

MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG13/5  
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Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on  
Dispute Settlement

MEETING OF 20 NOVEMBER 1987

Note by the Secretariat

1. The Group held its fifth meeting on 20 November 1987 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2514.

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), Nicaragua (MTN.GNG/NG13/W/15), Argentina (MTN.GNG/NG13/W/17), Hungary (MTN.GNG/NG13/W/18), Korea (MTN.GNG/NG13/W/19), a joint submission by Argentina, Canada Hong Kong, Hungary, Mexico and Uruguay (MTN.GNG/NG13/W/16), as well as two background notes by the secretariat (MTN.GNG/NG13/W/4 and 14).

3. The Chairman opened the meeting by saying that this Group had benefited from a large number of proposals so far which, together with the background papers by the secretariat, had enabled the Group to have a wide-ranging exchange of views on each of the elements contained in the negotiating mandate.

4. The representative of Korea introduced the communication submitted by Korea (MTN.GNG/NG13/W/19) which proposes improvements in the GATT dispute settlement procedures in the following areas:

- (1) an enhanced mediation rôle of the Director-General or his designee;
- (2) introduction of a non-compulsory arbitration procedure on the basis of mutually agreed terms with proper safeguards for the interests of third contracting parties;

- (3) panel procedures (stricter time-limits for the establishment of panels, use of standard terms of reference, additional authority of the Director-General to decide on the composition of panels, time-limits for panel proceedings as well as for adoption of panel reports, written justification of objections to the adoption of panel reports);
- (4) compliance with the adopted recommendations (time-limit for implementation; compensation and only exceptionally retaliation in case of non-compliance, regular surveillance by the Council).

He said that the submission by Korea, as well as the large number of other proposals, demonstrated the importance which contracting parties attributed to the work of this Group. In the view of Korea, an early successful result of the negotiations on improvements in the GATT dispute settlement procedures was both possible and desirable because it would benefit all contracting parties.

5. Several delegations welcomed the Korean submission and requested further clarifications relating, inter alia, to the "right to a panel"; the regular use of standard terms of reference unless specific terms of reference were agreed; the right to request a panel recommendation on the amount of compensation; the adoption of panel reports and their legal effects on non-disputants that have entered a reservation on the adoption of a panel report by consensus; the time-periods of the dispute settlement process; the "non-compulsory" (i.e. voluntary) recourse to arbitration; the examination or "taking note" by the Council of bilaterally agreed arbitration clauses and of arbitration awards legally binding for the parties to the dispute; the proposed regular monitoring by the Council of all on-going dispute settlement proceedings; the protection of the rights of third contracting parties, for instance by means of intervention in an arbitration procedure or by subsequently invoking GATT Article XXIII.

6. Following the proposal by a number of delegations, the Group requested the secretariat to prepare a background paper clarifying the concepts, different kinds and legal effects of arbitration.

7. One delegation recalled its earlier proposals for additional authority of the Director-General to appoint panel members, for allowing a panel to decide itself on its terms of reference, for the possibility of "urgency measures" in disputes involving perishable goods, for the adoption of panel reports by "consensus minus the parties to the dispute" and for a strengthened political commitment to abide by the GATT dispute settlement rules. Several participants commented on various other proposals as well as on the "Summary and Comparative Analysis of Proposals for Negotiations" prepared by the secretariat. The comments and discussions related, inter alia, to the following issues: The rôle of the Director-General with regard to good offices, conciliation and mediation, especially in disputes

between a less-developed and a developed contracting party; problems relating to a delegation by the Director-General of his own conciliation/mediation function to another neutral person designated by him; the respective merits of voluntary or mandatory conciliation and the sequence of conciliation, mediation and panel proceedings; the 1970/72 GATT procedures for consultations on balance-of-payments restrictions; the voluntary nature of a recourse to arbitration and the legally binding nature of arbitration awards; the involvement of third contracting parties in arbitration proceedings; the precedential effects of arbitration awards and "jurisprudence"; implementation of panel findings; compensation/retaliation in case of non-compliance with GATT obligations; GATT Article XXI and its review by a GATT panel; the importance of preserving and strengthening the special and differential treatment of less-developed contracting parties in the context of GATT dispute settlement procedures. The Chairman recalled that the "Summary and Comparative Analysis of Proposals for Negotiations" had been prepared by the secretariat on its own responsibility without committing any contracting party and would be revised with due account to the various comments made.

