MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG13/W/21
1 March 1988
Special Distribution

Group of Negotiations on Goods (GATT)
Negotiating Group on Dispute Settlement

Original: English

COMMUNICATION FROM JAPAN

The following communication has been received on 29 February 1988 from the delegation of Japan with the request that it be circulated to members of the Group.

Supplementary Proposal of Japan on Dispute Settlement

Japan hereby submits a supplementary proposal on dispute settlement with a view to facilitating discussions in this negotiating group. The supplementary proposal covers two outstanding issues: the undue obstruction to the adoption of a panel report, and arbitration. We also reserve the rights to suggest new, alternative, or more specific ideas, taking into account the deliberations in the negotiating group meeting.

1. How to avoid the undue obstruction to the adoption of a panel report

Introduction

(1) Japan considers that the CONTRACTING PARTIES should maintain the consensus practice in making a decision on a panel report for the following reasons: The consensus practice ensures the effective implementation of the

rulings or recommendations of the CONTRACTING PARTIES by simultaneously establishing the will of the CONTRACTING PARTIES and that of the parties to a dispute. The considerably effective functioning of the GATT dispute settlement procedures in the past in terms of the implementation of the rulings or recommendations is attributable in part to such merit of the consensus practice. In other words, regardless of the question whether the rulings or recommendations per se are legally binding or not, the findings adopted by the CONTRACTING PARTIES become binding, as far as the case in question is concerned, on the parties to a dispute as a result of their agreeing to or not obstructing the adoption of the panel report (pacta sunt servanda), and thereafter it becomes no longer permissible by any means for the parties to a dispute to deny or ignore the findings of the panel report in seeking a solution of the dispute. Thus ensured is the effective settlement of a dispute by the consensus practice. In this negotiating group, some participants have proposed the so-called consensus-minus-two-idea which consists of excluding the parties to a dispute from the decision-making process of the Council on a panel report. Contrary to its aim, however, the consensus-minus-two, if adopted, would bring about more difficulties in ensuring the settlement of a dispute in accordance with the rulings or recommendations, given the present situation where there is no

concurrence in view as to whether the rulings or recommendations per se are binding or not.

Some have also maintained that the existing consensus practice is a serious impediment to the prompt and effective functioning of the GATT dispute settlement procedures. On closer examination of the past cases during the period from 1979 through 1986, however, only two panel reports (W/4 Nos. 68, 82) were not adopted by the Council because of the opposition from the respective "losing" parties. Even in the two cases, the panel reports actually prompted an agreed solution of the disputes by effecting a voluntary action of the disputing party to withdraw the measure in question (See W/4, page 104). The delay in adopting a panel report has occasionally occurred in the past cases. But it should be noted that the delay is often attributable to the flaws in a panel report or the complexity of a dispute itself, and therefore it is wrong to impute the delays and non-adoptions entirely to the consensus practice.

Presently, on the other hand, the Council tends to make an immediate decision on a panel report once submitted without deliberating closely on it. Thus, the parties to a dispute are usually compelled to take alternative courses, agree or not agree to the adoption, without having an opportunity to raise an objection to the panel report. Under such circumstances, it is very difficult legally or politically for a disputing party to

accept the panel report in case where there are highly questionable findings in the panel report. The past cases indicate that, in case where many parties have doubts about findings in the panel report, the report often remains unadopted (W/4, Nos. 57, 71) or the adoption of the report is delayed (for example, W/4, Nos. 40--43).

(2) In the light of the above, Japan considers that the following two approaches are noteworthy in order to avoid the situation where the party or parties to the dispute would be compelled to obstruct the adoption, while keeping the merit of the consensus practice intact:

(1) To improve the quality of panels, thereby ensuring the proper legal or factual judgements.

(2) (a) To explicitly endorse the Council to give a disputing party an opportunity to raise an objection to the panel report, as indicated in 2(e) of Korean Proposal (W/19).

(b) To review the panel report, if such an objection is raised, in a specified period of time prior to the adoption of the panel report with a view to seeking an appropriate measure to be taken by the Council.

Taking this into account, Japan hereby puts forward the following proposal.

<u>Proposal</u>

(1) Improvement of the Quality of Panels

(a) The quality of panels could be improved in mid-term or longer term by recruiting persons

(governmental or not) qualified in the interpretation of the GATT provisions, or in the fields of international trade, or well informed of detailed situations of domestic industries of each contracting party and by registering them in a roster as candidates for panelists, taking into account inter alia the balance of their nationalities or geographic attributes.

