

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

PROFILE ON THE STATUS OF THE WORK IN THE GROUP

REPORT BY THE CHAIRMAN

Introduction

1. At the Mid-Term Review in Montreal, the Ministers decided that the Negotiating Group on Dispute Settlement should continue its work for the full achievement of the negotiating objective as established at Punta del Este. The Ministers noted that the work of the Group should include the examination of the following four issues that remained unresolved at Montreal:

- adoption of panel reports;¹
- implementation of rulings and recommendations under Article XXIII:2;
- compensation and retaliation in the context of GATT dispute settlement rules and procedures;
- strengthening of the commitment to abide by the GATT dispute settlement rules and procedures and refrain from unilateral measures inconsistent with these rules and procedures.

2. The following is the Chairman's understanding of the present stage of the negotiations in the Group. It is intended to reflect the possible future shape, coverage and elements of an agreement in the dispute settlement area. There is general recognition in the Group that all of the issues covered in this report are closely interrelated and that their final resolution presupposes agreement on an integral package covering the entire area. It is also clear that all of the areas covered will require further deliberation following the GNG and TNC meetings in July.

Review Stage in Panel Process

3. There is general support for a proposal that an interim review stage be provided in the panel process, whereby a panel would present an interim report to the parties to a dispute which would include both the descriptive

¹In this connection, certain delegates have shown considerable interest in the creation of an appellate review mechanism.

part (as is done presently) and the panel's findings. A party could then request the panel to review precise aspects of the findings² before circulation of the final report to the contracting parties. As a result of a review, the panel might modify its interim report or decide to maintain it. 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. The review stage should not result in a lengthening of the time required for the panel process. While some delegations would be satisfied with a review stage standing alone, others consider that such a review stage would not be a substitute for, but an addition to, an appeal mechanism. In order to preserve the right to appeal, it has also been suggested that a party would have to note its objections to the panel report at this stage.

Consideration of Panel Reports

4. There has been considerable discussion of whether the adoption or "acceptance" of panel reports needs to be made automatic. One option would guarantee acceptance of a panel report by the Council at the first or, at the latest, the second Council meeting at which the report were to appear on the agenda unless at that meeting the Council decided otherwise or one of the parties to the dispute formally notified the Council of its intention to appeal the report. This would be without prejudice to the present practice whereby contracting parties may express their views on a panel report. Other options include traditional full consensus and modulated consensus. In considering this issue, the role of the CONTRACTING PARTIES as envisaged in Article XXIII:2 will need to be further examined.

Appellate Review

5. The Group has given consideration to the possibility of providing an appeal mechanism in the GATT dispute settlement system to correct exceptional errors in the legal reasoning of panel decisions and to help ensure swift implementation of recommendations or rulings under Article XXIII:2. A number of specific proposals for an appellate body have been considered, with many delegations open to a full discussion of the concept but continuing to express reservations. Consideration of the concept has generally proceeded on the understanding that the parties to a dispute would agree in advance that they would accept the results of an appellate review unconditionally. Under the various proposals, an independent permanent appellate body would be created within GATT to hear appeals from panel cases. The appellate body would have discretion to accept or reject the appeal after having heard the parties. If accepted, after fully examining the issues, the appellate body could uphold, modify or reverse

²It has also been suggested that the descriptive (fact and argument) sections would be submitted to the parties before the last meeting of the panel so that the parties could comment on them at that time.

the panel decision. The appeal process should have a definite and relatively short time limit, e.g. two months, and the issues to be appealed should be well defined and limited to those raised previously in the panel. There also is a positive reception to the idea that the appeal body should be small, with e.g. three full members and four alternate members.

6. In regard to the effect of appellate decisions, several options have been considered, including: (i) making the decisions final and unconditionally accepted; (ii) accepting as a final disposition of the case the decisions unless the Council decides otherwise; (iii) subjecting the decisions to a form of modulated consensus in the Council; or (iv) retaining the traditional form of full consensus in the Council. For a large number of delegations, the key objective of such an appeal would be to prevent the possibility of blockage at the adoption and implementation stages of GATT dispute settlement. Clearly this is an important issue. There is concern that appeals should be limited to only truly exceptional cases but work remains to be done on how this would be achieved in practice, as well as on details regarding the functioning of an appellate body and the nature of assistance that would be provided to it by an independent team.

7. Several delegations express the view that an appeals procedure might lead to the dilution of the importance of panels and, unless the appellate decisions were submitted for adoption by the Council, of the authority of the CONTRACTING PARTIES. Attention has been drawn in this context to the possibility that binding appellate decisions could affect the right of contracting parties to request a vote under Article XXV. Other delegations note that despite the creation of an appellate body, the CONTRACTING PARTIES would retain their authority to interpret the General Agreement pursuant to Article XXV.

