

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

MEETING ON 6 AND 7 SEPTEMBER 1988

Note by the Secretariat

1. The Group held its tenth meeting on 6 and 7 September 1988 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2652 after having taken note of Mexico's statement that it would continue to hold informal consultations with interested delegations preparatory to submitting a revision of its communication of 23 June 1988 (MTN.GNG/NG13/W/27).

2. The Chairman reminded the Group of the report of the Group of Negotiations on Goods (GNG) to the sixth meeting of the Trade Negotiations Committee (TNC) on 26 July 1988, which urged "all [Negotiating] Groups to make every effort in the coming months to achieve progress and suggested that the Chairpersons prepare, after consultations with members of Negotiating Groups, their reports to the GNG. These would, in principle, consist of two parts - a very brief description of the work done to date, and proposals on which the Ministerial meeting of the TNC would be called, by the intermediary of the GNG's report, to take decisions" (MTN.TNC/6, para. 5). Recalling that the GNG had set aside 16-18 November 1988 to elaborate its report to the December TNC meeting, the Chairman called on the Group to carefully consider the nature and timing of the Group's contribution to the GNG, noting that any document to be forwarded to the GNG should have the full support of the Group.

Further consideration of the revised note by the Secretariat on differential and more favourable treatment

3. The Group continued its discussion of differential and more favourable treatment of developing countries in the GATT dispute settlement system, referring to the revised note on this subject prepared by the Secretariat (MTN.GNG/NG13/W/27/Rev.1). Several developing country delegations restated their displeasure with those sections of the Secretariat note which compared the GATT dispute settlement system with that of other international organizations. It was said that the GATT specifically provided for differential and more favourable treatment of developing countries, that it was important not to turn the clock back, and that the real issue should be one of how to strengthen these dispute settlement mechanisms by providing adequate safeguards to developing countries. It

was also said that there was likely to be increased use of GATT dispute settlement procedures by developing countries, accompanying their greater integration into the GATT; the contracting parties should not wait for this increase to occur before taking appropriate action to ensure developing countries' access to the GATT dispute settlement system through adequate provision of differential and more favourable treatment.

4. One delegation reiterated its proposal for retroactive compensation to developing countries, with the amount of compensation to be computed from the time when an injurious trade measure was first adopted. Another delegation emphasized that the most important form of special and differential treatment in the dispute settlement system was the provision of adequate flexibility in time-limits for developing country participation in each stage of the dispute settlement process. It was said that this flexibility was particularly needed with regard to submissions to panels and implementation of adopted panel recommendations bearing on structural adjustment programs. Yet another delegation spoke of the importance to developing countries of enforcement and monitoring mechanisms. It proposed that in disputes raised by developing countries, if a panel report were not adopted, the report should be considered at every subsequent Council meeting in order to put appropriate pressure on the offending contracting party. It was further proposed that following adoption of a report, the measures taken to implement the panel's recommendations should be monitored and reviewed at each subsequent Council meeting.

5. Noting that no developed contracting parties had participated at this meeting in the discussion of differential and more favourable treatment, a number of less-developed contracting parties and the Chairman called on developed contracting parties to offer their views on the specific proposals for differential and more favourable treatment compiled in Section III of the Secretariat note. One developed contracting party noted that it had previously stated its positions on these proposals and that its present silence should be interpreted as a continuation of those positions.

Consideration of the Secretariat's two-column note comparing existing texts of the GATT dispute settlement system with proposals for improvements thereto

6. The Group next discussed a note prepared by the Secretariat entitled "Comparison of Existing Texts and Proposals for Improvements to the GATT Dispute Settlement System" (MTN/GNG.13/W/29). Before discussing the specific sections of this document, delegations expressed their views on the nature of the document, its potential contribution to the work of the Group and possible approaches to its revision. In response to questions raised as to the nature of the right-hand column of the document, the Secretariat explained that this column was intended to be an updated presentation of the proposals on which there appeared to be a convergence of views, as recorded in the Secretariat's revised checklist of main issues for discussion, but that instructions to the Secretariat had not been entirely clear. Several delegations expressed the view that it was premature to try to pin-point areas of convergence or to synthesize the

Group's proposals. It was said that there were still a considerable number of areas of divergence which deserved to be recorded in this comparative document.

