MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG13/3
12 October 1987
Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on
Dispute Settlement

MEETING OF 21 AND 24 SEPTEMBER 1987

Note by the Secretariat

1. The Group held its third meeting on 21 and 24 September 1987. The meeting was chaired by Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2456.

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

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), Jamaica (MTN.GNG/NG13/W/5), Japan (MTN.GNG/NG13/W/7 and 9), Switzerland (MTN.GNG/NG13/W/8), the Nordic countries (MTN.GNG/NG13/W/10), Australia (MTN.GNG/NG13/W/11), the European Communities (MTN.GNG/NG13/W/12) and Canada (MTN.GNG/NG13/W/13), as well as a background note by the secretariat (MTN.GNG/NG13/W/4).

3. Introducing the communication submitted on behalf of Finland, Iceland, Norway and Sweden (MTN.GNG/NG13/W/10), the representative of Norway said that the GATT dispute settlement system had been functioning well but the procedures could be further improved and consolidated in one single text. In order to respond adequately to the different nature of dispute cases, the parties to a dispute should have the choice between a number of alternative and/or complementary techniques and mechanisms. The improvements suggested by the Nordic countries related to the following subjects:

(1) Mediation: The dispute settlement system should, for instance, more explicitly spell out that the parties - if they so agree - can have recourse at any time to mediation through the good offices of the Director-General or another competent person.

(2) Arbitration: A GATT arbitration instrument could be available in clearly defined dispute cases provided it did not adversely affect the rights of third countries and the sole responsibility of the CONTRACTING PARTIES to decide on the conformity of a particular measure with the General Agreement.

(3) Use of standard terms of reference for panels unless special terms of reference are mutually agreed.
(4) Regular composition of panels of three persons to be appointed by mutual agreement or, after three weeks from the time of establishment of the panel, by the Director-General.
(5) Use of standard working procedures for the work of panels and termination of the work of a panel within seven to ten months.
(6) Elaboration of an improved and consolidated instrument for dispute settlement in GATT.

In response to various questions, the representative of Norway agreed that mediation efforts should not delay the process of a panel proceeding and could take place in parallel with it. Bilaterally binding arbitration could not curtail the right of the CONTRACTING PARTIES to address the solution arrived at through arbitration. An obligation on the part of the Director-General to consult with the disputing countries prior to his decision on the appointment of panelists could not limit his freedom to decide himself on the ultimate choice of the panelists.

4. The representative of Switzerland introduced his communication (MTN.GNG/NG13/W/8) and said that the task of dispute prevention by means of greater transparency and surveillance might be discussed more appropriately in the Negotiating Group on the Functioning of the GATT System. He expressed the view that GATT should provide a variety of different procedures of dispute settlement corresponding to the often different nature of GATT disputes. The Swiss paper proposed therefore an enhanced rôle for conciliation and the introduction of non-mandatory arbitration. If a dispute was not resolved through consultations, the contracting parties concerned might request a contracting party, the Chairman of the CONTRACTING PARTIES or the Director-General to use their good offices with a view to conciliation in the dispute. Any arbitration scheme established under GATT needed to be part of the multilateral GATT system and to take sufficient account of the rights of third contracting parties. He further elaborated the Swiss proposals for specific improvements relating to the establishment of panels, their composition and working procedures, the position of "third parties" in panel proceedings, and bilateral settlements of disputes before panels.

5. With regard to part 2.4.2 of the submission by Switzerland, the question was raised, inter alia, whether it was within the terms of reference of a panel to examine also the compatibility of a bilateral settlement with the General Agreement. It was further asked in respect of part 2.3.4 of the Swiss submission whether it would be compatible with the standard terms of reference for a panel to hand back its panel mandate and to examine the need for new GATT provisions. The proposal set out in part 2.3.3 of the Swiss paper, namely to improve the position of "third parties" in panel proceedings, was supported by other delegations.

6. The representative of Japan explained Japan's proposals (MTN.GNG/NG13/W/7 and 9) for improvements in the dispute settlement procedures in the following areas:

(1) Clarification of the relationship between consultations under Article XXIII:1 and the recourse to the CONTRACTING PARTIES.
(2) Procedural improvements so as to ensure the establishment of panels within two months from the time so requested.
(3) Expansion of the present roster of panelists in such a way as to accommodate governmental as well as more non-governmental persons.
(4) Specification of the time periods for panel proceedings.
(5) Timely adoption of panel reports or findings within a period of normally eighty days from the time of their submission.
(6) Additional provisions for the follow-up of recommendations as well as for
(7) compensation and counter-measures (e.g. a requirement to bring the domestic legislation relating to counter-measures into conformity with Article XXIII:2).

