

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

COMMUNICATION FROM SWITZERLAND

The following text has been received from the delegation of Switzerland with the request that it be circulated to the members of the Group. The same text is also being submitted to the Negotiating Groups on MTN Agreements and Arrangements and Functioning of the GATT System.

1. Introduction

The Ministerial decision of Montreal commits the Negotiating Group to continue its work for the full achievement of the negotiating objectives, as defined by the Ministerial Declaration of Punta del Este, i.e. to ensure prompt and effective resolution of disputes. Particularly, the declaration recognized the contribution which more effective and enforceable GATT rules and disciplines would make.

Improving GATT rules primarily addresses negotiations in all the negotiating groups dealing with the amelioration of substantive law. However, effective improvements of enforcement also needs to include work on procedural requirements.

The Negotiating Group, so far, has been working on improvement of the existing system of dispute settlement. Substantial progress has been achieved, including the introduction of arbitration which is the object of further refinement in a separate communication submitted by this delegation.

Beyond the present scope of negotiations, the Swiss delegation submits the view that substantial improvement of enforcement of GATT rules and disciplines may be achieved by addressing the problem of domestic implementation of trade rules and enforcement of governmental decisions related to international trade.

GATT SECRETARIAT

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Some problems related to effective enforcement of the GATT may be due to the fact that the rights and obligations under the General Agreement and the MTN Agreements concluded at the end of the Tokyo Round are mainly applied on an international, i.e. intergovernmental level. In an increasing globalization of economic relations, it seems feasible to open a discussion within the remainder of the Uruguay Round as to how private subjects and entities could be increasingly protected from illicit governmental decisions affecting their trading interests and rights. It is a well established fact of experience that trade rules are best protected and implemented when both the application and the enforcement are, in addition to the international level, assigned to national authorities on the basis of individual rights and obligations.

2. Models

With a view to improving domestic enforcement and realization of GATT law, different levels of ambition and, correspondingly, different models are conceivable.

The most radical step, of course, would be the introduction of obligations of contracting parties to give full effect within national legal systems to relevant provisions of the General Agreement and the MTN Codes. In accordance with their constitutional relationship of international and national law, countries would choose appropriate techniques to comply with such obligations. It may, on the one hand, oblige some contracting parties to apply such rules directly, i.e. attribute a self-executing character to them. It may, on the other hand, oblige contracting parties to transform such obligations into national law, or a combination of both techniques. There is no doubt that a considerable number of relevant provisions of GATT are sufficiently precise and therefore suitable for judicial review by domestic courts or other, independent bodies.

Another, less far reaching proposal might leave contracting parties the choice to pick and choose a qualified number of provisions of said agreements, and have them directly implemented on a reciprocal basis. States or supranational organizations would define and select those provisions which in result they are prepared to apply directly in terms of self-executing or transformed provisions. Private subjects or entities would be entitled to invoke such provisions before the administration or the courts of law of the importing contracting party only to the extent the country of origin equally provides for direct or transformed application of the provision invoked.

Finally, it is conceivable to reinforce obligations of contracting parties to provide for effective remedies and review of governmental decisions related to international trade, yet without prescribing full effect to substantive GATT rules and disciplines. Such an approach is not new to GATT. It is already contained in Article X:3 of the General Agreement. Contracting parties are under the obligation to administer the

law in a uniform, impartial and reasonable manner and to establish judicial review. Also it may be noted that procedural requirements prescribed by GATT law in order to secure substantive rules can be found in the MTN Agreements. It is recalled, for example, that the Agreement on Government Procurement contains detailed provision on tendering procedures (Art. V) and on publication (Art. VI). The Subsidies Code contains provisions on domestic procedures to be followed in the process of determination of injury (Art. 2). Procedural requirements on the initiation and subsequent investigations and on evidence prescribed by the Anti-Dumping Code (Art. 5) are yet another example of minimal standards completing national procedures. The concept of prescribing procedural rules to be respected in a domestic context is a current practice in GATT and could therefore provide a basis for further work.

Such work could reinforce the right to be heard and, in particular, address the problem of improving legal remedies, in particular of judicial review. It should be recalled that this matter has not been dealt with in a systematic manner in the MTN Agreements. While we find a right to appeal in the Customs Valuation Code (Art. 11), and in the Agreement on Import Licensing (Art. 3(f), including an obligation to give the reasons for non-approval of applications), other instruments, in particular the Subsidy and Antidumping Code do not provide for such rights of appeal and judicial review.

3. Improving Domestic Procedural Rights

The Swiss delegation submits that further work should be based on the third and modest level of ambition. This does not mean to discourage developments to assign full effect of GATT rules and disciplines within national systems. However, such development still largely depends on national legal traditions and perceptions. It can hardly be introduced, at the present time, by means of international obligations. It should, for the moment, be left to legal developments within national or supranational jurisdictions.

Equally, we do not wish to discourage work based on the second model which defines a selective number of provisions of GATT to be given full effect. This project may be pursued at a later stage, given the fact that it also implies major conceptual shifts of GATT in its relation to domestic law, and that adequate concepts would have to be designed in order to preserve the unity of the system.

Based on the existing obligations of Article X:3 of the General Agreement, the present negotiations could therefore seek to expand the scope of that provision and refine general legal requirements to be met in domestic procedures related to international trade matters under GATT.

The provision of Art. X:3(b) of GATT and its procedural safeguards of administrative and judicial review of administrative action primarily relates to tariff matters which of course, were of highest importance when

the General Agreement was drafted. The term inter alia in Art. X:3(b), however, indicates that - just as the effectiveness of substantive GATT obligations on tariff concessions depends on supplementary prohibitions of non-tariff measures by GATT - the procedural obligations under Art. X:3 are unlikely to remain effective unless they are also observed in relation to non-tariff measures. The introduction of a right to appeal in the Agreement on Import Licensing supports that view.

The Swiss delegation therefore submits that the general scope of Art. X:3 should be clearly expressed and applied to all areas covered by the General Agreement, including non-tariff barriers. Also, it is submitted that the present procedural requirements be refined. Similar provisions should also be introduced in the MTN Agreements, as revised in this Round.

It is conceivable to introduce, for example, the following requirements to be met by national procedures:

- Provisions for fair hearing for all parties substantially affected by administrative or judicial action related to international trade. In case of urgent determination, the right to a hearing may be granted upon complaint only.
- Obligation to provide, at least upon complaint, a reasoned decision without undue delay.
- Prompt and effective provisional measures in case of pending irreversible damage.
- Prompt and effective administrative or judicial review of administrative action related to international trade. The scope of judicial review may be limited to issues of law, excluding questions of fact and discretionary exercise of authority within the law.

It is understood that particular areas of trade regulation may develop further standards of particular importance to the field. A general provision in GATT, however, should contain the procedural minimal standards listed above.

4. Improving Predictability of Individual Rights and Obligations

Finally, it would be useful, with a view to preventing costly disputes both on national and international levels, to seek to improve the predictability of trade regulations. It is therefore submitted to include a commitment to frame national trade regulations in a sufficiently precise manner in order to provide predictability and security of the law. Standards should not be less precise than corresponding rules and principles of GATT.

Under the preceding proposals, the substance of individual rights and obligations of private subjects may fully remain in the realm of national law. Disputes as to the content of those and as to whether they cause nullification and impairment by violation of international rights and obligations under GATT, may continue to stay on the international level. Alleged violations of such rights, including minimal procedural standards, set forth above, are subject to traditional GATT dispute settlement procedures, as revised by Council decision of April 12, 1989, and instruments developed within the Negotiating Group on the Functioning of GATT.