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NEGOTIATIONS
THE URUGUAY ROUND**

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Negotiating Group on
Dispute Settlement

SUMMARY AND COMPARATIVE ANALYSIS
OF PROPOSALS FOR NEGOTIATIONS

Note by the Secretariat

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Introduction

1. At its meeting on 21 and 24 September 1987, the Negotiating Group agreed that the secretariat prepare a summary and comparative analysis of written submissions and oral statements of participants, with due regard also to existing GATT provisions and practices in the field of dispute settlement, in order to promote more focused discussions in the Group (MTN.GNG/NG13/3, paragraph 14). This note is based on the working papers available at the most recent meeting of the Group (documents MTN.GNG/NG13/W/1-13), together with the notes on the meetings of 6 April, 25 June, 21 and 24 September 1987 (MTN.GNG/NG13/1-3). As agreed during the most recent meeting of the Group, a revision of this note will be prepared, if requested, to take account of additional submissions and statements.

2. The large number of written submissions to and oral statements in the Negotiating Group on Dispute Settlement have been summarized in chronological order in the secretariat notes on the meetings held by the Group so far, and in country-wise order in the working papers submitted to the Group. This note groups the proposals in an analytical order according to the various phases of GATT dispute settlement procedures (parts I.A to VIII.A, respectively), compares them with the existing GATT rules and practices (parts I.B to VIII.B, respectively) and lists questions relating to the proposals, which may be addressed in the negotiations (parts I.C to VIII.C, respectively).

I. Objectives and Nature of the GATT Dispute Settlement System

A. Proposals

3. Several participants suggested that the GATT dispute settlement system should offer a choice among alternative and complementary techniques of dispute settlement so as to respond adequately to the different nature of disputes and to make the dispute settlement system more flexible. Many participants proposed that the various means for the settlement of disputes within GATT should include consultations, good offices, mediation, conciliation, working parties, panels, GATT Council decisions, the various dispute settlement mechanisms provided for in the MTN Agreements, and mutually agreed arbitration. It was also said that a rule-oriented approach enabling legally binding interpretations should not be viewed as a hindrance to a conciliatory settlement; a "sequential approach" making use of a variety of means of dispute settlement could promote a speedy resolution of disputes and develop additional incentives and institutional mechanisms encouraging compliance by contracting parties with their voluntarily undertaken GATT obligations.

4. Many delegations emphasized that prompt and effective resolution of GATT disputes was of vital importance for the effectiveness and implementation of both existing and new GATT rules. Some participants emphasized that the dispute settlement mechanism existed to protect the rights of contracting parties and to promote security and predictability in the multilateral trading system. Other participants said that the parties

to a dispute should seek first and foremost a negotiated settlement that also takes account of the legal aspects, without the latter necessarily becoming the key element; according to this view, the ambiguity and divergent interpretations of certain GATT provisions should be overcome through negotiations rather than through deductive or "creative" interpretations by GATT panels. Again other delegates said that GATT presents a multilateral legal system and that bilaterally negotiated dispute settlements or mutually agreed arbitration cannot adversely affect the rights of third contracting parties and the competence of the CONTRACTING PARTIES to decide on the interpretation of GATT rules.

5. Divergent views have been expressed as to whether the principle of differential and more favourable treatment of developing countries called for differential and more favourable dispute settlement procedures for disputes between developing contracting parties with limited retaliatory power and more powerful contracting parties.

B. Present GATT Rules and GATT Practices

6. The existing GATT dispute settlement procedures explicitly recognize the possibility of bilateral and multilateral consultations, good offices, conciliation, working parties, panels of experts, bilaterally agreed dispute settlements and Council decisions as available means for the settlement of disputes within GATT. GATT practice indicates that contracting parties resort also to other means of dispute settlement such as "Chairman rulings" (see, e.g., BISD 2S/12, 35), fact-finding and enquiry by an independent "group of experts" (see, e.g., L/580), "advisory opinions" rendered by a GATT panel directly to the two disputing contracting parties and accepted by them as legally binding (see BISD 12S/65), and requests for binding arbitration (see C/M/212, p. 16). GATT Article X:3,b further provides that "each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters." Some of the 1979 Tokyo Round Agreements explicitly stipulate a right of appeal by adversely affected traders, for instance by requiring that "the legislation of each Party shall provide for the right of appeal without penalty to a judicial authority" (Article 11 of the Agreement on the Implementation of Article VII), and have considerably contributed to the availability of domestic judicial review e.g. of anti-dumping and countervailing duty determinations. Various international trade agreements concluded among contracting parties provide also for the settlement of their trade disputes by means of international arbitration and international courts.

7. In a Decision of 9 August 1949, the CONTRACTING PARTIES decided that "the determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES". This decision was subject to the following footnote: "This Decision by its terms clearly refers only to the determination of the rights and obligations as between the parties to a bilateral agreement and arising from the agreement. It is, however, within the competence of the

CONTRACTING PARTIES to determine whether action under such a bilateral agreement would or would not conflict with the provisions of the General Agreement" (BISD Vol. II/11). In accordance with this decision, Article XXIII has been invoked also in order to settle disputes over the legal impact of bilateral agreements upon the GATT rights and obligations of the parties to the bilateral agreement (see, e.g. BISD 29S/110) or of third contracting parties (L/6129). This practice suggests that the scope for bilaterally negotiated dispute settlements among contracting parties is limited by the multilateral GATT legal system.

8. The scope of application of the Decision of 28 November 1979 on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (BISD 26S/203) is largely confined to tariffs and non-tariff trade barriers on products originating in developing countries. But a footnote to this decision explicitly states that "it would remain open for the CONTRACTING PARTIES to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph". The Decision of 5 April 1966 on "Procedures under Article XXIII" (BISD 14S/139) already provided for differential treatment of developed and less-developed contracting parties and for more favourable procedural rights of the latter (e.g.: "the less-developed contracting party complaining of the measure may refer the matter which is the subject of consultations to the Director-General so that, acting in an ex officio capacity, he may use his good offices with a view to facilitating a solution"; see also paragraph 10 of the decision). The 1979 "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (BISD 26S/210) includes further provisions on differential and more favourable treatment of less-developed contracting parties (see paragraphs 5, 8, 21, 23, 24, 25 and the Annex, paragraph 3). The 1982 Ministerial Declaration extended, however, the right to seek the good offices of the Director-General in a qualified manner (i.e. "with the agreement of the other party") to all contracting parties (see BISD 29S/13).

C. Issues for Negotiations

9. The above-mentioned proposals raise, inter alia, the following questions:

(a) Should the various means of dispute settlement within GATT be supplemented by an explicit recognition, promotion and/or institutionalization of mutually agreed arbitration?

