

GENERAL AGREEMENT ON TARIFFS AND TRADE

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CONSIDERATIONS CONCERNING EXTENDED USE OF PANELS

Note by the Executive Secretary

1. When the provisions relating to the balance-of-payment consultations were reviewed at the Ninth Session, it was emphasized by several delegates that, if consultations carried out by the contracting parties were to be effective, improved arrangements for the competent and speedy conduct of the consultations would be necessary. This question was also discussed in connexion with the continuing administration of the Agreement, and the Danish delegation submitted a suggestion for the appointment of panels of qualified representatives to assist in carrying out consultations under Articles XII to XIV and in the consideration of complaints under Article XXIII, as well as other commercial policy matters which are the subject of regular reports for examination by the CONTRACTING PARTIES (see Third Supplement, pages 179 and 247). There was no general agreement on the suggestion put forward by the Danish delegation, and no other specific proposal was submitted, but it was agreed that the Executive Secretary should consider the problem and, if possible, put forward concrete proposals for consideration at the Tenth Session.

The normal working party procedure

2. With the exception of the panel that the CONTRACTING PARTIES have established for the consideration of complaints lodged under Article XXIII, the normal procedure for dealing with matters of the sort referred to by the Danish representative has been the same as that used for the consideration of all substantive problems, namely, initial consideration in plenary followed usually by consideration in a working party, and finally, adoption of the working party report by the CONTRACTING PARTIES. The working party has consisted of a number of delegations, varying from five to eighteen according to the importance of the question or the interests involved. A delegation which is a member of the working party is free to appoint any individual in its delegation and to change this representative as it thinks fit. All members of the working party occupy the same status, including the contracting party which is being consulted or whose report is under consideration.

3. The report of such a working party must either represent the views of all its members or record any minority views. Since the tendency has been to strive for unanimity, there has usually been some measure of negotiation and compromise between the consulting government and the rest of the working party in determining the form the report shall take.

4. Although this traditional method of dealing with consultations, reports and even complaints has the advantage of permitting a frank exchange of views under conditions in which all delegations meet on an equal footing, experience has revealed that it also has disadvantages. In the case of complaints, for example, it often proved embarrassing for the representative of a country against which a complaint was lodged to associate himself with the working party report. On the other hand, it was often equally embarrassing for him to dissent from the report and to file a minority statement. Furthermore, the majority of the working party themselves were frequently inhibited in a frank expression of views in their report to the CONTRACTING PARTIES because of their desire to reach unanimous agreement in the working party. These difficulties became so apparent during the early sessions of the CONTRACTING PARTIES that by their Seventh Session they adopted a radically different procedure and established a Panel on Complaints.

The Panel on Complaints

5. The Panel on Complaints, as it has been developed in successive sessions, differs substantially from the ordinary working party both in its composition and in its manner of working. Instead of selecting delegations as members of the Panel, the Chairman nominates individuals. In making this selection he takes into account not only nationality but personal qualifications and special knowledge of the General Agreement and of the matters to be dealt with by the Panel. While the individual selected would in most cases be the person who would have been designated by the delegation under the traditional working party procedure, the selection of individuals has provided a greater assurance that the Panel will include individuals with the necessary knowledge of the subject concerned. Furthermore, it has assured continuity in the work of the Panel by preventing delegations from substituting one member for another. Perhaps most important of all, this method of constituting the Panel has emphasized the fact that the primary function of the Panel is to prepare an objective analysis for consideration by the contracting parties, in which the special interests of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the contracting parties in general.

6. Differences between the working methods of the Panel on Complaints and those of the normal working party have further emphasized the importance of objectivity. The contracting parties immediately concerned with a complaint are not represented on the Panel. They appear before the Panel in a capacity that is similar to that of the plaintiff and the defendant before a court of law. After having heard the parties and any other contracting party which might have an interest in the case, the members of the Panel meet in closed session and arrive at their own conclusions. The report is then drafted under their individual responsibility and does not prejudice the attitude of the parties to the dispute. Nor does it prejudice the later position that may be taken by governments during the subsequent consideration of the report by the CONTRACTING PARTIES. In practice the draft report is shown to the parties immediately concerned before it is circulated. The Panel meets again, with those parties and any other observers, hears their comments, and finally meets to approve the text. The report is then submitted to the CONTRACTING PARTIES and discussed in the same manner as the report of an ordinary working party.

