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The Federal Government Proposals for Reform of the GATT Dispute Settlement System: Continued Momentum for a Rules-Oriented Approach to Dispute Settlement in International Trade Agreements

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Résumé de l'article

Réunis à La Malbaie du 5 au 7 août 1990, une trentaine de juristes et d'économistes européens, nord-américains et africains ont échangé sur l'évolution du droit international économique.

Ce premier colloque organisé par la SDIE (Canada) en collaboration avec la SDIE (France) aborde les aspects historique, théorique, pratique et éthique de ce secteur du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.

Le présent dossier reproduit, en français ou en anglais, les principaux exposés. Les deux premiers textes traitent de questions générales et du cadre dans lequel se développe le droit international économique. Les exposés suivants présentent divers aspects de ce secteur du droit en cours de transformation.

NOTES, INFORMATIONS ET DOCUMENTS

Société de droit international économique (SDIE)* Colloque international de La Malbaie (1990) sur la transformation du droit international économique

International Economic Law Society (SDIE)* La Malbaie International Colloquium (1990) on Transformation of International Economic Law

RÉSUMÉ

Réunis à La Malbaie du 5 au 7 août 1990, une trentaine de juristes et d'économistes européens, nord-américains et africains ont échangé sur l'évolution du droit international économique.
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ABSTRACT

In the course of a meeting held in La Malbaie (Québec, Canada) on August 5th to 7th, 1990, thirty european, north-american and african jurists and economists exchanged ideas on the evolution of international economic law.
This first colloquium organised by the SDIE (Canada) in cooperation with the SDIE (France) covered historical, theorical, practical and ethical aspects of this sector of

* Nous tenons à remercier Philips & Vineberg, M^cs^ Bruno Deslauriers, Godin, Raymond, Harris, Thomas ainsi que Jolicoeur, Lacasse, Simard, Normand et associés pour leur soutien financier dans la publication de ces actes de colloque, monsieur Jacques Paquet ainsi que monsieur Ernest Caparros, de la *Revue générale de droit*.

* We would like to express our thanks to Philips & Vineberg, Mes Bruno Deslauriers, Godin, Raymond, Harris, Thomas and Jolicoeur, Lacasse, Simard, Normand & associates for the financial support in publishing these acts Mr. Jacques Paquet and to Mr. Ernest Caparros of the *Revue générale de droit*.

du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.
Le présent dossier reproduit, en français ou en anglais, les principaux exposés. Les deux premiers textes traitent de questions générales et du cadre dans lequel se développe le droit international économique. Les exposés suivants présentent divers aspects de ce secteur du droit en cours de transformation.

law which covers the organisation of trade and production, monetary and financial relations, international trade law, resources management and environmental protection.
The present document reproduces the texts submitted by the speakers in their original language. The first two papers aim at giving a general perspective of the variables of International Economic Law. The following papers focus on specific areas of international economic law where changes are taking place.

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The Federal Government Proposals for Reform of the GATT Dispute Settlement System: Continued Momentum for a Rules-Oriented Approach to Dispute Settlement in International Trade Agreements

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I would like to discuss with you today certain aspects of the Canadian Federal Government proposals (the "Proposals") for systematic reform of the GATT dispute settlement mechanism tabled in Geneva in April and subsequently revised in June 1990. The Proposals are designed to increase the certainty and predictability of the enforcement of the GATT through increased judicialisation of the development, adoption and implementation stages of the panel report process. This represents a movement towards a more coercive legal framework for the GATT which should enhance both the security of market access achieved under the General Agreement, and any additional gains made in the Uruguay Round. For a country as dependent on international trade for its well being as Canada, this should be seen as a positive result.

I will focus on perhaps the most significant aspect of the Proposals, *i.e.* the manner in which the Proposals would change the adoption procedure to deal with the fact that a "losing" party may block, at its option, the adoption of a panel report which finds that an action previously taken by that party to be in violation of its obligations under the GATT (the "blockage" problem). The present ability of a Contracting Party ("CP") to veto a report that would find against it is at the heart of the tension between a "rule-oriented" versus a consensual or "power-oriented" approach to dispute settlement in the GATT system. In addition to analysing reforms relating to the blockage problem I will also discuss proposed changes to the implementation stage of a dispute which flow from reform of the adoption procedure. I will not be considering those parts of the Proposals relating to fragmentation of the dispute settlement system and common procedures.

I will first provide a brief overview of the history of reform of the dispute settlement mechanism in the GATT and the main deficiencies identified in the current system. Next, I will outline the proposals relating to adoption, implementation and withdrawal of concessions. The final part of my talk will discuss the implications of these changes for the GATT

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system generally and Council of Representatives (the "Council") in particular, as well as provide some suggestions for additional changes.

