

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

MEETING OF 5 APRIL 1990

Note by the Secretariat

1. The Group held its nineteenth meeting on 5 April 1990 under the Chairmanship of Ambassador Julio A. Lacarte-Muró (Uruguay). The Group adopted the agenda set out in GATT/AIR/2958.

Proposals by Least-Developed Countries

2. Under agenda item A.1, there were no further comments regarding the proposals by Bangladesh circulated in document MTN.GNG/NG13/W/34. The Chairman noted that there had been no discussion of these proposals since the meeting of 7 December 1989.

Third Party Rights

3. Under item A.2, a proposal from Hong Kong, Hungary, Singapore and Switzerland on the issue of third-party rights in GATT dispute settlement was introduced by Hong Kong. The document was circulated as MTN.GNG/NG13/W/38 on 30 March 1990. Hong Kong pointed out that the proposals contained in the document were not new; they had been discussed at the previous meeting of the Group in February but had since been further refined. Basically, the four countries were proposing two additional rights for third parties: (1) the right of interested third parties to receive the written submissions of the parties to the dispute; and (2) the right of interested third parties to observe at the first substantive meeting of the parties with the panel. It was emphasized that the conditions which would have to be fulfilled by interested third parties would ensure that the rights of the parties to the dispute would not be jeopardized and that there would not be a proliferation of third parties.

4. A number of delegations supported these proposals. Others stated that they would require further reflection. Some expressed the concern that the safeguards proposed would result in unnecessary complication of the dispute settlement process. Still others indicated that the present system, including the improvements introduced in April 1989, provided an adequate compromise between the competing interests of the primary parties and third parties and that there was no need for further modifications at this time.

Adoption of Panel Reports and Related Issues

5. The Group then proceeded to consider jointly items A.3 through A.9 of the agenda relating to the selection of panelists, appellate review, adoption of panel reports, implementation, strengthening of commitment, compensation and retaliation, and non-violation complaints.

6. The representative of the European Communities introduced a paper, circulated as document MTN.GNG/NG13/W/39, outlining certain options being considered internally in the European Communities for the strengthening of mechanisms for dispute settlement within GATT, the implementation of decisions of the Uruguay Round and the maintenance of the balance of rights and obligations negotiated in the Round. The representative emphasized that this was a preliminary contribution, submitted for the purpose of exploring the issues with other participants in the Group. It was not a formal or definitive proposal by the European Communities. Only in the light of further discussions and during the final phases of the Round would the European Communities be in a position to take a definitive position. The representative recalled that one of the goals of the Uruguay Round and the Punta Declaration was that of strengthening the multilateral role of the GATT, with a wider coverage of world trade under effective and enforceable, multilateral disciplines. This would require modification of the dispute settlement system to ensure that the results of the negotiations would be implemented in an appropriate manner reflecting a balance of rights and obligations. There would be a need for clear-cut rules applying to all contracting parties, taking into account the question of development. There would also need to be new rules on waivers and use of the grandfather clause. It would be essential that national legislation be brought into line with the obligations of the General Agreement and that contracting parties make a commitment to the non-use of unilateral measures incompatible with GATT. If these changes were incorporated, the CONTRACTING PARTIES could adopt a stronger dispute settlement system. In turn, the strengthening of dispute settlement would help ensure that the reports of panels would be prepared impartially.

7. The specific options being considered by the European Communities were as follows: On membership of panels, panelists would be chosen from a relatively short roster, unconnected with national administrations, consisting of individuals possessing legal, economic and commercial experience. On appellate review, the representative stated that this was not a new idea, that members of an appellate body should be distinguished people with professional experience in trade policy, that the authority of an appellate body would have to be hard to question, and that the body could reject cases where the appeal was groundless. The appellate body would be assisted by a small team, independent from the GATT Secretariat. The representative then noted that the current procedure requiring full consensus for adoption of panel reports could be adapted. On the issue of implementation, the Council should establish appropriate deadlines. Regarding difficulties in compliance, there should be recourse to temporary compensation for the injured party. The Council would also look favourably on retaliation requests if these were consistent with the degree of injury

suffered. In non-violation complaints, there would be no appeal possible unless both parties to the dispute agreed on such a procedure. However, panel decisions in such cases could be submitted to binding arbitration or conciliation.

