

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

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

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PROPOSAL BY MEXICO

The following communication has been received from the Delegation of Mexico on 11 July 1990 with the request that it be circulated to participants in the Negotiating Group.

INTRODUCTION

1. At the Mid-Term Meeting, major improvements were elaborated in the field of dispute settlement, on the understanding that they would be applied on a trial basis until the end of the Uruguay Round. These improvements covered only part of the procedures, and it was therefore agreed that the Negotiating Group would continue its work for the full achievement of the negotiating objective. Consequently, the balance of the total results on dispute settlement and, ultimately, the definitive application of the improvements agreed on at the Mid-Term Meeting may be expected to depend on the results obtained for the rest of the procedures.
2. It appears from the mid-term document and the meetings of the Negotiating Group held so far that the main issues to be negotiated include: adoption of panel reports; implementation of rulings and recommendations under Article XXIII:2; compensation and retaliation in the context of GATT dispute settlement rules and procedures; and strengthening of the commitment to abide by the GATT dispute settlement rules and procedures and to refrain from unilateral measures.
3. The proposals advanced in this document are aimed at strengthening the dispute settlement system (i) by providing procedural advantages for the party affected by a measure rather than for the party that adopted the measure, as is currently the case, and (ii) by allowing greater flexibility and security for the party that adopted a measure for it to accept and implement panel recommendations in exchange for greater commitments in this respect. The question of strengthening the commitment to abide by the procedures and refrain from unilateral measures will remain under discussion until there is a more precise idea of the procedures to be applied in the future.

## PROPOSAL

### I. Adoption of panel reports

The adoption of reports has very often encountered two kinds of problem which it is urgent to resolve. The first is substantive and arises where one of the parties to the dispute opposes a panel's conclusions and recommendations on the grounds that they are not sound or appropriate from the legal standpoint. The second type of problem is procedural, and arises where one of the parties takes advantage of the shortcomings of the decision-making system to block the adoption of reports by opposing a consensus.

#### A. Problems of a substantive nature

4. Under the present procedures, the parties to a dispute receive only the descriptive part of the panel report before it is circulated to the other contracting parties. This has prevented the parties to the dispute from submitting their observations on the panel's conclusions and recommendations in advance of the submission of the report to the Council of Representatives.

5. Experience has shown that much of the opposition to the adoption of panel reports has been based on arguments to the effect that the reports suffer from mistakes or errors of substance because they have failed to take due account of the observations of the parties to the dispute, generally of the party that lost the case.

6. In order to resolve this situation, it is proposed that in the internal procedure of panels a new stage be introduced. Without delaying the time-limits established in the mid-term document, this would enable parties to the dispute to make known the observations they may wish to make on the panel's conclusions and recommendations before the report is submitted to the Council.

7. According to this proposal, parties to a dispute would receive the full draft report of the panel, including its conclusions and recommendations, forty days before the time limits established for its submission to the Council. This forty-day period would mean that the parties to the dispute would have a period of twenty days to communicate their observations on the draft report to the panel and the latter would either confirm or amend the draft in the next twenty days. If necessary, the panel could hold another meeting with the parties to the dispute to review the draft report for the last time.

#### B. Problems of a procedural nature

8. The practice whereby panel reports are adopted by consensus has led to abuse and delay in the settlement of disputes between parties, which seriously weakens the whole GATT system. The improvements agreed on in the various Uruguay Round negotiating groups will be to no avail if, at the end of the process, sufficient means are not available to ensure that they are complied with by all contracting parties.

9. In the mid-term document, participants in the Uruguay Round accepted a partial limitation of their rights by agreeing that "a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise".

10. It would be inconsistent if, after accepting this type of solution for the establishment of panels, a contracting party had substantive difficulties in accepting a similar solution for the adoption of reports. In fact, it has already been established that the period from the request under Article XXII:1 or XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed to by the parties, exceed fifteen months.

11. Accordingly, it is proposed here that panel reports be adopted, at the latest at the Council meeting following that at which the draft report first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise or any of the parties to the dispute appeals to the appellate body.

C. Appellate body

12. The purpose of establishing an appellate body is to compensate for the virtually automatic adoption of panel reports, by allowing parties to a dispute the opportunity to have reports reviewed in their entirety by a body specialized in GATT matters: in other words, by a body whose membership and permanent nature ensure that the final conclusions and recommendations are free from any doubt or error of interpretation concerning GATT rules and disciplines.

13. The appellate body would be available to all contracting parties. However, this remedy should not be used as just another procedure in dispute settlement. Parties to a dispute which so request must present their case in writing, indicating their grounds for considering that the panel report being appealed is unsound and the specific points they wish to have reviewed by the appellate body. In addition, all appeal applications must be accompanied by a formal declaration reiterating that the applicant will accept the final outcome of the appeal.

14. The appellate body must submit its conclusions and recommendations to the Council within a maximum period of three months. Its conclusions and recommendations shall be final. Given that the applicant accepted the results of the appeal in advance, the adoption of the report of the appellate body by the Council will have its automatic approval. The other parties shall have the right to express their opinions; however, as the appeal procedure has been completed, the report of the panel/appellate body must be adopted, unless at that meeting the Council decides otherwise.

