

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG13/6

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Group of Negotiations on Goods (GATT)

Negotiating Group on
Dispute Settlement

MEETING OF 2 AND 3 MARCH 1988

Note by the Secretariat

1. The Group held its sixth meeting on 2 and 3 March 1988 under the Chairmanship of Ambassador Julio A. Lacarte-Murō (Uruguay). The Group adopted the agenda set out in GATT/AIR/2554/Rev.1.

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, 9 and 21), 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 22), 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), Peru (MTN.GNG/NG13/W/23), a joint submission by Argentina, Canada Hong Kong, Hungary, Mexico and Uruguay (MTN.GNG/NG13/W/16), as well as three background notes by the secretariat (MTN.GNG/NG13/W/4, 14/Rev.1, and 20).

3. The representative of Brazil presented the general views of his delegation on the matters under consideration in this Group (MTN.GNG/NG13/W/24) and referred, inter alia, to the following issues:

- the close relationship between the work of this Group with the work of the Negotiating Groups on GATT Articles, on the Functioning of the GATT System, and on MTN Agreements and Arrangements;
- the particular attention to be given in the consideration of Articles XXII and XXIII to differential and more favourable treatment for developing countries;
- the nature and functions of the GATT dispute settlement mechanism.

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Commenting, on various written submissions, he expressed support, inter alia, for strengthening the availability of good offices, mediation and conciliation by the Director-General; the submission by the defending party of its reply at the latest at the Council meeting following the submission of the complaint; the principle of a right to a panel; the use of standard terms of reference of panels; the maintenance of consensus in the decision-making process of the Council; the need for a written justification of any objections to panel findings; a time-limit of normally 80 days for Council decisions on the adoption of panel reports once they have been delivered; in the case of a matter raised by a less-developed contracting party, the establishment of a panel not later than upon the receipt of the Director-General's report if his good offices failed to produce a mutually satisfactory solution, as well as the possibility of a recommendation by the CONTRACTING PARTIES of compensation for injury caused; the elaboration of an improved and consolidated instrument integrating the various GATT dispute settlement procedures and of a strengthened commitment to abide by the dispute settlement system in GATT.

4. The representative of Japan introduced the supplementary proposals of Japan on dispute settlement (MTN.GNG/NG13/W/21), which address two major outstanding issues:

- How to avoid undue obstruction to the adoption of a panel report? In this respect, Japan proposes, inter alia, to maintain the consensus practice but to improve the quality of panels and to introduce procedures for the raising of objections to the adoption of a panel report and for its possible review by the Council within a short period of time.
- Institutional arrangements to prevent arbitration 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 third parties, or from bringing about a proliferation of bilateralism and countermeasures.

5. Referring to "the principle of the right to a panel", one delegation supported the view that the GATT CONTRACTING PARTIES should examine the GATT relevance of a complaint, the appropriateness of continuing or resuming bilateral consultations as well as the appropriate method of dispute settlement before deciding whether or not to accept the request to refer a matter to a panel. This delegation also said that departures from the standard terms of reference of panels were not only a matter of bilateral agreement among the parties involved but should also be justifiable in terms of the Council deliberations of the issue concerned. Commenting on the interpretation of the terms of reference of panels, it was suggested that if the complaining party had specified certain GATT Articles as being relevant for the matter before the panel and if the

panel, or third parties intervening in the panel proceeding, considered also other GATT Articles to be relevant for a ruling on the matter, it was up to the panel to decide which GATT Articles were relevant for a finding on the matter before the panel.

6. The representative of the European Community presented the communication from the EEC (MTN.GNG/NG13/W/22), which proposes improvements in the following areas of GATT dispute settlement procedures:

- Regarding adoption of panel reports and the object of avoiding situations of deadlock, the EEC points to "the two activities involved in dispute settlement, resolution of the conflict on the one hand and authoritative interpretations of GATT provisions on the other", and sets out possibilities for dealing with "the problem of how to avoid non-adoption" of panel interpretations and recommendations.
- Conciliation/mediation "should remain an option that could be used by mutual agreement of the parties and any settlement, adopted in this way, should be compatible with the General Agreement and should not prejudice the GATT rights of third parties."
- A rapid arbitration procedure should be institutionalized as a supplementary technique for the settlement of certain disputes without prejudice to the GATT rights of third parties.
- Deadlines should be fixed for the decisions on the establishment, terms of reference and composition of panels, as well as for the presentation, examination and implementation of their reports.
- The Council should continue to be in charge of a strengthened and regular procedure of surveillance and control of matters arising from Article XXIII.

