MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

DISCUSSION AND PROPOSALS IN OTHER NEGOTIATING GROUPS AND IN THE CODE COMMITTEES RELATING TO DISPUTE SETTLEMENT

Note by the Secretariat

1. At the meeting of 7 December 1989, the Negotiating Group on Dispute Settlement requested the Secretariat to prepare a Note on discussions and proposals in other Uruguay Round Negotiating Groups and in the Code Committees relating to dispute settlement. This Note is prepared in response to that request. Reference is made only to those Groups and Committees where there have been substantive proposals or discussion on the issue of dispute settlement.

Uruguay Round Negotiating Groups

2. The issue of dispute settlement has been discussed within the Negotiating Group on Non-Tariff Measures in relation to Preshipment Inspection. Specific proposals have been tabled by Zaire (MTN.GNG/NG2/W/50) and the United States (MTN.GNG/NG2/W/53).

3. Also within the Group on Non-Tariff Measures, there has been discussion of dispute settlement in relation to Rules of Origin. Detailed proposals have been submitted by Hong Kong (MTN.GNG/NG2/W/41), the United States (MTN.GNG/NG2/W/43) and Japan (MTN.GNG/NG2/W/52).

4. There have been several proposals submitted relating to multilateral surveillance and dispute settlement in the Negotiating Group on Textiles and Clothing. These include a proposal from Switzerland contained in MTN.GNG/NG4/W/25, page 4:

> "Switzerland proposed that rules and procedures should be established in particular with regard to:
> . . .
> - the applicability of the provisions for the settlement of disputes of the General Agreement."

In this Group there was also a proposal by the Nordic Countries, contained in paragraph 5 of MTN.GNG/NG4/W/30:

> "The integration process should be carefully supervised and monitored by a specifically established surveillance body, which could

> also deal with possible dispute settlement cases arising from the integration process."

There was also a proposal from Indonesia, contained in paragraph 5 of MTN.GNG/NG4/W/31:

> "A multilateral mechanism should be established for monitoring the implementation and surveillance of the phase-out programme and also for the settlement of disputes that might arise in this regard."

At the Group's meeting of 14 December 1989, the Hong Kong delegate said that "the need for a multilateral surveillance and dispute settlement mechanism during the phase-out has been outlined in a number of proposals which have been tabled so far. Hong Kong supports this view and we see merit in adopting the Textiles Surveillance Body as a basis for surveillance and dispute settlement procedures". Also at that meeting, the Swiss delegate commented, " ... we do not feel that there is a need for a special dispute settlement mechanism for textiles and clothing, one already exists in the GATT."

5. Within the Negotiating Group on Agriculture, the Working Group on Sanitary and Phytosanitary Reglementations and Barriers has discussed a number of proposals related to dispute settlement. The Cairns Group has proposed that informal consultations may use experts nominated by technical international organizations, or agreed by both parties. Cairns also proposed that any agreement should provide for technical advice from technical international organizations or experts sanctioned by them, and that compensation be provided to less-developed contracting parties for trade loss in case of unjustified stricter regulations or frequent changes in regulations (MTN.GNG/NG5/W/112; MTN.GNG/NG5/W/132). The United States submitted a proposal that good offices be encouraged, especially of international organizations, and that panels should give primary consideration to the judgment of a technical advisory group, drawn from a list provided by technical international organizations (MTN.GNG/NG5/W/118). Morocco proposed that the standards and findings of [the International Organization of Epizootics, the Codex Alimentarius Commission and the International Plant Protection Commission] should constitute a fundamental element in GATT dispute settlement (MTN.GNG/NG5/W/121). Korea called for participation of regional experts in bilateral and multilateral dispute settlement (MTN.GNG/NG5/W/130). Japan proposed the use of dispute settlement procedures of technical international organizations, and if these were not successful, to request technical organizations' participation in GATT dispute settlement (MTN.GNG/NG5/W/131). The Nordic Countries submitted the following proposal in MTN.GNG/NG5/W/143:

> "[A Sanitary and Phytosanitary] agreement should contain provisions for consultation and dispute settlement, taking into account the results achieved within the Uruguay Round in this area. A mechanism to monitor the implementation of the agreement should be established. This monitoring mechanism should include the possibility

of deciding upon the correct interpretation of the agreement, and of making recommendations to parties on its appropriate implementation. The best available technical expertise should be used in the administration of the agreement as well as in the consultation and dispute-settlement procedures. Notably, allowance should be made for the assistance that relevant international organizations can provide."

The Austrian delegation submitted the following proposal in MTN.GNG/NG5/W/144:

"The capacity existing within the 'International Office of Epizootics', the 'International Plant Protection Convention' and the 'Codex Alimentarius Commission' should be strengthened and broadened in a manner to enable these organizations to evaluate and appraise specific measures. These international institutions should be equipped with a technical dispute settlement competence within their scope of activities.