I. BACKGROUND

The GATT has gradually moved away from a purely consensual approach to dispute settlement to the extent that previous reforms of the GATT dispute settlement system have introduced increased legal control over national policies and programmes that violate GATT legal standards. This trend is evidenced by the codification of previous practice as reflected in the 1979 "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (the "Understanding") and also in the stricter procedural rules embodied in the non-tariff Codes, also adopted at the Tokyo Round. The movement towards a more rule-oriented approach, as opposed to a consensual or power-oriented approach to resolving disputes, was given further impetus in the Statement of Objectives of the Negotiating Group established to discuss dispute settlement at the beginning of the Uruguay Round. These objectives included the goals of making the dispute settlement mechanism more effective, expeditious and predictable. These objectives then, address the major frustrations that CP's have found with the dispute settlement mechanism over time, and reflect the starting point for the Proposals.

Four principal frustrations or complaints with the present system underlie the Proposals. The first, as identified above, is the ability of a "losing" party to block the adoption of a panel report which found a violation of a GATT obligation. Second, even if a panel report is adopted by the council, it can be difficult to obtain effective relief for the violation due to the time which a "losing" party can take in implementing remedial action.

Another recurring criticism of the mechanism concerns delays that are typically involved in setting up a panel and in the preparation and adoption of panel reports. These criticisms (or frustrations) led to the adoption of tighter time limitations on various stages of the dispute settlement process at the Mid-Term Review in Montreal for the balance of the Round. It is possible that in the final agreement on dispute settlement in the Uruguay Round these new time constraints will be adopted on a permanent basis.

Finally, there is a desire to make the work of the panels more predictable. Since panels are required to work with somewhat ambiguous concepts in an environment where the emphasis is on diplomatic compromise instead of rule-making, it is not surprising that many past findings have been obscure and have failed to provide a predictable framework of rules for the implementation of panel decisions. This prevents the creation of a body of GATT jurisprudence that can be relied upon to direct the future conduct of national trade and related policies.

II. OUTLINE OF THE PROPOSALS

A. CONSIDERATION OF PANEL REPORTS (ADOPTION PROCEDURES)

To end (or perhaps more properly isolate) the blockage problem, the Proposals contemplate an adoption procedure by which there would be no formal vote on a panel report in the Council. Instead, a report would be adopted automatically after debate of the report in Council unless an objection to it is made by one of the parties to the dispute, either before or during the debate of the decision by the Council. A CP who is not a party to the dispute (even if it has made the third party submissions in the dispute), could not block adoption or send the report for review.

Recognizing that taking away a party's right to veto a panel report represents removing the most significant right a CP has in the dispute settlement process, the Proposals provide *quid pro quo* for giving up this power through the reform of the review stage of the panel report process and by giving all countries a new right — the right of appeal. Each of these "trade-offs" will be discussed separately.

Under the current panel procedure a party to a dispute is allowed an opportunity to review the factual part of a panel's report prior to its circulation among the Council but not the report's conclusions, even after a request has been made for an opportunity to review these conclusions with the panel. This denial of an opportunity to "properly air" concerns of parties to a dispute, particularly those of a party who are likely to be adversely affected by the proposed conclusions in a draft report, can make it difficult to get both parties to accept the report when it is discussed in Council. The Proposals would require that a panel produce an interim report with conclusions which would be circulated to the parties to the dispute who could then make submissions to the panel. The panel's final report may or may not be modified to reflect the facts and arguments contained in the parties' submissions. The final materials circulated to the Council would include the parties' submissions regarding the interim report. The time provided for completion of a panel's report would not change, notwithstanding the addition of this new stage in its work.

The Proposals assert that these reforms would improve the quality of reports by ensuring that relevant arguments are dealt with by the panel members prior to presentation of the report to Council. Prior circulation may also help remove concerns regarding possible errors in reports. It is suggested that by involving the parties directly in the development of a panel report they will be less likely to feel aggrieved if the report finds against them.

The proposals also respond to a party's loss of the right to block a decision against it by allowing parties to appeal a panel's decision to another authority for review when it believes that a fundamental error has occurred. This new appellate body would examine the interpretation of rights

and obligations in the panel report arising from the precise concerns brought to its attention by parties. The appellate body's decision respecting the report would be sent to the Council to be noted and debated but *not* voted on. In other words, the appellate body's decision would be *final*.

The Proposals contemplate that the appellate body would be a permanent body made up of three GATT experts, who would be permanent members, and four other experts as alternate members. The members would be appointed by the CPs for a specified term. The Proposals express the desire that this additional step in the process will not become a "quasi-automatic" step.

B. IMPLEMENTATION/WITHDRAWAL OF CONCESSIONS

The Proposals assert that the vagueness of the current process allows for abuse as parties required to take restorative action can use the ambiguity of the "reasonable period of time" requirement to stall or delay implementation of such action. Therefore, the Proposals would require that a party implementing a report will have to inform the Council of a time-frame for implementation. If this Proposal is acceptable to the other party to the dispute the matter would be at an end. If, however, the other party found the proposed time-period to be "unreasonable", then the matter would be referred to an impartial arbitration procedure which would require the parties to first attempt to negotiate over the time-period, failing which the matter would then go to binding arbitration with a limited time-frame for the arbitrators to make a decision. (It should be noted that if a "winning" party to a dispute felt that a proposal either failed to implement the panel report, or was itself not in conformity with the GATT, this party would have to use current GATT procedures to show this was the case).

