

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG13/W/38

30 March 1990

Special Distribution

Group of Negotiations on Goods (GATT)

Original: English

Negotiating Group on Dispute Settlement

THIRD-PARTY RIGHTS IN GATT DISPUTE SETTLEMENT

The following communication has been received from the delegations of Hong Kong, Hungary, Singapore and Switzerland with the request that it be circulated to the Group.

Introduction

The CONTRACTING PARTIES adopted the Decision of 12 April 1989 (L/6489) on a number of improvements to the GATT dispute settlement rules and procedures. It was also decided that negotiations would continue in the Negotiating Group on Dispute Settlement with a view to further improving and strengthening such rules and procedures.

2. The improvements pertaining to third contracting parties adopted in the Decision of 12 April 1989 are reproduced below for ease of reference:

"1. The interests of the parties to a dispute and those of other contracting parties shall be fully taken into account during the panel process.

2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submission to the third contracting party."

3. In the light of the above, one of the tasks of this Negotiating Group is to consider further improvements to ensure that the interests of third contracting parties will be adequately taken into account during the panel process. We submit that the improvements in paragraph 2 above

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notwithstanding, this objective can be further advanced and would therefore wish to propose two additional improvements (see paragraphs 8 to 15 below).

4. Before making the proposals, it would be appropriate to clarify first our position on the status of the third contracting parties in the panel process.

5. We agree fully that a clear distinction should be drawn between parties to the dispute which might include co-complainants and interested third parties in the panel process. Third parties, by virtue of their lesser interest in the matter and more importantly, of the fact that they do not seek to exercise their full rights under the General Agreement in the first instance, should not enjoy or be given the same status as parties to the dispute.

6. We further recognize that the panel is set up primarily to adjudicate the dispute between the complaining and the defending parties. It is therefore only reasonable to ensure that the rights of the parties to the dispute will not be interfered with by the participation of third contracting parties.

7. It should be stressed that the deliberations leading to the two proposals below have taken fully into account the observations made in paragraphs 5 and 6.

Proposals

(i) Right of third contracting parties to receive written submissions of the parties to the dispute

8. It is our view that the Decision of 12 April 1989, whereby third contracting parties can have access to written submissions to the panel by parties to the dispute, dependent on the consent of the latter, was motivated by the desire to help the third contracting parties gain a better understanding of the dispute so as to make their respective subsequent presentation before the panel, either in the form of a verbal presentation or a written submission, or both, more meaningful. In this regard, it is essential that the third contracting parties are fully aware of the positions and arguments presented by both parties to the dispute. The present "conditional" access to such submissions will not meet such an objective.

9. We therefore propose to make it a right for interested third parties to receive the written submissions by the parties to the dispute.

(ii) Right of third contracting parties to observe at the first substantive hearing between the panel and the parties to the dispute

10. It is also our view that if an opportunity can be given to interested third contracting parties to hear first hand the exchanges by the parties to the dispute at the first substantive hearing, it would enable them to

understand better the precise issue in dispute and contribute to a more focused and cogent subsequent presentation to the panel by such third parties.

11. It is clear that the third contracting parties would not have the right to participate or speak in the course of the hearing unless specifically requested to do so by the panel. The panel proceedings would therefore continue to be conducted in the same manner as hitherto and would not be affected by the presence of such third contracting parties.

12. We therefore propose to make it a right for interested third parties to observe at the first substantive hearing between the parties to the dispute and the panel.

13. It is possible that one party or parties to a dispute may have a certain unease about access to written submissions by frivolous third parties which may not have a genuine interest in the matter under dispute and the possible presence of too large a number of third parties at the panel hearing. We do not consider that there is any real cause for such concern because past panel cases have demonstrated that while there might be a fair number of third contracting parties expressing an interest in the issue at the time of consideration of the panel request by the Council, only a small number actually make written or oral submissions or both to the panel. The preparation of such a submission, even if it is a one-off exercise, as in the case of third contracting parties, requires a lot of preparation, and only those with a real interest in the matter would make an effort to do so. In other words, there is an element of self election in this process. The recent dispute between the EEC and US concerning the latter's restrictions on the importation of sugar and sugar-containing products under the 1955 waiver and under the headnote to the schedule of tariff concessions is a good illustration (see panel report in L/6631). Paragraph 1.4 of the panel report indicated that fourteen contracting parties expressed interest and reserved their right to make submissions to the panel but only five exercised their right before the panel.

14. Should concern nevertheless remain, consideration could be given to stipulating the condition that in responding to the panel's invitation, the third contracting party should provide a written explanation of the reasons for their interest in the dispute, should give a clear indication of their intention to make an oral or a written statement or both, such communication to be lodged with the panel at least [10] days before the first substantive hearing of the panel and that upon fulfilling the aforementioned requirement, third contracting parties will then be given copies of the written submissions by the parties to the dispute and be allowed to observe at the first substantive meeting of the panel.

15. In conclusion, the two proposals above are intended to give more concrete meaning to the agreement in the Decision of 12 April 1989 that the interests of third contracting parties will be taken fully into account during the panel process. It is submitted that these proposals would not interfere with or jeopardize the rights of the parties to the dispute. Panels will, as hitherto, continue to deliberate within the legal scope set

by the parties to the dispute. The proposals are purely of a procedural nature and would not effectively interfere with the panel proceedings and its recommendations or rulings of the dispute.