7. Some delegations criticized the Secretariat note for omitting specific proposals for differential and more favourable treatment contained in Part III of the revised Secretariat note on this subject (MTN/GNG/NG13/W/27/Rev.1). It was said that leaving these proposals out of the right-hand column, while including existing provisions for differential and more favourable treatment in the left-hand column, gave the erroneous impression that the principle of differential and more favourable treatment had been eroded during the present deliberations of the Group. Other delegations stated that the right-hand column should contain a complete listing of all proposals made by the Group. Still other delegations noted that the Secretariat had already provided a comprehensive listing of the Group's proposals in MTN.GNG/NG/W/14/Rev.2 and in other documents, and that to ask the Secretariat to again prepare a complete listing of proposals would be a regressive step. What was needed at this stage was an operational document, one that could serve the negotiating process. While it was said by many delegations that this two-column document should not be viewed as a negotiating instrument, it was also said that the text of the right-hand column could become the basis for future negotiations, with certain portions of the text placed in brackets to reflect lack of convergence within the Group.

8. A number of delegations expressed the view that the left-column text was very useful because it highlighted the relative disuse of certain existing dispute settlement provisions and pointed up the similarities between certain existing provisions and proposals made in the Group. Other delegations noted that the left-column text would be particularly useful in the later preparation of a consolidated text on GATT dispute settlement. One delegation emphasized that the Group should not leave this task to the very end. It was generally agreed that the left-hand column should reproduce all relevant portions of existing GATT texts on dispute settlement.

9. The Group next began deliberations over specific paragraphs of the Secretariat's two-column note, with the understanding that the Secretariat would revise the note in the light of the discussions at this meeting of the Group. Regarding the initial section of the document, containing the relevant existing texts of the General Agreement (pages 2 through 4), one delegation stated that Article XXV of the General Agreement should be included in the left-hand column.

10. With respect to Section I, Objectives of the GATT Dispute Settlement System, one delegation stated that paragraph "a" of the right-hand column should contain a reference to Article XXV of the General Agreement. It was also said that paragraph "a" should refer to the 1979 Understanding and the 1966 Decision. Another delegation suggested mentioning the maintenance of the balance of rights and obligations under the General Agreement and that decisions in the dispute settlement process could not add to or diminish

the rights and obligations in the GATT nor replace the negotiating process. Regarding paragraph "b", one delegation suggested including therein the concept that mutually agreed solutions should reinforce the principles of the General Agreement. Another delegation proposed that paragraph "b" should also recite, as objectives, the regular adoption and effective implementation of panel reports. Still another delegation suggested that reference be made to its proposal on retroactive compensation, or that it be referred to elsewhere in the revised note. With respect to paragraph "d", it was said by one delegation that the wording on third-party rights was unnecessarily narrow. Regarding paragraph "e", several delegations believed that it was inappropriate to refer to differential and more favourable treatment as a specific objective and that it would be more appropriate to refer to equal opportunity for all contracting parties in the context of dispute settlement. Another delegation expressed the view that the reference to differential and more favourable treatment was too restrictive, especially the statement that the extension of this principle should be reserved solely for resolving specific problems faced by developing countries.

11. Regarding Section II, Notification, one delegation commented that the text of paragraph "a" was rather vague and would require redrafting. This delegation reserved its right to submit more specific language on notification at a later date.

