

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG13/2

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Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on
Dispute Settlement

MEETING OF 25 JUNE 1987

Note by the Secretariat

1. The Group held its second meeting on 25 June 1987. Due to absence of Mr. Lacarte-Muró (Uruguay), this meeting was chaired by Mr. Katz (United States). The Group adopted the agenda set out in GATT/AIR/2436.

Continuation of consideration of submissions by participants of their analyses of the functioning of the GATT dispute settlement process and of their views on the matters to be taken up in the negotiations, together with the background note by the secretariat

2. The Group had before it written submissions by Mexico (MTN.GNG/NG13/W/1), New Zealand (MTN.GNG/NG13/W/2), the United States (MTN.GNG/NG13/W/3 and 6) and Jamaica (MTN.GNG/NG13/W/5), as well as a background note by the secretariat (MTN.GNG/NG13/W/4).

3. In introducing its discussion paper (MTN.GNG/NG13/W/6), the representative of the United States referred to two recent GATT panel reports (on the US tax on imported petroleum and on New Zealand's antidumping duties on imports of electrical transformers) whose speedy elaboration and adoption by the Council had demonstrated how efficient the GATT dispute settlement process could be. Seven other GATT panels were currently at work, and the experience with these current proceedings would inevitably influence the US views on the functioning of the GATT dispute settlement process and on the matters to be taken up in the negotiations. The United States had not yet reached definitive or exhaustive conclusions with respect to the various elements suggested in its discussion paper for improvements of the GATT dispute settlement system. The suggestions focused on the following problems most frequently mentioned by members of this Negotiating Group at its April meeting:

- (1) An enhanced mediation rôle for the GATT Director-General or his designee. A voluntary mediation phase should be made a routine part of the dispute resolution process, but separated from the panel process so as to make clear that the rôle of the panel is a last-resort adjudicatory stage.

- (2) A binding arbitration process (entailing no GATT Council or Code Committee approval) as an alternative means of dispute settlement for defined classes of cases, or by prior agreement of the disputing parties on an ad hoc basis. Binding arbitration by a neutral body should become a formally available technique of GATT dispute settlement with due safeguards for the rights and interests of third contracting parties.
- (3) Fixed time limits for the various stages of the dispute settlement process. These should be made binding and enforceable.
- (4) Use of non-governmental experts as panelists. Panel members (and arbitrators) should be chosen exclusively from a roster of neutral non-governmental experts.
- (5) Use of the same standard terms of reference for all panels. An agreement to this effect could prevent delays occasioned by negotiating special terms of reference among the parties to the dispute.
- (6) A procedure to deal with the problem of blocking adoption of panel reports; and/or
- (7) An explicit new affirmation by all contracting parties that they will implement the recommendations resulting from a dispute settlement case, and recognize that failure to do so gives rise to a right to compensation or retaliation.

4. The statement of Japan was subsequently circulated as a written communication (MTN.GNG/NG13/W/7) and included, inter alia, the following proposals for specific improvements in the existing rules:

- (1) Clarification of the relationship between consultations under Articles XXII and XXIII:1 or good offices of the Director-General, on the one hand, and the recourse to a panel, on the other hand.
- (2) Improvements in the mechanism for using good offices for conciliation.
- (3) Review and enlargement of the indicative list of persons available for serving on panels (paragraph 13 of the 1979 Understanding), and more frequent use of non-governmental persons on the roster to serve as panelists.

- (4) Procedural improvements in order to facilitate more expeditious Council decisions on the setting-up of a panel and a more expeditious work of a panel (for instance, clarification of the maximum period of panel proceedings, of the meaning of the terms "cases of urgency" in paragraph 20 of the 1979 Understanding, and of the obligation of panels to give the parties "adequate opportunity to develop a mutually satisfactory solution").
- (5) Procedural improvements for the adoption of panel reports and for promoting timely implementation of panel recommendations (e.g. indication of a reasonable period for the implementation of a panel recommendation, measures by the GATT Council in case of non-compliance by the end of the said period, review of domestic legislation implementing GATT obligations).

5. The representative of Jamaica introduced the communication from Jamaica (MTN.GNG/NG13/W/5). While the delegation of Jamaica intended to make specific comments and proposals in the course of the negotiations, it was ready to accept at this stage that there should be:

- (1) a rationalization of the notification requirements;
- (2) an examination of the possibility for consolidating and improving the language of the various existing texts; and
- (3) an examination of "third parties" initiating action where "grey area" measures are concerned.