Referring to part 1 of the submission by Japan, the question was raised whether the GATT relevance of a complaint could not be examined more appropriately and more timely by a panel rather than directly by the CONTRACTING PARTIES themselves without advice from a panel. As regards the time periods for the work of panels and the difficulty of defining "cases of urgency", it was suggested that panels should aim to deliver their reports more expeditiously and normally within a period of three months unless the particular complexity of a dispute required a longer period of six months. In respect of the proposal by Japan that - in case of a discord between the parties to a dispute concerning the implementation of a Council recommendation - the Council should be empowered to reconvene the panel and request its advisory opinion relating to the points at issue, it was questioned whether examination of the follow-up of Council recommendations should not be left to the Council itself.

7. The representative of Australia introduced the Australian proposals on dispute settlement in the GATT (MTN.GNG/NG13/W/11). He emphasized the importance of a strengthened GATT dispute settlement system for the effectiveness not only of the General Agreement but also of the new rules to be negotiated during the Uruguay Round. In order to maximize the opportunities for disputing parties to reach mutually satisfactory solutions, the Australian proposal had as its central element the establishment of a discreet and compulsory conciliation phase. The proposal provided also for stricter time-limits for each phase of the panel process, acceptance by the contracting parties of an automatic right to a panel, adoption of recommendations by the CONTRACTING PARTIES on the basis of a consensus which would exclude the parties to a dispute as well as third parties which have been involved in the panel process, and for more thorough notification and surveillance.

8. The representative from the European Communities presented a communication from the European Economic Community (MTN.GNG/NG13/W/12). He elaborated notably on the following proposals by the EEC:

(1) Practice of consensus. In the view of the EEC, the parties concerned should continue to participate in the Council's decision-making process relating to the adoption of reports and recommendations.
(2) Strengthening of mediation/conciliation.
(3) Institutionalization of arbitration on a consensus basis and encouragement of its use in conflicts of a factual nature.
(4) Improvements in the panel procedures (reaffirmation of the principle of a right to a panel, use of standard terms of reference unless the parties agree on special terms of reference, expansion of the roster of panelists, authorization of the Director-General to complete the composition of panels, compliance with deadlines for the submission of panel reports to the Council).
(5) Procedures designed to avoid non-adoption of panel reports and to promote the timely implementation of recommendations (e.g. through strengthening the Council's surveillance function).
(6) Codification of the various existing texts relating to dispute settlement in a simple consolidated text, accompanied by a political pledge to use and observe the GATT dispute settlement procedures.

9. The representative of Canada introduced the Canadian statement on dispute settlement (MTN.GNG/NG13/W/13). He expressed the view that attempts should be made to clarify and improve the rules on consultations (e.g. the 1958 Decision in respect of Article XXII), on good offices as well as the procedures for panels established under Article XXIII:2 (e.g. specification of the "reasonable period of time" between submission of the panel report to the parties and its circulation to the contracting parties, strengthening of the confidentiality requirements, greater standardization of panel procedures, procedures for a more effective monitoring of the implementation of panel recommendations). Commenting on some of the proposals submitted by other delegations, he expressed support for improving notification procedures, optional mediation and conciliation facilities, mutually agreed binding arbitration with due safeguards for third party interests, recognition of the right of a party to the establishment of a panel with standard terms of reference as well as of the rights of third parties to take action under Article XXIII:2, strengthening of the roster of panelists and incentives for more expeditious implementation of panel reports.

10. Commenting on the submission by the United States (MTN.GNG/NG13/W/6), the representative of Japan explained the Japanese view that the panel process was designed for the the conciliation of the disputing parties and was not an "adjudicatory stage", as described in the United States' submission. He expressed support for empowering the Director-General or his designee to mediate bilateral dispute settlements. Japan felt extremely hesitant about the introduction of a binding arbitration process, which could undermine the competence of the CONTRACTING PARTIES under Article XXIII:2 to examine and authorize counter-measures. The Government of Japan was also reluctant to support the US proposal on binding,

enforceable timetables for the panel process, which could unduly restrict the possibility of a bilateral solution and could result in the abuse and proliferation of counter-measures. He agreed that non-governmental experts should be used more frequently, but he expressed doubts as to the idea of choosing panelists exclusively from non-governmental experts.

