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Group of Negotiations on Goods (GATT)
Negotiating Group on Dispute Settlement

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COMMUNICATION FROM PERU

The following communication has been received on 2 March 1988 from the delegation of Peru with the request that it be circulated to members of the Group.

IMPROVEMENT OF THE GATT DISPUTE SETTLEMENT MACHINERY

Suggestions by Peru

1. The following comments must be seen in the framework of the wholehearted efforts we must make to strengthen the GATT system, through the proper observance and implementation of the provisions of the General Agreement, as a means of forestalling disputes.
2. However, it must be recognized that the lack of clarity of some provisions of the General Agreement hinders a common interpretation and uniform application of those provisions, thus constituting a potential source of disputes. Hence the importance of the work being carried out in other Negotiating Groups to clarify and improve the various provisions of the General Agreement, since that will help to reduce possible sources of dispute.
3. We also consider that improved and strengthened dispute settlement machinery could play a more significant rôle as a "deterrent" to avoid disputes. If we could have a more efficient and reliable mechanism, contracting parties would be more cautious about applying certain controversial measures, and less disputes would arise.
4. In addition, we are convinced that disputes could also be prevented by developing confidence-building measures.
5. Confidence-building is a process in which each earlier measure becomes the basis for subsequent measures, which gradually and cumulatively consolidate and strengthen the confidence-building process itself.

6. Consequently, the absence of concrete results from the conclusions of Panels or their inability promptly to settle disputes, as well as the refusal by a party to accept a Panel's report and recommendations on the grounds that they are "politically unviable", cause frustration and undermine respect for and confidence in not only the dispute-settlement machinery but also the rights and obligations of the General Agreement.

7. We believe that the requirements for making concrete progress in confidence-building measures are realism and transparency in complaints and the strict application of the principle of good faith. This, together with the political will to accept, without dilatoriness, the outcome of the dispute-settlement process, are the basic ingredients to ensure that the machinery is applicable, reliable, effective and prompt.

8. However, as may be supposed, there will always be the possibility that certain disputes will arise from the diverging interpretation by some contracting parties of the legal norms of the GATT, and therefore, when such cases arise, it will be necessary to settle them by means of a dispute-settlement mechanism that is more expeditious, but equally fair and efficient, based on the implementation of fixed and clearly defined procedural time-limits as well as on compliance by the parties to the dispute with the recommendations made by Panels on each case.

9. The basic GATT machinery for dispute settlement is based on Articles 22 and 23 of the General Agreement, expanded and supplemented by the 1979 Understanding Regarding Notification, Consultation, Dispute-Settlement and Surveillance, as well as the dispute-settlement procedures contained in the Ministerial Declaration of 1982, the provisions adopted by the CONTRACTING PARTIES in November 1984, and the Decision adopted on 5 April 1966.

10. With regard to dispute settlement, Peru has always taken a position of principle, and in that spirit considers that any such machinery should take account, where the analogy is valid, of the concepts and principles of international law set forth in Chapter VI, Article 33, of the United Nations Charter relating to the peaceful settlement of disputes. Article 33 of the Charter establishes, as means for the solution of disputes: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other means chosen by the parties to the dispute.

11. The means for dispute settlement stipulated in Article 33 of the Charter of the United Nations provide a reference framework whose basic elements could be drawn upon for the elaboration of the rules and procedures for the GATT dispute settlement machinery.

12. Negotiation, for example, is a suitable enough means for settling the great majority of disputes between States. In international law, it is of real importance due to the uncertainty surrounding the possibility of bringing a dispute to a litigation procedure, which all depends on the willingness of the two parties concerned.

13. Good offices are the friendly action undertaken by a third party together with the parties to a dispute with a view to getting them to conduct negotiations. The objective is to restore dialogue between two States which, in general, have broken off communications because of a dispute, and bring them to the negotiating table. Good offices end precisely where the negotiations begin.

14. Mediation is action by third States, an ad hoc group or a person with a view to achieving a settlement between parties to a dispute. Unlike good offices, where the State concerned confines its rôle to bringing the parties to a dispute to a neutral point for beginning negotiations, in the case of mediation the third State, ad hoc group or person concerned takes part in the negotiations and suggests formulas for a solution. However, the mediator's job differs from that of an arbitrator or arbitration tribunal, because the mediator is not subject to procedural formalities or specific time-limits that must be complied with.

15. In the case of enquiry, the dispute is submitted to an impartial entity which is responsible for carrying out an enquiry or investigation into the facts in dispute, as a means of paving the way for a negotiated agreement. In the report of the enquiry, no recommendations, suggestions or conclusions are made.

16. Conciliation is where an ad hoc body studies a dispute submitted to it by the States and prepares a report in which, unlike an enquiry which is confined to establishing the facts, it suggests a solution or paths towards a solution. As in mediation and enquiry, the report is not legally binding, but allows effective settlement formulas to be made.

17. Arbitration is the institution in international law whose purpose is to settle disputes between States by means of judges selected by them and on the basis of respect for the law. Arbitration is essentially binding for the parties, and constitutes the final legal resort for the settlement of a conflict of interests.

18. The arbitrator's decision or judgement is binding on the parties and must be implemented in good faith. There can be no appeal against the decision; the parties since they freely agreed to submit their dispute to the arbitrator or arbitration tribunal, and must therefore necessarily comply with the decision. Decisions establish legal precedents since, by their very nature, they constitute a type of judicial practice.

19. In view of the foregoing, we could say that in GATT the equivalent to negotiation is "consultation". The designation of a mediator whose objective is conciliation must be on a personal basis; he cannot delegate his mandate to third persons. In addition, as we have seen, it is inappropriate to refer to binding arbitration since arbitration is inherently binding.

20. Legal instances must be respected; consequently, the various means of dispute settlement cannot be brought into play at any moment in the process, still less simultaneously with Panels, since they are successive and have a pre-established hierarchy.

21. Thus, the approach to the GATT dispute settlement procedure should be refocussed in order to obtain concrete commitments for agreement on a prompt and reliable mechanism essentially comprising the legal arrangements we have described above, without losing sight of the specificity and complexity of GATT's nature. The machinery should be a means of ensuring the effective application of the rules of the General Agreement in the specific cases in which disputes may arise.

22. It is also necessary to take into account, as a general principle, that the developed countries and developing countries are not equal trading partners. The developing countries are included in the international trading system on a weakened footing and therefore should be granted advantages, especially in the form of preferential and more favourable treatment.

23. Consequently, whatever the improved dispute-settlement machinery that may emerge from these negotiations, this fact must be taken into account with a view, among other things, to enhancing and speeding up procedures such as those contained in the Decision adopted on 5 April 1966, in the case of disputes submitted by developing countries.

24. In addition, this improved machinery should provide for special measures to make up for the limited retaliatory capacity of developing countries vis-à-vis major trading partners, in view of their lesser weight in international trade.

25. Finally, a concept that has already been raised in this Negotiating Group is that of "retroactive prejudice" caused by a measure applied by a contracting party. The Delegation of Peru endorses this idea and considers that it should be included in the dispute-settlement procedure. Consequently, that "retroactive compensation" should be provided for the prejudice caused from the moment when the disputed measure entered into force.