

# GENERAL AGREEMENT ON TARIFFS AND TRADE

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## Multilateral Trade Negotiations

### NOTE BY THE SECRETARIAT

This paper is being circulated by the secretariat on its own responsibility in order to try to facilitate the negotiations on this subject.

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### DRAFT UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE

1. The CONTRACTING PARTIES reaffirm their confidence in the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII. With a view to improving and refining the GATT mechanism, the CONTRACTING PARTIES agree as follows:

#### Notification

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification. They undertake to the maximum extent possible to notify the CONTRACTING PARTIES of the adoption of all measures which might materially affect the trade interest of another contracting party, it being understood that notification would of itself be without prejudice to views on the measures' conformity with or relevance to obligations under the General Agreement.

3. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified ex post facto with a minimum of delay.

Contracting parties which have reason to believe that such trade measures are

being contemplated or have been adopted by another contracting party may seek information on such measures either directly or through the secretariat. Such information could be made available to all contracting parties, if appropriate.

#### Consultations

4. Contracting parties reaffirm that they will afford interested contracting parties an opportunity, upon request, to consult with them regarding trade measures proposed or taken, or other matters affecting commercial policy or practice. Such consultations are often undertaken in the course of normal intergovernmental relations, although with respect to any matter affecting the operation of the GATT it is appropriate that such consultations be instituted pursuant to Article XXII:1<sup>1</sup> or XXIII:1, or pursuant to other GATT articles laying down consultation procedures on specific subjects. Any request for consultations should include the reasons therefore.
5. The parties concerned will initiate requested consultations promptly, i.e. within fifteen days of the request.
6. Contracting parties engaged in consultations on a particular trade measure or matters affecting the operation of the GATT - whether under GATT Article XXII:1 or XXIII:1 or otherwise - should attempt to conclude such consultations within a reasonably short period of time. If a mutually satisfactory solution is not developed within such time, the matter may be referred by any party to the consultations, either for consultation with the CONTRACTING PARTIES<sup>2</sup> under Article XXII:2 or dispute settlement.

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<sup>1</sup>The possibility of using the procedures for consultation under Article XXII:1 on questions affecting the interests of a number of contracting parties (BISD, 7th Suppl., p.24) is open to any contracting party wishing to use them.

<sup>2</sup>For the purpose of this understanding, the Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice.

7. During such consultations, contracting parties should give special attention to the particular problems and interests of less-developed contracting parties.

8. If either party so requests, the results of such consultations between developed and less-developed contracting parties shall be notified to the Director-General who would inform the CONTRACTING PARTIES of these.

Resolution of disputes

9. The CONTRACTING PARTIES agree that the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future, subject to the improvements set out below. They recognize that the efficient functioning of the system depends on their will to abide by the present understanding. It is understood that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 (BISD, 14th Suppl., p.18) and that these remain available to less-developed contracting parties wishing to use them, with the improvements set out below.

10. If a dispute is not resolved through bilateral consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General or of the Chairman of the CONTRACTING PARTIES or the Chairman of the Council.

11. It is understood that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as aggressive or contentious acts and that, if disputes arise, all contracting parties will engage in these procedures in good faith in an effort to resolve the disputes. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

12. It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, this request would be granted by the CONTRACTING PARTIES. It is also agreed that the CONTRACTING PARTIES would establish a working party for this purpose if this were requested by a contracting party invoking the Article.

13. If a panel is requested, the Director-General, after securing the agreement of the contracting parties directly concerned, should propose the composition of the panel, normally of three but not more than five members, to the CONTRACTING PARTIES for approval. It is understood that citizens of countries whose governments are parties to a dispute would not be members of the panel concerned with that dispute. The contracting parties directly concerned would respond within a short period of time, i.e. five working days, to nominations of panel members by the Director-General and would not oppose nominations except for specified compelling reasons.

14. In order to facilitate the constitution of panels, the Director-General should maintain an informal list of persons qualified in the fields of trade relations and other matters covered by the General Agreement, who may be governmental or non-governmental representatives and who would be available

for serving on panels. In this connexion, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two governmental experts whom they would be willing to make available for such work. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations would therefore not give them instructions with regard to matters before a panel.

15. Panel members for a specific case should be selected with a view to ensuring the independence of the members, the presence of appropriate technical expertise, a sufficiently diverse background and a wide spectrum of experience.

16. Any contracting party having an interest in the matter before a panel should have an opportunity to be heard by the panel. Each panel should have the right to seek information from any individual or body which it deems appropriate. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information.

17. Each panel should make an objective assessment of the matter before it including an objective assessment of the facts of the case and the applicability of GATT provisions. It should also consult regularly with the parties to the dispute and make appropriate efforts to facilitate a mutually satisfactory solution.

