

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Institutions

MEETING OF 26 SEPTEMBER 1991

Note by the Secretariat

1. The Negotiating Group on Institutions met on 26 September 1991 under the Chairmanship of Ambassador J. Lacarte-Muró (Uruguay). The Negotiating Group adopted the agenda circulated in GATT/AIR/3225.

MTN.TNC/W/35/Rev.1

2. The Group carried out a review of the dispute settlement negotiations on the basis of the revised draft Understanding on the Interpretation and Application of Articles XXII and XXIII, dated 25 March 1991. The Group noted that certain technical amendments with regard to footnote 1 and paragraphs A.2, D.1(a), L.1, L.7 and section P proposed at the Brussels Ministerial Meeting had not been formally agreed.

3. A number of participants stated that they had not participated in the drafting of these amendments and raised questions concerning their justification and precise meaning. With regard to footnote 1 of the draft Understanding, a participant stated that the second sentence in this text was not clear on the question of the effects of the date of application of the Understanding. In his view the text, as currently drafted, might risk opening up dispute settlement cases already concluded or where panel reports had never been adopted and might even be introducing uncertainties with respect to the possible invocation of the new procedures in outstanding dispute settlement cases. Concerning paragraph A.2 of the draft Understanding, some participants noted that the text had been modified in response to the concerns expressed by a participant who was not a party to the Vienna Convention on the Law of Treaties. However, it would appear that a broad reference to the principles of public international law might subject the multilateral trading system to the risk of having to accept emerging peremptory rules or obligations not negotiated within GATT. A number of participants recalled that the dispute settlements mechanisms could not add or diminish the rights and obligations provided in the General Agreement. These participants stressed, therefore, that the CONTRACTING PARTIES should continue to have exclusive competence on all issues concerning the General Agreement including the essential question of the establishment of rights and obligations. Non-GATT law should have no rôle in the interpretation of the General Agreement as this was the exclusive prerogative of the CONTRACTING PARTIES. Reference was also made to paragraph D.1(a) of the draft Understanding concerning the panel procedures and the need to ensure that

panels are established promptly. A number of participants asserted that the rôle of the Council in the establishment of panels had to be preserved. In the view of some participants the suggested 20 days time period to request the establishment of a panel prior to a Council meeting appeared to be too rigid and should only be considered as the minimum time for the submission of the request. Other participants said that 20 days was insufficient for capitals to analyse complex complaints with factual and legal implications. While agreeing that panels should be established without undue delay, these participants felt that the time period should reflect the fact that many participants needed a longer time period to examine the complaints and define their positions. A participant said that the consequences of possible changes in the dates for the meetings of the Council should also be foreseen. Reference was also made to the provisions of the draft Understanding concerning compensation which, in the last sentence in paragraph L.1, would provide that compensation should be consistent with the General Agreement. Some participants noted that the earlier text which had referred to the application of compensation on a most-favoured-nation basis had appeared to be adequate. Moreover, the new draft might appear to imply that compensation might also be provided in areas outside the General Agreement as long as the compensation was not inconsistent with the General Agreement itself. The Group noted that the revised text in paragraph L.7 of the draft Understanding concerning the determination of the amount of the suspension of concessions or other obligations and its coming into effect was acceptable to participants. The Group took note of the comments made concerning the proposed amendments to the draft Understanding and agreed to revert to these amendments in the course of informal consultations to be carried out in the coming weeks.

4. The Negotiating Group noted that the brackets or notes in Section F. - Panel and Appellate Body Recommendations; paragraph G.4 - Adoption of Panel Reports; paragraphs H.1(e) and 3 - Appellate Review; paragraph K.3 - Surveillance of Implementation of Recommendations and Rulings; paragraph L.3 - Compensation and the Suspension of Concessions and Section M - Strengthening of Multilateral System could not be deleted at this time as they concerned some broader issues with implications beyond the areas of exclusive competence of the Group. The Group agreed to revert to these texts as soon as possible.

5. The Chairman invited participants in the Group to identify any ambiguities, lack of clarity or inconsistencies in the text of the draft Understanding and to submit any proposals they might have in this respect as soon as possible. It was also suggested that the Group might consider the convenience of including in the Understanding provisions with regard to the following issues: forum shopping for the resolution of disputes; specificity of complaints in the identification of the matter of the dispute and the legal basis of the claim; the inaction of certain panels during an extended period of time; the value of retaliation; the non-implementation of panel recommendations; and the notification to contracting parties of the composition of panels. The Group agreed to take up these proposals and any other proposals submitted by participants in the course of the informal consultations to be undertaken shortly.