(b) Would a larger choice among different means of dispute settlement within GATT render the differences of views among contracting parties as to the appropriate functions and means of the GATT dispute settlement mechanisms less important by enabling the disputing countries concerned to choose that method of dispute settlement which they consider most appropriate? Could such a "free choice" and "trial-and error-approach" contribute to depolarizing the past debates over the respective merits of

"rule-oriented" vs. "negotiated" dispute settlements and over the proper rôle of law in GATT?

(c) Is there a need for procedural and institutional safeguards to ensure that bilateral dispute settlements do not adversely affect the multilateral GATT legal system and the rights of third contracting parties?

(d) Is there a need for additional GATT rules on the relationship between the general GATT dispute settlement procedures and the special dispute settlement provisions of the various Tokyo Round Agreements?

(e) Is there a need for additional differential and more favourable dispute settlement procedures for less-developed contracting parties?

II. Notification

A. Proposals

10. Proposals have been made with respect to improved notification procedures, including prior notification of trade measures affecting the operation of the General Agreement before they have been put into force. It was said that improved notifications and surveillance could allow earlier consultations which might assist in preventing disputes from developing.

B. Present GATT Rules and Practices

11. In paragraph 2 of the 1979 Understanding, contracting parties "reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification" (BISD 26S/210). A comprehensive summary of notification procedures in force, applicable to contracting parties generally, is provided in documents C/111, Annex I, and PREP.COM(86)W/31/Add.1. The notifications received under these provisions are circulated to contracting parties and their status is also regularly being reviewed in the biannual secretariat notes on "Developments in the Trading System" (e.g. L/6205, pp. 90-101).

In paragraph 3 of the 1979 Understanding, "Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement" ... "Contracting parties should endeavour to notify such measures in advance of implementation" ... The notifications received under this paragraph are circulated to contracting parties and they are also reported in the biannual secretariat notes on "Developments in the Trading System".

C. Issues for Negotiations

12. Is there a need for additional, improved notification requirements in the context of the GATT dispute settlement rules and procedures? How should any additional notification requirements and procedures be designed?

III. Consultations

A. Proposals

13. One participant said that the CONTRACTING PARTIES should not accept the request of a complaining party under Article XXIII:2 unless the disputing countries had held bilateral consultations under Article XXIII:1, subject to certain agreed exceptions (e.g. in case of complaints under Article XXIII:1,c, in case of consultations under Article XXII:1 that were mutually considered to meet the conditions of Article XXIII:1, or if the respondent party did not enter into consultations).

14. It was also proposed to review the 1958 Procedures for consultations under Article XXII on questions affecting the interests of a number of contracting parties (BISD 7S/24), for instance the requirement of a "substantial trade interest in the matter" and the 45-day notification time frame. With regard to Article XXIII:1 consultations, the question was raised whether it would expedite the consultative process if time limits were established and the consultations were regularly held in the capital of the party requested to consult, unless otherwise agreed.

B. Present GATT Rules and Practices

15. Article XXIII:2 stipulates that, "if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES". This wording suggests that the General Agreement itself does not require invocation explicitly of Article XXIII:1 prior to an invocation of Article XXIII:2. But paragraph 6 of the 1979 Understanding provides that "Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2". In paragraph 4 of the same Understanding, contracting parties also "undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions. Any requests for consultations should include the reasons therefore" (BISD 26S/211).

The "Procedures for Dealing with New Import Restrictions for Balance-of-Payments Reasons and Residual Import Restrictions" adopted on 16 November 1960, recognize, inter alia, "that a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII" (BISD 9S/19, paragraph 9). In the 1966 Decision on "Procedures under Article XXIII" the CONTRACTING PARTIES agreed, inter alia, "that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree" (BISD 14S/20, paragraph 11).

C. Issues for Negotiations

16. Is there a need for additional consultation requirements in the context of the GATT dispute settlement system? Would time limits and other procedural rules be conducive to consultations under Article XXIII:1? Is there a need for revising the Procedures adopted in 1958 in respect of Article XXII (BISD 7S/24)?

IV. Good Offices, Conciliation and Mediation

A. Proposals

17. Many participants proposed strengthening of the conciliation/mediation rôle of the Director-General or of another neutral person designated by him. Different views were expressed as to whether conciliation/mediation should be a mandatory step in the dispute settlement process or whether it should be an option that could be used voluntarily by mutual agreement. It was said that, if conciliation/mediation were to be mandatory, there would be a need for appropriate safeguards for timing and confidentiality in order to avoid any undue prolongation of the process. It was further suggested that any resolution reached through conciliation must be consistent with the General Agreement and not prejudicial to the interests of third parties.

18. One participant proposed specific procedures for conciliation requesting the conciliator, inter alia, to "make an independent judgment as to the applicability of the General Agreement, the conformity with the General Agreement of measures giving rise to the dispute, the existence of nullification or impairment, and whether or not the attainment of any objective of the General Agreement is being impeded". "If solutions cannot be found ..., the conciliator shall make recommendations on the appropriate level of compensation with a view to restoring the balance of benefits between the parties". The appropriateness of such recommendations by a conciliator was questioned by another participant. It was further said that compensation as a means of conciliation could not be imposed by a conciliator but had to be agreed by the parties.

19. It was said that mediation could take place at any time following failure of finding a mutual acceptable solution in bilateral consultations or during the panel proceedings. If mediation was initiated when a panel was in the process of addressing the dispute, the panel proceedings should continue in parallel with the mediation efforts. Another participant was of the view that either party to a dispute could request the mediation of the Director-General or of his designee also during bilateral consultations. Another proposal was that, "if a dispute is not resolved through consultations the contracting parties concerned may request a contracting party, the Chairman of the CONTRACTING PARTIES or the Director-General to use their good offices with a view to the conciliation of the parties to a dispute".

20. Another proposal was that "the mediation function would be separated out from the panel process so as to make clear that the rôle of the panel is a last resort adjudicatory stage". One participant raised the question whether it would be appropriate to authorize panels to suggest conciliation proposals even if not necessarily based on provisions of the General Agreement?

B. Present GATT Rules and Practices

21. At the request of a contracting party, Articles XXII:2 and XXIII:2 enable the intervention of the CONTRACTING PARTIES with the aim of contributing to the settlement of a dispute. The 1958 Procedures adopted in respect of Article XXII (BISD 7S/24) and the 1966, 1979 and 1982 Procedures adopted in respect of Article XXIII (BISD 14S/18, 26S/210, 29S/13) make it explicitly clear that Articles XXII:2 and XXIII:2 are a sufficient basis for requesting and offering good offices and conciliation by the Director-General or by another appropriate body or individual.

