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Negotiating Group on Dispute Settlement

COMMUNICATION FROM CANADA

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

21 and 24 SEPTEMBER MEETING OF
THE NEGOTIATING GROUP ON
DISPUTE SETTLEMENT - CANADIAN STATEMENT

The dispute settlement mechanism of GATT exists to protect the rights of Contracting Parties to the General Agreement. It is a central element in providing security and predictability to the multilateral trading system. The Uruguay Round affords the opportunity to seek improvements to this system so as to make the GATT responsive in a more timely fashion to the trade issues of the coming decade.

An effective dispute settlement system rests on three elements: efficient, reliable procedures for handling disputes; clear and precise rules of trade; and a political commitment to respect the findings, rulings and decisions of Contracting Parties.

GATT SECRETARIAT

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The second of these elements is the substance of the negotiations of the Uruguay Round. If the dispute settlement system has become discredited in recent years, it is due to a large degree to the limitations of the rules themselves. While recognizing that it is neither possible nor well advised to attempt to define rules for every trade policy situation,

to the extent that existing rules can be clarified and elaborated, governments will have clearer guidance for their trade policy actions and the Contracting Parties will have an improved basis on which to take decisions on disputes. Improved, multilaterally agreed rules will in turn contribute to the confidence of governments in availing themselves of the dispute settlement mechanism and respecting its results. However, improved rules and efficient procedures cannot in the end make up for a lack of political commitment to abide in the system. Such a commitment requires a judgment that the system overall works in the better interest of each Contracting Party.

It is, however, on the first element - efficient, reliable procedures for handling disputes - that this paper wishes to focus. Many useful suggestions have been made in this negotiating group for improving the system. We would wish to pose a few questions of our own for consideration and to provide some thoughts on a number of these proposals.

The Contracting Parties have taken a number of decisions over the years, as usefully compiled by the Secretariat in its note MTN GNG/NG13/W/4, which have improved the dispute settlement procedures. This has been complemented by improved capacity within the Secretariat to coordinate the work of panels. The rules of procedure have generally developed on an ad hoc basis and experience has revealed in recent years that further scope exists to make the system more responsive to achieving the earliest possible resolution of the dispute. An ad hoc approach to disputes leaves room for a flexible and pragmatic response to issues. At the same time, it leaves uncertain the assurance that a procedure adopted in one instance would equally be applied in similar circumstances in another. It is for this reason that attempts should be made to develop additional, mutually agreed procedural rules based on the experience gained since the last decision of Contracting Parties on dispute settlement.

CONSULTATIONS

An important function of the dispute settlement system, which has been referred to by a number of delegations, is to provide a means for resolving disputes through conciliation. As the Secretariat note points out, recourse to these procedures provides an incentive to settle disputes by mutual agreement. We can agree with the suggestion that it would be useful to look at the relationship between consultations under

Articles XXII and XXIII including using the good offices of the Director General on the one hand, and the recourse to a panel on the other. These remain distinct processes although we would normally not wish to see recourse being had to a panel without an opportunity for adequate consultation in advance.

Procedures have been set out for Article XXII consultations in a decision of 1958 but have not been substantially revisited. The procedures exist to allow other parties an opportunity to join in the consultations in matters of interest to them. The question arises whether these procedures may require streamlining? Is the forty-five day notification time frame provided for in these procedures an impediment to an efficient system? If so, should a shorter period be envisaged? Should the requirement of "substantial interest" in the matter, which should be retained, nonetheless be reviewed so as to avoid the need for the party requested to consult to reserve its position on this claim? Would it be useful to sketch out a mechanism to facilitate the holding of such consultations when requested?

Article XXIII.1 consultations traditionally have been used in a bilateral context to place the discussions within the ambit of the General Agreement and to set the stage should a satisfactory solution not prove possible to have recourse to action by the CONTRACTING PARTIES. There have been occasions in the past where it has proven difficult to get these consultations underway. Would it expedite the consultative process if a time limit were established within which they were to be initiated without thereby limiting the flexibility currently available on how to pursue the matter further nor unduly raising the profile of the issue? Would it facilitate the process and provide for more substantive discussions if it were agreed that consultations be held in the capital of the party requested to consult, unless another location is mutually agreed?

The 1966 Decision on Article XXIII provides for the Director General to use his good offices with a view to facilitating a solution to a problem between a less-developed Contracting Party and a developed Contracting Party. Should the use of the Director General's good offices also be made available for disputes between developed parties on one hand and disputes between developing parties on the other, provided

that they mutually agree to this procedure? Should time frames be established for holding such consultations, subject to extension by mutual agreement?

ARTICLE XXIII:2

Recourse to a Panel under Article XXIII.2 still leaves open the possibility for the parties to reach a mutually satisfactory resolution of the matter. Existing procedures call for a "reasonable period of time" between providing the Panel's conclusions to the two parties and the circulation of the report to the Contracting Parties to encourage mutually satisfactory solutions. Would it expedite domestic consideration of the Panel's conclusion if a set time frame of, say, three to four weeks were to be established in advance, either as a general rule or by the Panel, as this "reasonable period of time", subject to extension by mutual consent, to finalize the agreement should a solution be found?

Experience in recent years has also shown the erosion of the confidentiality of material provided to panels or of panel reports themselves prior to the consideration of reports by the Council. Such occurrences reduce confidence in the system

and can impede the prospects for conciliation during the panel process. It is for consideration whether the rules of procedure with respect to confidentiality can be strengthened to avoid unwarranted release of information relating to a dispute involving the panel process prior to Council consideration of the matter.

