MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG13/W/35
1 December 1989

Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group
on Dispute Settlement

RULINGS AND RECOMMENDATIONS IN TERMS OF ARTICLE XXIII:2

Note by the Secretariat

1. At the meeting of the Negotiating Group on 28 September 1989 the Secretariat was requested to prepare a background note on the legal status and use by the CONTRACTING PARTIES of "rulings" and "recommendations" under Article XXIII:2 of the General Agreement. This Note has been prepared in response to that request.

I. Drafting history

2. Article XXIII:2 provides in pertinent part: "If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate" (emphasis added).

3. The "Suggested Charter for an International Trade Organization", which was proposed by the United States in 1946, included an Article 76 on "Interpretation and Settlement of Legal Questions", according to which "Any question or difference concerning the interpretation of this Charter shall be referred to the Executive Board for a ruling thereon". Article 76 also provided that the rulings could, under specified conditions, be referred to the "Conference"; certain "justiciable issues arising out of a ruling" could be further submitted to the International Court of Justice.

4. The dispute settlement provisions in Article 35:2 of the 1946 London draft and of the 1947 New York draft of a "Charter of the International Trade Organization of the United Nations" refer, in their paragraphs 2 corresponding to GATT Article XXIII, only to the power of the Organization to "make appropriate recommendations to the Members concerned" without mentioning a power to make "rulings". But the dispute settlement provision in Article 90 of the 1947 Geneva draft used almost the same language as in GATT Article XXIII:2 by empowering the Executive Board and the Conference to "make recommendations to the Members ... concerned or give a ruling on the matter, as appropriate". There exist no documents from the drafting history explaining why the power "to give a ruling" was inserted into the text. According to paragraph 2 of Article 90, the "Executive Board may refer the matter, with the consent of the Members concerned, to arbitration

upon such terms as may be agreed between the Board and such Members". Paragraph 3 provided: "Any ruling of the Executive Board shall be reviewed by the Conference at the request of any interested Member. Upon such request the Conference shall by resolution confirm or modify or reverse such ruling". During the preparatory work at the 1947 Geneva Conference, it was stated that, in the case of recommendations affecting otherwise legal conduct, member States "are under no specific and contractual obligation to accept those recommendations" (EPCT/A/PV/5, p.16).

5. In the 1947 "Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment",

> "The Preparatory Committee points out that a limited time has been devoted to the study of the means of providing for interpretation of the Charter and for the settlement of differences among Members and between Members and the Organization. Therefore the Preparatory Committee recommends that this subject should receive early and full re-examination by the World Trade Conference and the drafts contained in this Report have been prepared on the assumption that this course will be followed." (at p.53).

During the 1948 Havana Conference, the dispute settlement provisions later incorporated into Chapter VIII of the 1948 Havana Charter were completely redrafted. Article 94, paragraph 2 of the Havana Charter - which corresponds to a certain extent to the first two sentences of GATT Article XXIII:2 - provides as follows:

> "2. The Executive Board shall promptly investigate the matter and shall decide whether any nullification or impairment within the terms of paragraph 2 of Article 93 in fact exists. It shall then take such of the following steps as may be appropriate:
>
> (a) decide that the matter does not call for any action;
>
> (b) recommend further consultation to the Members concerned;
>
> (c) refer the matter to arbitration upon such terms as may be agreed between the Executive Board and the Members concerned;
>
> (d) in any matter arising under paragraph 1(a) of Article 93, request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter;
>
> (e) in any matter arising under sub-paragraph (b) or (c) of paragraph 1 of Article 93, make such recommendations to Members as will best assist the Members concerned and contribute to a satisfactory adjustment."

During the preparatory work at Havana, it was stated that the power to give a ruling cannot be utilized to impose changed obligations (E/Conf.2/C.6/W/43; W.49). It was further agreed that the above-mentioned sub-paragraph 2(e) of Article 94 "does not empower the Executive Board or

the Conference to require a Member to suspend or withdraw a measure not in conflict with the Charter" (ICITO/8, at p.155).