Implementation

8. There is agreement that the CONTRACTING PARTIES should provide more definite procedures for ensuring prompt implementation of rulings and recommendations under Article XXIII:2. Indeed, the sentiment is unanimous that the primary objective of the GATT dispute settlement process must be to secure the removal of measures inconsistent with the General Agreement. Delegates generally note the close linkage of this question to procedures for compensation and retaliation.

9. Various options have been discussed, all of which however have in common a limit to the "reasonable period of time" that a contracting party may claim as necessary for the implementation of recommendations. One option would subject the issue of reasonable period to a binding arbitration procedure where the parties could not agree among themselves as to such a period within, e.g. three months. Another option would call for an outside time limit of two years, after which the party failing to implement may not oppose authorization for the withdrawal of concessions by affected parties. Yet another option would give the affected party an automatic right to retaliate if the party charged with implementation failed to meet the implementation deadline or failed to reach agreement on

such a deadline within a specified time, e.g. six months. The need for rapid completion of the dispute settlement process, including implementation, is stressed by all delegations, with some delegates giving particular emphasis to the need for quick action in the context of perishable goods. Some delegations point out that in the case of disagreement as to the existence of or GATT consistency of measures taken for implementation, this would have to be decided through recourse to normal GATT dispute settlement procedures, possibly involving the original panel.

Compensation and Retaliation

10. As noted above, delegates have emphasized the critical linkages between the issues of implementation and those of compensation and retaliation. There is an overall desire to provide the dispute settlement system with further incentives to ensure rapid implementation.

11. Options that have been discussed range from an automatic right to retaliation in the face of non-implementation, to Council looking favourably on such a request, to retaliation authorized by Council but with more definite rules as to the right and scope of such retaliation. Most of the options that have been discussed have emphasized that the non-implementing party should not be able to block such authorization. It has been proposed that parties which do not comply within the reasonable period should be subject to compensation or retaliation for the same amount of time as that during which the measure under dispute is applied. Another option would call for an arbitration body to decide upon the appropriate level of retaliation. While several delegates emphasize that compensation in the context of GATT dispute settlement is not and should not be mandatory, many delegates express their preference for strengthening access to compensation, as compared with retaliation, as a means of encouraging implementation. In this context, some delegations have proposed that there should be an obligation to negotiate on compensation.

Non-violation Complaints

12. Some delegations consider that the new procedures should not be applicable in the context of non-violation complaints. For these delegations, this issue will require further discussion. However, many delegations consider that all complaints should be treated on an equal basis, and that the procedural rights and safeguards afforded to parties in violation cases should be equally available in non-violation cases.

Strengthening of Multilateral System

13. The Group discussed the need for contracting parties: (i) to strengthen their commitment to abide by GATT dispute settlement rules and procedures; (ii) to abide by the recommendations, rulings and decisions of the CONTRACTING PARTIES; (iii) to refrain from unilateral measures or the threat of unilateral measures inconsistent with the GATT rules and procedures; and (iv) to undertake to adapt their domestic trade legislation and enforcement procedures in a manner ensuring the conformity of all

measures with GATT dispute settlement procedures. Many delegations consider that such undertakings should be included in the final package on dispute settlement. However, one delegation considers that unilateral measures include procedural unilateralism employed with respect to dispute settlement, such as blocking at any stage of the process. This delegation considers that unilateralism can be addressed only where there are clear rules, enforceable through dispute settlement procedures that eliminate opportunities for delay and blockage.

Other Issues

14. A number of other issues remain on the Group's agenda for further consideration. One such issue is the establishment of common procedures between GATT Article XXIII dispute settlement procedures and those elaborated in other Agreements reached under the auspices of GATT. In this context, it is generally agreed that flexibility should be retained to adapt common procedures to the special needs of different areas. Some delegations spoke of concern over fragmentation of the GATT dispute settlement system. It also has been stressed that there should be means to discourage forum shopping among the various GATT-related dispute settlement procedures. Results in other areas of the negotiations will have to be perceived more clearly before a determination can be made on these issues.

15. Also on the agenda is the issue of improving procedures for the selection of panelists. Here, various options have been considered including providing for obligatory selection from the roster of panelists and reaching agreement on required criteria for panelists.

16. There is also the issue of strengthening of third party rights in panel proceedings, with some delegations proposing that there be an automatic right of third parties to receive submissions of the parties for the first meeting of the panel and to be present at that meeting. However, some delegations consider that the present procedures, including the improvements agreed to at the Mid-Term Review, already give third parties sufficient participation in GATT panels.

17. Other issues that require further study are: proposals to clarify that contracting parties have an absolute right to a panel; proposals that the Group review the overall time frame for the dispute settlement process and the weight to be given to prior panel reports; a proposal to further elaborate procedures for arbitration within GATT; and proposals for special provisions for facilitating use of the GATT dispute settlement system by the Least-Developed Countries.

18. Finally, it is noted that there is a request to the GATT Secretariat to prepare a consolidated text of GATT dispute settlement procedures.