

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on  
Dispute Settlement

MEETING OF 28 SEPTEMBER 1989

Note by the Secretariat

1. The Group held its sixteenth meeting on 28 September 1989 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2817.

General Discussion

2. The meeting began with a general discussion of the issues on the agenda and future work of the Group. There was general agreement that many of the issues on the agenda were closely interrelated. Many delegations spoke in favour of seeking additional ways to ensure the development of a swift, fair and effective dispute settlement system. The importance of looking beyond the issues of current disputes was stressed. Several delegations also called for the issue of third-party rights to be included on the agenda of a future meeting.

3. One delegation commented that enforcement was ultimately the most significant element of the GATT dispute settlement system, not only when applied in specific cases but also as an important ingredient in the prevention of disputes. It was said that while most panel reports were adopted, it was impossible to tell how many cases were never taken to the GATT because of the possibility that the result would be blocked at the adoption stage or never implemented. The view was also expressed that the current accumulation of non-adopted or non-implemented cases was undermining the dispute settlement process just when the GATT was beginning its implementation of the trial procedures agreed to at the Montreal mid-term review.

Implementation of Rulings, Decisions and Recommendations

4. Under agenda item A(1), the Group continued its consideration of the issue of implementation of rulings and recommendations by the CONTRACTING PARTIES under Article XXIII. It was considered that effective implementation of rulings and recommendations and surveillance of such implementation were of critical importance to the operation of the entire dispute settlement system. Many delegations recalled the improvements on surveillance of

implementation adopted in the April 1989 Decision and expressed the view that these improvements should be given a chance to work. Several delegations also recalled the proposals on this subject contained in MTN.GNG/NG13/W/30 and suggested that these proposals be given further consideration by the Group.

5. A number of delegations noted that strengthened substantive rules in the GATT could only be as effective as the dispute settlement system available for their enforcement. A representative of a number of contracting parties stressed the political nature of the relationship between adoption and implementation of panel reports. According to this representative, it appeared to be easier for some contracting parties to consider adoption as an isolated act, judging a panel report on its merits, and then to deal with implementation on a domestic level. For other contracting parties the procedure appeared to be more complicated, requiring a domestic political consensus on implementation before dealing with the question of adoption. Other delegations emphasized the relationship between the issue of implementation and that of strengthening the commitment to abide by GATT dispute settlement rules and procedures (agenda item A(6)).

6. Delegations addressed the issue of the "reasonable period of time" for compliance with recommendations or rulings. They discussed whether panels or the Council would be in a better position to make a recommendation on a reasonable period of time for implementation. Most speakers considered that the Council would be in a better position to make such a recommendation but that panels could make a recommendation in appropriate situations. One delegation recalled its proposal, contained in MTN.GNG/NG13/W/19, para. 3(a), that "[t]he Council shall define a reasonable time-limit for implementation of the panel recommendations when it adopts the panel report". This delegation expressed the view that where a contracting party requests a period of time for implementation, the Council should take into account not only legal factors but also political, economic and social factors which may have a bearing on the situation.

7. Some delegations argued that a lesser period of time might be required when contracting parties could directly implement rulings and recommendations through executive action, whereas more time might be required if implementation necessitated legislative action. These delegations considered that some normative guidelines might be useful in determining the reasonable period of time in each case. One delegation also suggested that the Council could request the panel to make a proposal on the timing of implementation. Another delegation reiterated that the Group should give further consideration to the proposals contained in MTN.GNG/NG13/W/30. It was generally agreed that a contracting party charged with implementation should in the first instance inform the Council of what action it intends to take and within what time-frame; thereafter it would be for the Council to determine whether the proposed time-frame is reasonable in light of the circumstances of the particular case.

Compensation and Retaliation

8. Under item A(2) of the agenda, the Group proceeded to discuss further the issue of compensation in the context of GATT dispute settlement. To aid in this discussion, the Group had before it the Secretariat Note, circulated as document MTN.GNG/NG13/W/32, summarizing existing GATT texts and proposals submitted in the Group, and suggesting issues for further consideration. There was general agreement that compensation should only be resorted to as a temporary means of encouraging implementation of rulings and recommendations under Article XXIII where implementation of such rulings and recommendations within a reasonable period is impracticable. All speakers agreed that the primary objective of the GATT dispute settlement system should be to ensure the removal or bringing into conformity of measures inconsistent with the General Agreement.

9. Most delegations spoke against making compensation a legal obligation in the GATT dispute settlement system. In this regard, a representative of a number of contracting parties noted that there is no mention of the concept of compensation in Article XXIII. Delegations generally cautioned against the elaboration of rules on compensation which might have the effect of encouraging the non-implementation of panel recommendations.

