

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

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**Group of Negotiations on Goods (GATT)**

Negotiating Group on Dispute Settlement

MEETING OF 7 FEBRUARY 1990

Note by the Secretariat

1. The Group held its eighteenth meeting on 7 February 1990 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2909.

Proposals by Least-Developed Countries

2. No comments were made under agenda item A.1.

Third Party Rights

3. Under agenda item A.2, one participant said that third party rights needed further strengthening. Although such rights should not be enhanced at the expense of the parties to the dispute, two improvements could be envisaged. First, third parties should have a general right to receive panel submissions. Second, third parties should be allowed to be present at the first substantive panel hearing. This proposal would not necessarily result in the presence before the panel of large numbers of third parties, especially if certain conditions were stipulated, such as a requirement to make a formal written submission.

4. Other participants felt that the decision reached in April 1989 on improvements of the dispute settlement rules and procedures had already adequately taken into account concerns of third parties. The main purpose of a panel was to solve a dispute between the parties; large numbers of third parties could complicate the solution of the dispute by turning the process into a sort of working party. If a third party had a real interest in a dispute it could always be a co-complainant or itself invoke the provisions of Article XXIII. The system at present seemed to be working well.

Selection of Panelists

5. Under agenda item A.3, one participant supported the proposal that all panelists be chosen from a fixed pool of experts serving staggered terms; that two out of three panelists would be required to have previously served on a panel; and that the number of non-governmental

panelists be increased. However, a question remained on how such a roster would be selected.

6. Another participant suggested that the selection of the proposed roster could proceed in either of two ways. First, the selection could be put in the hands of the Director-General. Second, the roster could be established by the Council, or some other body acting on behalf of the CONTRACTING PARTIES, on a periodic basis. Several participants said that the primary goal of the selection process must be to find well-qualified persons who were independent, of high quality and experienced in trade policy matters. One problem was that with so many panels the pool of qualified persons willing to serve a second or third time might not be sufficiently large. The development towards an increased use of non-governmental panelists was to be welcomed.

#### Appellate Review Mechanism

7. Under agenda item A.4 participants commented that an appellate review mechanism could unduly delay and burden the dispute settlement process.

#### Adoption of Panel Reports

8. Under agenda item A.5, one participant expressed the view that an adopted panel report should not be seen as an agreed interpretation that applied to contracting parties other than those to the dispute. The situation of third parties was different from that of parties to the dispute. Panels considered only the issues and arguments presented by the actual parties. Since third parties did not have full rights under the panel process, they should not bear the full consequences. In any case, panels had not always reached the same conclusions in similar cases.

9. Some participants pointed out that if adopted panel reports could not be relied on as agreed interpretations of general application, then in extreme cases a party wishing to assert its GATT rights would have to request the establishment of a separate panel against each contracting party. Other participants, however, supported the view that the adoption of a panel report concerned solely the issues under dispute, and should not bind third parties.

10. One participant suggested that the problem of deciding which interpretations in adopted panel reports that had general application and did not, might be solved by having recourse to the distinction set out in Article XXIII between a "ruling" and an "interpretation".

#### Implementation of Rulings, Decisions and Recommendations

##### Unilateral Measures

##### Compensation and Retaliation

11. No comments were made under agenda items A.6, A.7 and A.8.

Non-violation Complaints

12. Under agenda item A.9, one participant said that the non-violation concept was very complex and that the clear distinction between violation and non-violation complaints should be maintained.

Arbitration within the GATT

13. Under agenda item A.10, one participant said that the place of arbitration in the GATT should be determined by its degree of effectiveness as measured by concrete results.