22. The general GATT dispute settlement procedures provide for good offices and conciliation on a voluntary basis and - contrary to Article 17 of the Subsidy Code and Article 15 of the Anti-Dumping Code - not as a mandatory phase of the dispute settlement process. The 1966 Decision on Procedures under Article XXIII provides that, if a less-developed contracting party complaining of a measure refers the matter to the Director-General so that he may use his good offices, the developed contracting party concerned shall participate in consultations undertaken by the Director-General with a view to promoting a mutually acceptable solution. The procedures also state that, if no mutually satisfactory solution has been reached after a period of two months from the commencement of the consultations undertaken by the Director-General, the Director-General shall, at the request of one of the contracting parties concerned, submit the matter to the CONTRACTING PARTIES or to the Council. The 1982 Dispute Settlement Procedures include the following provisions on conciliation (BISD 29S/13):

"With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. Conciliation proceedings, and in particular positions taken by the parties to the dispute during conciliation, shall be confidential, and without prejudice to the rights of either party in any further proceedings under Article XXIII:2. It would remain open at any time during any conciliatory process for either party to the dispute to refer the matter to the CONTRACTING PARTIES."

C. Issues for Negotiations

23. Is there a need for additional (e.g. mandatory) procedures for good offices, conciliation and mediation in the context of Articles XXII and XXIII? Does the very rare recourse to good offices, conciliation and mediation in GATT practice reveal a preference of contracting parties to insist on their GATT rights rather than to compromise the multilateral rules through ad hoc conciliation proposals? Should a conciliator be asked to make an independent judgment on the GATT conformity of the measures concerned, on the existence of "nullification or impairment" and on an appropriate level of compensation? Or should the mediation function be clearly separated from the function of GATT panels? Would it be compatible with the "rule-oriented" mandate of panels to authorize them to submit also conciliation proposals?

V. Rôle of the GATT Council

A. Proposals

24. Several participants proposed to strengthen the rôle of the Council in the GATT dispute settlement system (see also below part VIII on "surveillance"). One proposal was that the Council could resolve less complex "straightforward cases" by a decision of the Council on the basis of accepted interpretations of GATT Articles without recourse to a panel. But it was also said that such a Council decision should not be taken without the consent of the party complained against since there was a need to ensure that a full and fair hearing of the issues had been held and the party complained against was satisfied this was the case. Another proposal was to remove the disputing parties from Council decisions e.g. on the establishment and terms of reference of panels, on the adoption of panel reports, and on whether a particular case is "straightforward". It was also suggested to set up a separate GATT body dedicated to dispute settlement, which would report to the Council and could discharge many of the Council's functions in respect of dispute settlement. Such an auxiliary body of the Council could meet regularly in order to keep existing disputes under review and examine the proper functioning of the dispute settlement mechanism. As an alternative to such an additional body, it was proposed that the Council could meet regularly "in a dispute settlement mode" to consider and monitor only dispute settlement matters. Such Council meetings could be the forum for initiating disputes. The chairman of these special Council meetings could be different from the chairman of the ordinary Council and could be available for conciliation and arbitration. It was also said that the establishment of a separate body for the regular review and monitoring of disputes had to take duly into account the existing functions of the Council and of the Director-General in the field of dispute settlement.

25. It was also suggested that all contracting parties should explicitly undertake to accept as binding all Council decisions emerging from the dispute settlement process and adopted by consensus (not including the disputing parties or third parties to the dispute). The question was

raised whether access to Article XXIII:2 should be limited for those contracting parties which did not implement Council decisions under Article XXIII:2.

B. Present GATT Rules and Practices

26. Under Article XXIII:2, "the CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate". The 1979 Understanding explicitly confirms that "the Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice" (BISD 26S/215). It appears therefore that the present GATT rules already enable the Council to give a ruling on "straightforward disputes" directly unless the disputing parties request the referral of their dispute to a working party or panel.

27. It has been recognized in GATT practice that the Council has authority to take action on all matters of concern to the CONTRACTING PARTIES other than final decisions under Article XXV:5 (see SR 25/9, page 177). Thus the Council has already authority to set up an auxiliary body dedicated to dispute settlement or to meet regularly "in a dispute settlement mode". This seems to be borne out by the Council practice, since 1980, to hold periodic special meetings to review developments in the trading system. Initially, such meetings were related exclusively to the 1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance. They were concerned primarily with reviewing developments covered by paragraphs 2 and 3 of the Understanding, which deal with the notification of trade measures, and by paragraph 24, which concerns surveillance of developments in the trading system. In July 1983, the Council agreed to extend the scope of its special meetings to include monitoring of paragraph 7(i) of the 1982 Ministerial Declaration (BISD 29S/11). The Council also agreed that such special meetings should preferably be held twice a year. The Council could similarly agree to extend the scope of its special meetings to all matters under Articles XXII and XXIII and to convene the special Council meetings more frequently.

28. GATT panels are usually mandated to examine the matter in the light of the relevant GATT provisions. Panel reports and Council decisions on their adoption only apply the existing GATT obligations to the facts of the case. They are usually neither authorized nor purport to create new obligations but only confirm the existing GATT obligations in respect of a particular dispute. The 1982 Ministerial Declaration states accordingly: "It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement" (BISD 31S/16). The CONTRACTING PARTIES remain free to depart from their earlier decisions and interpretations of GATT rules. It is often impossible to draw a neat distinction between authoritative interpretation, law-creation or amendment, because general rules inevitably undergo a change if authoritative interpretations or "understandings" by the treaty-applying

agencies (e.g. the CONTRACTING PARTIES) fix the meaning of ambiguous rules or reduce the number of possible interpretations.

C. Issues for Negotiations

29. Is there a need for strengthening the rôle of the Council in the dispute settlement process? How could this be achieved (e.g. establishment by the Council of an auxiliary body dedicated to dispute settlement, special meetings of the Council sitting "in a dispute settlement mode")? Is there a need for clarifying the legal effects of Council decisions applying existing GATT obligations to the particular circumstances of a dispute?

VI. GATT Panel Procedures

1. Establishment of panels

A. Proposals

30. There seemed to be general agreement among participants on "the principle of the right to a panel". One proposal was that, when a request for the establishment of a panel had been submitted to the Council, the Council should endorse it and could only object in cases that were obviously unfounded. Another participant was of the view that the CONTRACTING PARTIES should examine the GATT relevance of a complaint, the appropriateness of continuing or resuming bilateral consultations as well as the appropriate method of dispute settlement before deciding whether or not to accept the request to refer a matter to the CONTRACTING PARTIES; when the CONTRACTING PARTIES had accepted the request to establish a panel, they (the Council) should establish a panel normally within a period of two months from the time so requested. Another view was that the Council should decide on the constitution of a panel at the latest at the second meeting following the Council meeting in which the establishment of a panel had been requested. Another participant suggested that the GATT relevance of a complaint could be examined more carefully by a panel and that, "should a party request the establishment of a panel in accordance with the appropriate procedures, it should be automatically established, without debate in Council or delay". It was also said that requests under Article XXIII:2 should be made in writing and must be substantiated (e.g. by a brief summary of the facts, problems and consultations held), and requests for the establishment of a panel should be accompanied by draft terms of reference.