7. Commenting on the supplementary proposals of Japan, one delegation shared the doubts concerning the concept of "consensus minus two" and supported the introduction of an obligation to justify in writing any objection to the adoption of a panel report. With regard to the proposed procedure for the review by the Council of a panel report, this delegation questioned whether and how it could be avoided that the contentious arguments on the dispute would be merely resumed in the review procedure. It was also asked under what "explicitly predetermined terms" the parties to a dispute should be entitled to oppose also the findings resulting from the review process. Japan's support for the introduction of voluntarily agreed arbitration and for a certain control by the Council over the object of the arbitration was welcomed. It was suggested that the Council should remain free in the exercise of this control and should not be obligated to accept arbitration only if it was limited to factual issues. The proposed

introduction of a prima facie control by the Council of objections raised by third parties vis-à-vis an arbitration award could limit the right to a panel, which all contracting parties should have if they consider that any benefit accruing to them under the General Agreement is being nullified or impaired.

8. The representative of Peru introduced the communication from Peru (MTN.GNG/NG13/W/23) which suggests, inter alia:

- the means for dispute settlement stipulated in Article 33 of the UN Charter could provide a reference framework for the elaboration of the rules and procedures for the GATT dispute settlement machinery;
- the procedures for disputes submitted by developing countries should be enhanced and provide for measures to make up for the limited retaliatory capacity of developing countries vis-à-vis major trading partners;
- the GATT dispute settlement procedures should provide also for "retroactive compensation" for the prejudice caused from the moment when the disputed measure entered into force.

9. Commenting on the Japanese proposals, one delegation expressed the view that a modified consensus (i.e. consensus minus the parties to a dispute and, possibly, interested third parties) could be applied in certain circumstances without weakening the protective function of the consensus principle for the integrity of multilaterally agreed rules founded on the principles of non-discrimination and reciprocity. The effective power of veto, which the consensus principle granted individual contracting parties, had caused delays in the dispute settlement process and, arguably, had contributed significantly to the erosion of the credibility of the GATT system as a whole. The application of modified consensus could not only expedite the resolution of disputes but reinforce the GATT rules to the benefit of all contracting parties and help to restore the balance of advantage between parties. Parties to a dispute would of course have full right of reply to panel findings and recommendations and so would have the opportunity to convince other contracting parties of their concerns before a final decision was taken on the adoption or implementation of a panel report. He was not convinced that more flawed reports would be adopted by a modified consensus than by an absolute consensus, nor that a consensus minus two rule could be easily undermined by surrogates parties blocking the adoption of a report in bad faith on behalf of a party to a dispute. The exclusion of the disputants was not based on bad faith but on the knowledge that the persuasiveness of one's own arguments and the merits of one's own case so overwhelm one's own judgment that one was most often incapable of seeing alternative solutions.

Commenting on the EEC proposals, the same delegation said that the point about modified consensus was to ensure that the rights of contracting parties were not impaired by the blocking tactics of one or two contracting parties where the panel had arrived at a generally acceptable conclusion. The EEC submission did not address a solution to this possibility. The second of the three possibilities set out in the EEC submission for the adoption of reports - i.e. the consideration of the general conclusions as regards GATT conformity separately from the specific recommendations for remedy - seemed to be the most interesting. It did not, however, preclude the possibility of a disputant blocking a report. As regards arbitration, he doubted that arbitration would help to resolve differences over adoption and implementation of panel reports. In general, he could accept the line taken on deadlines for panel procedures in the EEC proposal, even though some of the time periods appeared arbitrary. He asked about the rationale for the procedure of Council surveillance suggested by the EEC (for example, why a Deputy Director-General?) and said that there should be a set of procedures on when and how the Council could agree to suspend equivalent concessions.

10. Several delegations emphasized the continuing need to improve the special and differential treatment extended to less-developed countries including the 1966 Decision on Procedures under Article XXIII (BISD 14S/18). They expressed support for the Peruvian proposal, mentioned also in the communication from Argentina (MTN.GNG/NG13/W/17), for "retroactive compensation" for the damage caused from the moment when the disputed measure entered into force. One delegation said that the "retroactive compensation" could cover also the prejudice originating from a threat of retaliation, especially against a less-developed contracting party. Another delegation said that the compensation for a less-developed contracting party might be even greater than the injury suffered. This delegation expressed support for the "consensus minus two" proposal and said that "taking note" of a panel report would not lead to a settlement of disputes. Another delegation from a developing contracting party was in favour of adopting panel reports as a whole and welcomed the favourable attitude of Japan towards the principle of arbitration. Still another delegation referred to the possible contribution of public opinion to the implementation of dispute settlement findings and suggested to improve the GATT information services in this respect.