Non-Violation Complaints

6. The Group considered Section P - Non-Violation Complaints - of the draft Understanding. In noting that it would be necessary to define the types of cases that could fall under special non-violation procedures and the nature of such special procedures, some participants supported the inclusion of a text on non-violation in the draft Understanding. Recalling that the future dispute settlement procedures were expected to be blockage-free, some participants agreed that the text in the draft Understanding had to be clarified and improved. Other participants said, however, that they did not consider that special procedures were appropriate for non-violation complaints and expressed substantial reservations with the text in Section P of the draft Understanding. The Group agreed that the section on Non-Violation Complaints should be taken up in the informal consultations that would be undertaken shortly.

Consolidated text

7. The Group noted that an informal Consolidated text of GATT dispute settlement rules and procedures, dated 12 August 1991, had been prepared by the Secretariat. Some participants said that the 1958 and 1966 Decisions should be incorporated in the Consolidated text and not be listed separately. Several participants said that the preparation of the Consolidated text was a technical exercise which should be undertaken as soon as feasible in the light of developments in the substantive negotiations. The Group agreed to carry out a preliminary review of the informal Consolidated text in the course of informal consultations.

Coordination with other Negotiating Groups

8. The Chairman recalled that one of the non-papers on dispute settlement, dated 12 August 1991, presented certain provisions on dispute settlement contained in document MTN.TNC/W/35/Rev.1 that had emerged in other Negotiating Groups. Ideally there should be a single dispute settlement procedure applicable to the whole of the multilateral trading system even though special provisions might be contemplated in certain areas. Several members said that the Group had the responsibility of establishing neutral rules which would prevent the proliferation of dispute settlement mechanisms and forum shopping. To this effect the Group should try to coordinate with other Negotiating Groups in order to ensure consistency in the dispute settlement rules and procedures which would emerge from the Uruguay Round and to prevent eventual conflicts between the various Uruguay Round agreements or arrangements. Some members also expressed support for the establishment of an integrated dispute settlement procedure and said that concrete proposals in this respect would be submitted in the course of the informal consultations to be undertaken shortly. A participant stressed that this Negotiating Group came under Part I of the Punta del Este Declaration which only covered trade in goods. The Group also had to observe decisions concerning TRIPS which had been adopted at the Montreal Mid-Term Review.

While able to support further work with a view to identifying inconsistencies among the various dispute settlement procedures under consideration and trying to the extent possible to achieve harmonization in a neutral manner, this participant believed that the establishment of an integrated dispute settlement system was a political issue which went beyond the competence of the Group. The Group agreed to undertake informal consultations in respect of the issue of coordination with other Negotiating Groups.

General Comments

9. A participant said that the questions of decision-making in the dispute settlement process and the draft text "Strengthening of the Multilateral System" were issues which could not be resolved until the results of negotiations in all other areas were known. As the Brussels text contained inconsistencies, ambiguities and omissions, technical discussions should continue and provisions might be negotiated with respect to issues such as the maximum length of time for dispute settlement proceedings and the procedures for non-violation complaints. In the view of this participant, neither the text in MTN.TNC/W/35/Rev.1 nor the text dated 25 March 1991 reflected consensus among delegations. It could not be presumed that the absence of brackets denoted agreement or even likelihood of agreement. This participant supported the drafting of the Consolidated text with all provisions relating to dispute settlement procedures which would eliminate duplication and inconsistencies while retaining the appropriate elements of earlier decisions. He also noted that the Group should work with the negotiators in other groups towards tailoring the dispute settlement procedures developed in this Group to meet the individual needs of other agreements. In his view it would be important to have a more unified dispute settlement system when concluding the Round as one single undertaking at the end of the negotiations. His delegation was ready to work towards the creation of a more unified system. Some other participants stressed that the achievement of substantial improvements in the area of dispute settlement would require renouncing the application of unilateral measures incompatible with the GATT and their replacement by multilaterally agreed procedures.

Next meeting

10. The Group agreed to meet again on 24-25 October 1991 to take up all issues within its mandate. The Chairman invited participants interested in taking part in the informal dispute settlement consultations that would be undertaken shortly to inform the secretariat at the end of the present meeting of the Group.