II. Practice of the CONTRACTING PARTIES

5. The practice of the CONTRACTING PARTIES in respect of deciding on matters referred to them under Article XXIII:2 has varied, especially during the early years of GATT:

(a) In 1948, the Chairman of the CONTRACTING PARTIES responded to requests for an interpretation of various GATT provisions by giving "Rulings by the Chairman" without specifying on what GATT provision such Chairman Rulings" were based (see, for example, BISD II/12).

(b) In a dispute between Czechoslovakia and the United Stated in 1947, the CONTRACTING PARTIES adopted a "Decision" of 8 June 1949 "to reject the contention of the Czechoslovak delegation that the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licences" (BISD II/28).

(c) In a dispute relating to internal taxes imposed by Brazil, the CONTRACTING PARTIES adopted two Working Party Reports on 30 June 1949 (BISD II/181) and on 13 December 1950 (BISD II/186), respectively, without adopting a separate "ruling" or "recommendation" on the dispute. But a separate "Resolution" on the settlement of this dispute was later adopted by the CONTRACTING PARTIES on 24 October 1953 (BISD 2S/25). In the dispute on the Australian subsidy on ammonium sulphate, the CONTRACTING PARTIES adopted a Working Party Report on 3 April 1950 (BISD II/188) and thereby, implicitly, also a "Recommendation Regarding the Complaint of Chile concerning the Australian Subsidy on Sulphate of Ammonia" as proposed in the Working Party Report (BISD II/195).

(d) In respect of another dispute between Czechoslovakia and the United States, the CONTRACTING PARTIES adopted a "Declaration of 27 September 1951" on "Suspension of obligations between Czechoslovakia and the United States under the Agreement" (BISD II/36) without specifying the GATT provision on which this "Declaration" was based.

(e) In another dispute, the CONTRACTING PARTIES adopted various "Resolutions", for example on 26 October 1951 and 8 November 1952, on "United States Import Restrictions on Dairy Products" which, inter alia, recognized "that concessions granted by the United States Government to contracting parties under the General Agreement have been nullified or impaired within the meaning of Article XXIII of the General Agreement and that the import restrictions in question constitute an infringement of Article XI of the Agreement" (BISD II/16; 1S/31, 2S/28). In connection with this dispute, and in response to a request from the Netherlands for an authorization pursuant to Article XXIII:2 to suspend the application of concessions to the United States, the CONTRACTING PARTIES adopted a Working Party Report (BISD 1S/62) plus a separate "Determination" of 8 November 1952 on the appropriateness of the measure proposed by the Netherlands,

which authorized the Netherlands to suspend the application to the United States of their obligations under the General Agreement in a specified manner (BISD 1S/32).

(g) In 1952, various disputes were settled by the CONTRACTING PARTIES by adopting panel reports plus additional separate "Recommendations" addressed to the contracting parties concerned (see BISD 1S/23, 51; 30, 53; 59; 2S/18). In another dispute, the panel report was adopted without an additional separate "Ruling" or "Recommendation" (BISD 1S/48). Since about 1955, most disputes submitted to the CONTRACTING PARTIES under Article XXIII:2 led to the adoption or, in a few cases, "taking note" of panel reports without additional, separate "Rulings", "Recommendations", "Decisions", "Declarations", "Resolutions" or "Determinations" by the CONTRACTING PARTIES. In 1971, the CONTRACTING PARTIES adopted a panel report and, following the Panel recommendation, granted a waiver to Jamaica (BISD 18S/33, 183). In 1981, the CONTRACTING PARTIES adopted four panel reports on certain tax practices subject to a certain "Understanding" of the meaning and implications of the Panel findings (BISD 28S/114).

6. The Report of the Panel on "Uruguayan Recourse to Article XXIII", adopted in November 1962 (BISD 11S/95, paras. 11 and 12), states:

> "Paragraph 2 of Article XXIII provides, apart from promptly investigating any matter so referred to them, for two kinds of action by the CONTRACTING PARTIES, namely: (i) they shall make appropriate recommendations or give a ruling on the matter; (ii) they may authorize the suspension of concessions or obligations.
>
> The action stated under (i) is obligatory and must be taken in all cases where there can be an 'appropriate' recommendation or ruling. The action under (ii) is to be taken at the discretion of the CONTRACTING PARTIES in defined circumstances.
>
> ... Whilst a 'ruling' is called for only when there is a point of contention on fact or law, 'recommendations' should always be appropriate whenever, in the view of the CONTRACTING PARTIES, they would lead to a satisfactory adjustment of the matter".

