient settlement of disputes to the benefit of all contracting parties, and it fully subscribes to the negotiating objective assigned to the Group, namely, to improve and strengthen the rules and procedures for dispute settlement.

Like other participants, the Community intends to present its preliminary views on how this machinery could be improved. These views are not exhaustive, and it may have occasion to submit further proposals. The Community will define its position in the light of the discussions and subsequent negotiating process.

1. Analysis of the nature and functioning of the machinery

The GATT dispute settlement machinery is original and specific; there is no equivalent in other areas of international relations. It remains a delicate instrument between sovereign contracting parties, especially when fundamental interests are at stake.

GATT disputes involve a set of economic and trade interests as well as legal issues. The primary objective of the machinery is to work out mutually satisfactory solutions to the disputes in a multilateral framework, and to restore the balance of economic and trade advantages that have been nullified or impaired. This leads the parties concerned to seek first and foremost a negotiated settlement that also takes account of the legal aspects, without the latter necessarily becoming the key element.

The dispute settlement rules and procedures have been largely codified in recent years (in 1979, 1982 and 1984). As was clear from the Group's initial discussions, the present machinery has on the whole proved adequate, although in a limited number of cases it was not possible to find satisfactory solutions to disputes.

In the view of the Community, these difficulties were due in particular to the political sensitiveness of certain cases and/or to the ambiguity of certain provisions of the General Agreement and Codes. In other cases it is sad to observe that a deadlock has arisen at the initial stage of the process (for example, establishment of panels, agreement on terms of reference and membership).

The machinery cannot and must not be used to create, through a process of deductive interpretation, new obligations for contracting parties, or to replace the negotiating process. One of the objectives of the Uruguay Round is to eliminate certain ambiguities and diverging interpretations of the General Agreement and Codes, and this will make a fundamental contribution to dispute settlement.

The Community remains of the opinion that a satisfactory solution to disputes should be sought above all in conciliation, negotiation and consensus.

2. The practice of consensus

The question of consensus in the dispute settlement process is doubtless its most difficult aspect. In the Ministerial Declaration adopted in November 1982, the CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided.

The findings of the panels are advisory opinions for the CONTRACTING PARTIES to assist them in discharging their responsibilities. Panel reports are submitted to the CONTRACTING PARTIES for discussion and adoption. Any new procedure providing for an automatic process in the adoption of reports and recommendations would constitute a profound change in the nature of the machinery.

The parties concerned should continue to participate in the Council's decision-making process at this stage.

3. Specific improvements to be made in existing procedures

The Community is ready to give positive consideration to specific improvements in procedures in the light of the past experience in the functioning of the machinery and proposals made in the Negotiating Group.

(a) Conciliation/mediation:

Conciliation of the parties on a consensus basis through the Director-General (or a person designated by him) is already provided for in the existing procedures.

The Community shares the view that this conciliation/mediation rôle should be strengthened, by providing for a stage in which the mediator should meet with the parties to each dispute (still at the bilateral level) and offer his good offices.

Whether or not this phase of mediation by the Director-General should constitute a mandatory stage prior to the panel procedure is an open question. If so, it would of course be necessary to fix time-limits in order to avoid any undue prolongation of the process (for example, the Subsidies Code provides for a mandatory conciliation stage within a period of thirty days).

(b) Mandatory arbitration process (not requiring approval by the Council):

A process of arbitration on a consensus basis, the outcome of which is binding for the parties, is an option that already exists in the GATT; it has been used in the past, for example, to determine the injury caused by a specific measure.

This arbitration procedure could be institutionalized. In addition, a Declaration by the CONTRACTING PARTIES to have recourse in principle to this procedure in conflicts of a factual nature could encourage greater use of it.

Although this is an attractive approach, it would be difficult to define a priori the categories of disputes where mandatory arbitration (not requiring approval by the Council) should be prescribed in place of the normal panel procedure. Moreover, it would not be easy to safeguard properly the rights and interests of third parties. In any event, given that the outcome of the arbitration would not be submitted to the Council for approval, the categories of disputes that could be handled by this alternative procedure should be factual and not involve questions of interpretation or of conformity with the General Agreement. The outcome of the process could not constitute a legal precedent.

(c) Panel procedures

- Right to the establishment of a panel:

  The principle of the right to a panel could be reaffirmed. When such a request has been submitted to the Council, the latter should endorse it, and could only object in cases that are obviously unfounded.

- Terms of reference of panels:

  In order to avoid any delay in the establishment of terms of reference (which is currently done in consultation with the parties), a possibility to be considered would be that the traditional terms of reference should be given to panels unless the parties to the dispute, within a short specified period (for example, five working days) agree on more specific terms of reference.

Composition of panels

The constitution of a list of persons not linked with any government and having a thorough knowledge of international trade matters and GATT experience, and who are available to be panel members, is already a step forwards. Such a list could subsequently be improved and expanded.

Panels should continue to be composed of representatives of governments and/or persons on the reserve list.

If an agreement on panel membership is not reached by the parties to a dispute within a short specified period (for example, ten working days), the Director-General, in consultation with the Chairman of the Council, will complete or determine the membership without seeking the opinion of the parties concerned, also drawing on persons whose names are included in the agreed reserve list.

- Fixing of time-limits in panel procedures:

The issues referred to panels vary in complexity and urgency. Complex and politically sensitive cases require more time than others. Thus, it would be important that everything should be done to ensure compliance with deadlines for the submission of panel reports to the Council. The 1979 Agreement does contain guidelines on this subject (from three to nine months for the panel to complete its work) but experience has shown that these time-limits are not always respected.

(d) Adoption of panel reports and implementation of recommendations

As mentioned above, the Community considers that the practice of consensus should be maintained in the Council's decision-making process with regard to the adoption of reports and the making of recommendations.

The question that arises, however, is how to reconcile the requirement of maintaining this practice with that of avoiding deadlock situations which undermine the system's credibility and effectiveness. An improvement in the quality of panel reports and clear findings would no doubt help to avoid such situations. Moreover, parties raising objections to panel findings should make a written submission to the CONTRACTING PARTIES, giving the grounds for their opinions.

Finally, reasonable time-limits could be specified for the implementation of recommendations adopted by the Council. If these are not implemented, the right to compensation or to compensatory withdrawals (following authorization, as provided for in Article XXIII:2) for the injured parties would be reaffirmed.

(e) Surveillance

The Community can agree with the idea of strengthening the Council's surveillance function with regard to the implementation of recommendations concerning disputes.

4. Final remarks

The Community also considers that it is necessary to codify in a single instrument the various existing texts relating to dispute settlement (Article XXIII), as amended and improved through negotiations. This should be accompanied by a declaration by the CONTRACTING PARTIES reaffirming their determination to respect these provisions and to have recourse to the machinery to settle their disputes. With regard to the dispute settlement procedures of the Codes, while preserving possible particularities of those procedures, those instruments could include a reference to the single consolidated text.