

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG13/4
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Group of Negotiations on Goods (GATT)

Negotiating Group on
Dispute Settlement

MEETING OF 9 NOVEMBER 1987

Note by the Secretariat

1. The Group held its fourth meeting on 9 November 1987 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2501.

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 summary and comparative analysis by the secretariat of the proposals made so far

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), Canada (MTN.GNG/NG13/W/13) and Nicaragua (MTN.GNG/NG13/W/15), as well as two background notes by the secretariat (MTN.GNG/NG13/W/4 and 14). Three additional written proposals were distributed during the meeting: one submission by Argentina, Canada, Hong Kong, Hungary, Mexico and Uruguay (MTN.GNG/NG13/W/16); and two further proposals by Argentina (MTN.GNG/NG13/W/17) and Hungary (MTN.GNG/NG13/W/18).

3. Introducing the proposal from the delegations of Argentina, Canada, Hong Kong, Hungary, Mexico and Uruguay, the representative of Hong Kong said that this joint proposal was without prejudice to any other proposals which had been or might be submitted to the Negotiating Group by the delegations concerned. The proposal related to the second part of the negotiating objective, i.e. "the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations". While it was encouraging to note a certain convergence of views on possible improvements in dispute settlement procedures, such procedural improvements needed to be complemented by adequate arrangements to oversee and monitor the whole dispute settlement process as well as to enhance compliance with the adopted recommendations. He explained the basic ideas underlying this proposal for regular Council meetings in a special Dispute Settlement Mode, to carry out all the functions relating to disputes, under the

chairmanship of a separate chairman appointed or elected for that purpose by the CONTRACTING PARTIES. The Council in Dispute Settlement Mode would remain identical with the Council and would report directly to the CONTRACTING PARTIES.

4. Many delegates expressed support for the idea of strengthening the rôle and surveillance function of the GATT Council in the dispute settlement system. According to some delegates the institution of a special Council chairman could relieve the workload of both the Director-General and the general Council chairman. But it should not exclude a possible rôle of the Director-General in the dispute settlement process nor weaken the unity of the Council chairmanship. It was also said that the considerable competence and longer-term appointment of such a special Council chairman could lead to tension with the annually appointed general Council chairman. Another proposal was that the Council sitting in Dispute Settlement Mode could be chaired by an assistant or deputy of the general Council chairman. But it was also said that the chairman of the "Dispute Settlement Council" should have sufficient political stature and should not be a full-time employee of the secretariat.

5. The representative of Uruguay said, inter alia, that arbitration had proved to be an effective instrument for the settlement of disputes among states when diplomatic means had failed to produce a dispute settlement. Since World War II, an increasing number of national constitutions (including the one of Uruguay) and international agreements had made provision for arbitration as an optional means of dispute settlement. In the view of Uruguay, arbitration and the institution of a special GATT Council sitting in Dispute Settlement Mode could make an important contribution to the strengthening of the GATT dispute settlement system.

6. The representative of Argentina introduced its submission circulated in MTN.GNG/NG13/W/17. This communication proposes, inter alia, to exclude the contracting parties involved in the dispute from the decision-making by the CONTRACTING PARTIES or Council and to make provision also for panel recommendations and Council decision on "retroactive prejudice" caused from the time when the disputed measure had entered into force.

7. The representative of the United States said that the large number of submissions made in this Negotiating Group provided a basis for rapid progress in reaching agreement on the much-needed reform of the system. The United States favoured many of the proposals in concept. He was encouraged, for example, by proposals which would streamline and expedite dispute settlement procedures, including shortening the timetable for panel consideration, providing for standard terms of reference, and expanding the Director-General's rôle to mandate terms of reference and panel composition where the parties could not reach agreement within a brief period. The United States was also encouraged by proposals to expand the roster of non-governmental panelists, to increase surveillance over implementation of panel reports, and to consolidate the text of all GATT settlement procedures. The United States was very interested in further exploring proposals to remove parties with a material interest in a dispute from Council decisions on panel reports.

The United States would like to see the issue of use of binding arbitration explored in greater depth. He thought the first step should be to explore what those who proposed binding arbitration meant by that term. He had the impression the term might mean different things to different people. He also would like clarification on certain aspects of various proposals. Some parties had suggested that agreements resulting from binding arbitration should be submitted to the Council for approval in order to ensure they were GATT-consistent and did not violate the rights of third parties. He shared the desire to maintain the integrity of the system and the rights of third parties, but other ways could be found to ensure these goals. He had two questions for those advocating Council approval. First, wouldn't such a requirement discourage parties from submitting disputes to binding arbitration? Second, if a third party believed its GATT rights had been nullified or impaired by an arbitration decision, couldn't it avail itself of the dispute settlement procedures? Referring to the concern that binding arbitration would lead to retaliation and that disputes involving interpretations of the General Agreement should not be referred to binding arbitration, he recalled that most of the proposals on arbitration had suggested that it be an option undertaken only with the consent of both disputants. He wondered whether such a procedure would mitigate the concerns of Japan and the EC.

For the United States, blocking of adoption of panel reports represented the most serious breakdown in the GATT dispute settlement process. Referring to the proposals that parties to a dispute should not "unduly obstruct" adoption of panel reports and that the blocking country(ies) should provide their reasons in writing, he asked Japan and the EC to seriously consider whether their proposals went far enough to solve this critical problem, or whether they were willing to go further. As to the Australian suggestion that parties to a dispute and third parties with a material interest in it should not participate in Council decisions on adoption of the report, he wondered how the term "material interest" should be defined. The United States was sympathetic with their concern but wondered whether this proposal provided a practical solution. He noted that some disputes were very broad and had many interested parties. The pool of delegations deciding an issue would be very small in such cases. Australia also had suggested a mandatory three-month procedure for conciliation. He expressed concern that this might prolong the dispute settlement process rather than shorten it.