18. Each panel report should set out the rationale behind any findings and recommendations that it makes.

19. To encourage development of mutually satisfactory solutions between the parties and to enable the panel to take note of observations of the parties and take them into account when it deems appropriate, each panel should inform the parties to the dispute of its conclusions before they are circulated to the CONTRACTING PARTIES.

20. If a mutually satisfactory solution is developed by the parties to the dispute, any contracting party with a significant interest in the matter has a right to enquire about, and be informed of that solution.

21. The time required by panels will vary with the particular case. However, panels should aim to deliver their findings without undue delay, taking into account the obligation of the CONTRACTING PARTIES to ensure prompt settlement in cases of urgency, normally within a period of four months.

22. Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of less-developed contracting parties concerned.

23. The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings.

24. If a contracting party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the CONTRACTING PARTIES.

25. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the CONTRACTING PARTIES could take additional action, with a view to finding an appropriate solution. If the matter is one which has been raised by a less-developed contracting party, the CONTRACTING PARTIES shall consider what joint action they might take which would be appropriate to the circumstances.

26. Disputes relating to matters covered by instruments negotiated under the GATT which contain separate dispute settlement procedures, should not normally be brought before the CONTRACTING PARTIES under Article XXIII unless a contracting party which is not a signatory of the code is affected, or unless the possibilities for dispute settlement under the instruments in question have been exhausted. If cases relating to matters covered by such an instrument are referred to the CONTRACTING PARTIES, any findings established under procedures laid down in the instruments regarding e.g. the facts of the case and provisions of the instrument should be accepted by the CONTRACTING PARTIES as the basis for consideration of the case, together with any appropriate new information.

#### Surveillance

27. The CONTRACTING PARTIES agree to conduct a regular and systematic review of developments in the trading system. Particular attention would be paid to developments which affect rights and obligations under the GATT, to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding

and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding.

Technical assistance

28. The technical assistance services of the GATT secretariat shall, at the request of a less-developed contracting party, assist it in connexion with matters dealt with in this understanding.



ANNEX

An agreed description of the customary practice of the GATT in the field of dispute settlement (Article XXIII:2)

1. Any dispute which has not been settled bilaterally under the relevant provisions of the General Agreement may be referred to the CONTRACTING PARTIES<sup>1</sup> which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.

The CONTRACTING PARTIES have sometimes settled disputes themselves in plenary meetings but usually have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the more frequent procedure.

2. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties (BISD, 14 Suppl., p.18). This procedure provides, inter alia, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure.

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<sup>1</sup>The Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice.

3. The function of a panel is normally to review the facts of a case and the applicability of GATT provisions, taking into account the interests of developing countries, and to arrive at an objective assessment of these matters. Panels also perform the rôle of conciliation and give advice with a view to assisting the parties concerned to reach a mutually satisfactory solution. In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings, as envisaged in Article XXIII:2.

4. Before bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute, i.e. one that facilitates trade. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. The first objective of the CONTRACTING PARTIES is normally to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other

obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case.

5. In practice, contracting parties have had recourse to Article XXIII only when, in their view, a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. A prima facie case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases it is up to the other contracting parties to rebut the charge. Paragraph 1(b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement, and paragraph 1(c) if any other situation exists. If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification.

6. Concerning the customary elements of working parties and panels procedures, the following elements have to be noted:

- (i) working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the working party and have the same status as other delegations. The report of the working party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the working party's report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision.

- (ii) In the case of disputes, the Council establishes a panel if this is requested by a contracting party bringing a case forward under Article XXIII:2. However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council. The terms of reference are discussed and approved by the Council. In most cases these terms of references are "to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII". When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2.
- (iii) Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council.

(iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three meetings with the parties concerned. The panel invites the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party, not directly party to the dispute, which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. 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. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels.

(v) Panels have always submitted written reports. The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made. Panels have submitted the descriptive part of their report to the parties concerned with a view to obtaining their comments and have also sometimes given them a broad outline of their conclusions before

submitting them to the Council. This practice has helped to promote bilateral settlements of the matter between the parties concerned before the panel has published its conclusions, and, where this procedure has been successful, the report of the panel has been confined to reporting that a settlement has been reached. In other cases, a full report is made on the matter before the panel, containing findings of fact and findings relating to the applicability of relevant GATT provisions, together with the basic rationale for the panel's conclusions.

- (vi) Panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, as appropriate, formulated draft recommendations addressed to the parties. In yet other cases, panels were invited to give a technical opinion on some precise aspect of a matter (e.g. on the modalities of a withdrawal or suspension in regard to the volume of trade involved) or an opinion on other matters dealt with in Article XXIII:2. The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret.
- (vii) Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months.

- (viii) The report of any panel is in the nature of an advisory opinion on the basis of which the CONTRACTING PARTIES can take action as provided in Article XXIII:2, and has therefore been submitted to the Council for consideration and adoption. The Council has normally completed its review of the matter and adopted reports within a short period of time following the submission of the report.