Use of panels in other cases

7. Although the disadvantages of the working party technique have not been as apparent in the other cases in which the CONTRACTING PARTIES have been called upon to deal with a problem in which one or more contracting parties are especially concerned, there have been instances which suggest the desirability of extending the panel technique to such cases. The discussion which took place during the Ninth Session in the working party which considered the Second Annual Report of the Member States of the European Coal and Steel Community raised a number of problems similar to those referred to in connexion with complaints. The working party which was called upon to consider that report included representatives of those governments which were themselves responsible for the report. Some members of the working party felt that the report could have been considered more objectively if the reporting members had appeared before the working party in a different capacity. It was also the feeling of some that the discussion would have been more fruitful if the representatives of other delegations taking part had had more specialized knowledge of the highly technical points which were under consideration. This experience suggests that at least in the case where a report involves a subject calling for special individual competence a panel procedure modelled after that followed in the case of complaints would be worthy of consideration.

8. At the Ninth Session the contracting parties expressed a general desire to make the procedure of consultations under the balance-of-payment provisions of the General Agreement more meaningful and effective. While this does not necessarily suggest the use of a panel procedure for these consultations, the CONTRACTING PARTIES will presumably want to consider whether such a procedure might not aid in achieving the desired result. It would appear that the basic condition that dictated the use of panels in the case of complaints is also present in the case of balance-of-payment consultations, namely, that the contracting party directly concerned must deal with the CONTRACTING PARTIES under circumstances in which its own interests may, for the time being, differ from the interests of the CONTRACTING PARTIES as a whole. There may also be occasions when it is desirable for the working party or panel to receive information in confidence from the contracting party concerned and for it to meet privately to consider what use it can properly make of such confidential information in its report. It is suggested that a guiding consideration for the CONTRACTING PARTIES in deciding whether and to what extent the panel technique might be extended to cases other than complaints, should be a determination of the sort of case in which it may be especially desirable to obtain an objective and technical consideration of the issues involved before the CONTRACTING PARTIES are called upon to reach their final judgment. Most consultations with individual governments and the consideration of special reports by individual governments under waivers, are cases in which the CONTRACTING PARTIES are entitled to a preliminary objective consideration of this kind and in which such an objective consideration is difficult to obtain through the normal working party technique.

9. At the Ninth Session the Danish representative suggested that the experience of the OEEC in dealing with similar cases had proved the usefulness of a procedure like that of the Panel on Complaints. In all cases in which the OEEC is called upon to consider the action of individual member governments in connexion with the maintenance of quantitative restrictions, the detailed consultations and examination of the facts are conducted by bodies of limited composition whose members are selected as individuals for their personal qualifications. The reports of these panels or committees are then submitted to commissions of broader composition the members of which are governments and not individuals. The nature of the material dealt with in this way by the OEEC would appear to be comparable with much of that ordinarily dealt with by the CONTRACTING PARTIES through the usual working parties. If contracting parties which are members of the OEEC have found the OEEC procedures successful, it would suggest that the CONTRACTING PARTIES might well use the same technique in place of one that has not proved entirely satisfactory.

Recommendation

10. Although the rather limited experience available is not sufficient to permit the unqualified conclusion that the panel technique should be adopted in all cases mentioned above, it would appear that the CONTRACTING PARTIES would find it worth while to experiment on a broader basis with this technique. It is suggested therefore that the CONTRACTING PARTIES consider:

- (i) the renewal for the Tenth Session of the panel procedure for dealing with complaints; and
- (ii) the experimental use during the Tenth Session of a similar procedure wherever possible for dealing with other matters for which working parties have been used in the past.