11. Another delegation, offering preliminary reactions to Japan's supplementary proposals, agreed to the need to expand and improve the roster of panelists, to increase secretariat resources, and to require parties opposing Council adoption of a panel report to supply a written explanation of their reasons. He expressed concerns at the suggested procedure for raising objections to a panel report since this could become a repeat of the arguments presented before a panel. As regards the proposal for one arbitral body to be used for all arbitration, he doubted whether the same individuals should serve as arbitrators in all cases,

notably if an arbitrator was a national of one of the parties to a dispute. He also expressed doubts as to the proposed direct Council consideration of third party objections to agreements resulting from binding arbitration without first requiring that objecting parties hold Article XXIII:1 bilateral consultations.

Turning to the communication from the EEC, he expressed agreement with the proposals that mediation should be optional and that a party opposing Council adoption of a panel report should supply a written explanation of its reasons. He could generally agree with most of the ideas expressed in respect of deadlines concerning panel procedures, and saw positive elements in the ideas raised with regard to surveillance. He considered blocking of panel report adoption one of the most serious problems facing dispute settlement, and raised various questions relating to the EEC's proposals for solving this problem. As to the establishment of a panel, it appeared to him that one Council meeting should be sufficient to decide on the establishment of a panel. He further questioned the need to limit the matters which could be referred to arbitration to factual issues. In his view, objecting third parties could always have recourse to Article XXIII.

12. It was said with regard to the EEC's proposals on surveillance that it would be unfortunate if the "designated chairman" were subordinate to the normal Council chairman. Another delegation said that a decision of the CONTRACTING PARTIES to "improve and strengthen the rules and procedures of the dispute settlement process" should include, inter alia, the following: a reaffirmation of the commitment to observe GATT rules and disciplines; adherence to the basic GATT mechanism for the management of disputes; an undertaking that protective measures would be taken in strict conformity with the provisions of the GATT (OMAs and VERA designed to circumvent GATT rules should be excluded explicitly); an obligation to notify arrangements for dispute settlement promptly to the GATT; codification of the several dispute settlement texts in a consolidated, single instrument; an obligation of each contracting party to establish procedures for their domestic importers and consumers to seek trade remedies if their interests are adversely affected. The same delegation proposed also various elements for "arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations", inter alia: a strengthened mediation and conciliation rôle of the Director-General at the request of a party to a dispute; standardized terms of reference of panels; their circulation in writing to the Council at the time when the request for the establishment of the panel is being considered; additional rules on the composition of panels; additional procedures to ensure compliance with adopted recommendations, which should also provide for special measures in situations where the trade interests of a less-developed contracting party are affected.

13. Several delegations said that improvements in the GATT dispute settlement procedures were important for the strengthening and credibility of the entire GATT system. The Secretariat's "Summary and Comparative Analysis of Proposals for Negotiations" (MTN.GNG/NG13/W/14 as revised)

could serve as a useful basis for giving focus to and structuring discussions in this Group. It was said that compulsory mediation/conciliation could unduly prolong the dispute settlement process. Panel members should be the best qualified experts available regardless of their nationality and of geographical considerations. There were also concerns expressed at the Japanese proposal for a Council review procedure of panel reports and of objections to their adoption.

14. Another delegation said that the various new proposals pointed to a number of areas where the present dispute settlement mechanisms could be improved without any fundamental changes to the rules (e.g. terms of reference for panels, timetables, adoption of reports, third party rights). Some procedures that had formed part of proposals (such as mediation, conciliation and arbitration) were quite possible under the present system, and the Group should look first at what was already available, though the opportunity for more fundamental changes should not be lost. Referring to the principle of special and differential treatment, it was said that the main interest of developing countries and others of limited economic strength was in certainty and efficiency in a dispute settlement system. Rule-based systems favoured those with limited power of retaliation, and improvements in the system itself could thus be seen as special and differential treatment because the smaller and weaker parties had most to benefit. He expressed support for "consensus minus two" at the final stage of the decision-making process which included opportunity for hearing the views of disputants and for having them discussed. But he could not support a suggestion of adopting legal findings separately from recommendations because the two were often inextricably linked and their separation would tend to weaken the panel process. He also expressed concern at the Japanese proposals for Council review of panel findings. Referring to the final paragraph of the Japanese communication, he asked whether this implied that Japan could accept arbitration also if it related to the interpretation of GATT rules.

