

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG13/W/40

6 April 1990

Special Distribution

Group of Negotiations on Goods (GATT)

Original: English

Negotiating Group on Dispute Settlement

COMMUNICATION FROM THE UNITED STATES

The attached communication has been received from the Office of the United States Trade Representative in Geneva with the request that it be circulated to participants in the Negotiating Group.

ISSUES FOR DISCUSSION:
GATT DISPUTE SETTLEMENT

The United States believes that the Dispute Settlement Negotiating Group should focus primarily on two interrelated areas during the remainder of the Uruguay Round:

- I. Procedures to ensure high quality of panel reports:
 - A. Selection of panelists
 - B. Appellate review of panel reports
- II. Procedures to ensure that panel results are implemented:
 - A. Adoption of panel reports
 - B. Monitoring of compliance
 - C. Compensation and/or compensatory withdrawal

This paper identifies some of the problems that currently exist in these areas, and discusses some of the options for solving them that have been raised in the Negotiating Group. The U.S. delegation remains open to exploring further with other delegations these and any other options for addressing the issues.

I. Ensuring high quality of panel reports.

The quality and consistency of GATT panel reports (in proceedings under Article XXIII:2 and under Tokyo Round Codes) has improved considerably in recent years. This improvement is attributable in part to the selection of more experienced panelists. Few recent panel reports have been so flawed that their adoption by the Contracting Parties has been permanently blocked.¹ To continue this trend, two approaches might be considered: modifying the procedure for selecting panelists; and establishing a procedure to review panel reports that contain

¹ The defending party has blocked adoption of a panel report for several years (with no ultimate Council or Committee action) in only six cases. The EC blocked adoption of reports on pasta, citrus, and canned fruit; Canada blocked reports on gold coins and manufactured beef; and the United States blocked adoption of a report on wine.

findings that are unacceptable to a large number of contracting parties.

A. Selection of panelists.

1. Current practice:

When the GATT Council establishes a panel under Article XXIII:2, it generally authorizes the Council Chairman to consult with the parties on composition of the panel. In practice, a member of the Secretariat is appointed to serve as Secretary to the panel, and he or she usually proposes a list of three panelists, with a senior member as chairman.²

Each party to the dispute is given a chance to reject a panelist for good cause; there are no guidelines for objections that are considered reasonable. In the past, it has often taken several months to agree on panelists. However, the new procedures agreed in 1989 at the Mid-Term Review provide for agreement on panelists within 20 days from establishment of the panel. Failing such agreement, either party may ask the Director General to appoint a panel, which he must do within 10 days of receiving a request. Thus there should be no reason why a panel cannot be composed within 30 days of establishment if a party wishes to exercise that right.

While there was an express preference in the past for governmental panelists, the 1989 rules merely call for "well-qualified" individuals -- governmental or non-governmental. There is a roster of non-governmental panelists, nominated by contracting parties on the basis of their knowledge of international trade and of the GATT. Panelists are often selected from this roster when the Secretariat proposes a slate, but non-governmental experts do not have to be on the roster in order to serve as panelists.

2. Problems encountered:

Many recent panels have included one or more non-governmental panelists -- former GATT Secretariat members, well-known academics in the field of trade law, and retired jurists. Panels have also recently included governmental representatives who have served on at least one previous panel, so the trend is toward appointing panelists with more dispute

² Under the new procedures agreed at the Uruguay Round Mid-Term Review, panels are composed of three members unless the parties agree, within ten days of establishment of the panel, to have five members. See L/6489, "Improvements to the GATT Dispute Settlement Rules and Procedures," Decision of 12 April 1989.

settlement experience. However, the selection process still is largely ad hoc, with no certainty that this trend will continue.

3. Solutions to explore:

One solution is to establish a fixed pool of experts (perhaps 15 to 20 persons), serving staggered terms of two or more years, from which all panelists would be chosen unless the parties to the dispute mutually requested other panelists. Such a pool could include both governmental and non-governmental representatives who had served on panels previously, or appeared before panels on behalf of disputing parties. The composition of this pool could be determined annually by the Director General, after consultation with interested contracting parties. The pool might also be served by a special staff within the Secretariat.