It is also necessary in this regard to expand and improve the function of the GATT Secretariat as a whole, at the leading initiative of the Director-General, to render technical assistance or service to panel procedures.

(b) It is also needed to expand the staff of the legal section of the Secretariat.

(2) Procedures to Raise an Objection to a Panel Report

Taking into account the necessity to avoid undue delay in the dispute settlement procedures, it should be explicitly recognized for a disputing party to have an opportunity of raising an objection to the panel report in accordance with an agreed procedure with a view to ensuring a prompt settlement of the dispute making the most of the merit of the consensus practice. Main elements of such a procedure are as follows:

(a) A party to a dispute which it considers could not accept the panel report for compelling reasons shall, by the time of the session of the Council first deliberating on the report, submit to the CONTRACTING PARTIES written representations specifying the compelling

reasons. The parties to a dispute shall not obstruct the adoption of the panel report without submitting such written representations to raise an objection.

(b) When such an objection is raised, the CONTRACTING PARTIES (the Council) shall pay due consideration to the objection in deliberating on the panel report.

(c) If the Council deems it necessary to review a part or the whole of the panel report upon the objection, the review shall be conducted in accordance with an agreed procedure. (Although the specific procedures for the review remain to be examined, the procedures shall be structured so as to ensure an objective, professional and comprehensive assessment of the panel report vis-à-vis the objection. The procedure shall not be utilized in such a way as to merely resume the contentious arguments on the dispute.)

(d) Such a reviewing procedure should be invoked to ensure an objective assessment of the matter and prompt settlement of the dispute with due repect for the purposes of the GATT dispute settlement procedures. It shall not be intended or considered as a device to bring about delay of the settlement of the dispute. Therefore, the review should be terminated within a short period of time (within 30 days, for example), and the parties to a dispute shall not oppose the findings resulting from the review except under explicitly predetermined terms.

2. Arbitration Proceedings

If arbitration proceedings are to be introduced as a formally available means of the GATT dispute settlement procedures, it is essential to make institutional arrangements to prevent the proceedings from impairing the authority or rights of the CONTRACTING PARTIES to decide on the interpretation of or conformity with the GATT provisions as well as the rights or benefits of the third parties, or from bringing about a proliferation of bilateralism and countermeasures.

Japan considers, therefore, that the following conditions shall be met at least if any arbitration proceedings are to be incorporated into the GATT dispute settlement procedures.

(1) Neutrality of an Arbitral Body

Arbitration is, by definition, based upon an (prior or ad hoc) agreement of the disputing parties to refer the matter to it. It is still necessary, however, to avoid the situation where one disputing party takes advantage of political or economic leverage to impose unfair arbitrators or awards upon another party. Thus, the arbitral body shall be neutral. It is prefererable in terms of the neutrality of arbitration that any arbitration of the disputes between contracting parties be exclusively referred to one arbitral body established by the CONTRACTING PARTIES in Geneva. Moreover, unless otherwise agreed upon by parties to a dispute, the qualifications and nomination procedures of panelists should also apply, mutatis mutandis, to those of

arbitrators in order to ensure the neutrality of arbitrators. (It is recommendable to make use of the panelist roster to select arbitrators).

(2) Consistency and Transparency of the Enforcement

(a) Unless specifically authorized in advance by the CONTRACTING PARTIES, the mandate of an arbitral body shall be limited to fact-finding. The awards by the arbitral body shall be notified to the CONTRACTING PARTIES.

(b) If any third party considers that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired or that the attainment of any objective of the GATT is being impeded as a result of the arbitration award, it may raise an objection to the award and request the Council to make a suitable effort with a view to seeking an appropriate solution. The Council (excluding the disputing parties) thus approached shall, if it considers that the objection has the prima facie grounds(*), make a decision upon the request including the establishment of a panel or working party to examine the matter. The Council may nullify the award on the basis of the reports of a panel or working party.

(c) An arbitration award shall not add to or diminish the rights and obligations provided in GATT of the parties to an arbitration. The parties to an arbitration may refer the matter to the CONTRACTING PARTIES if either of them is convinced that the award

adds to or diminishes its rights and obligations provided in GATT.

(*) It can be defined for example that, in case where an objection is based upon the alleged violation of the GATT provisions or the objecting party establishes the nullification or impairment of its benefits, the complaint of the objecting third party has prima facie grounds.

(3) Discrete Nature of Findings

The findings contained in an arbitration award are effective only to the specific case which is referred to the arbitration, and the award binds only the parties to the arbitration. Any findings shall not be construed as establishing generally applicable interpretation of the GATT rules.