12. With respect to Section III, Consultations, good offices, mediation and conciliation, it was said by several delegations that paragraph "a" should more clearly distinguish between the mandatory nature of consultations and the voluntary and mutual nature of good offices, mediation and conciliation. Several delegations also commented that the objective of entering into consultations in good faith with a view to reaching acceptable bilateral solutions should be highlighted at the beginning of paragraph "a". A representative of a number of contracting parties expressed the view that thirty days could in many cases be too short a time-limit for the completion of consultations. Other delegations agreed that thirty days might be too short a period in certain instances but emphasized that some time-limit was necessary in order to prevent the possibility of indefinite delay. It was suggested that requiring contracting parties to respond to a request for consultations within thirty days would be reasonable. One delegation reiterated its view that there was a need for shorter time-limits on consultations in cases involving perishable goods.

13. Still with respect to Section III, one delegation emphasized that the Director-General's ability to act in an ex officio capacity on behalf of developing countries, as provided for in the 1966 Decision, should be safeguarded. Other delegations commented that the availability of this mechanism should be extended to all contracting parties. It was also said that there should be a reference in the right-hand column to the ex aequo et bono nature of mediation. Several delegations further commented that a revised text should reference the need to protect the rights of third parties with respect to settlements reached through consultations, good

offices, mediation or conciliation. In addition, a number of delegations suggested that a revision should make clear that requests for good offices, mediation or conciliation would at all times be without prejudice to a contracting party's rights under Article XXIII:2 and under the 1966 Decision. Delegations also noted that the last sentence of paragraph "a" was largely redundant in view of the penultimate sentence.

14. Regarding Section IV, Requests for the establishment of panels, it was said that such requests should include the factual and legal bases of the complaint, not merely a brief summary thereof. One delegation also noted that there was no need for a complaining party to recite standard terms of reference in a panel request. This same delegation noted that there was still no consensus in the Group that contracting parties did not have an absolute right to a panel. A number of delegations reiterated that the thirty-day time-limit for consultations mentioned in paragraph "a" might be unrealistically short in a number of cases, and that a distinction should be made between the time required to initiate consultations and the time required to resolve a dispute through consultations.

15. With regard to Section V, Council decisions on the establishment of panels, there was much discussion of the contracting parties' right to a panel and the scope of Council discretion in deciding on whether or not to establish a panel. It was generally agreed that while there was no "absolute" right to a panel, contracting parties did have the right to a panel subject to certain safeguards. Many delegations felt that the "abuse of right" standard, as recited in the right-hand column, was inappropriate because it required the Council to evaluate the substance and GATT-relevancy of a complaint prior to its submission to a panel. The "good faith negotiations" language in the right-column text was also criticized as calling for an impractical and subjective evaluation by the Council. Most delegations believed that the Council's decision on the establishment of a panel should largely be based on an inquiry into whether the procedural requirements of Article XXIII:2 had been met. However, several delegations indicated that the issue of GATT "relevancy" of a complaint should also be taken into account. One delegation suggested that the Group give consideration to a procedure allowing for panels to reach summary determinations on the issue of GATT relevancy. Yet another delegation proposed that the parties to a dispute should not be permitted to participate in the Council decision on the establishment of a panel.

16. With respect to Section VI, Terms of reference, a number of delegations commented that in view of the multilateral nature of GATT dispute settlement, the Council should not only be required to "note" special terms of reference but should "agree to" or "approve" such terms of reference. One delegation expressed the view that the adoption of special terms of reference should not be based merely on the parties meeting some procedural time-limit but should involve a substantive Council decision as to the nature of the dispute. Other delegations, however, argued that a requirement of Council approval of special terms of reference would unnecessarily complicate the procedures and would not give sufficient flexibility to the parties to the dispute.

17. Regarding Section VII, Composition of panels, several delegations noted that Council decisions as to (1) the number of panelists and (2) the selection of individuals to sit as panelists were two separate matters and should be treated separately in the right-column text. Other delegations commented that a thirty-day time-limit on the selection of panelists was an excessive period. It was also said by one delegation that the word "normally" in the second line of paragraph "a" should be deleted. Another delegation criticized the right-column text for implying, contrary to the 1984 Action, that the Director-General, in cases of the parties' failure to agree on the composition of a panel, could complete the panel without first consulting the parties. Yet another delegation drew attention to the language of the 1979 Understanding which gives preference to governmental panelists. A number of delegations suggested that governmental and non-governmental panelists should be treated equally in the selection of panelists.