31. Different views were expressed as to whether, and to what extent, "grey area trade restrictions" and the proliferation of bilaterally agreed trade restrictions should be brought within the GATT dispute settlement system. One participant proposed an understanding encouraging recourse to Article XXII and XXIII by third contracting parties adversely affected by such bilateral arrangements. Another view was that recourse to Article XXII:2 consultations could provide a more appropriate remedy for third parties vis-à-vis such bilateral arrangements.

B. Present GATT Rules and Practices

32. Article XXIII:2 provides that the "CONTRACTING PARTIES shall promptly investigate any matter referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate". The 1966 "Procedures under Article XXIII" specify that, in case of a complaint by a less-developed contracting party under Article XXIII:1 and upon receipt of a report by the Director-General, "the CONTRACTING PARTIES or the Council shall forthwith appoint a panel of experts to examine the matter with a view to recommending appropriate solutions" (BISD 14S/139, paragraph 5). The 1979 Understanding says: "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, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice ... It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES" (BISD 26S/210, paragraph 10). It appears that it has been "standing practice" of the Council so far to establish a panel, albeit in some instances only after several Council meetings, if the complaint has been referred to the CONTRACTING PARTIES pursuant to Article XXIII and the complaining contracting party has requested the establishment of a panel. The "right to a panel" has been explicitly recognized in several Tokyo Round Agreements (e.g. Article 14.14 of the 1979 Agreement on Technical Barriers to Trade, Article VII:7 of the 1979 Agreement on Government Procurement, Article 18:1 of the 1979 Subsidy Code, Article 20:5 of the 1979 Agreement on Implementation of Article VII of the GATT, Article 15:5 of the 1979 Agreement on Implementation of Article VI).

33. The 1979 Understanding recognizes that, "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." (BISD 26S/210, 216) Panels established under Article XXIII:2 are usually requested to examine the complaint in the light of the relevant GATT provisions. There have been only very few instances where the "GATT relevance" of a complaint under Article XXIII had been put into doubt. In one instance, these doubts were taken into account by a supplementary Council decision "that the terms of reference remain as they stood, that the reservations and statements made be placed on the record and that it be presumed that the Panel would be limited in its activities and findings to within the four corners of GATT" (BISD 30S/141). In another instance, the defendant party took the view "that the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:b(iii) by the United States in this matter", and the Council then agreed to incorporate this understanding explicitly into the terms of reference of the panel (C/M/192, page 6; L/6053, page 2).

34. Complaints under Article XXIII presuppose an assertion by the complaining country "that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment

of any objective of the Agreement is being impeded" (Article XXIII:1). In GATT practice, the Council has granted requests for the establishment of a panel also when the complaint was initiated by a third contracting party against trade effects resulting from bilateral preferential trade arrangements (see L/5776) or from other sectoral trade arrangements (e.g. between Japan and the USA concerning trade in semi-conductors, C/M/208, pages 13, 15).

C. Issues for Negotiations

35. Should the "principle of a right to a panel" be explicitly recognized following the precedent set by the 1966 dispute settlement procedures as well as by various Tokyo Round Agreements? Should the CONTRACTING PARTIES (Council) retain the right not to establish a panel if (a) there is no consensus (without the parties to the dispute) on the "GATT relevance" of the complaint, or if (b) all contracting parties, except the complaining party, agree that another dispute settlement method might be more appropriate (e.g. continued consultations, a working party)? Should there be an explicit requirement that complaints under Article XXIII:2 must be substantiated by a written summary of the facts of the case and of its "GATT relevance"? Should such complaints be recognized to be prima facie "GATT relevant"? Should the choice of the most appropriate method of dispute settlement be left to the complaining contracting party? Is there a need for clarifying (recognizing) the applicability of Articles XXII/XXIII to "grey area trade restrictions" perceived to nullify or impair benefits accruing under the General Agreement or to impede the attainment of any objective of the Agreement?

2. Terms of reference and composition of panels

A. Proposals

36. Several participants took the view that the party raising the complaint had the right to have its complaint examined in the light of the relevant GATT provisions and that the Council should regularly give panels the traditional "standard terms of reference" unless the parties to the dispute had reached agreement on special terms of reference by the time the Council considered the request for a panel or within a specified period (e.g. thirty days) after the establishment of the panel. In its request for a panel, the complaining country should indicate the terms of reference it considered appropriate. The complaining country had the right to define the scope of its complaint.

37. Many participants proposed that the "roster of non-governmental panelists" (see BISD 31S/9) be made permanent and be expanded. The composition of the roster should be decided upon by the Council for the period of, for example, two years. Another proposal was that the Director-General should maintain an annually updated and published list of both governmental and non-governmental persons available for serving on panels. For this purpose the number of panelists to be indicated by each contracting party should be increased to three or four. Several

participants suggested that panels should continue to be composed of government representatives and/or persons on the "roster". When an agreement on the panel membership was not reached by the parties to a dispute within a short specified period (for example, ten working days), the Director-General, in consultation with the Chairman of the Council, should complete or determine the membership without seeking the opinion of the parties concerned, also drawing on persons whose names were included in the agreed roster. Another view was that the Director-General should also consult with the parties concerned prior to such appointment of panelists. It was also said that citizens of countries whose governments were parties to the dispute should not be members of the panel concerned with that dispute.

38. Some participants proposed that, as a rule, panels should continue to be composed of three persons unless the parties to the dispute agreed within a specified period on a composition of five persons. One proposal was that each disputing party should unilaterally nominate one panelist, and the Director-General should then nominate the third panelist (who would be the chairman) from a roster adopted by the CONTRACTING PARTIES. Other participants expressed concern at this proposal on the ground that it could increase the risk of split panel findings. Several participants said that non-governmental persons mentioned in the roster should be invited to serve as panelists more frequently. Another proposal was that panelists should be chosen exclusively from a roster of neutral non-governmental experts.