10. A number of contracting parties spoke in favour of elaborating guidelines for the resort to compensation in the context of GATT. Several speakers expressed the view that compensation or retaliatory withdrawal of concessions should possibly include a penalty component to encourage contracting parties to comply with adopted panel recommendations with the least possible delay. One delegation considered that the present lack of provisions governing compensation could lead to situations where contracting parties might try to justify taking inconsistent measures by claiming that they suffered from the delayed implementation of panel recommendations by other contracting parties. Another delegation expressed the view that the GATT should develop guidelines for determining the time period that compensation should cover.

11. Several contracting parties pointed to the potentially distorting effect of compensation. They noted that whereas compensation should restore the balance of rights and obligations of the parties concerned, in practice compensation would most likely be granted in a sector other than that subject to dispute and would therefore be unsatisfactory to those seeking implementation. It was questioned whether the grant of compensation should ever be permitted to benefit the non-implementing industry concerned. Several delegations also referred to the lack of understanding of the economic effects of temporary compensation, especially as regards investment.

12. A number of speakers recalled that the principle of compensation may be particularly attractive to smaller and less-developed contracting parties given their limited retaliatory power viz-à-viz their larger trading partners. However, one delegation cautioned that smaller countries

may find it more difficult to negotiate compensation with their larger trading partners. Another delegation said in this regard that there may be room for the granting of compensation by decision of the Council as an alternative to retaliation.

13. One delegation expressed the view that there were several types of compensation that needed to be addressed. In particular, this delegation considered that the Group should give its attention to situations where the removal of inconsistent measures would not remove the consequential prejudice and harm suffered by the contracting parties concerned. In such circumstances this delegation felt that provision should be made in the GATT for indemnification of the party harmed. Consequential harm could be particularly acute in the private sector. The delegation went on to state that this type of prejudice and compensation should be the subject of specific regulation in the GATT. A representative of a number of contracting parties responded to this proposal by stating that GATT dispute settlement rules govern the relations of contracting parties and that questions of indemnification of private traders could not appropriately be considered in this forum.

14. On the issue of retaliatory withdrawal of concessions, a number of delegations stated that no contracting party should have the right to use unilateral measures to preserve what it believed to be its rights under the General Agreement. While retaliation was considered to be a measure of last resort, it was felt that it could be useful to elaborate certain procedural guidelines for recourse to such action. A representative of a number of contracting parties emphasized that a non-implementing contracting party should under no circumstances be permitted to block a Council decision in favour of retaliatory action.

#### Non-violation Complaints under Article XXIII

15. The Group next turned to a brief discussion of non-violation complaints in the GATT (agenda item A(3)). On this subject, the Group had before it a Secretariat Note circulated as document MTN.GNG/NG13/W/31. This Note contains a summary of existing GATT practice, proposals made in the Group thus far and suggestions for issues for consideration by the Group. Many speakers expressed the view that the distinction between violation and non-violation complaints should be carefully preserved in the elaboration of new rules for GATT dispute settlement. It was also said that the further clarification and development of non-violation nullification and impairment might best be left to future GATT dispute settlement practice.

16. A representative of a number of contracting parties commented that the cases of non-violation are fundamentally different from violation cases in the GATT and that this whole area is an extremely complex one requiring further reflection. This representative also commented that many of the older non-violation cases are of only marginal relevance today. He noted

that the remedy proposed in non-violation cases, that of re-establishing the balance of rights and obligations through negotiation, poses more questions than it answers, especially with regard to the issues of adoption and implementation.

17. One delegation noted that the precedents in the non-violation field suggest that the party found to be nullifying or impairing benefits must take actions necessary to restore the competitive balance regarding imported and domestic products, particularly when the benefits impaired are derived from a tariff concession. With reference to paragraph (k) on page 32 of the Secretariat Note, another speaker commented that not only the non-violation track of dispute settlement was implicated when a waiver was granted under Article XXV.

18. One delegation was of the view that the distinction in the General Agreement between violation and non-violation complaints reflects a particularly positivist view of the law. He noted that in other fora such concepts as good faith, legitimate expectation and estoppel are already well-developed as sources of legal obligations.

#### Adoption of Panel Reports

19. The Group then proceeded to discuss the issue of adoption of panel reports under agenda item A(5). The Chairman recalled that various proposals on this issue had been tabled prior to the mid-term review and that these proposals were summarized in the Secretariat document MTN.GNG/NG13/W/29/Rev.1. A number of delegations raised concerns about the status of adopted panel reports in GATT jurisprudence. Among the questions discussed were those concerning the differing status of panel recommendations, rulings and findings.