15. The representative of a group of countries said that written objections to the adoption of a panel report, which were possible already under the current rules, must not result in delaying and weakening the dispute settlement regime. He said that the time had come to concentrate the work in the Group on a limited number of problems (perhaps less than ten) and, in view of the converging views on many of these problems, to make progress up to the mid-term review in December 1988. Some of these problem areas, the resolution of which would entail substantial progress, were: the rights of third parties to a dispute; the role of the GATT Council; the role of arbitration; GATT panel procedures including the questions concerning the right to demand a panel and the adoption of panel reports; as well as the questions regarding strengthened commitments and integrated dispute settlement procedures.

He welcomed that most submissions to this Group seemed to agree with the Nordic proposal that the GATT dispute settlement system should offer a choice among alternative and complementary techniques of dispute settlement so as to respond adequately to the different nature of disputes and to make the dispute settlement system more flexible. Such a larger choice would contribute to a depolarization of previous disagreements on the proper role of law in GATT. He recognized the need for bilateral dispute settlements not to adversely affect the multilateral GATT legal system and the rights of third contracting parties. But he also said that, as explained in para. 7 of document MTN.GNG/NG13/W/14/Rev.1, there was already ample opportunity for any contracting party to raise the question of "GATT validity" of any bilaterally agreed solution, even though there might be a case for improving transparency. Turning to the proposals for strengthening the role of the Council in the dispute settlement process, he shared the concern of another delegation that a "special dispute settlement chairman" should not be subordinate to the normal Council chairman. Referring to the possible need for clarifying the legal effects of Council decisions, he quoted the 1982 Ministerial Declaration that "it is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement". Yet, it was often impossible to draw a neat distinction between authoritative interpretation, law-creation or amendment, and the CONTRACTING PARTIES remained free to depart from their earlier decisions and interpretations of GATT rules. It seemed wise to continue to apply a "case-oriented" interpretative process as to the legal effects of Council decisions. It was nevertheless clear that in practice panel findings might have precedent-creating effects. The EEC proposal for separating the panel's legal interpretations from its dispute settlement findings deserved close examination. Turning to the proposals for a GATT arbitration instrument, he said that the Council should have a principal rôle in pronouncing on arbitration agreements, the effects of arbitration awards on third parties as well as their possibly precedent-creating value. He believed that the existing GATT Article XXIII:2 was a sufficiently flexible basis for establishing arbitration bodies and that some of the proposals for arbitration did not necessitate changes in the existing rules. He recalled the Nordic proposal for an improved, consolidated instrument integrating the different present dispute settlement procedures into a single, transparent text. In order not to confuse matters, the negotiations should first concentrate on improving the already existing procedures, and should only afterwards aim at consolidating the results into a neat text about dispute settlement.

16. One delegation expressed support for the Japanese proposals on the maintenance of the consensus principle, the improvement of the quality of panels, the need to expand the staff of the legal section of the secretariat, the requirement of a written explanation of objections to the adoption of panel reports, and for a more detailed procedure for a review of such objections and of a panel report (e.g. time limits? review based on consensus? review of the panel report by the same panel?).

17. Commenting on the various reactions to its proposals, Japan said, inter alia, that the consensus practice had proven to be the key to the proper functioning of the GATT dispute settlement mechanism and to the effective implementation of dispute settlement findings of the Council. In response to questions relating to the proposed procedure for the review of panel reports by the Council, he said that the proposed requirement of a written justification of objections to a panel report by the time of the first Council deliberation on the report did not yet form part of the present procedures. The final decision on the review should lie with the Council and should be taken within a limited period of time. In order to avoid a mere repetition of arguments, the Council should determine which contentious issues of a panel report should become the subject of the review process that could then be carried out, for instance, by an independent professional body separate from the Council. Only in very exceptional cases should it be possible for the parties to a dispute to oppose also the findings resulting from the review process. Panel members should be selected on their personal merits but should usually not have the nationality of the parties to the dispute concerned. Turning to the proposed procedure for a Council review of arbitration awards, he agreed that the right of third contracting parties to raise objections and to invoke Article XXIII should not be limited. The mandate of an arbitral body should, in principle, be limited to fact-finding unless the CONTRACTING PARTIES had specifically authorized in advance a broader arbitration mandate.