B. Present GATT Rules and Practices

39. The Agreed Description of the customary practice of the GATT in the field of dispute settlement, annexed to the 1979 Understanding, mentions that panels have normally been given standard terms of reference and that the "function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters". "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" (BISD 26S/215). However, there is no requirement that standard terms of reference be used for panels established under GATT Article XXIII:2. Some of the Tokyo Round Agreements do, by contrast, specify the terms of reference to be given to panels (see, e.g. Article 14.15 of the Agreement on Technical Barriers to Trade, Article VII:7 of the Agreement on Government Procurement, Annex III of the Agreement on the Implementation of Article VII). The present practice of establishing the terms of reference of panels in consultation with the parties to the dispute has sometimes considerably delayed the composition of panels and, in at least one instance, prevented the panel from examining the complaint in the light of all relevant GATT provisions. There is also evidence from other GATT panel proceedings that special terms of reference have been invoked as evidence in support of the legal arguments of the defending party and risk to prejudice the neutral examination of the dispute by the panel.

40. The 1966 "Procedures under Article XXIII" provide that "the members of the panel shall ... be appointed in consultation with, and with the approval of, the contracting parties concerned" (paragraph 5). The 1979 Understanding includes detailed procedures for the composition of panels (paragraphs 11 to 14). The dispute settlement procedures adopted in 1984 enable the Director-General to complete the nomination of panelists at the request of either party:

"The Director-General should continue the practice of proposing panels composed preferably of governmental representatives but may also draw as necessary on persons on the approved roster. The parties should retain the ability to respond to the Director-General's proposal, but shall not oppose nominations except for compelling reasons. In the event that panel composition cannot be agreed within thirty days after a matter is referred by the CONTRACTING PARTIES, the Director-General shall, at the request of either party and in consultation with the Chairman of the Council, complete the panel by appointing persons from the roster of non-governmental panelists to resolve the deadlock, after consulting both parties." (BISD 31S/10).

These various procedures appear not to have been fully used and observed in GATT practice (e.g. as regards time-limits, choice of panelists from countries who are parties to the dispute, annual updating of "an informal indicative list of governmental and non-governmental persons qualified ... and available for serving on panels"). The present GATT practice of seeking the consent of both disputing parties for the nomination of panelists has sometimes considerably delayed the composition of panels.

41. In GATT practice, most panels have been composed of three panelists. Experience with GATT panels suggests that panels composed of five members have sometimes produced panel reports that were not adopted (e.g. L/5776, SCM/43) or whose adoption was qualified by certain "understandings" (see C/M/154, page 7, as regards adoption of the four "tax panel reports" of 1976). But the controversy over the adoption of these panel reports might have been due not to the number of five panelists, which may make it more difficult to reach agreement among panel members on precise panel findings, but to the complexity of the disputes concerned.

C. Issues for Negotiations

42. Do participants agree that the complaining country should propose the terms of reference of the panel in its request under Article XXIII:2 and should be recognized to have a right to the use of the "standard terms of reference" unless the parties to the dispute agree within a specified period on special terms of reference?

43. Should the existing requirement to "maintain an informal indicative list of governmental and non-governmental persons qualified ... and available for serving on panels" (paragraph 13 of the 1979 Understanding) be reactivated? Should the "roster of non-governmental panelists" be made permanent and expanded? Should the Director-General be authorized to decide - even without a request of either party (see BISD 31S/10) on his own initiative - on the composition of panels if the parties to the dispute

cannot agree on the panel membership within a specified period of time prior to, or after, the establishment of the panel? Should paragraph 11 of the 1979 Understanding be modified so as to explicitly admit the recent practice of appointing by mutual agreement also panelists who are nationals of one of the disputing parties? Should the "principle of a right to a panel" be extended not only to the use of standard terms of reference but also to a normal composition of three panelists (to be nominated by the Director-General, if necessary) unless the disputing parties agree within a specified period on a composition of five panelists?

44. Since the "quality" and legitimacy of panel findings depend also on their consistency with the ever more complex GATT rules and GATT practices and since most panelists are no longer familiar with the details of the development of GATT rules over the past forty years (e.g. the more than fifty past panel reports) and often lack the time necessary for the drafting of panel reports on complex disputes (sometimes involving more than 1,000 pages of submissions): How can the panel process be further "professionalized" so as to make panel reports more calculable and consistent among each other as well as with past GATT practice?

3. Panel Procedures

(a) Proposals

45. Many participants proposed expediting panel proceedings and making them more predictable through the use of standard working procedures to be adopted by panels for their internal work and proceedings with the parties. There seemed to be general agreement that the time-limits for each phase of the panel proceedings, as well as for the dispute settlement process as a whole, should be fixed more precisely and stricter. One proposal was that a panel should aim at delivering its report to the CONTRACTING PARTIES normally within a period of nine months, and in cases of urgency within three months, from the establishment of a panel. Another proposal was that panels should be generally requested to submit the panel report within six months unless otherwise agreed. Given the complexity of some cases, it was suggested that a maximum overall deadline of no more than twelve months be introduced. Some participants suggested to maintain a certain flexibility so that in cases where a specific time-period for panel proceedings was agreed upon among disputing parties and panelists, the panel should respect such a specifically agreed deadline. It was further proposed to specify the conditions for the applicability of the "urgency procedures" as well as the "reasonable period of time" (paragraph 18 of the 1979 Understanding) between the submission of the panel report to the disputing parties and its circulation to the CONTRACTING PARTIES.

46. One participant proposed to introduce binding, enforceable time-tables for the dispute settlement process including the various stages of panel proceedings. According to this view, "in the case of unconsented delays caused by the defending party during the work of the panel or thereafter (e.g. delays in providing written submissions or information requested by the panel), the complaining party should have the right to retaliate for

damage caused by the measures at issue during the period of delay, provided that such measures are found to have infringed obligations or otherwise to have caused nullification or impairment". Another proposal was to allow for the possibility of "interim measures of protection", for instance in case of perishable goods and supplies en route.

47. Several participants suggested to clarify the procedures and rules for the intervention of third contracting parties and to extend their rights to participate in panel proceedings.

48. Divergent views were expressed as to whether panels were authorized to examine the "GATT conformity" of bilaterally agreed dispute settlements among the disputing parties, or to refuse to decide on the dispute on the ground that there was a need for new GATT provisions.

49. In view of the erosion of the confidentiality of panel reports prior to their consideration by the GATT Council, which could impede the prospects for conciliation during the panel process, it was suggested to strengthen the rules with respect to confidentiality so as to avoid unwarranted release of information relating to a dispute during the panel process.

B. Present GATT Rules and GATT Practices

50. Since 1985, panels established under Article XXIII:2 have regularly adopted the standard working procedures prepared by the GATT secretariat on the basis of the existing dispute settlement procedures and practices (see MTN.GNG/NG13/W/4, pages 48 f).