8. The United States then covered the same agenda items, introducing an internal discussion paper that was later circulated as document MTN.GNG/NG13/W/40. The delegation indicated that the United States had not yet developed a formal position on these issues and that internal discussions were still at a relatively early stage. Emphasis needed to be placed on the end of the process of dispute settlement, with procedures to ensure the continued high quality of panel reports and expeditious implementation. On the issue of selection of panelists, the U.S. delegation noted that recent experience with a mixture of governmental and non-governmental panelists had been favourable and that the Group may want to consider the possibility of institutionalizing the practice of having a fixed pool of governmental and non-governmental panelists. With respect to appellate review, this issue raised more questions than answers but the United States was considering two forms of review. In the first place, the panel could rehear issues either prior to or after submission of its report. The issuance of an interim report for comment by the parties would not preclude a formal appeal in extraordinary cases. The U.S. delegation questioned the need to set up a separate system for the adoption of panel reports in non-violation disputes. The United States then noted that the availability of a formal appeal, even if only limited to extraordinary cases, would carry the risk of lengthening the process of dispute settlement. The United States was looking at both a standing appeal body, as suggested by the European Communities, and a roster of appellate panelists. In each case, questions would be raised as to how the appellate body would be selected, how it would be staffed, and what would become of the appeal findings. Would they apply automatically or would they be submitted to the Council for adoption?

9. On the question of adoption of appellate reports, some form of "modulated" full consensus could be explored. In the area of implementation, the United States noted its interest in considering an ad hoc or ultimate deadline for the completion of the process. There was need for a procedure to ensure that disputes would not languish at the point of implementation of Council recommendations. Guidelines could also be developed regarding retaliation, concerning the level of proposed retaliation and the appropriate leverage to be applied to end the dispute.

10. Other delegations then commented on the presentations by the European Communities and the United States, and on the issues raised under items A.3 to A.9. First, responding generally to the presentations, delegations referred to the need to secure a comprehensive system for the implementation of the results of GATT dispute settlement. They also spoke of the need to obtain a full undertaking by all contracting parties to bring their domestic legislation into line with GATT dispute settlement rules and to abstain from unilateral retaliation inconsistent with GATT. One delegation also spoke of the need to provide consistent dispute settlement procedures coming out of the Uruguay Round so that contracting

parties would no longer engage in "forum shopping" between the General Agreement and the Codes. Another delegation indicated that it favoured giving the Mid-Term Improvements time to be tested before introducing any major new changes to the GATT dispute settlement system.

11. On the issue of selection of panelists, a number of delegations favoured the idea of a fixed pool of panelists but expressed concern over the means of selecting such a pool. Delegations generally spoke in favour of a mixed pool, including both governmental and non-governmental panelists. One delegation suggested that there should be two separate lists covering these two groups, while another delegation emphasized that a fixed pool should not prevent the recruitment of new talent.

12. On the issue of appellate review, several delegations spoke in favour of an interim review procedure whereby the panel would submit its findings and conclusions to the parties to the dispute with a view to receiving their comments and hearing arguments thereon prior to circulating the report to the contracting parties. If unpersuaded by the arguments submitted, the panel could include an appendix to its report explaining its reasoning. One delegation suggested that in order to improve the quality of the legal reasoning by panels, draft panel reports could be submitted to an expert body and that changes proposed by such a body would be incorporated by the panels automatically or, if not accepted, submitted to the contracting parties along with the panel reports. With respect to formal review by an appellate body, many delegations expressed concern that such a procedure could complicate and prolong the dispute settlement process. There also was concern over the mechanics of setting up an appeals body. While some participants declared their opposition to any such mechanism, others considered that it might be useful in specific circumstances if appeals could be limited to truly exceptional cases. One delegation spoke in favour of a permanent legal body that could handle both panel appeals and disputes in the implementation of the results of the Uruguay Round. Two other delegations spoke against the idea of modifying the consensus principle of adoption in connection with appellate review, noting that consensus decision-making was important not only for adoption but also for implementation.

13. On the issue of adoption, most delegations reiterated their support for continuation of the full consensus principle. One delegation considered that even in the case of appeal, the CONTRACTING PARTIES should be involved -- with or without the parties to the dispute -- in deciding whether or not to accept the report of the appellate body. Any automatic adoption procedure would negate the role of the CONTRACTING PARTIES in deciding on the precedential value of rulings and recommendations under Article XXIII.