11. Commenting further on the submissions from New Zealand (MTN.GNG/NG13/W/2) and Jamaica (MTN.GNG/NG13/W/5), he expressed reluctance towards the proposal to allow "third parties" to invoke Article XXIII with regard to bilateral arrangements which such a party considered affecting the GATT system as a whole, even if there were no actual nullification or impairment of the benefits accruing to that third party under the GATT. Recourse to Article XXII consultations, notably improved procedures for Article XXII:2 consultations, could provide a more appropriate remedy for third parties vis-à-vis such bilateral arrangements. The problem of the proliferation of bilateralism could be more appropriately addressed in another suitable negotiating group of the Uruguay Round.

12. Commenting on the submissions from the United States, Japan and the EEC (MTN.GNG/NG13/W/6, 7, 9 and 12), the representative of Korea supported an enhancement of dispute settlement by means of consultations, conciliation and mediation. The concern over the proliferation of bilateralism should be more properly addressed in another suitable negotiating group of the Uruguay Round. The availability of binding arbitration should be limited to cases where prior agreement had been reached among disputing parties to refer the dispute to an arbitration process. To expedite the panel process, it would be advisable to make arrangements for the Council to establish a panel automatically after consultations and appropriate discussion in the Council. Korea also supported the use of standard terms of reference as well as the proposal by Japan that each disputing party nominate one panelist and the Director-General nominate the other panelist, if the disputing parties did not reach an agreement on the nomination within thirty days from the Council decision to establish a panel. Panels should complete their work within a maximum period of nine months from the establishment of the panel. In urgent cases, this maximum period should be shortened to three months. The Council should decide on the adoption of panel reports by consensus, including the disputing parties, within a period of sixty days, and in urgent cases thirty days, from the date of the submission of the panel report to the Council. Any party to a dispute, which strongly objected to the adoption of the panel report, could submit its position in writing during this time span.

13. The representative of Brazil offered some preliminary views on the principles that should guide the proposals to improve the GATT dispute settlement mechanism. The dispute settlement procedures should be based on consensus and should be used as a conciliation mechanism, the final stage of which, if conciliation failed, could not be of a judicial nature. Nor should the dispute settlement procedures be used to create, by constructive interpretation, obligations that were not clearly established in the text of the General Agreement, or to prematurely internationalize conflicts of a

private nature, the solution of which should be first sought within the domestic jurisdiction of the contracting parties. Alleged deficiencies in the dispute settlement system might be due less to the procedures themselves than to their implementation by contracting parties and to the divergent views on the nature of the dispute settlement mechanism. He said that Brazil attached utmost importance to differential and more favourable treatment of less-developed contracting parties in the area of dispute settlement between developing contracting parties with limited retaliatory power and more powerful contracting parties.

14. Following the proposal made by several delegations, the Negotiating Group agreed to request the secretariat to prepare an analytical summary and comparison of the various written and oral proposals made so far for the strengthening and improving of the dispute settlement process, with reference also to the GATT provisions in force.

15. The representative of Hong Kong referred to the objective of the negotiating plan (MTN.GNG/5, page 16) that "negotiations shall include the development of adequate arrangements for overseeing and monitoring the procedures that would facilitate compliance with adopted recommendations". He expressed support for the proposal made (e.g. in the submissions by Australia and the EEC) to strengthen the Council's surveillance function with regard to matters arising from disputes in the GATT. He mentioned the possibility of setting-up a separate GATT body dedicated to dispute settlement, which would report to the Council and could discharge many of the Council's functions in respect of dispute settlement. Such a body could meet regularly in order to keep existing disputes under review and examine the proper functioning of the dispute settlement mechanism. An alternative to such an additional body could be the Council meeting regularly in a "dispute settlement mode" to consider and monitor only dispute settlement matters. Such Council meetings could be the forum for initiating disputes. The chairman of these Council meetings could be available for conciliation. He said that Hong Kong intended to submit a formal proposal on this matter.

16. The representative of Singapore offered preliminary comments on various reform proposals made by other delegations and expressed support, inter alia, for allowing greater participation by third parties in the panel proceedings.