51. As regards time-limits and avoidance of delays, the 1979 Understanding states: "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 the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established" (paragraph 20). The Annex to the Understanding further states: "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" (BISD 26S/218). The 1984 dispute settlement procedures add: "Panels should continue to set their own working procedures and, where possible, panels should provide the parties to the dispute at the outset with a proposed calendar for the panel's work. Where written submissions are requested from the parties, panels should set precise deadlines, and the parties to a dispute should respect those deadlines" (BISD 31S/10). GATT practice seems to suggest that the sometimes considerably longer time needed by panels was due to delays by the disputing parties and, in a few instances, to too infrequent panel meetings and insufficient legal staff

within the secretariat to advise the panel on the legal aspects of the matter and prepare consistent drafts of panel findings.

52. The concept of "cases of urgency" (BISD 26S/214) is not specified in the present GATT dispute settlement procedures. Some Tokyo Round Agreements include dispute settlement provisions for expeditious dispute settlements e.g. "in the case of perishable products" or "where disputes arise affecting products with a definite crop cycle of twelve months" (Article 14.3 and 14.6 of the 1979 Agreement on Technical Barriers to Trade).

53. In GATT practice, the "reasonable period of time" between submission of the panel report to the disputing parties and the circulation of the report to the CONTRACTING PARTIES has varied between one week and six weeks, depending on the requests of the parties to the dispute.

54. Retaliation is admitted under Article XXIII only "if the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action (and) authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances" (Article XXIII:2).

55. The 1979 Understanding mentions with regard to bilateral dispute settlements agreed upon during the panel process: "Where a bilateral settlement of the matter has been found, the report of the panel has been confined to a brief description of the case and to reporting that a solution has been reached". One GATT panel continued the examination of the matter in spite of a bilateral agreement among the parties after the complaining party had requested the panel to continue its work with the aim of reaching substantive conclusions in view of the threat of a reintroduction of the controversial trade measure concerned (BISD 29S/94, paragraph 2.8). While panel findings are usually confined to those issues whose clarification is necessary for a ruling on the dispute, panels have regularly avoided a "non liquet" on the main issue (for an exception to this GATT practice, which was criticized by several contracting parties, see SCM/42, paragraph 5.3).

56. As regards confidentiality of panel proceedings, the standard working procedures of panels include the following provision: "The deliberations of the Panel and the documents submitted to it will be kept confidential. For the duration of the Panel proceeding, the parties to the dispute are requested not to release any papers or make any statements in public regarding the dispute." Since panel reports are circulated as L/-documents to all contracting parties prior to their deliberation in the Council, panel reports are often discussed in the press before they have been presented in a GATT Council meeting.

C. Issues for Negotiations

57. Should the traditional "standard working procedures" for the work of panels be formally adopted, and their regular use be recommended, by the CONTRACTING PARTIES? Should the CONTRACTING PARTIES establish more precise and possibly shorter deadlines for the different phases of panel proceedings? Should the conditions for the applicability of the "urgency procedures" and the "reasonable period of time" between the submission of the panel report to the disputing parties and their circulation to all contracting parties be further specified? Is there a need for additional rules on "interim measures of protection" or on the recourse to retaliation in case of unconsented delays? Should the rules and procedures for the intervention of third contracting parties in panel proceedings be further specified? Should panels or the Council examine the compatibility of bilateral dispute settlements with the multilateral GATT rules? How can the confidentiality of panel reports be protected more effectively prior to their circulation to all contracting parties?

4. Adoption of panel reports

A. Proposals

58. Many participants proposed additional procedural devices designed to promote the adoption of panel reports and to avoid deadlock situations undermining the credibility and effectiveness of the GATT dispute settlement system. Some participants expressed the view that the practice of consensus should be maintained in the Council's decision-making process with regard to the adoption of reports and the making of recommendations. Parties raising objections to panel findings should make a written submission to the CONTRACTING PARTIES giving the grounds for their objections.

59. Other participants proposed that panel reports and recommendations should be adopted by the CONTRACTING PARTIES on the basis of a consensus which would exclude the parties to a dispute and third parties which have been involved in the panel process, while affording them every opportunity to place on record their views on the panel's findings and recommendations prior to a decision by the CONTRACTING PARTIES. No reservation or dissension should in any way modify the rights or obligations of any contracting party resulting from rulings or recommendations by the CONTRACTING PARTIES. It was also suggested for consideration whether panel findings should become binding automatically unless the Council decided by consensus against adoption of the panel report.

60. It was suggested that the Council should decide on panel reports within a period of normally 80 days, and in cases of urgency 30 days, from the time they are delivered.

B. Present GATT Rules and Practices

61. According to Article XXIII:2, "the CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate". GATT Article XXV:4 provides that, "except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast". During the early years of GATT, a few disputes submitted under Article XXIII:2 were decided by a majority vote of the CONTRACTING PARTIES (see, e.g. CP.3/SR.22, page 9). But these exceptional cases apart, consensus has been the traditional method of adopting panel or working party reports, recommendations and rulings under Article XXIII:2. The 1979 Understanding says:

"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" (paragraph 21).

The 1982 GATT Ministerial Declaration includes the following paragraphs:

- "(vii) Reports of panels should be given prompt consideration by the CONTRACTING PARTIES. Where a decision on the findings contained in a report calls for a ruling or recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report."
- "(viii) The recommendation or ruling made by the CONTRACTING PARTIES shall be aimed at achieving a satisfactory settlement of the matter in accordance with GATT obligations. In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The contracting party to which such a recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES. The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding."

- "(ix) The further action taken by the CONTRACTING PARTIES in the above circumstances might include a recommendation for compensatory adjustment with respect to other products or authorization for the suspension of such concessions or other obligations as foreseen in Article XXIII:2, as the CONTRACTING PARTIES may determine to be appropriate in the circumstances."
- " (x) The Parties to a dispute would fully participate in the consideration of the matter by the CONTRACTING PARTIES under paragraph (vii) above, including the consideration of any rulings or recommendations the CONTRACTING PARTIES might make pursuant to Article XXIII:2 of the General Agreement, and their views would be fully recorded. They would likewise participate and have their views recorded in the considerations of the further actions provided for under paragraphs (viii) and (ix) above. The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided. . It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement" (BISD 31S/15, 16).

The footnote states:

"¹This does not prejudice the provisions on decision making in the General Agreement."

C. Issues for Negotiations

62. Should the GATT dispute settlement procedures include an explicit requirement to explain objections to the adoption of panel reports in a written submission? Should the dispute settlement procedures specify that reservations or objections of the disputing parties cannot modify the rights or obligations resulting from rulings or recommendations by the CONTRACTING PARTIES under Article XXIII:2? Is there a need for further defining the traditional practice of consensus? Should there be time-limits for Council decisions on panel reports? Are panel reports only "advisory opinions" which the Council is free to ignore, or should there be a procedural rule that panel reports should be adopted and promptly published by the Council unless the Council decides to the contrary?

