

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Negotiating Group on Dispute Settlement

DISPUTE SETTLEMENT

Communication from Canada

The following communication has been received from the Delegation of Canada on 28 June 1990 with the request that it be circulated to participants in the Negotiating Group.

Dispute settlement is an integral part of a well functioning and credible multilateral trading system, underpinning the rights established by the multilateral trade agreements. A fundamental objective of the Uruguay Round is to make the dispute settlement system more effective, timely and predictable. While improvements have been steadily made to the system over the years and new procedures regarding establishment and operation of panels have been implemented on an interim basis as a result of the Mid-Term Review, further improvements are needed.

An improved GATT dispute settlement system will fulfill the Punta del Este mandate of ensuring prompt and effective dispute settlement for the benefit of all contracting parties. It will strengthen the credibility of the GATT as the forum for the resolution of trade disputes and allow countries to commit themselves to act within the trading rules to resolve disputes.

In order to be effective and credible, the multilateral dispute settlement system must be accepted by all contracting parties. Criticisms condoning recourse to unilateralism purport that the existing GATT rules are inadequate, and that the GATT system is slow and can be subject to inordinate delays. Substantial improvements in the rule making areas in the Uruguay Round combined with improvements in the dispute settlement process would respond to these criticisms. The value of stronger rules is diminished if contracting parties choose to ignore the multilateral system. Contracting Parties must strengthen their commitment to abide by the dispute settlement rules and procedures and agree to refrain from unilateral measures inconsistent with these rules and procedures.

GATT SECRETARIAT

UR-90-0368

A) Review of Panel Reports

Issue

Current practice has revealed a number of difficulties with respect to decisions reached by panels. At times, these concerns have related as much to political considerations as to substance. Parties to a dispute are provided an opportunity to review the factual part of the panel's report prior to its circulation but not its conclusions. This has resulted in a number of instances where a panel's conclusions have been questioned by a party to the dispute and a request has been made for a further opportunity to meet with the panel to comment on the decision. In most cases, panels have declined these requests and a party to the dispute has been left to argue its case before the Council. The denial of an opportunity to have a proper airing of a concern could make it more difficult to take the necessary domestic decision enabling acceptance of a panel report.

Proposal

In order to ensure that a panel is fully aware of all concerns, a review stage should be added to the current process. This would allow a panel to provide clarification and possibly reverse errors or avoid decisions on matters not essential to the case at hand.

The panel would present an interim report, comprising both the factual part and its findings, in confidence to the parties to the dispute. A party to the dispute could then request the panel to review precise aspects of the findings of the report before its circulation to other contracting parties. The parties would provide the panel with written arguments regarding their precise concerns with specific aspects of the report. At the request of a party, the panel would hold another meeting with the parties.

As a result of a review, the panel might modify all or part of its interim report or decide to maintain its interim report. The panel would issue a final report containing a statement of the facts and the arguments made by the parties, including those made at the review stage, as well as its findings and conclusions. The final report would be circulated to all contracting parties.

The review stage should not lengthen the time required for the panel process. As a general rule, panels would provide the interim report to the parties within not more than (4) months. Parties would then have (20) days to provide the panel with written arguments regarding their

precise concerns with specific aspects of the report. At the request of a party, the panel would hold another meeting with the parties (10) days later. The panel would then decide whether to maintain or to modify all or part of its interim report, and would circulate the final report to the parties within an additional (15) days.

B) Consideration of Panel Reports

Issue

As the GATT dispute settlement system now operates, governments have been able unilaterally to block adoption of a report which finds against them and then delay implementation indefinitely. It is in the interest of an effective system that a panel report be responded to quickly. At the same time governments have legitimate concerns about changing domestic measures as a result of a GATT ruling. Any panel decision must be a reasonable interpretation of the rules.

The Mid-Term Review improvements provide that parties to a dispute have the right to participate fully in the consideration of panel reports by Council. To this end, contracting parties having objections to panel reports must give written reasons to explain their objections at least 10 days prior to the Council meeting at which the panel report will be considered. In addition, in order to provide sufficient time for the members of the Council to consider panel reports, they cannot appear on the agenda of Council for adoption until at least thirty days after their circulation to contracting parties. These procedural improvements, coupled with the additional panel review stage proposed above, should ensure that contracting parties are in a position to give full and careful consideration to panel reports the first time they appear before the Council.

Proposal

Discussion of the panel report would take place at the first or, at the latest, the second Council meeting at which the report appears on the agenda in order that all contracting parties have a full opportunity to express their views. The report would be accepted by Council unless one of the parties to the dispute formally notifies the Council of its intention to appeal the report to the Appellate Body. There would be no formal requirement for Council to adopt a panel report. Only the parties to the dispute would have standing to appeal a report. In cases where a report is not appealed, the report would be considered accepted and therefore final. Contracting parties would have a full

opportunity at the Council meeting to express their views with respect to the panel report. These views would be recorded in the minutes of the Council meeting.