20. One delegation commented that the difference between rulings and recommendations could have implications for the enforcement of adopted panel reports: whereas adopted panel rulings may be directly binding under international law, adopted panel recommendations may not have any directly binding effect. Accordingly, this delegation found more favour in the consensus principle with respect to the adoption of rulings but considered that this principle would be problematic for the adoption of non-binding recommendations. A representative of a number of contracting parties commented that it was unclear in GATT jurisprudence whether adopted rulings should be viewed as applying only to specific disputes between specific parties or as having broader relevance to the interpretation of the General Agreement. The Secretariat noted that in practice panels had often interchangeably identified their conclusions as either recommendations or rulings. The Chairman suggested that the Secretariat could prepare a note on the legal status of "rulings" and "recommendations" by the CONTRACTING PARTIES in terms of GATT Article XXIII:2 to facilitate discussion of this issue.

21. Several delegations discussed the problem of erroneous or poorly reasoned panel reports. One suggestion was that consideration should be given to some form of standing appeal body. Another was that the selection of panelists from a wider range of candidates would ensure better quality panel reports and thus reduce the problem of dealing with poor panel reports at the adoption stage. It was noted in this regard that the quality and consistency of panel reports had improved in recent years, in part due to the more consistent approach taken within the Secretariat. One delegation considered that while there was a need for more automaticity in the adoption of panel reports, there also was a need for a mechanism to deal with erroneous panel reports. This same delegation, however, cautioned against a standing appeal procedure, noting that the availability of such a procedure would result in virtually every case being appealed.

22. Another contracting party spoke in favour of retaining the principle of consensus adoption, noting that reports adopted by consensus resulted in a greater commitment to implement on the part of contracting parties subject to rulings and recommendations under Article XXIII. This delegation viewed adoption and implementation as a single package and considered that if adoption procedures were to become more automatic, this could undermine the system if it were to result in a greater number of non-implemented panel reports. Yet another delegation recalled that the practice of adoption by consensus did not preclude the right of contracting parties under Article XXV to vote on adoption.

#### Strengthening of Commitment

23. Under agenda item A(6), the Chairman recalled that in accordance with the April Decision of the TNC, the Group was to give further consideration to the strengthening of the commitment to abide by the GATT dispute settlement rules and procedures and to refrain from unilateral measures inconsistent with these GATT rules and procedures. A number of delegations commented that the strengthening of the multilateral dispute settlement system necessitated agreement by all contracting parties to refrain from taking unilateral measures and to seek resolution of all GATT disputes exclusively through the GATT dispute settlement system. Delegations considered that taking actions outside the scope of GATT procedures would distort both GATT dispute settlement and the international trading system as a whole.

24. One representative commented that the issue of unilateralism had relevance beyond the terms of reference of this Group and indeed would be an important element in the final package of the Uruguay Round. Another delegation commented that the proposals in this area had been adequately formulated in document MTN.GNG/NG13/W/30 and that the Group should take a fresh look at these proposals. Yet another delegation stressed that unilateralism is a general term, not limited to any point or issue in dispute settlement. In the view of this delegation, it was necessary for

the Group to consider the impact of unilateralism at all stages of the dispute settlement process.

#### Arbitration within GATT

25. The Group next continued its discussion of arbitration within GATT, agenda item A(7), having before it a proposal circulated by Switzerland at the previous meeting as document MTN.GNG/NG13/W/33. The Swiss delegation recalled the main lines of its proposal, noting that the April Decision of the TNC contained the bare bones of an arbitration procedure and that the Swiss proposal was intended to clarify the relationship of arbitration to GATT, especially as concerned financing, surveillance and the position of third contracting parties. The fundamental problem addressed by Switzerland was that arbitration within GATT needed to be moulded into the multilateral context of GATT dispute settlement.

26. Many delegations expressed their appreciation to Switzerland for its proposal. A number of speakers however questioned the need to further elaborate GATT procedures for arbitration at this time. There was also concern that the Swiss proposal might inappropriately encourage resort to arbitration at the expense of the more traditional forms of dispute settlement in GATT. Several delegations questioned whether the parties to an arbitration would be bound by the arbitration award if it were subsequently found by the Council to be incompatible with GATT. In this connection it was recalled that paragraph A.2 of the April Decision states that "... arbitration awards shall be consistent with the General Agreement and shall not nullify or impair benefits accruing to any contracting party under the General Agreement ...". Several delegations also raised the concern that provision for a third party's right to be heard, as an additional right to that of intervention, might be inconsistent with the process of arbitration.

#### Proposals by Least-Developed Countries

27. The representative of Bangladesh had expressed his intention to present proposals by the least-developed countries for special provisions facilitating their effective use of the GATT dispute settlement mechanism (agenda item A(4)). The Chairman explained that at the request of Bangladesh, this presentation would be postponed to a future meeting of the Group.

#### Other Business

28. Under item B of the agenda, the Group confirmed that its next meeting would be held on 7-8 December 1989. The Chairman recalled the widely supported view expressed at the last TNC meeting in July 1989 that further negotiating proposals should be circulated, if possible, before the end of 1989.