5. Follow-up

A. Proposals

63. In order to promote the prompt implementation of adopted panel reports, it was suggested to reconsider the time limits and requirements for compensation and to provide for a more effective monitoring of the

implementation of panel recommendations following their adoption by the Council. One proposal was that, if the CONTRACTING PARTIES recommend that a party take action to rectify a matter or provide compensation, the contracting party concerned should advise the CONTRACTING PARTIES in writing as soon as possible, and in no case later than three months after the adoption of the recommendations, of the action it has taken or proposes to take in accordance with those recommendations. The defending contracting party should submit a follow-up report six months after its initial advice, and the complaining country might request the immediate intervention of the CONTRACTING PARTIES with a view to obtaining appropriate relief, if its rights continue to be nullified or impaired. It was further suggested that in cases where the panel report did not specify a time period for the implementation of the recommendations, the Council should specify such a time period in accordance with the normal GATT practice, taking account of the circumstances relating to the dispute.

64. Another proposal was that in case of a discord between the parties to a dispute as to the way to implement the recommendations, the Council should, at the request of either party, be empowered to reconvene the panel and request its advisory opinion relating to the points at issue, if bilateral consultations lead to no satisfactory solution within a reasonable time. Another view was that the examination of the follow-up of Council recommendations should be left to the Council itself.

65. It was also said that any disputing party should grant compensation if it failed to observe the recommendations addressed to it within a reasonable time. If a disputing party neither observed the recommendations nor made compensation, the CONTRACTING PARTIES (the Council) could authorize the other party to resort to countermeasures. The party which failed to observe the recommendations and to make compensations should not oppose the authorization of the countermeasures. In examining the authorization, the CONTRACTING PARTIES (the Council) should give due consideration to what measures were appropriate in the light of the circumstances (i.e. the degree of the nullification or impairment of the benefit accruing to the party under GATT). After authorizing the counter-measures, the CONTRACTING PARTIES should periodically review the status of the counter-measures or the implementation of recommendations. The Council should withdraw the authorization immediately if it considered that the counter-measures were no longer needed in the light of the circumstances. It was further proposed that it should be reaffirmed that no contracting party should resort to counter-measures without the authorization of the CONTRACTING PARTIES. The party to which counter-measures were applied could ask the Council to find an appropriate solution, if counter-measures had been introduced without the authorization of the CONTRACTING PARTIES. Each contracting party should undertake to bring its domestic legislation and the enforcement thereof relating to countermeasures in conformity with Article XXIII:2.

66. Some participants proposed an explicit new political and legal affirmation by all contracting parties that they will seek to implement the recommendations resulting from a dispute settlement case and recognize that

failure to do so gives rise to a right to compensation or retaliation for adversely affected parties.

B. Present GATT Rules and GATT Practices

67. Article XXIII:2 provides that

"... If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary¹ to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him."

The 1966 "Procedures under Article XXIII" include the following provisions:

"8. Within a period of ninety days from the date of the decision of the CONTRACTING PARTIES or the Council, the contracting party to which a recommendation is directed shall report to the CONTRACTING PARTIES or the Council on the action taken by it in pursuance of the decision.

9. If on examination of this report it is found that a contracting party to which a recommendation has been directed has not complied in full with the relevant recommendation of the CONTRACTING PARTIES or the Council, and that any benefit accruing directly or indirectly under the General Agreement continues in consequence to be nullified or impaired, and that the circumstances are serious enough to justify such action, the CONTRACTING PARTIES may authorize the affected contracting party or parties to suspend, in regard to the contracting party causing the damage, application of any concession or any other obligation under the General Agreement whose suspension is considered warranted, taking account of the circumstances.

10. In the event that a recommendation to a developed country by the CONTRACTING PARTIES is not applied within the time-limit prescribed in paragraph 8, the CONTRACTING PARTIES shall consider what measures, further to those undertaken under paragraph 9, should be taken to resolve the matter."

The 1979 Understanding further provides:

"22. The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may

ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution.

23. If the matter is one which has been raised by a less-developed contracting party, the CONTRACTING PARTIES shall consider what further action they might take which would be appropriate to the circumstances."

The Annex to the 1979 Understanding adds, inter alia:

"The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually 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" (paragraph 4).

The 1982 dispute settlement procedures add:

"In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The contracting party to which such a recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES. The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding" (paragraph viii)

"The further action taken by the CONTRACTING PARTIES in the above circumstances might include a recommendation for compensatory adjustment with respect to other products or authorization for the suspension of such concessions or other obligations as foreseen in Article XXIII:2, as the CONTRACTING PARTIES may determine to be appropriate in the circumstances" (paragraph ix).

68. In GATT practice, the Council has often not specified the "reasonable period of time" within which measures inconsistent with the General Agreement had to be withdrawn. Nor has the Council in the past specified

the amount of any compensation due under Article XXIII:2. The Council has rather left these matters to the parties concerned. The issues of the timely implementation of Council rulings or recommendations under Article XXIII:2 and of compensation and retaliation have been raised in the Council usually only at the request of the complaining country.

69. The Council has only rarely made use of its power to reconvene a panel to examine the implementation of the previously adopted panel recommendations (see, e.g. BISD 13S/36, 45). In most instances, the Council has, at the request of the complainant party, examined itself the follow-up of rulings or recommendations under Article XXIII:2.

70. A suspension of obligations pursuant to Article XXIII:2 was authorized in the history of GATT in only one dispute (see BISD 1S/32, 62; 7S/23).

C. Issues for Negotiations

71. Should the monitoring of rulings and recommendations under Article XXIII be made a regular agenda item of each Council meeting together with strengthened requirements on the contracting parties concerned to report on their implementation of such rulings and recommendations? Is there a need for confirming the power of the Council to reconvene a panel to examine the implementation of panel recommendations? Should it be reaffirmed that GATT Article XXIII:2 admits a suspension of obligations only if authorized by the CONTRACTING PARTIES? Should there be an explicit obligation to bring domestic legislation into conformity with this requirement of GATT Article XXIII:2?

VII. Arbitration

A. Proposals

72. In order to further improve the GATT dispute settlement system, various proposals have been made to make available to disputing parties an arbitration procedure in addition to the various other possible means of dispute settlement within GATT. One proposal has been to provide for binding arbitration by a neutral body as a formally available technique of GATT dispute settlement. The arbitrators' decision would not require approval by the GATT Council or by a GATT Code Committee. But, to safeguard the interests of other contracting parties, it would have to be provided that decisions of such an arbitration process could not bind other contracting parties or prejudice their rights and interests. Binding arbitration would be available whenever both disputing parties agree, as an alternative to the normal dispute settlement process. In addition, there might be classes of disputes where binding arbitration should be required in lieu of the normal panel process.