Each Contracting Party to the GATT and each member of the aforementioned organizations should be permitted to take recourse to these institutions when judgement and/or dispute settlement is required.

These international organizations would have to come forward with conclusive judgements and/or recommendations as to the implementation of their results. If the Contracting Party concerned has not taken appropriate measures in time, a trade related dispute settlement procedure can be initiated within GATT.

When judging certain measures, including analytical methods, Contracting Parties should apply the principle of equivalency.

In the light of the aforementioned considerations modifications of Art. XX:b or possibly a specific code of conduct might be envisaged."

In addition, the European Community submitted the following proposals in MTN.GNG/NG5/W/146:

"Consultation

The development of a consultation process is the fourth objective. Such a process is already provided for in Articles XXII and XXIII as well as in the Standards Code. However, the possibilities for resolving matters through consultations under Articles XXII and XXIII are limited by the exception contained in Article XX(b). Therefore, a consultation process along the lines of that contained in the Standards Code which, of course, does not cover PPMs at present, shall be developed.

The Community also advocates the incorporation into this process of provision for ad hoc negotiations on particular issues, as already proposed in its initial submission.

Dispute Settlement

The separation of technical issues from panel proceedings and legal issues has rendered the existing dispute settlement procedure of the Standards Code unworkable in certain situations. The Community, therefore, proposes that all the relevant issues should be examined by a single panel. Of course, provision already exists for taking scientific evidence into account in dispute settlement. Paragraph 6(iv) of the Annex to the 'Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance' adopted on 28 November 1979 states: 'Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter'. The panel procedures set down in Annex 3 of the Standards Code include the following: 'Each panel may consult and seek information and technical advice from any source it deems appropriate'. In this context it is suggested that the GATT secretariat be asked to establish a list of experts nominated by the recognized international organizations who could be called on to provide technical expertise as required."

6. In the Negotiating Group on GATT Articles, a proposal by the United States and Canada for reform of the GATT balance of payments disciplines contains the following language on page 9 of MTN.GNG/NG7/W/58:

"Countries adversely affected by a contracting party's BOP-justified measures which exceed those allowable under the Guidelines can seek redress through GATT dispute settlement procedures if:

- the exceptional measures have not been accepted, with or without conditions, by the BOP Committee;

- the consulting country fails to implement the conditions for acceptance; or

- the consulting country departs from, or fails to implement, its trade liberalization plan for BOP-related measures and fails to gain Committee acceptance of this derogation from its commitment.

In these cases, the onus in dispute settlement proceedings is on the country applying the exceptional measures to demonstrate that no, less disruptive (restrictive or distortive) alternatives are available and that the measures are GATT-consistent. The panel shall use the same criteria for assessing BOP-related trade restrictions as those outlined above for use by the BOP Committee.

Where a panel report which concludes that the measures are inconsistent with the invoking country's GATT obligations is adopted by the Council, adversely affected contracting parties may withdraw concessions of equivalent value.

In addition, under existing rules, if the BOP Committee reports to the GATT Council that the restrictions are inconsistent with the provisions of the General Agreement and if that finding is adopted by the CONTRACTING PARTIES, adversely affected contracting parties are released from appropriate obligations to the country applying the restrictions.

In any case, contracting parties retain their existing rights to seek redress where any action, whether or not it conflicts with GATT rights or obligations, is nullifying or impairing any benefit accruing to them directly or indirectly. However, in such cases where there is no question of violation of an obligation, the onus is on the affected country to demonstrate actual injury due to the measure(s) in question."

7. In the Negotiating Group on MTN Agreements and Arrangements, many delegations have expressed interest in reviewing Article 15 of the Anti-Dumping Code in light of the results achieved in the Negotiating Group on Dispute Settlement. Specific issues raised in the Group relating to dispute settlement procedures under Article 15 include the nature of actions (whether final or provisional) in respect of which the dispute settlement mechanism can be invoked, the timing of the establishment of panels, the possibility of a standing multilateral body to give advisory opinions, the time period for the completion of the dispute settlement process, and payment of compensation to exporters in cases where it is determined that investigations have been opened in a manner not in accordance with the applicable rules.

8. The issue of dispute settlement has been discussed in the Negotiating Group on Safeguards. The main proposal in that Group is contained in paragraph 32 of the draft text of a comprehensive agreement on safeguards drawn up by the Chairman (MTN.GNG/NG9/W/25):

"32. Contracting parties which believe their rights under this agreement are being nullified or impaired have recourse to the dispute settlement provisions of the General Agreement."

Discussions on the subject can also be found in paragraphs 20-22 of MTN.GNG/NG9/8, paragraph 25 of MTN.GNG/NG9/12 and paragraph 25 of MTN.GNG/NG9/13.