18. With respect to Section VIII, Multi-complainant procedures, one delegation doubted the value of trying to elaborate uniform rules for multi-complainant cases, especially for those cases where only part of the issues were overlapping. This delegation also commented that the rights of all parties to a multi-complainant dispute should be safeguarded, not just the rights of the complainants. In this connection, it was proposed that a panel should be required to submit separate reports if any party to a multi-complainant dispute so requested.

19. Regarding Section IX, Third party practice, a representative of a number of contracting parties commented that it was important to provide transparency in the panel process for the benefit of interested third parties, but that a balance needed to be established between the interests of those third parties and the interest of the disputing parties in resolving bilateral disputes. This representative and other delegations criticized the provision in the right-hand column which would empower the panel to release a party's submission to third parties even in the absence of agreement of the submitting party. One delegation noted that under current practice, all party submissions were considered confidential so that the reference in the right-hand column to non-confidential submissions had little practical significance. Another delegation, however, questioned why submissions exchanged between the parties to a dispute should be considered "confidential" vis-à-vis interested third parties. Yet another delegation commented that it had not yet fixed its views as to whether interested third parties should have an automatic right to be present in a panel proceeding and to receive submissions made by the disputing parties.

20. With respect to Section X, General procedures for panels, the Secretariat confirmed that the "standard working procedures" referenced in the right-hand column were the procedures reproduced on pages 45-49 of MTN.GNG/NG13/W/4; these procedures had been regularly used by panels since 1985 but had never been formally adopted as a whole by the CONTRACTING PARTIES. One delegation expressed the view that these standard working procedures should be formally codified by the CONTRACTING PARTIES and adopted by GATT panels as a matter of course, except where special circumstances warranted deviations from these procedures. Another

delegation suggested that reference also be made to the 1966 Decision on Procedures under Article XXIII.

21. Regarding Section XI, Secretariat assistance to panels and parties, one delegation commented that the right-hand column's reference to assistance of the Secretariat's legal staff "upon request" should be deleted because the Secretariat's participation was not viewed as optional. Another delegation suggested substituting the words "as appropriate" for the words "upon request". Several other delegations noted the overlap and duplication between the left-column and right-column texts in this section, and questioned the need for such a repetitive text. It was also said that Secretariat assistance in GATT dispute settlement was not and should not be limited to assistance from the Secretariat's legal staff. Another proposal was to make provision for specialized legal assistance for problems and provisions relating to differential and more favourable treatment for developing countries.

22. With respect to Section XII, Objections to panel findings, several delegations expressed the concern that a formal procedure for considering contracting parties' objections to panel findings might weaken or obstruct the efficient functioning of the GATT dispute settlement system. These delegations reserved their positions as to precisely what status objections would have within the system. At the same time, a number of delegations commented that further thought needed to be given to the timing of submissions of objections and their consideration by the Council. Delegations generally favoured the submission of written objections, but several delegations said that the right-column text unnecessarily distinguished between submissions by parties to the dispute and those of third parties, and erroneously assumed that there would always be two Council meetings prior to the adoption of a panel report. It was suggested that a mechanism be provided for the benefit of third parties whereby they could reserve the right to submit objections at a later Council meeting.

23. Regarding Section XIII, Council decisions on adoption of panel reports and recommendations, one delegation noted that there was inconsistency in the right-column text concerning use of the words "submitted" and "presented". A representative of a number of contracting parties commented that objections to panel reports were a very serious matter and should not be subjected to rigid time-limits. This representative proposed that the Council "would normally take a decision" within a given period, but that a certain degree of flexibility should be provided for. Other delegations expressed the view that the mechanism for Council consideration of objections should not be so open-ended as to provide a form of veto over the adoption of panel reports.