18. The representative of Austria presented the statement subsequently circulated in document MTN.GNG/NG13/W/25, which provides preliminary comments on a number of proposals relating, inter alia, to:

- enhanced, but voluntarily agreed, mediation/conciliation which should be clearly separated from the function of GATT panels;
- improvements in the 1958 procedures for Article XXII consultations;
- explicit recognition of the possibility of arbitration on mutually agreed terms;
- establishment and composition of panels, regular use of standard working procedures of panels and more precise time-limits for each phase of the panel proceedings;
- adoption of panel reports by the Council on the basis of consensus within a period of normally 80 days;
- follow-up reports by the defending contracting party on its implementation of adopted recommendations.

19. Another delegation raised the question of what was meant by several speakers when they proposed to "maintain the practice of consensus". He emphasized that voting was the general rule provided for in GATT Article XXV and the practice of consensus had not given rise to a new rule or to a modification of the existing rules of Article XXV. In agreeing to discuss the issue of consensus, his delegation did so on the understanding that it was not a question of discussing or negotiating on Article XXV and on other GATT provisions that governed the GATT system of voting on decisions. There was no explicit or tacit derogation from the voting system established in the General Agreement, nor could there be said to be any international custom derogating from it. His delegation expressly reserved all the rights accruing to it in this regard under the existing GATT provisions. Even if contracting parties refrained from exercising their right to request a vote, the existing law enabling majority voting went far beyond the proposals for "consensus minus two".

20. Referring to the EEC proposal of considering a panel report's general conclusions as regards GATT conformity separately from the specific recommendations for remedy and of practicing different modalities for the adoption of these two elements of a panel report, it was said that the specific Council recommendations were only addressed to and legally binding for the disputing parties concerned. For third contracting parties, the panel report could constitute a precedent for future, similar cases. But the contracting parties remained free to criticize this precedent in any future dispute. He asked whether the proposed adoption by the Council also of the legal findings would imply that the panel interpretations would become authentic interpretations of GATT law erga omnes and that the nature of panel reports would be changed? Was it necessary at all for the Council to pronounce on the general panel conclusions as regards GATT conformity if these remained but a precedent?

21. Responding to various questions raised, the representative of the EEC said, inter alia, that the dispute settlement process could not substitute itself for the negotiating process. He confirmed the EEC's view that arbitration procedures should also be available in order to allow the parties concerned to overcome a deadlock as to the adoption of panel reports. The proposed reasonable delay in the range of six to twelve months for the implementation of panel recommendations could be fixed more precisely as a result of the negotiations in this Group. The Community proposals for improving the general procedures for surveillance over matters arising from Article XXIII were not meant to exclude that the parties to the MTN Agreements would incorporate similar improvements into the dispute settlement provisions of these agreements. Nor was the EEC proposal for a Deputy Director-General "designated" to chair that part of a Council meeting reserved to dispute settlement issues meant to lower the level of these dispute settlement deliberations of the Council. Turning to the various possibilities proposed by the EEC for adoption of panel reports, he said that the separation of the general legal interpretations of panel reports from their specific recommendations for remedy was technically possible and could facilitate the adoption of panel reports.

In his view, the nature of a panel report would not be modified by such a separation of the legal findings from the specific recommendations for remedy. He agreed that, with regard to arbitration procedures, it would not always be easy to draw the border-line between factual points and matters of interpretation.

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

22. The Group agreed to hold two further meetings before the summer break and to convene informal consultations in connexion with the formal meetings. The next meeting will take place on 27-29 April 1988. The date for the second meeting will be fixed at the April meeting and could be 25-27 May or 11-13 July 1988. The Group requested the Secretariat to update document MTN.GNG/NG13/W/14/Rev.1 and to prepare a concise "non-paper" identifying the most important points of convergences and divergences of views without drawing conclusions. The Chairman invited all delegations to communicate to the secretariat their ideas for such a "non-paper". Some delegations suggested that the headings of the "Summary and Comparative Analysis of Proposals for Negotiations" (MTN.GNG/NG13/W/14/Rev.1), which includes both written and oral submissions, could provide a good basis for structuring the "non-paper".