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Negotiating Group on Dispute Settlement

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COMMUNICATION FROM THE EEC

The following communication has been received on 1 March 1988 from the delegation of the European Economic Community with the request that it be circulated to members of the Group.

In a previous communication (circulated as MTN/GNG/NG/13/W/12), the Community presented an analysis of the nature and functioning of the GATT dispute settlement system and its preliminary views on some specific improvements to be made in existing procedures.

Since then, the Community has followed up its internal reflections and it now presents additional views on some elements on which the Negotiating Group has focused its debates.

In the first place, there is the question of the adoption of panel reports and the making of recommendations; on this sensitive issue, our ideas are put forward as options on which the Community has not taken a definite stance. Other issues dealt with in this communication are: conciliation/mediation, arbitration process, time-limits in panel procedure and surveillance.

With this new document, the Community intends to stimulate reflection in order to achieve progress in the negotiation. The Community may have the occasion to submit further proposals and will define its position in the light of the discussions and subsequent negotiating process.

1. Adoption of Panel Reports

A number of suggestions have been made with the object of avoiding situations of deadlock where one or other party to a dispute is unable to accept a panel report. These range from ideas which would tend to make non-adoption more difficult (i.e. by obliging parties with objections to give written reasons to explain their difficulties), to limiting the possibilities for refusing a panel report, (e.g. by excluding the parties to the dispute from the decision to adopt), or

again to circumvent the problem (e.g. by providing that panel reports become binding, unless it is clear, within some fixed period, that there is no consensus against adoption of the findings and recommendations in the panel report). The most extreme solution would be to make panel findings and recommendations binding without further action by the GATT Council or Code Committees.

At the level of general principles, the problem of how to avoid non-adoption could be considered against the background of two general approaches which reflect different views about the essential purposes of dispute settlement:

- First, seen from the angle of a trade dispute, it may seem illogical that one of the parties could become, so to speak, both judge and jury in its own case. This is the consequence of a situation where a party would first present its case to a panel but would then be free to ignore its findings, where these were unfavourable, by resisting adoption.

- Second, seen from the angle of interpreting GATT rules, it would seem equally illogical that a Contracting Party should be excluded from the process of interpretation which belongs to the Contracting Parties as a whole. To depart from this principle would mean at the limit that new interpretations - even if they do not have full support - might result in GATT obligations which a Contracting Party felt that it had not accepted in the past and was unwilling to accept in future.

At the level of general principles, therefore, there is a conflict of approach which is difficult to resolve in a way which would be satisfactory in all cases and which in any event depends upon the degree of emphasis which each Contracting Party gives to the two activities involved in dispute settlement, resolution of the conflict on the one hand and authoritative interpretations of GATT provisions on the other.

Following this analysis it would appear preferable not to think of procedures which would effectively deny a Contracting Party its right to participate in the decision-making process as regards interpretation of GATT provisions, e.g. by taking decisions on adoption by consensus without the parties concerned, or which would force it to act upon findings with which it did not agree, e.g. by any form of semi-automatic adoption. In any event, the latter course, while it might effectively preserve the right of the "injured party" to retaliate in the last resort (as provided for in Article XXIII:2), would be unlikely to result in any modification of the legislation or measures in question or in compensation for their effects.

If these ideas are to be excluded, what are the remaining options available? There appear to be three possibilities worth consideration:

(i) to continue the present practice of adoption by consensus but to make it more difficult in political terms to resist a consensus. This might be by having a more structured arrangement for justifying opposition - e.g. written submissions to the GATT Council or Code Committees which could then be discussed;

(ii) the adoption of reports could be facilitated by considering the general conclusions as regards GATT conformity separately from the specific recommendations for remedy. As regards a legal finding, the traditional consensus of all Contracting Parties would still be required, whereas a decision on the recommendations for action might be taken in a more flexible manner, e.g. where a consensus might be considered to exist although the recommendations raise difficulties for one of the parties to the dispute.

(iii) A third option might be, in cases where the full consensus as regards the legal finding is not possible, to follow the procedure of taking note (which has a weaker connotation as regards the legal precedent); but nonetheless to seek a decision on the recommendations in a pragmatic way as suggested above.