14. With respect to implementation of rulings and recommendations, most delegations believed that the party charged with implementation would, in the first instance, be in the best position to propose a reasonable period for implementation, but many delegations also felt that there was need for a mechanism to ensure prompt implementation in those cases where the time proposed was not reasonable or had not been met. Two delegations stressed

that the practice of full consensus adoption helped to mobilize the party against whom the case was brought to secure prompt and effective implementation. One delegation suggested that the panel could be involved in the decision regarding the acceptability of the period of time proposed for implementation. Another delegation emphasized that to obtain a strengthened GATT dispute settlement system, the system had to be respected by all contracting parties in all circumstances.

15. On retaliation, many delegations noted that emphasis should be placed on removal of measures inconsistent with the General Agreement, that retaliation should be considered only as a last resort and only as a temporary measure directed towards full implementation. Most speakers emphasized that retaliation could not be automatic but required the approval of the CONTRACTING PARTIES. One delegate considered that there could be limited sanctions imposed for non-implementation of recommendations within a specified period of time. Another suggested that the original panel to a dispute could be reconvened to aid in determining the appropriate level of withdrawal of concessions in the given circumstances. Yet another emphasized that it in many cases it was not possible to technically calculate the amount of trade loss and that retaliation often involved more general consideration of the appropriateness and reasonableness of the particular action. Several delegations suggested that the party charged with implementation should not be involved in any Council decision authorizing retaliation.

16. On the issue of non-violation complaints, several delegations were concerned that the European Communities was proposing a different procedure from that envisioned for violation complaints. For implementation in non-violation cases, one delegation spoke in favour of conciliation and against binding arbitration.

#### Arbitration within GATT

17. The Group next turned its attention to the issue of arbitration within GATT, item A.10. Several delegations noted that arbitration may have new significance in light of discussions on the question of appellate review procedures wherein the parties would be bound in advance to abide by the appellate verdict. It was said by one delegation that this procedure could make appellate review tantamount to binding arbitration and could produce diverse effects on the choice of arbitration in the first instance. Another delegation noted that the issue of arbitration was important both for appellate procedure and for implementation.

#### Domestic Implementation of Trade Rules

18. At the February meeting of the Group, the Swiss delegation presented its proposal contained in MTN.GNG/NG13/W/36 concerning Domestic Implementation of Trade Rules and Enforcement of Governmental Decisions Related to International Trade. At the present meeting, Switzerland stated that this was a major question for the future of international trade. However, Switzerland would prepare a more detailed approach for submission in the Negotiating Group on the Functioning of the GATT System and would withdraw its proposal from the Negotiating Group on Dispute Settlement. Item A.11 was therefore withdrawn from the agenda.

Dispute Settlement Proposals in Other Negotiating Groups

19. Under item A.12, the Group returned to the issue of dispute settlement proposals in other negotiating groups and in the Code committees. The Chairman noted that the Secretariat had prepared an update of its paper on this issue, circulated as MTN.GNG/NG13/W/37/Add.2. Following the request of one delegation, it was decided that the next Secretariat update of this document should contain an indication of those proposals in other negotiating groups and committees which clearly depart from GATT dispute settlement procedures, including proposals discussed in the Group, and those which depart but which are considered to be interim, transitional procedures.

20. One delegation stressed that there should be an emphasis on developing uniform procedures but that it would not be desirable to have unified procedures because different contracting parties have different levels of obligations. On the issue of harmonization of the new areas with GATT dispute settlement procedures, this delegation noted that there was no agreement on the incorporation of these new areas in GATT. Another delegation urged an ambitious approach on the consolidation of dispute settlement procedures within GATT.

Consolidated Text

21. Under agenda item A.13, the Chairman requested the Secretariat to continue studying the topic of elaborating a consolidated instrument integrating the existing GATT dispute settlement procedures into a single transparent text.

Other Business

22. Under "other business", the Chairman indicated that he favoured a more concentrated and succinct agenda for the next meeting of the Group. He suggested that the next agenda could be supplemented by a letter from the Chairman explaining the basis for the more concentrated agenda. It was decided that the next meetings of the Group would be on 7-8 June and 5-6 July 1990.