24. With respect to Section XIV, Participation of parties to a dispute in Council decisions on panel reports, several delegations suggested the inclusion in the right-hand column of the various proposals for "consensus minus" decisions. Another delegation noted that the right-hand column's formulation of a procedure whereby a party could disassociate itself from a consensus without blocking such a consensus, could be misinterpreted, for

instance as calling for a "consensus minus" approach to decision-making. Two other delegations expressed the view that more explicit reference to the decision-making procedure under Article XXV should be included in the right-hand column. A representative of a number of contracting parties commented on the continued existence of many diverging proposals regarding procedures for Council decisions on the adoption of panel reports. This representative requested the inclusion in a revision to this section of the three alternatives that he had proposed in an earlier written submission.

25. Regarding Section XV, Implementation of adopted panel reports and recommendations, a number of delegations commented on the proposed procedure for the Council's determination of a "reasonable period for the implementation" of panel recommendations. Some contracting parties felt that the panel and the parties should retain maximum flexibility in deciding upon an appropriate schedule of implementation. It was said that panels might be in a better position than the GATT Council to recommend an appropriate schedule for implementation. Other contracting parties drew a distinction between disputes involving measures found to be inconsistent with the General Agreement and disputes in "non-violation" cases which did not entail a legal obligation to withdraw specific trade measures inconsistent with the General Agreement. With regard to the former, it was said that it would be inappropriate for the panel to recommend any schedule of implementation other than withdrawal of the inconsistent measure at the earliest possible time; in the case of the latter, it was said that the panel could be asked to recommend a reasonable period of time for implementation. One delegation raised the question as to whether recommendation of a "reasonable period" for implementation could lend legitimacy to GATT-inconsistent trade measures. Regarding the scheduling of implementation, it was proposed that a revision of the left-column text should include reference to the procedure in the 1982 Declaration whereby "the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter ...".

26. One delegation repeated its earlier proposal that where the contracting party concerned by a measure was a less-developed country, the Council should require that the contracting party charged with implementation of the adopted panel recommendation complete such implementation within a maximum period of fifteen days. Another delegation reiterated an earlier proposal that in cases where a less-developed country was faced with implementation of a panel recommendation involving structural adjustment measures, account should be taken of the country's need to continue to be in a position to ensure its economic development in order to meet international financial obligations. Yet another delegation said that the reference to "development circumstances" in paragraph "a" of the right-hand column was not the only type of circumstances to be considered, and that the Council should more generally take into account the particular circumstances of each contracting party concerned.

27. Still with regard to Section XV, one delegation expressed its reservations over the "rigid" scheduling of status reports on

implementation of panel recommendations, reflected in paragraph "a" of the right-hand column. This delegation favoured a more flexible scheduling of such reports based upon a rule of reason. Another delegation held the view that regular scheduling of Council reviews would be an effective means of keeping the pressure on contracting parties charged with implementing adopted panel recommendations. It was also said that the reference to "retaliation" in paragraph "b" of the right-hand column should be deleted in favour of a more general reference to the suspension of concessions or other obligations as in the text of GATT Article XXIII:2.

28. With respect to Section XVI, Arbitration, one delegation commented that the proposed text in the right-hand column contained too much detail in an area in which the GATT had too little experience. This delegation proposed that more general guidelines on arbitration should be adopted, with the overall objective of institutionalizing arbitration within the GATT as a rapid alternative to the traditional dispute settlement mechanisms. It was said that the central elements of an arbitration procedure within the GATT should specify that: resort to arbitration would be by mutual agreement of the parties; the parties would agree to be bound by the result; and the result would have to be consistent with the General Agreement, not adverse to the interests of third parties, and notified to the Council. Other delegations generally concurred with this "streamlined" formulation but added that the GATT Council should retain the capacity, as called for in the right-column text, to take appropriate action in light of the arbitration result. A representative of a number of contracting parties remarked that all of the elements of this streamlined formulation were already contained in the proposed right-column text. Another delegation observed that while arbitration was a novel concept in the GATT context, there was considerable experience with arbitration in international law. What was new in the GATT context was the adaptation of an arbitration procedure to a multilateral dispute settlement system. Several delegations commented that the Council alone, and not also the Director-General as suggested in the right-column text, should be empowered to establish an arbitration panel.