Domestic Implementation and Enforcement

14. Under agenda item A.11, the delegation of Switzerland presented a proposal set out in document MTN.GNG/NG13/W/36. The dispute settlement system operated at two levels: international and national. The national level had so far been neglected in the negotiations. The fundamental issue was the extent to which private persons could be protected from governmental actions which were contrary to the international trade obligations of the government concerned. Different models to solve this problem could be conceived. One way would be to have countries undertake to apply GATT obligations directly under their national laws; another would be for countries to choose a limited number of obligations and apply them on a reciprocal basis. A third and preferred approach, within the scope of the present negotiations, would be to ensure private persons' rights to minimum procedural standards under national laws relating to trade matters. This concept already existed in a limited form in Article X of the GATT. Article X could be amplified and expanded to cover all areas under the General Agreement; a similar provisions could be set out in the Codes and in any agreements in the new areas. Obligations could be expanded to cover rights to a fair hearing, a reasoned decision, effective provisional measures and effective administrative or judicial review. The predictability of rights and obligations would further be improved by the creation of an obligation to frame national trade regulations in terms at least as precise as the corresponding rules and principles of the GATT. Although the issue of implementation and enforcement in the GATT context could be discussed in the Negotiating Group on Functioning of the GATT System, it would be preferable to deal with it in the Negotiating Group on Dispute Settlement to ensure a better coordination between the national and international levels of dispute settlement.

15. In commenting on the Swiss proposal, several participants pointed out that the introduction of GATT obligations directly into national systems of law was not feasible for a number of contracting parties for constitutional reasons. However, a proposal on domestic procedural obligations had merit. The extension of Article X provisions to non-tariff areas needed further study. Another participant said that the Swiss proposal contained elements which were already reflected in its legislation or procedures; rulings and decisions in the trade area could currently be appealed before its courts.

16. It was pointed out that the Swiss proposal raised more questions than answers. The proposal seemed to favour obligating contracting parties to give full effect to GATT and MTN Code rights and obligations within their national legal systems. This aim did not fall within the Punta del Este mandate for the dispute settlement negotiations. The link between strengthening domestic procedures for administrative review of domestic actions related to international trade and the application of the GATT dispute settlement mechanism was not clear. The following issues arose: could private persons challenge governments on the GATT consistency of their measures; what would be the status of foreign nationals; did the proposal question the GATT as essentially an agreement between sovereign nations and favour creating a series of individual rights; and, what would be the status of domestic judicial rulings vis-à-vis GATT panel rulings and recommendations.

17. Several participants said that the Swiss proposal could be handled better in the Negotiating Group on Functioning of the GATT System and in the Code Committees.

18. The Swiss delegation replied that it would be unfortunate to reject the proposal solely on the grounds that it should be discussed in another group. The present Group had the advantage of an overall view of the dispute settlement process. Further comments would be made on the proposal at a later meeting.

#### Proposals on Dispute Settlement Procedures in Other Groups

19. Under agenda item A.12, participants noted that dispute settlement proposals were being made at an increasing rate in other groups as appeared from the secretariat note (MTN.GNG/NG13/W/37), and that an attempt should be made to coordinate them.

20. One participant said that he supported the harmonization of dispute settlement procedures across the GATT, the Codes and any agreements in the new areas. Proposals made in other groups fell into three categories: (a) those that followed normal GATT dispute settlement procedures (perhaps with small modifications); (b) those that attempted to set up interim procedures in areas not currently covered by GATT dispute settlement procedures (eventually to be replaced by GATT dispute settlement procedures); and (c) those that departed markedly from the GATT dispute settlement mechanism (as in the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods and in the agricultural negotiations.) This last category of dispute settlement proposals should be discouraged.

21. Another participant said that attempts to harmonize dispute settlement procedures must not lead to the creation of a more complex and less workable system. Another participant stated that harmonization as far as possible across all sectors of negotiations was desirable. However, harmonization had to take into account specific adaptations that might be necessary in particular sectors.

22. Several participants supported the continued update of document MTN.GNG/NG13/W/37. It was suggested that the document should indicate where proposals were substantially different from standard GATT dispute settlement procedures. What was most important at this point was a continued information flow to the Group; at a later date, the Group could examine what action it wished to take in this context. The Chairman requested the secretariat to produce an updated version of the Secretariat Note MTN.GNG/NG13/W/37 on dispute settlement proposals in other groups for the next meeting of the Group. He suggested that the number of dispute settlement submissions in other groups was a reflection of fact that this Group had not come up with any clear guidance on this matter.

#### Elaboration of a Consolidated Instrument

23. Under agenda item A.12, the Chairman stated that in his view not enough information had been gathered to hold a discussion on this matter.

#### Other Business

24. Under agenda item B the Group decided that the next meeting would be held on 5-6 April 1990.

25. The Chairman reminded participants that time was running out and that substantive negotiations had to begin at the next meeting. Therefore, participants should ensure that any proposals were ready for circulation before the next meeting of the Group.