

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED  
MTN.GNG/NG13/17  
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Group of Negotiations on Goods (GATT)

Negotiating Group on  
Dispute Settlement

MEETING OF 7 DECEMBER 1989

Note by the Secretariat

1. The Group held its seventeenth meeting on 7 December 1989 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2889.

Proposals by the Least-Developed Countries

2. Under Agenda Item A.1, the Group discussed a set of proposals by Bangladesh on behalf of the least-developed countries, circulated in document MTN.GNG/NG13/W/34 on 14 November 1989. In introducing the four proposals, Bangladesh stated that the least-developed countries were the less equal among equal contracting parties and that their economic and trade situation was desperate. Bangladesh emphasized that it was not looking for ad hoc measures of differential and more favourable treatment but was calling for the permanent institutionalization of certain measures in favour of the least-developed countries. The delegation also expressed the view that disputes involving the least-developed countries should be approached with special attention, flexibility and sympathy.

3. Several delegations supported the proposals by Bangladesh, noting that the Punta Del Este Declaration called for special attention to be given to the particular situation and problems of the least-developed countries. However, a number of speakers commented that the best way to ensure equality for the least-developed countries was to provide sufficient flexibility in the context of equal dispute settlement rules for all contracting parties. It also was noted that the April 1989 Improvements and earlier decisions of the CONTRACTING PARTIES contained provisions designed to safeguard the particular concerns of developing contracting parties. One developing contracting party commented that it would be neither feasible nor appropriate to set up special procedures for the least-developed countries and that it was preferable to view special and differential treatment as a unified principle within GATT dispute settlement. A number of comments were made on specific details of the Bangladesh proposals. The Chairman suggested that the Group revert to this matter at a future meeting.

GATT SECRETARIAT

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### Third Party Rights

4. Under Agenda Item A.2, the Group gave further consideration to the issue of third party rights in GATT dispute settlement. A representative of a number of contracting parties expressed the view that the April 1989 Improvements adequately dealt with the issue of third party rights. However, a number of delegations took the position that the issue could benefit from further reflection and possibly the elaboration of new provisions. One delegation considered existing procedures inadequate in that they did not ensure the right of interested third parties to participate along with the parties to a dispute in the substantive meetings of panels.

5. Another delegation raised the related issue of third party obligations with respect to the legal consequences of adopted panel reports. In this regard, the speaker referred to the Secretariat Note on "Rulings and Recommendations in terms of Article XXIII:2", circulated in document MTN.GNG/NG13/W/35 on 1 December 1989, and in particular to the issues for consideration noted at the end of that document. The delegation considered that it would be important for the Group to further explore the consequences resulting from the adoption of a panel report where the panel was interpreting, not just applying, provisions of the General Agreement. In the view of this delegation, the clarification of existing rights and obligations in a panel report, once adopted by the CONTRACTING PARTIES, resulted in an agreed interpretation that applied to all contracting parties, not just to the parties to the dispute. This delegation noted however that there was not complete agreement among contracting parties on the effect of adopted panel reports. The effect of reservations expressed at the time of adoption also needed clarification.

6. Several delegations stated that they required more time to reflect on the issues raised concerning the effects of adoption of panel reports. Others considered that it would be unfortunate to have to address this issue because the legal effect of adoption was already clear. One delegation noted that the distinction to be drawn concerning adopted panel reports was that between persuasive authority and binding interpretation. Another delegation expressed the view that currently there was no legally binding, precedential value of adopted panel reports other than for the parties to the dispute. This delegation noted the practice of different panels reaching different findings in similar cases. It was agreed that the Group would revert to the issues of third party rights and obligations at the next meeting.

### Adoption, Implementation, Strengthening of Commitment, Compensation and Retaliation

7. The Group then proceeded to discuss together the related issues under Agenda Items A.3, A.4, A.5 and A.6 of adoption, implementation, strengthening of commitment, compensation and retaliation. In conjunction with the above subject areas, the issues of selection of panelists and appellate review also were raised. Delegations repeatedly stressed the interrelationship of all these issues.

8. One delegation, noting an improvement in the quality of panel reports in recent years, suggested that various options should be explored to further improve the selection of panelists. This delegation proposed four possible options for further consideration: (1) the Director General, with the agreement of the CONTACTING PARTIES, could select three or more permanent panelists who would adjudicate all GATT disputes; (2) a fixed pool of experts could be established, with the experts serving staggered terms, and from which all panelists would be chosen unless the parties to a dispute mutually requested other panelists; (3) there could be a requirement that two out of three members of a panel would have to have previous panel experience; or (4) the arbitration model for the selection of panelists could be drawn upon, with each party selecting one panelist and the two panelists then selecting the third. A representative of a number of contracting parties commented that a simple solution to improving the overall quality of panelists would be to increase the number of panelists on the non-governmental roster. This representative also noted the role of the GATT Secretariat in contributing to the improved quality of panel reports and suggested that appropriate strengthening of the GATT Secretariat should be considered.