B. "Appellate" review of panel reports.

1. Current practice:

There is currently no provision for substantive review and revision of panel reports. Under current GATT practice, when a panel has completed its examination it first issues to the parties a "descriptive portion" of the draft panel report. This portion describes the facts at issue and then outlines seriatim the legal arguments made by the parties. The parties are then given a period (usually two to three weeks, though it can be longer if the panel thinks it appropriate) to review that portion of the report and to submit to the panel written suggestions for changes or additions. These suggestions are usually limited to the panel's characterization of that party's arguments, and corrections of factual errors; the panel retains the discretion to accept or reject the parties' suggestions.

About two weeks after receiving comments on the descriptive portion, the panel issues its final report to the parties on a confidential basis. The final report includes findings and conclusions and, in most cases, a recommendation that a party take steps (usually unspecified) to come into compliance with its GATT obligations if the panel has found a breach. The parties are asked to keep the panel report confidential and are encouraged to reach a mutually satisfactory solution by a certain date,³ after which the Secretariat will circulate the report to all contracting parties (unless the parties jointly request that it be withheld).

³ The period during which the panel report is available only to the disputants is usually two to three weeks, although the panel can prescribe a longer period if appropriate.

2. Problems encountered:

If one of the parties believes the panel has made an error on the factual portion of the panel report, that error usually is corrected before the final report is issued. If a party believes there is an error of law, however, that party's only recourse under current procedure is to argue before the full GATT Council that the report is fatally flawed and should not be adopted. Most members of the Council will not have studied carefully the issues examined by the panel, nor researched the legal questions at issue. Thus, a sufficient review of the panel's reasoning is unlikely to occur in such a forum.

3. Solutions to explore:

To reduce the potential for parties to request a review, panels could issue an interim report that includes both findings and conclusions (rather than solely the factual portion of the report) to the parties for comment, a few weeks in advance of issuing a final report. The parties' comments on an interim report might result in revisions to the report that would make it easier for the losing party to accept. The panel could either meet without the parties to consider the parties' written comments; or the panel could invite the parties to present comments on the interim report at an additional hearing, if requested, before issuing its final report.

In addition, a review process could be established for extraordinary cases where a panel report contains legal interpretations that are questioned formally by one of the parties. A number of approaches to such review can be envisioned. The right to review could be either automatic or granted by the Council, and the parties could be required to agree in advance to be bound by the results of the review. The review could be conducted in a very short period (e.g., 60 days), unless the parties mutually agreed to a longer period. In such a review, the review panel could be asked to address specific questions of law presented to it by the parties, rather than reconsidering all the issues considered by the panel below. Alternatively, if there were a standing review panel, it could determine whether and what issues to review.

There are a number of questions, however, that arise in considering an appellate mechanism:

- How might we ensure that the review process is used only in extraordinary cases, rather than affording an automatic opportunity to delay the dispute settlement process?
- Should the same panel that considered the case initially be requested to reconsider questions addressed to it by the parties (in effect, afford a rehearing), or should a separate review panel be established? Or could a review panel be composed of the original three panelists plus two new panelists?
- If a separate review panel were established, how would the review panelists be selected? How would such panels be staffed?
- Would the findings of review panels be automatically binding upon the parties, or subject to adoption by consensus?

Answers to these questions become critical to the procedure for adoption of panel reports, whether they are reports of an initial panel or an appellate panel.

II. Procedures to ensure that panel results are implemented.

GATT rules and procedures currently contain no time limit for implementation of recommendations that flow from a GATT panel report, and such implementation may take many years, even where a panel report is quickly adopted by the Contracting Parties. To ensure compliance with GATT obligations, procedures should be considered for obtaining prompt adoption of panel reports, requiring a timetable for implementation, and allowing for compensation (or, as a last resort, retaliation) when implementation is not forthcoming.