15. The appellate body shall be composed of five members appointed by the CONTRACTING PARTIES for a specified period (three years, for example) and two appeal specialists of the GATT secretariat's Legal Division. It shall have its own support staff to assist it in carrying out its work and may call on the advisory services of experts outside GATT when it considers this to be necessary. The Chairman of the Panel whose report has been appealed may participate on invitation to clarify to the appellate body the conclusions and recommendations of the Panel report in question.

II. Implementation of rulings and recommendations under Article XXIII:2

16. The implementation of panel rulings and recommendations is closely linked with the question of compensation and retaliation in the context of GATT rules and procedures. In practice, the latter are the only means of restoring the balance of rights and obligations among parties or of providing an incentive for the withdrawal of measures that are incompatible with GATT obligations.

17. The mid-term document recognizes that prompt compliance with recommendations or rulings of the CONTRACTING PARTIES is essential in order to ensure effective resolution of disputes to the benefit of all contracting parties, that the contracting parties concerned shall inform the Council of their intentions in respect of implementations or rulings, and that if it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned shall have a reasonable period of time in which to do so.

18. The aim in this document is to elaborate further on obligations as regards provision of information by the contracting party concerned, and also to allow greater flexibility in the period for implementation of rulings or recommendations in exchange for greater obligations in case of non-compliance with them.

19. These proposals are based on the assumption that GATT-inconsistent measures adopted by the Executive branch should be withdrawn immediately, since the Executive itself can do so, while measures adopted by the Legislative branch need more time to be withdrawn.

A. Information

20. It is proposed that in cases where it is impracticable to comply immediately with recommendations or rulings because they concern measures adopted by the Legislative branch of the party concerned, the latter, when requesting a reasonable period for doing so, shall provide detailed information concerning the constitutional procedure it will have to follow for its legislative body to carry out the reforms submitted to it by the Executive in order to comply with its GATT obligations; propose a time-frame for implementing the panel rulings or recommendations in full; and undertake to follow that procedure as far as possible, on the understanding that if it fails to fulfil its obligations within the agreed reasonable period the party concerned shall not oppose the authorization by

the CONTACTING PARTIES of the suspension of concessions or obligations in accordance with Article XXIII:2 of the General Agreement at the request of the affected party.

21. This information will enable the Council to know more accurately the amount of time required for carrying out the legislative amendments which the party concerned must make in order to comply with its GATT obligations; determine the reasonable period to be applied in the dispute in question for compliance with the panel's rulings or recommendations; and use it as a basis for the written status reports on progress in the implementation of the rulings or recommendations agreed on in the mid-term document.

B. Reasonable period

22. In order to ensure that the definition of the reasonable period does not become a sort of open-ended waiver which bypasses Article XXV of the General Agreement shall be agreed between the parties to the dispute and adopted by the Council. If the parties cannot come to an agreement, the period shall not exceed two years from the adoption of the panel report.

23. Parties which comply with their obligations within the established period shall be exempt from payment of compensation or retaliation under any circumstance, including the time during which they delayed in the implementation of the rulings or recommendations. However, parties which do not comply within the reasonable period shall be subject to compensation or retaliation for the same amount of time as that during which the measure under dispute is applied.

24. Once the reasonable period has expired, parties affected by the failure to implement the rulings or recommendations may be authorized to suspend the application of concessions or other obligations to the contracting party which has not implemented the ruling or recommendations, in accordance with Article XXIII:2 of the General Agreement, on the understanding that the latter party may not oppose such authorization.

25. If after such suspension has been authorized the Council or the party concerned considers that the amount thereof is disproportionate, the question of the determination of such amount shall be referred to the appellate body for the latter to decide within a period of six months from the suspension, taking account of the circumstances.

III. Compensation and retaliation in the context of GATT dispute settlement rules and procedures

26. Both compensation and retaliation should continue to be used as extreme measures for restoring the balance of rights and obligations among parties or for providing an incentive for the withdrawal of measures that are not compatible with the General Agreement.

27. Both compensation and retaliation may be requested only if the party concerned does not comply with panel rulings and recommendations. However, this does not mean that the parties affected may not request either of these measures before the reasonable period has expired, on the understanding that they would not enter into force until the need for doing so has been established.

28. In fact, in order to avoid possible mishaps and encourage the party concerned to abide by panel rulings and recommendations, it is considered desirable that the affected parties should request compensation or retaliation immediately following the adoption of the report of the panel or the appellate body. In this way, the party concerned will know in advance the cost it will incur by not complying with its GATT obligations.

29. Furthermore, as mentioned in paragraph 24 above, once the reasonable period has expired the compensation or retaliation will last for the same period of time as that during which the measure under dispute is applied. In other words, the duration would be a period going beyond the withdrawal or elimination of the measure under dispute to the same extent as the time that elapses between the entry into force of the measure and the date on which the reasonable period expires. If the measure was in force for a total of five years, for example, the compensation or retaliation would also last for five years, regardless of the fact that the measure in question had been withdrawn in the third year after the entry into force of the compensation or retaliation.

30. Where the Council or party concerned considers that the amount of such suspension is disproportionate, the appellate body shall confirm or modify that amount taking into account the nature of the dispute. In cases of nullification or impairment of concessions, the extent of the suspension shall be based on the concept of "substantially equivalent concessions". In other cases, the suspension may be greater than under that concept, according to the circumstances.