C) Appellate Mechanism

Issue

In rare cases, where a party to a dispute considered, despite the review by the panel, that a report was so fundamentally flawed that it should not be accepted, the GATT dispute settlement system should provide for a means of correcting errors. The addition of an appellate mechanism would serve that purpose. The intent would not be to have appellate review become a quasi-automatic step in the dispute settlement process. Rather, in those cases where a party to a dispute considered that the panel had made a fundamental error in interpretation of rights and obligations, that party could ask for appellate review. Decisions of the Appellate Body would be final.

Proposal

Where a party to the dispute believes that a panel has made a fundamental error in its findings, that party may appeal that report to the Appellate Body. Only issues raised during the panel process could be brought to the Appellate Body. The Appellate Body would examine the questions raised by the appellant and would decide whether the case merited an appellate review. Where the Appellate Body decided not to hear the case, it would state the reasons for that decision in writing and it would uphold the panel report. Where it decided to grant an appellate review, the parties would make written representations and have a hearing before the Appellate Body.

After a full examination of the questions raised, based on an analysis of the record, the Appellate Body would make a decision. It could decide either to uphold the panel report or to substitute its own decision for that of the panel. In either case, the decision of the Appellate Body would be final. The decision would be circulated to the parties to the dispute and to the other contracting parties. It would be notified to Council and would be discussed at the next Council meeting. Contracting parties would have a full opportunity at the Council meeting to express their views with respect to the appeal decision. These views would be recorded in the minutes of the Council meeting.

The Appellate Body would be made up of a limited number of eminent GATT experts appointed by the contracting

parties for a specific period of time. The members of the Appellate Body would be appointed by the contracting parties for (3) years and could be reappointed. Members of the Appellate Body would not necessarily be resident in Geneva but would be expected to be available as required. The Appellate Body would establish its own rules of procedure. Members of the Appellate Body would be free to engage in outside activity as long as they avoided either direct or indirect conflicts of interest.

The Appellate Body would consist of (3) full members and (4) alternate members. The full members would constitute the Appellate Body for each dispute sent to appeal. In the rare instances where a full member was unable to participate in an appellate review, that member would be replaced for that review by one of the alternate members. A Chairman would be chosen by lot for each appellate review from among the full members of the Appellate Body.

The Appellate Body would only require a small independent secretarial staff to provide the members with the necessary documents, arrange logistics of meetings, ensure that reports are typed, etc. The Appellate Body could hire such outside research, legal or technical assistance as the members might deem necessary.

The Appellate Body would conduct its review expeditiously. The appellate process should not exceed (60) days. The entire period for final resolution of disputes in the GATT system would not exceed eighteen months.

D) Implementation

Issue

The objective of the GATT dispute settlement process has consistently been to secure the removal of measures impairing benefits through a breach of the rules. The principle governing implementation is that the contracting party that must implement has a reasonable period of time in which to do so. In some circumstances it may be possible to implement a panel report immediately. In other circumstances it may be necessary to provide more time to implement panel recommendations. It is the contracting party that must implement the recommendations or rulings that is best placed to know how much time it requires to implement. It should, in the first instance, be allowed to indicate its intentions with regard to implementation. However, the reasonable period of time must not be used as a pretext to delay implementation.

Proposal

The contracting party that must implement a panel report should inform the Council of its intentions in respect of implementation, either when the panel report is accepted or when the appeal decision is discussed in the Council. If the period of time required for implementation is acceptable to the parties to the dispute, the matter would end there. If, however, any party to the dispute considered that the time proposed for implementation was unreasonable, it would have recourse to an impartial arbitration procedure.

The parties to the dispute would have a short time period in which to agree on a timetable for implementation, perhaps (6) months. If at the expiry of the (6) months the parties were unable to agree on the timetable for implementation, the matter would be referred to arbitration to determine the period of time. The arbitration process would occur quickly and would be completed within (2) weeks. Among the possible arbitral bodies could be the original panel, the members of which would be well aware of all the aspects of the dispute, or an arbitrator appointed by the Director General of the GATT.

Only at the expiry of the time for implementation as agreed by the parties or as determined by the arbitral body would the non-implementing party be subject to the withdrawal of concessions in accordance with the procedure proposed below.

(It is possible that the parties to the dispute could disagree as to whether the measure proposed or taken by the party that must implement amounted to complete implementation or was itself in conformity with the provisions of the General Agreement. In case of disagreement, the party alleging that the measure did not entirely implement the panel report or was itself not in conformity with the GATT would of course have to resort to normal GATT dispute settlement procedures to show this was the case.)

E) Withdrawal of Concessions

Issue

There is a need to clarify and strengthen the procedures for requesting authority to withdraw concessions in the event the party impairing benefits does not act within the reasonable period of time. The intention would

be to increase pressure on that party to remove its measure. The objective remains removal of the measure, not compensatory withdrawals.

Proposal

A contracting party to the dispute requesting authorization to suspend the application of concessions or other obligations would present a specific request to the Council. Failure to implement the panel report within the reasonable period of time would constitute the serious circumstances of Article XXIII:2. Withdrawal of concessions would not be allowed before the expiry of the reasonable period of time.