A. Adoption of panel reports.

1. Current practice:

Thirty days after the panel report has been circulated to the contracting parties, it is placed on the agenda of the next scheduled GATT Council meeting for discussion and adoption. The Council adopts a panel's findings and recommendations by consensus, and the Contracting Parties formally adopt all Council decisions at the annual CPs Session. Since a consensus must include the parties to the dispute, either party may block adoption, even if its position is not supported by other contracting parties.

Some panel reports are adopted at the first Council meeting where they are discussed, but more are adopted the second or third time they are on the Council agenda. Since many panel reports contain interpretations of GATT provisions, the panel's legal reasoning is addressed in Council by several contracting parties, whether or not they have any direct trade interest in the outcome. Generally, however, if the parties to the dispute are willing to agree to adoption of the report, other contracting parties may express disagreement with the panel conclusions, but indicate they will not stand in the way of a consensus to adopt the report. In this way they might maintain they are not bound by the panel's interpretation of the GATT, as if they were entering a reservation on the legal conclusions. In fact, it is likely that if they have similar practices that are subsequently challenged in a GATT panel, the subsequent panel probably will rely on the precedent set by the earlier panel report. These informal "reservations" have no legal status, but may be brought to the attention of future panels.

2. Problems encountered:

The ability of a losing party to block adoption of a panel report permanently, even when unsupported by other contracting parties, remains a serious impediment to the system. Similarly, the uncertainty about the legal status of panel reports -- and the extent to which they create a precedent to be followed by future panels -- must be clarified.

3. Solutions to explore:

One approach, already considered by the Negotiating Group, is to provide that panel reports shall be automatically adopted by the Council if, after a specified period, no specific objections to adoption are raised. This would enable panel reports to be accepted without an affirmative decision by the disputants, but it would be unlikely to resolve the problem of blockage where a losing party raises strong objections.

Some delegations have also considered having automatic adoption of panel reports unless an appellate review is requested within a specified time. In this way, the panel report is issued as an opinion of experts and the GATT Council's deliberations would focus only on the appropriate time frame for implementation of the panel's recommendations.

In addition to adoption of panel reports by the Council, the Contracting Parties, at their annual sessions, could adopt decisions accepting particular legal interpretations of the GATT that are contained in panel reports, to clarify any legal obligations that might flow from the adoption of panel findings.

Another approach is to retain the current practice of adoption of panel reports by consensus, but with an additional procedure to break a stalemate if a losing defendant is the only party blocking that consensus. This is the single most difficult issue facing this Negotiating Group. In considering different procedures by which reports could be adopted, it is useful also to consider what steps may be taken by affected parties in the absence of compensation, or other remedial action, after a report has been adopted.

B. Monitoring compliance.

1. Current practice:

Panel reports are "de-restricted" upon adoption, which means they can be made available to the public and used by governments to explain to domestic constituencies the basis for changing a policy or practice condemned by a panel. After a panel report has been adopted, the party subject to the panel recommendation must inform the Council of its intentions with respect to implementation. Six months after adoption, the issue of implementation is placed on the Council agenda and remains on the agenda until it is resolved. Ten days prior to each Council meeting, the party concerned has to submit to the Council a written progress report on implementation. Since this procedure entered into effect May 1, 1989, we have not yet had experience with this surveillance process.

2. Problems encountered:

Since there is no rule on how long a party should be given to remove a measure found to nullify or impair benefits of other contracting parties, implementation generally takes too long. In some national legal systems, implementation requires the passage of legislation, while in others implementation can be effected through executive action. Sometimes implementation is achieved only after the winning complainant seeks authorization to retaliate.

3. Solutions to explore:

One approach is to require that a losing defending party consult with the complaining parties during a specified period (perhaps 90 days, as was recommended in the Korea beef panel report), with a view to reaching an agreed timetable for implementation. In the event that no such agreement is reached, procedures could be followed for compensation or retaliation (discussed below).