7. According to their standard terms of reference, Article XXIII panels are empowered by the CONTRACTING PARTIES to examine matters referred to them in the light of the relevant GATT provisions and to make such findings as will assist the CONTRACTING PARTIES in making recommendations and rulings as provided for in Article XXIII:2. In their reports, notably in the final sections setting out the "findings" and "conclusions" of panels, panels frequently use the terms "find" and "conclude" in their determinations regarding the consistency with the General Agreement of the measures under examination and regarding "nullification or impairment" of benefits accruing under the General Agreement. But it is generally accepted that panel reports, including their "findings" and "conclusions", are advisory in nature until they are adopted or otherwise acted upon by the CONTRACTING PARTIES.

8. The "findings" and "conclusions" are sometimes contained in separate sections (see BISD 31S/88, 91), but mostly in one and the same section of the panel report (e.g. 34S/112, 154). If the "conclusions" are that the measures under examination are inconsistent with the General Agreement and nullify or impair benefits accruing under the General Agreement, panels regularly suggest that the CONTRACTING PARTIES "recommend" (e.g. BISD 30S/140) or "request" (e.g. L/6474, para. 6.2) that the party concerned eliminate the inconsistent measure or bring it into conformity with the obligations under the General Agreement (e.g. 34S/159; L/6568, L/6439). The formulation "request" makes it clear that contracting parties are under a legal obligation to withdraw measures inconsistent with the General Agreement. In the case of "non-violation complaints" (Article XXIII:1(b) or (c)) where a measure consistent with the General Agreement has been found to nullify or impair benefits accruing under the General Agreement, the practice has been for panels to suggest that the CONTRACTING PARTIES "recommend" to the contracting party concerned that it consider ways and means to re-establish the competitive benefits that could be reasonably expected before the "nullification or impairment" (see BISD II/195; 1S/59). In "non-violation cases", removal of the measure itself has not been recommended because, as stated in the Working Party on the Australian Subsidy, "There is nothing in Article XXIII which would empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy" (BISD II/195) or another measure consistent with the General Agreement (see also EPCT/A/PV/5, p.16). Panel reports have only rarely considered whether to "propose a ruling" to the CONTRACTING PARTIES (see report of the Panel on "United States Trade Measures Affecting Nicaragua", L/6053, p.15 f). No panel report has ever suggested a formal "ruling" in addition to the adoption of the panel report by the CONTRACTING PARTIES.

9. In the GATT Ministerial Declaration adopted on 29 November 1982, it was stated with regard to the dispute settlement process pursuant to Article XXIII:2: "It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement" (29S/16, paragraph (x)).

Issues for Consideration

10. The Negotiating Group might wish to consider the following questions relating to "rulings" and "recommendations" under Article XXIII:2:

(a) Should the current GATT practice under Article XXIII:2 of adopting or "taking note" of panel reports without additional, separate "rulings" or "recommendations" by the CONTRACTING PARTIES be continued or modified?

(b) As there is agreement that "decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement" (BISD 29S/16), rulings under Article XXIII:2 can only clarify and determine, but not modify existing rights and obligations in respect of a particular dispute. Moreover, there is a long-standing GATT practice that adopted "findings", "conclusions", "recommendations" and "rulings" are

to be taken into account in subsequent interpretations of GATT rules e.g. by subsequent GATT panels (in accordance with the "general rule of interpretation" set out in Article 32 of the 1969 Vienna Convention on the Law of Treaties) without affecting the right of the CONTRACTING PARTIES to over-rule and deviate from principles announced in previously adopted panel reports. Is there a need for further clarification by the CONTRACTING PARTIES of the legal effects of the adoption of panel reports?

(c) It is an established principle of GATT that "the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement" (BISD 26S/216). Would it be more appropriate for the CONTRACTING PARTIES to "rule" on, "require" or "order" the removal of an inconsistent measure rather than "request" or "recommend" this? Would such specific "rulings" enhance the effectiveness of GATT rules by increasing the scope for their "direct legal effects" and "direct applicability" by domestic courts and by individuals within the domestic legal system of the contracting party concerned?