Normally, the request would be authorized automatically by the Council. However, where there is a dispute as to the amount of trade subject to the proposed withdrawal of concessions, that question could be referred to binding arbitration. The arbitration could be carried out by the panel that originally examined the dispute or an arbitrator appointed by the Director General of the GATT. The arbitral body would carry out its work within (1) month.

The determination of the arbitral body would not relate to the products on which it was proposed to withdraw concessions. The choice of products must remain with the party seeking authorization to retaliate. Rather the determination of appropriateness would relate to the amount of trade likely to be affected by the proposed retaliation and its relation to the amount of nullification or impairment caused by the failure to implement. The amount of nullification or impairment would be calculated as from the date that the panel report was first circulated to the contracting parties.

The parties to the dispute would be able to present to the arbitral body any material they consider relevant to the determination. The decision of the arbitral body would be final. The decision would be circulated to the contracting parties for information. Council would monitor the withdrawal of concessions.

Withdrawal of concessions would be temporary and would only be applied until such time as the measure found to be inconsistent with the General Agreement has been eliminated, or agreement has been reached on its phasing out, or the contracting party that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits.

F) Other Issues

Issue - Common Procedures

In order to increase the credibility and effectiveness of the international trading system, the same broad set of dispute settlement rules and procedures should apply to all obligations assumed under the GATT system, whether under the General Agreement, the Codes or any new agreements. This would provide for common procedures in such areas as consultations, good offices, mediation, arbitration, conciliation, panel procedures, acceptance of panel reports, appellate mechanism and implementation.

The common procedures would have to allow for special procedures which are unique to specific agreements. In particular, the system would have to take into account the technical aspects of specific agreements, e.g. subsidies, safeguards, technical barriers, intellectual property and services.

Proposal

The GATT Secretariat should prepare a consolidated text of dispute settlement procedures, taking account as appropriate of unique provisions of existing agreements as well as new Uruguay Round agreements. At a minimum, the results of the MTN negotiations in dispute settlement should be made applicable to all existing agreements as well as to new agreements resulting from the Round.

Issue - Fragmentation of the Dispute Settlement System

Under the current GATT system, there are now a multiplicity of different dispute settlement procedures. The Uruguay Round agreements could result in even greater fragmentation of the system. This situation results in disputes about the appropriate forum, and confusion about the procedures under various agreements. It is questionable whether every agreement requires an entirely separate dispute settlement system. The time has come to consider developing a more unified, effective dispute settlement system where trade disputes involving related obligations can be resolved under one roof.

Proposal

In order to prevent further fragmentation of the system and to discourage forum-shopping, the procedures for dispute settlement, including consultations, good offices, mediation, conciliation, arbitration, panel procedures and

appellate mechanism, should be supervised under the authority of a central body. Such a system would enable all relevant rights and obligations as between the parties to a dispute to be considered. A more unified system is necessary to ensure trade policy coherence and even-handed enforcement of GATT rules and obligations.

Issue - Establishment of a Panel

It has been suggested by some commentators on the GATT dispute settlement system that the Mid-Term Review improvements to the dispute settlement system that are being applied on a trial basis are not sufficiently clear that a contracting party has a right to the establishment of a panel under Article XXIII.

Proposal

The consolidated text should remove all ambiguity on this point and make it clear that a contracting party has a right to the establishment of a panel under Article XXIII in any situation where it claims that there is a violation of the obligations of the General Agreement or that benefits are being nullified or impaired.

Issue - Roster of Panelists

The current system of choosing panelists affords flexibility, while at the same time ensuring that undue delay will not occur since, at the request of a party to a dispute, the Director General is required, in consultation with the Chairman of the Council and after consulting the parties to the dispute, to form the panel if there is no agreement on the members within twenty days from the establishment of a panel. Contracting parties recognize the need to maintain the existing flexibility in the choice of panelists yet to ensure that highly qualified individuals continue to serve as panelists. Improvement in the roster of panelists will help maintain the high quality of panel members.

Proposal

The roster of panelists should be amended to allow for the inclusion of governmental as well as non-governmental experts. Guidelines should be developed for the use of contracting parties in nominating individuals for the roster.

Issue - Non-Pursuance of Complaint

The existing GATT dispute settlement system has no provision for cases where a panel is established but not pursued further because the contracting party that requested the establishment of the panel has decided, for whatever reason, not to proceed further.

Proposal

The consolidated text should provide that if a panel is established but no further action is taken within (12) months, because the party bringing the complaint has chosen not to pursue it further, the panel be terminated. The party bringing the complaint would be free to request the establishment of another panel to examine the same issue at a subsequent date, if it determined that the matter had not been resolved to its satisfaction.

Issue - Assessment of the Dispute Settlement System

A revised dispute settlement system along the lines set out above, coupled with the Mid-term Review Improvements to the GATT dispute settlement rules and procedures now being applied on a trial basis, constitutes a significant change to present practice. Experience over time with the revised system may reveal a need to review the operation of the dispute settlement system and perhaps to make some changes.

Proposal

After Contracting parties have had sufficient experience with the revised dispute settlement system, they may decide to review the operation of the system and make such changes as they may deem necessary.