29. Regarding Section XVII, Surveillance by Council, a number of delegations restated their objections to the proposal that the Council meet in a "dispute settlement mode", as provided for in the right-hand column. One proponent of the "dispute settlement mode" proposal recalled that the thinking behind the proposal was that there needed to be greater and more systematic emphasis given to dispute settlement issues and especially to the implementation of adopted panel recommendations. Another delegation took the view that making Council surveillance of disputes a regular agenda item, as provided for in the right-hand column, would largely achieve the objectives of those delegations proposing a special dispute settlement body. As regards the term "regular agenda item", it was said that, while the Council should devote regular attention to its various dispute settlement and surveillance functions, this did not necessarily mean that the implementation of each panel report had to be an agenda item of each meeting of the Council.

30. With respect to Section XVIII, Strengthened commitments of contracting parties, one delegation reiterated its opposition to the last sentence of paragraph "a". This delegation subscribed to the view that there should be strengthened political commitment to abide by the rules and procedures of the GATT, but objected to a proposal that would require contracting parties "to adjust their domestic trade legislation and enforcement procedures in a manner ensuring the conformity of all countermeasures with GATT Article XXIII:2". A representative of a number of contracting parties questioned how the above-mentioned delegation could reconcile its position on strengthened commitments to the GATT dispute settlement system with recently passed domestic trade legislation providing for unilateral retaliation against trading partners. Several other delegations felt strongly that the last sentence of paragraph "a" should be retained, emphasizing that for the GATT to remain a credible institution, commitments to the GATT dispute settlement system would have to be implemented in national legislation. It was said that unilateral measures could erode the multilateral system; the principle of international law taking precedence over national legislation required contracting parties to commit themselves to adjusting national legislation in order to bring it into conformity with the GATT. The delegation opposing the last sentence of paragraph "a" stated that it was ready and willing to discuss its domestic trade legislation in the appropriate forum, and that it looked forward to the day when the GATT dispute settlement system was improved to such an extent that there would no longer be the political necessity to protect the national interest in other ways. Other delegations commented that while they agreed with the principle of the last sentence in paragraph "a", they favoured a more general reference to contracting parties' commitment to ensuring the conformity of domestic measures (rather than only "counter-measures") with the GATT (rather than only Article XXIII:2).

#### Future work and dates for the next meetings of the Negotiating Group

31. The Group requested the Secretariat to revise its two-column note on "Comparison of Existing Texts and Proposals for Improvements to the GATT Dispute Settlement System" (MTN.GNG/NG13/W/29) in the light of the discussions and proposals made at this meeting. It was agreed that the left-hand column should reproduce all relevant portions of existing texts on GATT dispute settlement rules and procedures, and that the right-hand column should remain an "operational" text focusing on proposals supported, at least in principle, by most participants. It was further agreed that the revised note should reflect the proposals made in the Group for additional provisions on differential and more favourable treatment of developing countries in the GATT dispute settlement system, as listed in Part III of the Secretariat note in document MTN.GNG/NG13/W/27/Rev.1, taking into account the discussions at the recent meetings of the Group. Some participants suggested that the Secretariat place brackets around those proposals listed in the right-hand column that were objected to by several participants.

32. The Group took note of the intention of Canada and Mexico to carry out informal consultations with contracting parties with the view to preparing

additional submissions to the Negotiating Group. The Chairman, Ambassador Lacarte-Muró, said that he continued to be at the disposal of all participants for any consultations they might wish to hold with him.

33. The Group agreed to hold its next meeting on 10-11 October 1988 and a subsequent meeting on 2 November with the possibility of continuing that meeting on 15 November 1988.