9. Considerable discussion of dispute settlement has occurred in the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Detailed proposals have been submitted by the United States (MTN.GNG/NG11/W/14), Switzerland

(MTN.GNG/NG11/W/15 and W/28), the European Community (MTN.GNG/NG11/W/16 and 49), Japan (MTN.GNG/NG11/W/17), Mexico (MTN.GNG/NG11/W/28), Austria (MTN.GNG/NG11/W/55) and the Nordic Countries (MTN.GNG/NG11/W/59). The issue of dispute settlement and proposals relating thereto were discussed most recently at the meeting of the Group of 11-14 December 1989. At this meeting, many delegations expressed the view that there would be no need to apply different procedures to disputes arising from obligations under a TRIPS agreement than those applicable to disputes arising under the General Agreement. Some participants suggested that the Group should take account of the program of work underway in the World Intellectual Property Organization on dispute settlement.

10. The issue of dispute settlement has also been raised in the Negotiating Group on Trade-Related Investment Measures. Consideration of the issue in this Group includes a proposal by the United States in paragraph IV.B of MTN.GNG/NG12/W/15:

> "If disciplines on TRIMs are to be effective, an agreement must include adequate mechanisms to enforce disciplines and resolve disputes. The Group should thoroughly examine this issue."

It also includes a proposal by Switzerland in paragraph IV.2 of MTN.GNG/NG12/16:

> "Dispute settlement would follow normal GATT procedures."

The European Communities also submitted proposals on dispute settlement to this Group in sections F and G of MTN.GNG/NG12/W/22:

> "15. It has been rightly pointed out that Articles XXII:1 and XXIII:1 of the GATT can apply with regard to investment measures where these measures distort or restrict trade.
>
> It would be appropriate to be more specific in relation to investment measures with a view, on the one hand, to arriving expeditiously at a clarification of the situation and a mutually acceptable solution, thus reducing the period of uncertainty for the investor, and, on the other hand, excluding frivolous requests for consultations. Bearing in mind this twofold objective, consultations should be entered into as quickly as possible where a signatory has reason to believe that another signatory has introduced or maintains an investment measure which causes nullification or impairment of benefits accruing to it under the General Agreement, or serious prejudice to its trade.
>
> Such a request for consultation should include a statement of available evidence with regard to the existence and nature of the investment measure in question and the adverse effects on the interests of the requesting signatory.

Where it is established in the course of these consultations that the investment measure in question has any of the effects set out in paragraph 7 above, the party which has introduced the measure would be expected to remedy the situation, preferably by revoking or modifying the measure so as to eliminate the restrictive or distorting trade effects. Any such remedial action should be implemented without causing discrimination among signatories to the agreement.

16. Since such consultations do not always result in a mutually acceptable solution, signatories might have to resort to GATT dispute settlement procedures which ultimately could imply the withdrawal of concessions or the suspension of other obligations under the General Agreement."

Finally in this Group, the Nordic Countries have submitted a proposal contained in paragraph 18 of MTN.GNG/NG12/W/23:

"18. Enforcement of this discipline should be based upon normal GATT dispute settlement procedures (as embodied in Articles XXII and XXIII with improvements agreed upon in the context of the Uruguay Round), using the notifications made at the outset as a base line. A consultation procedure preceding actual dispute settlement would need to embody the right of counter-notification by parties perceiving an infringement of the discipline."

11. There has also been discussion of dispute settlement in the Committee on Government Procurement. The matter was first raised at meetings in the early 1980s at which time the Committee considered the rights of third parties (BISD 29S/40 and 30S/36). In June 1985 the Nordic Countries made proposals for new Code provisions concerning complaints by suppliers (GPR/W/56/Rev.4). The Nordic Countries then submitted additional proposals in January 1986. Amendments to the Code were agreed upon in November 1986, but no changes were made with respect to Article VII. Suggestions with a bearing on dispute settlement procedures were made in the second phase of the Article IX:6(b) negotiations, which began in February 1987. According to the 1988 Report to the CONTRACTING PARTIES (BISD 35S/374):

"What has been referred to as 'bid challenge system' could be an element of enforcement both in the area of broadening and services. Some have suggested that this would be an improvement to the Code. The Group was informed about how protest and dispute procedures in procurements operated in the United States, and about the draft EC directive commonly called the 'Compliance Directive'."

In the 1989 Report (L/6593), it is stated, inter alia, that:

"Three delegations have submitted information and suggestions about surveillance, monitoring and control, including what has been referred to as a 'bid protest mechanism'. This has to be discussed

further since some delegations have questioned the usefulness and cost of new requirements in this regard; other have sought further clarifications from other participants. A number of delegations see rules in this area as an important element in confidence-building for the business world."