Finally, he said he would appreciate more detailed explanations on the proposals to clarify the procedures for requesting retaliation. Was the purpose behind these proposals to facilitate the resort to retaliation by parties suffering trade damage as a result of another contracting party's failure to implement a Council decision? If so, then unless there was agreement on substantive measures to address the problem of blocking of panel reports in the Council, could it not be expected that Council decisions to authorize retaliation would be blocked as well? In

conclusion, he reiterated that the United States was encouraged by the progress of this group. He believed that the Group would soon reach the time when it could begin to synthesize the proposals which had been put forward.

8. The representative of Australia agreed that the proposal of "consensus minus materially interested parties" could entail the risk that the other contracting parties were not sufficiently well informed of a panel report. The term "materially interested parties" should normally refer to those contracting parties which had made presentations to a panel.

9. The representative of Japan said that the purpose of the Japanese proposal for the examination of the GATT relevance of a complaint by the CONTRACTING PARTIES prior to a decision on the establishment of a panel was to prevent politicization and abuse of the GATT dispute settlement system. This would not hinder the panel, once established, to make its own findings on the GATT relevance of the complaint before it. He expressed doubts as to the proposal to make conciliation a mandatory stage before one could have recourse to panel proceedings and to limit, thereby, contracting parties' right to a panel under Article XXIII:2. He referred to the conciliatory function of GATT Working Parties under Articles XXII:2 or XXIII:2 and said that the proposed elaboration of detailed conciliation rules could reduce the advantageous flexibility of conciliation. Since it was the sole responsibility of the CONTRACTING PARTIES to decide on the GATT conformity of a particular measure and to authorize counter-measures under Article XXIII:2, Japan shared in principle the view that mandatory bilateral arbitration should neither involve questions of interpretation or of conformity with the General Agreement nor justify recourse to counter-measures. Even in case of a prior approval by the CONTRACTING PARTIES of an arbitration clause or of the initiation of an arbitration proceeding, Japan retained doubts about the legality and appropriateness of such a broad delegation of powers under Article XXIII:2 to an arbitration body entirely independent from the CONTRACTING PARTIES.

He expressed agreement with the proposed requirement that, if a mutually satisfactory settlement was worked out by the parties to a dispute before a panel, the contents of such settlement should be communicated to the CONTRACTING PARTIES by the parties to the dispute. Since the complaining country would then usually withdraw its complaint under Article XXIII, the CONTRACTING PARTIES were entitled to examine the GATT conformity of bilateral dispute settlements only on the basis of a specific request by a third contracting party. He expressed support for the proposal to standardize and clarify the panel procedures for the participation of third contracting parties having a substantial interest in the matter before a panel. He also referred to the danger of abuse of a panel by third countries. Thus, the Australian proposal that a panel might also recommend compensation to be extended to any interested third contracting party, could cause an unwarranted spillover of bilateral disputes. He endorsed the proposal to strengthen the confidentiality requirements of panel proceedings.

10. Responding to various questions raised, the representative of the European Communities said that bilateral arbitration could not curtail the competence of the CONTRACTING PARTIES to interpret the General Agreement and to protect the rights of third contracting parties. The representative of Hong Kong explained that the joint submission introduced by him had left it deliberately open whether the "Dispute Settlement Council Chairman" should be elected (e.g. from among current GATT delegates) or appointed on a longer-term basis as a full-time, senior employee of the CONTRACTING PARTIES. Even if the current dispute settlement functions of the Director-General were vested in the "Dispute Settlement Council Chairman", the parties to a dispute could continue to approach the Director-General for conciliation or mediation purposes. The unity of the Council chairmanship would be ensured by the unity of the CONTRACTING PARTIES. The "Dispute Settlement Chairman" would report to the CONTRACTING PARTIES and not to the general Council chairman. The representative of Australia wondered how an arbitration award could possibly judge on the rights under GATT without interpreting GATT rules. The representative of the United States confirmed the view of his government that the parties to binding arbitration would agree to either accept the result of the arbitral decision or, if it could not be implemented, to pay compensation or accept retaliation.

11. The representative of Nicaragua introduced her submission circulated in MTN.GNG/NG13/W/15. She said that the GATT dispute settlement system was vital particularly for small and less-developed contracting parties with limited retaliatory power. The two recent Article XXIII complaints by Nicaragua in 1983 as well as in 1985 had had disappointing results. This experience could assist in negotiating improvements in the dispute settlement mechanism. She explained the various specific proposals set out in the Nicaraguan submission concerning consultations, panel procedures, recommendations of the CONTRACTING PARTIES and differential treatment of less-developed contracting parties.

12. The representative of Hungary introduced its proposals, circulated in MTN.GNG/NG13/W/18, for conciliation procedures, the right to a panel, bilateral settlements of a dispute before a panel, participation of third parties in panel proceedings and adoption of panel reports.

13. In reply to a question from the chairman whether participants intended to make further submissions to this Group during the initial phase of the negotiating process, the representative of Korea announced that his delegation might submit a paper. The chairman confirmed that each participant remained free to present comments and proposals at any time.

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

14. The Group decided to hold its next meeting on 20 November, to be continued on 26 November 1987 if necessary.