8. Several delegations welcomed the joint communication from the delegations of Argentina, Canada, Hong Kong, Hungary, Mexico and Uruguay. One participant expressed reservations in regard to the proposal of special Council meetings in a dispute settlement mode. He said that the capacity of the GATT Council to give full attention and focus to the settlement of disputes could be ensured by extending, if necessary, the duration of the Council sessions. Since the majority of GATT dispute settlement proceedings involved developed countries, the agenda of Council meetings in a dispute settlement mode would be likely to include more items referring to disputes among developed contracting parties than to disputes involving developing countries. This could act as a disincentive to the participation of less-developed contracting parties in a special GATT Dispute Settlement Council. By contrast, the comprehensive agenda of the current Council meetings involved the interests of all contracting parties and promoted the close examination by less-developed contracting parties of all the steps of dispute settlement proceedings. He further expressed doubts concerning fixed time-limits for the various phases of the dispute settlement process as well as concerning the proposed rôle of the chairman of the Dispute Settlement Council as arbitrator. He sought clarification on several points of the joint proposal including the following: Would dispute settlement proceedings continue to be initiated in the regular Council meetings? How would the respective rôles and competences of the chairman of the regular Council and those of the chairman of the Dispute Settlement Council be delimited from each other? Would both the regular and the special Council be authorized to establish working parties? What was meant by "appointment" or "election" of the chairman of the Dispute Settlement Council? Another participant said that the creation of a new body, such as the GATT Dispute Settlement Council, could dilute the competence and importance of the regular GATT Council and weaken the GATT dispute settlement process. Still another delegation welcomed the joint proposal to strengthen the surveillance of the implementation of adopted panel reports, but expressed concern that frequent meetings of the Dispute Settlement Council, even without a specific request by a complaining contracting party, could lead to politicization and an unwarranted burden.

9. In response to the various questions, some sponsors of the joint proposal replied that the existence of two chairmen of the Council meeting in separate modes would not affect the unity, nature and authority of the Council which remained the only standing body representing the CONTRACTING PARTIES. A full-time chairman of the Dispute Settlement Council and his rôle, with the agreement of the disputing parties concerned, as facilitator, conciliator, mediator or arbitrator was considered to be justifiable. It was also recalled that the joint proposal (paragraph 3) preserved all the existing dispute settlement functions of the Council as well as the existing dispute settlement procedures relating to less-developed contracting parties. Nor would the existence of the special chairman of the Dispute Settlement Council detract from the existing dispute settlement procedures with regard to developing countries. It was recalled that at least two of the developing countries sponsoring the joint proposal, Hong Kong and Mexico, had recently used the GATT panel procedures with success. One purpose of the proposed Council meetings in different modes was to avoid establishing a different new body. All dispute settlement business should be dealt with in the Dispute Settlement Council which would report directly to the CONTRACTING PARTIES. The terms "appointed or elected" were meant to refer to the difference between a long-term employee paid by the CONTRACTING PARTIES and devoted exclusively to the task of chairman of the Dispute Settlement Council, on the one hand, and a representative from a GATT delegation elected on an annual basis to be the chairman of the Dispute Settlement Council, on the other hand. The joint proposal was meant to be an open "framework proposal" that did not prejudice the positions of its sponsors on the various substantive issues before this Group.

10. The question was raised why less-developed contracting parties were so infrequently resorting to the GATT dispute settlement procedures and whether additional reforms were needed (e.g. provision of legal assistance) to enable developing countries to use the GATT dispute system more actively to defend their interests. It was also said that it was in the interest of all contracting parties to participate in Council deliberations on disputes and panel reports. Not only developing countries but also other small contracting parties could be disadvantaged by a lack of retaliatory power.

11. Responding to the various questions relating to the communication from Korea, the representative of Korea said, inter alia, that arbitration was inherently of a bilateral nature. In order to incorporate voluntarily agreed arbitration into the multilateral GATT system, the terms of reference as well as the arbitration award should be reported to the GATT Council. Even if the Council would exercise a passive rôle in this respect, the bilaterally binding nature of arbitration awards would not prevent third GATT contracting parties from asserting all their rights under GATT Article XXIII in respect of the matter at issue. He expressed support for the proposed regular use of standard terms of reference and for the speedy settlement of disputes; the somewhat lenient time-limits proposed in the Korean submission reflected a certain cautiousness of his country which had never been directly involved in a GATT dispute settlement

proceeding. In the view of the Korean delegation, it was up to the Council to decide whether or not to adopt a panel report. He agreed that also developed contracting parties could request a GATT panel to include into the panel report a recommendation on the amount of compensation due in case the main panel findings were not implemented.

12. Another participant noted that, while there was an encouraging convergence of views on certain improvements in the GATT dispute settlement procedures, participants continued to hold differing views on certain other delicate issues such as adoption of panel reports by "consensus minus the parties to the dispute", arbitration and multilateral surveillance. Another delegation said that it did not support proposals for binding arbitration because arbitration could encroach upon the exclusive competence of the CONTRACTING PARTIES to adopt binding interpretations of GATT rules and to authorize the retaliatory suspension of GATT obligations pursuant to GATT Article XXIII:2. An arbitration body entirely independent from the CONTRACTING PARTIES would be difficult to reconcile with GATT Article XXIII:2 and could lead to abuse of countermeasures. It was also said that the discussions in this Group should not focus exclusively on improvements in the dispute settlement procedures but should also address certain substantive issues such as the legal nature of panel reports and the legal effects of Council rulings or recommendations under Article XXIII:2.

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

13. The Group agreed that it was not necessary to meet again during 1987. The Group further agreed, subject to confirmation by the GNG at its meeting of 16 December, to schedule its next meeting for the week beginning 29 February 1988. The Chairman concluded the meeting by saying that the time-span until the next meeting of the Group would enable participants to carefully study the large number of submissions and secretariat notes which the Group had received and discussed so far as required by the negotiating plan.