In conjunction with reform of the implementation process, the Proposals recognize the need to clarify and strengthen the procedures for withdrawal of concessions by an affected party, if the party impairing benefits does not implement its plan to remove the offending measures. The strengthening of these procedures would add to the pressure on an offending party to remove the measure in question expeditiously.

The Proposals contemplate that if the removal of offending measures is not achieved within "a reasonable period of time", then the aggrieved party could approach the Council to request authorisation to withdraw concessions equivalent to the injury being incurred. The request would normally be authorised automatically by the Council. The innovation in the Proposals lies in the possible use of binding arbitration if there is a dispute as to the amount of trade which is to be subject to the proposed withdrawal (however, the arbitration process would not affect the choice of products to which the withdrawal would relate; this would remain at the sole

discretion of the party seeking authorisation to withdraw). The arbitration process would be required to be completed in one month.

III. ANALYSIS OF THE PROPOSALS

A. IMPACT OF REFORM OF THE ADOPTION PROCESS

It has been suggested above that the major thrust of the Proposals is to remove the power of a "losing" party to block adoption of a panel report. This loss of power is balanced by the attempt to give parties to a dispute greater input in the decision-making process so that a decision which goes against a position of that party will be more acceptable to it. The opportunity for increased participation is reflected in both the proposal to create a review stage following development of an interim report by the panel, and in the creation of an appellate mechanism.

In removing the "blockage" problem, however, the Proposals have the effect of significantly diminishing the power of the Council in the dispute settlement process. Power to make decisions has been taken from the Council and distributed among the panels, appellate body, and arbitrators. The question that an individual CP must ask is whether the loss of power by the Council detrimentally affects its interests more than the potential benefits to be derived from the increased certainty and predictability introduced into the process of enforcing substantive GATT law. Presumably one would evaluate this question by considering a CP's current ability (or lack thereof) to form alliances within the council and to influence opinion in Council debates through such alliances. To the extent that a CP is confident in the advantages derived from that alliance-making capability, it would be wary of any proposed reform that would take away powers from the Council. However, greater influence at the Council review stage can be preserved only by foregoing an increase in the certainty and predictability of the panel process, particularly with respect to implementation and withdrawal of concessions.

It should be noted that the proposed reform of the implementation stage would also result in power moving from the Council to bodies dealing with the parties to a dispute (here, the arbitrators). Therefore, the issues raised in the preceding paragraph would also be applicable here.

B. SUGGESTED AMENDMENTS TO THE PROPOSALS

1. The Appellate Mechanism

The provisions relating to the introduction of an appellate mechanism are perhaps the vaguest part of the Proposals. The issue of

''vagueness'' should raise concern when one realises that the drafting of an international trade agreement in vague language can give a body, such as the new appellate body, enormous power to control the scope of the signatories' obligations under the subject agreement.

The first ambiguity relates to the determination of the grounds for appellate review. As currently suggested, the body would examine and consider only those aspects of a panel report that arise from the ''precise concerns'' brought to its attention by the parties. It is not clear whether those concerns, as characterised by the parties, will be faithful to or address all the significant aspects of the panel report. This creates possible uncertainty with respect to the beneficial effect of the final decision as a precedent. One way to ensure that such uncertainty will not result in the dilution of the importance of panel to make clear the grounds for review before the appellate body and the relationship of these grounds to the panel decision.

The Proposals are also vague with respect to the specific manner in which the appellate body would function. It does not address how the rules of the body will be made up or how they will be applied. It would be in the interest of all CP's to obtain greater specificity as to the details of the working of the appellate mechanism before giving approval to this aspect of the Proposals.

2. Implementation/Withdrawal of Concessions

It is interesting to note that the parties are given six months to negotiate an agreement on implementation and, if that process fails, the arbitration process is to take just two weeks. It is difficult to see how an arbitrator could do his/her task unless he/she was already involved in monitoring the dispute. One then wonders how independent or unbiased a member of the original panel would be with respect to this phase of the process and how acceptable it would be to the ''losing party'' to have a panel member sitting as an arbitrator.

Another aspect of this proposal which should be amended is the time-frame applicable to the arbitration process. There is no magic in giving the parties six months to negotiate at this stage in the dispute process and one must realise that for a smaller, trade-oriented economy, such as Canada's, the costs of the continued existence of an offending measure has a greater impact than it would on some of our larger trading partners. Therefore, it is suggested that this time-frame be shortened to perhaps three months so that the implementation stage be made as prompt as possible. This suggestion is made recognising that it will require a quicker response than is currently required from federal and provincial authorities whose policies or programmes are found to violate GATT obligations. These ''costs'' are ones that must be borne if the GATT system is to be moved in the direction

of a more rule-oriented approach. The same changes are suggested for those parts of the Proposals dealing with withdrawal of concessions.

CONCLUSIONS

It has been suggested that the overall impact of the Proposals would be to increase the certainty and predictability of the enforcement of the GATT through increased judicialisation of its dispute settlement mechanism. This result would be consistent with most of the principles to which Canada has subscribed in the recent past concerning the settlement of international trade disputes.