17. The representative of New Zealand said that, given the large number of proposals and the great deal of convergence so far, a more generic approach might be called for. He identified the following main areas of convergence:

(1) Improvements in specific aspects of panel procedures. New Zealand supported among these proposals in particular:
- an automatic right to a panel in the event of unsuccessful conciliation;

- use of standard terms of reference with departures only if approved by the Council;
- a roster of panelists;
- selection of panel membership by a neutral party, e.g. the Director-General, where there is a disagreement;
- fixed timetables for working procedures, submission of reports and decisions.

(2) Removal of some obstacles to adoption and implementation of reports. New Zealand supported the objective of limiting the scope for abuse of the consensus rule by blocking the dispute settlement process. New Zealand had therefore supported the idea of a consensus not including the parties to a dispute at some points in the process.

(3) Enhancement of the consultation and mediation process, availability of arbitration, and a strengthened political commitment to abide by decisions arising from the dispute settlement process. New Zealand was in favour of an agreement to accept as binding Council decisions adopted by consensus not including the disputing parties or third parties to the dispute. The idea of a surveillance mechanism through the Council sitting in "dispute settlement mode" would also assist governments in overcoming domestic opposition to reaching a settlement.

18. The representatives of Korea and Canada expressed support for the proposal to strengthen surveillance through establishment of a separate body for the regular review and monitoring of disputes. The existing functions of the Council and of the Director-General in the field of dispute settlement had to be taken duly into account.

19. Commenting on the proposal submitted by Australia, the representative of the United States expressed a preference for voluntary rather than compulsory conciliation so as to avoid unwarranted delay in the dispute settlement process. He questioned the appropriateness of the proposed recommendations by a conciliator "on an appropriate level of compensation with a view to restoring the balance of benefits between the parties". As regards the proposal to adopt panel reports by "consensus minus the parties to a dispute", he drew attention to the problem of blocking the adoption of panel reports with the help of "surrogates".

20. In response to various questions raised, the representative of Australia said that compensation as a means of conciliation could not be imposed by a conciliator but had to be agreed by the parties. The resolution reached through conciliation would have to be notified to the CONTRACTING PARTIES without a right of the Council to veto the mutually agreed resolution. As to the proposal that each party to the dispute nominate one panelist and the third panelist being nominated by the

Director-General, he wondered whether such a procedure would not increase the risk of split panel decisions.

21. Commenting on the submission by the EEC, attention was drawn to the difficulty of defining when a request for a panel was "obviously unfounded". It was further said that, in order to reduce the risk of objections to the adoption of panel reports, it would not be enough to require a written submission to the CONTRACTING PARTIES giving the grounds for such objections. Responding to the various comments made, the representative of the EEC took the view that - the principle of the right to a panel and the difficulty of objectively defining "obviously unfounded" cases notwithstanding - the Council must retain the right not to grant a request for the establishment of a panel if the Council considered the complaint to be outside the scope of application of the GATT. He said that the proposed requirement of a written justification of any objections to the adoption of panel reports would constitute an improvement compared to the present situation. He agreed that there might be a need for defining more precisely the various kinds of "conflicts of a factual nature" (e.g. amount of injury suffered) which might be submitted to an institutionalized arbitration procedure.

22. Commenting on the submission by Canada, the representative of the United States expressed doubts as to the appropriateness of holding Article XXIII:1 consultations normally in the capital of the country requested to consult. He supported the Canadian view that - the desirability of fixed time-limits for the various stages of the panel process notwithstanding - sight should not be lost of the need for flexibility, by mutual consent, in some cases. The representative of Canada made it clear that Canada was not against the use of standard terms of reference but considered it necessary that Article XXIII complaints be set out in precise language and spell out the nature of the problem in sufficient clarity.

Other business, including arrangements for the next meeting of the Negotiating Group

23. Evaluating the Group's requirements in terms of meeting days, formal and informal, in order to carry out the Initial Phase, as requested by the GNG, participants were of the view that some three or four more meeting days might be necessary before the end of this year. As for desired timing, it was noted that the dates of 9 November and of 19 and 20 November had been mentioned in informal discussions for further meetings of this Group.

24. As for the agenda of its next meeting, the Group agreed to continue its work on the basis of the same agenda, having as a background the analytical summary and comparative analysis by the secretariat of written and oral proposals submitted so far. This comparative analysis could be revised at a later time so as to take account of subsequent submissions by contracting parties.