2. Conciliation/mediation procedures

The very rare recourse (in the context of Articles XXII and XXIII) to conciliation/mediation in past GATT practice can be explained by the fact that the parties concerned, convinced of the merits of their complaint, prefer to insist on their GATT rights on a multilateral level instead of accepting conciliation/mediation on an ad-hoc basis.

As a result, it might be thought that the concept of developing additional procedures, which could be used by the parties in the event of the failure of their bilateral consultations, would be of rather limited usefulness.

In any event, a structured compulsory concilation/mediation phase, as proposed by one participant, is not acceptable since it is likely to unduly prolong the process. Experience, e.g. in the Subsidy Committee, shows that compulsory conciliation is often perceived by the parties as a simple pro forma state, before resorting to the panel procedure.

One can also express serious doubts about the possibility of the Director-General (or his designate) becoming systematically involved with the parties in each dispute (still at bilateral level) to offer his mediation services. In fact, such a procedure would require the mediator, if he were to play an effective role, to be informed beforehand on the details of the dispute, as well as the arguments developed by the parties in their bilateral consultations. In many cases this would simply mean an element of duplication with the panel process.

The Community considers that conciliation/mediation should remain an option that could be used by mutual agreement of the parties and any settlement, adopted in this way, should be compatible with the General Agreement and should not prejudice the GATT rights of third parties.

3. Arbitration procedure

Several proposals have been presented in the Negotiating Group with the aim of formulating, as a supplementary technique of dispute settlement in the GATT, an arbitration system by a neutral body.

The Community, for its part, would like to stress the following points:

- the institutionalisation of a rapid arbitration procedure, as a supplementary technique of dispute settlement, could facilitate the solutions of certain disputes concerning essentially factual questions. (In practice, the border-line between factual points and matteres of interpretation is not always easy to determine).

- use of this procedure would be dependent upon the mutal agreement of the parties:

- the arbitration decision would be binding for the parties concerned but should not prejudice the GATT rights of third parties;

- the GATT Council would be informed of the arbitration result and could, if necessary, take appropriate decisions.

A different possibility might also be considered. The arbitration procedure could also be used in conjunction with the three options outlined in part 1, in order to allow the parties concerned to find a pragmatic solution to the dispute.

4. Deadlines concerning panel procedures

What is important is to fix deadlines for the beginning and the end of the process, in order to expedite examination of disputes and avoid delays in the follow-up stage: but panels should remain free to organise their own timetable.

- Establishment of a panel : the Council should take a decision on the setting up of a panel, normally at the first meeting, or at the latest, at the second meeting following the one where the request was made.

- Terms of reference : standard terms of reference should apply, unless the parties to the dispute, within 10 working days, agree upon a special mandate.

- Composition : in the absence of an agreement between the parties within 10 working days, the Director-General, in consultation with the Chairman of the Council, should decide or complete the composition of the panel.

- The "standard working procedure" utilised by the panels could be formally adopted by CPs and its regular utilisation recommended. There should be no rigid deadlines for the different work phases of panels, but it is important to respect the maximum delays (from 3 in urgent cases to 9 months in normal cases) for the presentation of the reports to the Council.

- Examination of reports : the Council must examine the reports at the latest 30 days from the date of their presentation.

- Implementation of recommendations : fixing a reasonable delay (e.g. 6/12 months) for the implementation of recommendations.

5. Surveillance

The Community also considers that it is necessary to have a strengthened and regular procedure of surveillance and control of the dispute settlement process.

This procedure should only cover matters arising from Article XXIII, thereby excluding specific dispute settlement procedures in the MTN Codes where competence for surveillance should remain with the Signatories' Committees.

Instead of creating a new ad hoc mechanism, the Council should continue to exercise this function.

It could be envisaged that, in its meetings, the Council specifically reserves a part of its agenda to questions on dispute settlement. This part of the meeting could be chaired, on a experimental basis, by a chairman "designated" (e.g. the Deputy D.G.) who could exercise the role of conciliator/mediator, arbitrator or supervisor, depending on circumstances, without encroaching on the responsibilities of the DG relating to dispute settlement.