9. One delegation proposed that the Group consider various options for possible appellate review of panel reports. Noting that there was a risk that an appellate mechanism could become a delaying factor, the delegation indicated that it was assessing the following three options: (1) the establishment of a time-limited review (e.g. 30 days), with procedures that would discourage losing parties from routinely using the review process; (2) the establishment of a standing review tribunal or a roster of panelists from which the Director General would select an appellate panel on a case-by-case basis; or (3) a requirement that panels issue an interim report (including findings and conclusions) to the parties for comment, in advance of issuing a final report, to help reduce the potential for the parties to request a review. This delegation noted that it was unclear whether an appeal process would be necessary if a more adequate adoption mechanism were developed. A number of delegations responded that they would be interested in considering specific proposals on the issue of appellate review. However, there was a widespread concern that any appellate mechanism would result in often unwarranted delay of the dispute settlement process.

10. On the issue of adoption of panel reports, one delegation noted that it was currently examining whether and under what circumstances there could be automatic adoption of panel reports or, if subject to appellate review, automatic adoption of the review panel's report. This delegation was also considering whether the adoption of a panel report constituted a precedent for the future interpretation of GATT rules in respect of other contracting parties, a precedent that a future panel would be obliged to follow or expressly indicate why it had not done so. Other delegations emphasized that the practice of adoption by consensus should be continued because it was important at the implementation stage to have the contracting party against whom the complaint was brought associated with the decision to adopt. One delegation however expressed the view that the consensus minus two concept merited further consideration.

11. On the issue of implementation, one delegation suggested that the Group consider the following three options: (1) replace the current procedure for monitoring implementation, as set out in paragraph I.3 of the April 1989 Decision, with a procedure in which the party subject to a recommendation would propose a specific timetable for implementation, to be approved by the Council; (2) consider whether authorization to suspend concessions should be granted after the expiration of a reasonable period of time and whether such authorization should be extended to third parties; and (3) consider whether there should be general guidelines by which the amount of nullification or impairment would be assessed. A number of delegations expressed the view that the reasonable period of time for the implementation of panel recommendations would vary depending on the type of measure involved and the type of governmental action required to eliminate the measure or to otherwise bring it into conformity with the General Agreement. Some speakers suggested that the Group could possibly develop more specific guidance as to what constituted a reasonable period of time. However, others considered that this would always have to be decided by the Council on a case-by-case basis and that it would not be appropriate to define the reasonable period in the abstract. A representative of a number of contracting parties suggested that the starting point should always be the contracting party charged with implementation. This party could be required to propose a plan for implementation to the Council at the time of adoption of the report. The issue could then be brought back to Council as a function of the plan's implementation.

12. Several delegations referred to the issues of strengthening of the commitment to abide by GATT dispute settlement rules and procedures and of refraining from unilateral measures inconsistent with these rules and procedures. A representative of a number of contracting parties stated that any agreement on improved mechanisms for GATT dispute settlement should include a precise commitment from all contracting parties to adapt their domestic procedures to the new multilateral disciplines. Another speaker commented that what was required was not just a political commitment but a legal commitment not to resort to unilateral measures. Yet another speaker considered that the best way to reduce the incidence of contracting parties resorting to unilateral measures was to make the GATT dispute settlement procedures more attractive. One delegation expressed the view that there was no legal significance to strengthening the commitment to abide by GATT dispute settlement rules and procedures. This delegation considered that because the General Agreement is a treaty imposing legal obligations on its members, seeking a strengthening of commitment could only result in a weakening of the General Agreement and the April 1989 Decision.

13. A number of delegations expressed the view that the Group should develop more precise guidelines concerning the circumstances in which there should be compensation and authorization of retaliatory withdrawal of concessions. It was generally agreed that the practice governing retaliation needed to be reassessed. One delegation suggested that, in the absence of implementation, authorization to retaliate could be automatic after the expiry of a reasonable period of time following adoption of a panel report.

14. The Group deferred further discussion of non-violation complaints (Item A.7) and arbitration within GATT (Item A.8).

Other Business

15. Under "other business", the United States suggested that it would be useful to obtain from the Secretariat a brief note on proposals and issues under discussion related to dispute settlement in other negotiating groups in the Uruguay Round. The US delegation noted that it would be important for the work of this Group to be consistent with and coordinated with the work in other negotiating groups. Another delegation suggested that such a Secretariat note should also review issues concerning dispute settlement being discussed in the various Code Committees. One delegation expressed reservations about a document that might in some way prejudice the negotiations in other groups. It was agreed that the Secretariat should prepare a brief, purely informational, background note on dispute settlement issues and proposals being discussed in other negotiating groups and in the Code Committees.

16. Also under "other business", the delegation of Switzerland indicated that it would be submitting a paper before the end of 1989 concerning proposals for prompt resolution of disputes through dispute settlement procedures at the national level, including procedural standards for domestic review and improvements in national disciplines relating to the rights and obligations of private citizens in the area of international trade.

17. Referring to discussions at previous meetings, the Chairman suggested that the Secretariat could proceed with preparation of a first draft of a consolidated instrument integrating the existing GATT dispute settlement procedures into one, single, transparent text. However, in view of doubts expressed by one delegation, it was decided that the issue of a consolidated instrument should be included on the agenda of the next meeting but that the Secretariat would not be requested to prepare a draft for the time being. It also was agreed that review of the April 1989 Improvements on dispute settlement should be deferred to the Spring of 1990.

18. The Group confirmed that their next meeting would be held on 5-6 February 1990. The Chairman then indicated that the Secretariat had reserved the dates of 5-6 April and 7-8 June 1990 for subsequent meetings of the Group.