Recent cases before the Council have resulted in panels being established with more than one party to the dispute and with a number of Contracting Parties expressing interest in the matter. These cases have been handled on an ad hoc basis and generally proceeded expeditiously and in a cooperative manner. Existing decisions provide for panels to set up their own working procedures. In some cases involving interested third parties, these procedures have differed. In the interest of providing a predictable panel process and ensuring similar treatment for all, should the procedures for panels be standardized to a greater extent?

The implementation of panel reports has remained a question of concern to Contracting Parties in recent years and has been the subject of various proposals, including by Canada, during that time. In cases where parties have been

found to maintain measures inconsistent with the GATT, the party which brought the dispute bears the burden of the damage to their trade interests throughout the course of the dispute settlement process, which as the Secretariat note suggests, takes an average of 14 1/2 months to the date of the adoption of the report. A delay in implementing an adopted report prolongs even further the damage to trade interests. To avoid this prolongation of trade damage, should procedures be agreed to which provide for a more effective monitoring of the implementation of panel recommendations following their adoption by Council than is currently available.

PROPOSALS BY OTHERS

In addition to the points we have raised above, a wide range of useful suggestions have been made in the previous meetings of the group to improve the procedures of the system and to make it more efficient. Canada would be prepared to examine these suggestions in more detail in the course of the group's work, but offers preliminary comments on some of them for consideration.

Proposals have been made with respect to improved notification procedures, including prior notification of trade measures affecting the General Agreement. Canada considers this to be an important question. The negotiating group on Functioning of the GATT System has under consideration improvement of surveillance of the trade policy of individual Contracting Parties. The implementation of such surveillance would contribute to the information base available to Contracting Parties and allow for earlier consultations which may assist in preventing disputes from developing.

Several delegations have made suggestions for improving the mediation/conciliation mechanisms of the system and we have added a suggestion of our own today. While the onus for resolving bilateral disputes rests ultimately with the parties directly involved, the availability of multilaterally sponsored mediation or conciliation facilities could provide additional impetus for reaching a solution by providing an objective and neutral third party to look at the problem. We would not, however, consider mediation a mandatory step in the dispute settlement process. The option to proceed by that route should be by mutual agreement.

As an alternative solution to proceeding to a panel, binding arbitration without Council approval has been proposed. Canada considers that binding arbitration is an effective means of resolving disputes in certain circumstances, and has itself resorted to such a mechanism in other areas. Binding arbitration could also be a useful tool in trade policy where both parties agree to this process. The use of the roster of GATT panelists would facilitate such a process. But to be an effective GATT instrument, we consider that third party interests would need to be protected. One way to ensure this would be to provide a monitoring function for the council of the outcome of the matter so that third parties may more readily ensure they are not adversely affected by the solution. Perhaps such results could be considered to stand unless council "disapproves" of the agreement.

Canada has long favoured the right of a party to the establishment of a panel upon request and supports those who have made this suggestion. Appropriate time should, however, normally be provided for consultations prior to the establishment of a panel. Given the increased interdependence of international trade, the proposal that third parties be

permitted to take action under Article XXIII.2 is also worthy of consideration. Third parties with interest in the trade should be in a position to protect their interest within a multilateral context. In this regard, the Report of the Panel on USA-Taxes on Petroleum and Certain Imported Substances provides useful guidance in addressing the question of trade impairment. A further case initiated as a result of third party interests is currently before a panel.

Proposals have been made to expedite the process with respect to the establishment of terms of reference for panels, including the use of standard terms of reference. The formulation of the terms of reference reflects the important issue of the scope of the complaint to be examined by the panel. As a general principle, Canada considers that the party raising the complaint has the right to have that complaint examined in the light of the relevant GATT provisions. Part of the problem rests with the formulation of the complaint by the complaining party and the onus should be placed on that party to be as precise as possible (recognizing that the definition of the problem generally becomes clearer as the case proceeds). At the same time, it is necessary to avoid "fishing expeditions" which leave a panel little

guidance on where it should draw the line in its considerations. This in our view again underscores the utility of substantive consultations prior to the establishment of a panel.

Canada supports proposals to strengthen the roster of panelists, be they outside experts or experts from Geneva-based missions. The trial period for the existing roster has produced favourable results and its usage has expanded with the increase in the number of cases subject to dispute. Experience has shown the need for a roster of well-known, qualified individuals capable of serving in a neutral and objective fashion. The increased recourse to the panels requires that the composition of this roster be carefully considered in order to ensure that reports are of the highest quality and command the respect of governments and the trading community.

Canada would be prepared to explore proposals for fixed time limits and improved procedures for the various stages of the panel process. Sight should not, however, be lost of the need for flexibility, by mutual consent, in some cases. The question of enforceable time limits which if not met would

entail compensation being paid would require careful examination. With respect to the proposal to resolve less complex cases by decision of the Council without recourse to a panel, current rules do not preclude Council's taking a decision at any time on a specific matter in accordance with established procedures. We question, however, whether this should be done without the consent of the party complained against since there is a need to ensure that a full and fair hearing of the issue has been held and the party complained against is satisfied this is the case.

The question of procedures for adoption of panel reports should be examined carefully during the work of the negotiating group and looked at from a comprehensive perspective based on a more detailed analysis of why certain reports have taken longer to adopt or have not yet been adopted. Canada would consider it a dangerous precedent to limit the Article XXIII.2 right of a Contracting Party for failure to implement a panel decision as this would leave that party open to impairment of benefits by third parties not involved in the original dispute without legal recourse for redress. It would, however, be useful to explore in greater detail the question of compensation and time limits in order to encourage more expeditious implementation of panel reports and to reinforce the need for governments to respect panel findings and recommendations.