6. A number of other delegations made oral proposals for specific improvements in the dispute settlement rules and procedures including the following:

- (1) Additional authority for the Director-General to appoint members of a panel in the event that panel composition cannot be agreed among the parties to the dispute (Chile);
- (2) authorization to panels to decide on their own terms of reference in case the GATT Council cannot reach agreement on their definition (Chile);
- (3) additional provisions for "urgency procedures" and "interim measures of protection" (for instance, in case of perishable goods and supplies en route) (Chile);
- (4) removal of the parties to a dispute from certain Council decisions, e.g. on the establishment and terms of reference of panels, on the adoption of panel reports, and on whether a particular case is "straightforward" and could be decided by the Council on the basis of accepted interpretations of GATT Articles without resort to a panel (New Zealand);

- (5) provision for time-limits for the implementation of Council decisions on disputes under Article XXIII (New Zealand);
- (6) developing additional incentives and institutional mechanisms encouraging voluntary compliance by contracting parties with their GATT obligations and, at the same time, making them easier to sell domestically (e.g., limitation of access to Article XXIII for contracting parties which do not implement Council decisions under Article XXIII) (New Zealand);
- (7) consolidation and negotiated improvements of the various existing texts on dispute settlement accompanied by a commitment to abide by the results of the application of such a new re-negotiated instrument (Nordic countries);
- (8) improving mechanisms for prior notification of trade measures affecting the operation of the General Agreement before they have been put into force (Switzerland);
- (9) promoting dispute prevention through improvements of domestic trade policy procedures (e.g. guarantees for "due process", "fair hearing" and "freedom of information" for parties particularly affected by certain trade measures) (Switzerland);
- (10) strengthening of the present dispute settlement provisions relating to mediation, conciliation, time limits, terms of reference, intervention by third parties in panel proceedings, withdrawal of trade measures that have been found inconsistent with GATT obligations, compensation and retaliation, exploration of the possibility of consensual arbitrations and advisory opinions (Switzerland);
- (11) arrangements for the automatic establishment by the Council of a panel if a party to the dispute so requests after consultation and appropriate discussion in the Council (Korea); formal recognition of the right to the establishment of a panel under Article XXIII following the precedent of similar provisions in some Tokyo Round Agreements (Czechoslovakia);
- (12) more frequent or exclusive use of non-governmental experts as panelists so as to ensure the neutrality of panels and improve the quality of panel reports (e.g. Korea);
- (13) reinforcing the surveillance function of the Council through regular and comprehensive review of the implementation of panel recommendations by the Council (e.g. Korea);
- (14) provisions for differential and more favourable treatment of less-developed contracting parties involved in disputes with developed countries (e.g. Brazil);

- (15) arrangements to ensure that bilateral settlements reached through mediation, conciliation or arbitration conform to the general GATT rules and that retaliation does not adversely affect the rights of third contracting parties (Australia);
- (16) clearer separation of mediation/conciliation from adjudication through panels so as to take into account the past experience that adoption of panel reports might be opposed if panels do not stick to their mandate of examining the complaint "in the light of the relevant GATT provisions" and are more influenced by a political desire to proceed by conciliation to a negotiated solution (e.g. Hong Kong).

7. Some delegations expressed the view that the GATT dispute settlement procedures should not be used to create, by constructive interpretation, obligations which were not established in the text of the General Agreement. Panels should merely interpret and apply existing GATT rules to the particular sets of circumstances in the disputes before them without purporting to create new obligations. The view was also expressed that panels should not be used as a supranational jurisdiction and as a means to prematurely internationalize conflicts of a private nature, the solution of which should be first sought within the domestic jurisdiction of contracting parties.

8. It was suggested that contracting parties should carefully examine whether alleged persisting deficiencies lay in the procedures themselves or in their implementation by the contracting parties. In the past, the most useful improvements of the GATT dispute settlement procedures had evolved gradually based on experience gained from the various dispute cases. It was also suggested that the secretariat review in more detail the reasons for the non-adoption of certain panel reports so as to assist the Group in identifying the actual problems and in drawing practical lessons from various dispute cases. Various delegations (including the EEC, Hong Kong, Japan and Switzerland) expressed their intention to make submissions to the Group. Some delegations stated that the apparent convergence of views on improvements in the dispute settlement procedures could enable an early progress in this Negotiating Group.

Observer organizations

9. The Chairman recalled that following the decision of 14 April of the Group of Negotiations on Goods, each Negotiating Group was invited to make recommendations to the Group of Negotiations on Goods as to the international organizations which it considered could assist it in the pursuit of its task and which it therefore wished to invite to its meeting. The Chairman noted that no comments and no specific requests had been received in this respect.

Other business

10. The Group agreed to hold its next meeting on 5-6 October 1987.