C. Compensation and retaliation.

1. Current practice:

If the party subject to an adopted panel recommendation does not implement the recommendation within a "reasonable period of time" (as yet undefined), the complaining party may request the Contracting Parties to authorize it to suspend certain GATT obligations to the defending party -- in effect, to retaliate. The request is submitted in writing to the GATT Secretariat, for circulation to the Contracting Parties, and it should include the details of the proposed retaliation, including the amount of trade to be affected. The request is considered at a meeting of the Council, which is required to determine whether "the circumstances are serious enough to justify such action," and to determine if the proposed retaliation is appropriate in the circumstances (i.e., commensurate with the amount of nullification or impairment suffered by the complaining party). Since such authorization has been granted only once in GATT history,⁴ there is no established procedure. However, in that one case the question of the amount of the proposed retaliation was considered by a working party, and the working party recommendation was adopted by the Contracting Parties. The two parties participated in the discussions in the Working Party, but did not participate in the framing of the recommendations to the Contracting Parties.

2. Problems encountered:

Application of the consensus approach has allowed a defending party, in effect, to block authorization to retaliate. The decision whether proposed retaliatory measures are "appropriate in the circumstances" -- especially with respect to the amount of trade to be affected by the proposed retaliation -- is unlikely to be made in the Council without reference to a panel or working party. Moreover, there are no accepted guidelines for determining the extent of trade damage suffered by the complaining party.

⁴ In 1951 the Netherlands and Denmark complained that U.S. import restrictions on dairy products violated GATT Article XI, and the United States did not contest their claim. When the restrictions had not been removed a year later, the Contracting Parties authorized the Netherlands to impose a 60,000 T import quota on wheat flour from the United States during calendar year 1953, on the basis of a working party recommendation. The Netherlands had proposed a 57,000 T quota, but the working party recommended action of less magnitude. The CPs re-authorized the retaliatory quota annually until 1959.

3. Solutions to explore:

One option would be to give a "winning" complainant an automatic right to withdraw concessions if, after a specified time, the defending party has neither complied with the panel recommendations nor agreed to an acceptable timetable for compliance. If such an option were available, a period of delay before retaliating would be desirable, so that retaliatory measures are used only as a last resort.

Under this scenario, the rules could provide for a specified period (perhaps 90 days from the date of adoption of the panel report) during which the disputants should agree to a timetable for implementation. If the parties are unable to agree on a timetable within that period, the complainant would be free to seek compensation or propose retaliation. If acceptable compensation is not agreed upon within a specified number of days, the complainant would be free to implement its proposed retaliation unless the amount of the proposed retaliation were challenged by the defendant. (In such cases, one option is to submit the question of the amount of damage and equivalent retaliation to binding arbitration -- either by a new panel or by the panel that issued the original panel report. However, it would be necessary to adopt guidelines to assist arbitration panels in assessing trade damage.) The disputants could mutually agree to extend any deadline if they believed additional time would facilitate an agreement.

If a timetable is agreed and the defending party fails to meet the deadline for implementation agreed in that timetable, the complainant could be free to retaliate (unless the parties mutually agreed to an extension of time), and only the amount of the retaliation would be subject to review.

Retaliation, once imposed, would be considered a temporary measure to be removed when the losing defendant eliminates or begins to phase out the practice at issue, or provides an imminent solution to the nullification or impairment caused. Consultations between the disputants would continue, with a view to reaching a mutually satisfactory solution, and the good offices of the Director General could be sought at any time to encourage a satisfactory implementation schedule.

In adopting any procedure that facilitates retaliation, contracting parties should recognize that retaliation is not the objective of dispute resolution and would be allowed only to provide a concrete incentive for a more prompt remedy to the practice at issue.

* * * * *

The United States delegation is prepared to explore all of the foregoing approaches with other members of the Negotiating Group, to determine whether any of them should be pursued further. Whether the United States could accept any of these provisions would, of course, depend on the overall balance of concessions achieved in the negotiations.