

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG13/W/33
19 July 1989

Special Distribution

Group of Negotiations on Goods (GATT)

Original: French

Negotiating Group on Dispute Settlement

ARBITRATION WITHIN GATT

Communication from Switzerland

The Swiss delegation has transmitted the following communication dated 13 July 1989 to the secretariat.

1. The central elements of an arbitration procedure within GATT were set out in Sections A.2 and E.1-3¹ of the Decision of 12 April 1989 adopted by the CONTRACTING PARTIES (L/6489). It was, moreover, decided to continue negotiations with the aim of further improving and strengthening the GATT dispute settlement system taking into account the experience gained in the application of these improvements (A.3.).

2. One of the Negotiating Group's tasks could therefore be to clarify and strengthen the central elements of the arbitration procedure described in the Decision adopted on 12 April 1989 by the CONTRACTING PARTIES. In this connection the Group should take due account of its detailed discussions and work connected with the mid-term meeting.

3. One possible approach would be to take up each of the central elements in turn and to determine whether it requires additional clarification.

4. The objective should be to offer the contracting parties an incentive to resort to expeditious arbitration within GATT as an alternative means of dispute settlement (E.1.) to that offered by panels. Although the aim is not to make arbitration procedure more attractive than the procedure offered by panels, arbitration within GATT should be more attractive than conventional arbitration.

5. Two kinds of incentives could be offered in this connection: first, the expenses of an arbitration panel within GATT would be assumed by GATT. Secondly, the implementation of an arbitration award made within GATT would

¹The section and paragraph numbers indicated in brackets below refer to this Decision.

be subject to surveillance machinery identical to that used to monitor the implementation of the recommendations and rulings of the CONTRACTING PARTIES.

6. These facilities would be made available providing that the agreement to resort to arbitration¹ is concluded and the arbitration award is made within GATT (E.1.), that they are consistent with the General Agreement, and do not nullify or impair benefits accruing to any contracting party under the General Agreement, nor impede the attainment of any objective of the General Agreement (A.2.). The decision to provide financing would be taken by the Council. Surveillance would in principle be automatic.

7. The Decision of 12 April 1989 leaves the contracting parties completely free to draw up the mutual agreement providing for optional recourse to arbitration. Not only issues of law but also of fact may be submitted to arbitration provided that they are clearly defined (E.1./E.2.). The agreement to resort to arbitration is then notified to all contracting parties sufficiently in advance of the actual commencement of the arbitration process (E.2.). Any contracting party may then raise any point relating thereto in the Council (B.). The expenses of the arbitration panel, including the remuneration of its members, would be assumed by GATT providing that the Council so decides. This decision would be facilitated by providing the contracting parties with a model agreement to resort to arbitration (annex).

8. Intervention machinery has been provided for in the Decision of 12 April 1989 (E.3.) in that other contracting parties may become party to an arbitration proceeding upon the agreement of the parties which have agreed to have recourse to arbitration. In addition to this possibility of intervention, which depends on the consent of the parties to the dispute and implies that the intervening party undertakes to abide by the award, provision could be made, in respect of third contracting parties, for the right to be heard similar to the one they enjoy under the panel procedure. A third party not wishing or not able to use the intervention procedure could exercise its right to be heard. In this case, the procedures available to it would be more limited than those of an intervening party, and it would not be bound by the award.

9. The GATT secretariat would provide the arbitration panel with any assistance and facilities it might require.

¹The agreement to resort to arbitration is an agreement under which the contracting parties entrust an arbitration panel with responsibility for the settlement of a dispute that already exists. Unlike the agreement to resort to arbitration, the arbitration clause concerns not a dispute that has emerged and exists but possible disputes that may emerge between the contracting parties. The Group's work on the agreement to resort to arbitration should also cover the arbitration clause.

10. The parties to the proceeding will agree to abide by the arbitration award (E.3.). In other words, the award is binding upon the parties to the dispute and cannot be reversed by the Council. However, arbitration awards within GATT must be notified to the Council where any contracting party may raise any point relating thereto (B.). The award's nature as a precedent from the standpoint of the interpretation of the General Agreement may therefore be discussed in the Council. The latter is completely free to determine whether the award is compatible with the General Agreement¹ and to ensure that it does not nullify or impair benefits accruing to any contracting party under the General Agreement or impede the attainment of any of its objectives (A.2.). The discussions in the Council and a possible recommendation by the CONTRACTING PARTIES concerning the substance could therefore weaken or strengthen the award's value as a precedent.

11. It would be desirable to create surveillance machinery in connection with the implementation of arbitration awards within GATT, identical to that established in respect of the recommendations and rulings of the CONTRACTING PARTIES (I.). In view of the fact that recourse to arbitration is optional (E.2.), that, in the agreement to resort to arbitration, the parties to the dispute agree to abide by the arbitration award (E.3.), and that they should be encouraged to settle their dispute within GATT, surveillance should be automatic, namely, the implementation of any award should be subject to surveillance unless, within a certain period following notification² of the award, the Council decides not to exercise surveillance.

12. The Council, through financing and surveillance, can help to ensure that arbitration procedures become a harmonious part of GATT's multilateral framework without calling in question the principle that a final award is binding on the parties to the agreement to resort to arbitration.

¹For example, since the arbitration award must be compatible with Article XXIII:2 of the General Agreement, the arbitration panel cannot, on its own authority, authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under the Agreement as it determines to be appropriate in the circumstances. This power belongs to the CONTRACTING PARTIES under Article XXIII:2. It appears, however, that the arbitration panel would be competent - providing that the parties to the dispute agree thereto - (a) to find that a measure is inconsistent with the General Agreement, and (b) to decide that the measure in question should be withdrawn immediately or that compensation should be provided on a temporary basis if the immediate withdrawal of the measure is impracticable (in accordance with customary GATT practice, Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, paragraph 4).

²The parties to the dispute will not prevent the achievement of consensus on a decision of this kind.

ANNEX

Model agreement to resort to arbitration

I. The Governments of (contracting party) and of (contracting party) agree to establish an arbitration panel which shall decide, on the basis of the General Agreement on Tariffs and Trade, other international treaties binding upon the parties, as well as international law, whether ... (issue in dispute).

II. The arbitration panel shall be constituted as follows: each of the parties shall appoint an arbitrator and these arbitrators shall designate another arbitrator who will act as chairman. If, three months after the entry into force of the present agreement, one of the parties has failed to appoint an arbitrator, or if the arbitrators have been unable to select a chairman, each of the parties may request the Director-General of GATT to appoint the arbitrator or the chairman of the arbitration panel. The chairman may not be a national of one of the parties.

III. The arbitration panel shall itself decide upon its procedure which must ensure that each of the parties to the dispute can be heard and can defend itself. Any third contracting party which has a substantial interest in the issue referred to the arbitration panel in accordance with Article I of the present agreement and which has accordingly informed the GATT Council may be heard by the arbitration panel and submit written communications to it.

IV. The arbitration panel shall conduct its proceedings in Geneva. The panel's secretariat services shall be provided by the GATT secretariat.

V. The decisions of the arbitration panel shall be reached by a majority of its members. Its decisions are final and not subject to appeal. The parties agree to abide by the arbitration award.

VI. The present agreement shall be approved by the parties in accordance with their respective procedures. The parties shall notify one another when the necessary procedures in this connection have been completed. The agreement shall enter into force on the date of the last notification.