73. Another proposal has been that, if a dispute is not settled through consultations or conciliation or if the GATT Council fails to adopt a Panel report submitted to it, a party to the dispute may invoke a previously agreed arbitration clause or agree with the other party on an ad hoc

compromissory clause with a view to submitting the dispute to arbitration. The compromise or arbitration clause should be submitted to the Council. The CONTRACTING PARTIES could thus exercise supervision over the subject of the arbitration and over the arbitration procedure adopted by the parties to the dispute, and the Council might reject the arbitration clause on grounds to be defined. The CONTRACTING PARTIES might also agree themselves on an arbitration procedure to be applied by the parties to the dispute, and could see to the implementation of the arbitral decision, which would be binding and final for the parties to the dispute.

74. Other proposals have emphasized that it is the sole responsibility of the CONTRACTING PARTIES to decide on the conformity of a particular measure with the General Agreement and that, in order to ensure coherence of the GATT system, the GATT Council should have a formal rôle in the initiation of the arbitration procedure and in the addressing of the arbitration award. It has also been suggested that, because an arbitration award would not be submitted to the Council for approval and in order to safeguard the rights and interests of third contracting parties, any encouragement and institutionalization of arbitration procedures by the CONTRACTING PARTIES should be confined to conflicts of a factual nature. According to this view, arbitration awards should not deal with questions of conformity with the General Agreement and should not constitute a legal precedent. Others have pointed out that the use of the roster of GATT panelists could facilitate also a binding arbitration process and that the best way of protecting third party interests could be to provide a monitoring function for the GATT Council of the outcome of the matter (e.g. by providing for the possibility of a formal "disapproval" of the dispute settlement by the GATT Council).

B. Present GATT Rules and GATT Practices

75. Article 93 of the still-born Havana Charter began with a first paragraph that was largely identical with the present GATT Article XXIII:1, and continued with two paragraphs dealing with arbitration in the following terms:

"2. The Members concerned may submit the matter arising under paragraph 1 to arbitration upon terms agreed between them; provided that the decision of the arbitrator shall not be binding for any purpose upon the Organization or upon any Member other than the members participating in the arbitration."

"3. The Members concerned shall inform the Organization generally of the progress and outcome of any discussion, consultation or arbitration undertaken under this Charter."

Additional provisions relating to arbitration were included in Article 94 of the Havana Charter. Paragraph 2 of this Article provided that, whenever a complaint under Article 93, paragraph 1, was referred by any member concerned to the Executive Board:

"The Executive Board shall promptly investigate the matter and shall decide whether any nullification or impairment within the terms of paragraph 1 of Article 93 in fact exists. It shall then take such of the following steps as may be appropriate:

- (a) decide that the matter does not call for any action;
- (b) recommend further consultation to the Members concerned;
- (c) refer the matter to arbitration upon such terms as may be agreed between the Executive Board and the Members concerned;
- (d) in any matter arising under paragraph 1(a) of Article 93, request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter;
- (e) in any matter arising under sub-paragraph (b) or (c) of paragraph 1 of Article 93, make such recommendations to Members as will best assist the Members concerned and contribute to a satisfactory adjustment."

Article 96 of the Havana Charter also made provision for referring disputes to the International Court of Justice and for requesting advisory opinions by the Court on legal questions arising within the scope of the activities of the then envisaged International Trade Organization. None of these various provisions of the Havana Charter relating to arbitration were incorporated into the General Agreement.

76. It appears that several trade agreements concluded among contracting parties (e.g. under GATT Article XXIV) provide for the possibility of settling their respective trade disputes by means of arbitration. Mutually agreed ad hoc arbitration seems to have been resorted to in GATT practice only rarely. For instance, in October 1963 the EEC and the USA requested the GATT Council to establish a Panel to render an advisory opinion to the two parties in connexion with their negotiations on poultry. The proposed terms of reference of the Panel were as follows:

"To render an advisory opinion to the two parties concerned in order to determine: 'On the basis of the definition of poultry provided in paragraph 02-02 of the Common Customs Tariff of the European Economic Community, and on the basis of the rules of and practices under the GATT, the value (expressed in United States dollars) to be ascribed, as of 1 September 1960, in the context of the unbindings concerning this product, to United States exports of poultry to the Federal Republic of Germany."

On 29 October 1963, the Council appointed a Panel with these terms of reference, and the two disputing parties agreed to accept the Panel finding as binding. The Panel held a number of meetings in November 1963 and

presented its report to the two parties. The parties concerned have complied with the Panel's conclusions (see BISD 12S/65).

C. Issues for Negotiations

77. Are contracting parties free to conclude special arbitration agreements ("ad hoc compromissory clauses") submitting an existing "GATT dispute" to the jurisdiction of a mutually agreed arbitration body and determining the subject-matter, arbitrators, procedures and applicable law? Should the CONTRACTING PARTIES follow the example of other multilateral international economic agreements and provide for a general arbitration clause ("anticipated compromis") enabling the reference, subject to specified conditions and to an additional "implementing compromis" or "protocol of submission", of all or definite classes of future "GATT disputes" to international arbitration as an alternative to dispute settlement by diplomatic means? Should any such general arbitration clause limit the freedom of the disputant contracting parties to refuse to set up an "implementing compromis" (e.g. by enabling the establishment of an "arbitration panel" by the GATT Council at the unilateral request of any party to a general arbitration agreement)? And/or should it limit the freedom of the disputant contracting parties to determine the contents of an "implementing compromis" (e.g. the freedom to determine the jurisdiction of the arbitral body, the arbitrators, the applicable rules and procedures)?

78. What issues should be addressed in a potential understanding by the CONTRACTING PARTIES on arbitration? For instance:

(a) Recognition that arbitration can contribute to the strengthening of the GATT dispute settlement system, and thereby to the GATT legal system in general, provided it does not adversely affect the rights and interests of third contracting parties?

(b) Recognition that GATT Article XXIII does not prevent contracting parties from submitting disputes to mutually agreed arbitration and to define, by common agreement, the subject of the dispute, the manner of appointing arbitrators, the applicable law, the arbitration procedures and related issues, provided that any such arbitration agreement and arbitration award cannot adversely affect the rights and obligations of contracting parties other than the parties participating in the arbitration?

(c) Recognition of the desirability of promoting transparent and uniform dispute settlement procedures by encouraging contracting parties to inform the GATT of any arbitration clauses relating to their rights and obligations under the General Agreement? Recognition of an obligation of the contracting parties concerned to inform the GATT generally and promptly of the initiation, progress and outcome of an arbitration proceeding in which they participate and which concerns their respective rights and obligations under the GATT?

(d) Since the authoritative interpretation of the General Agreement lies within the sole responsibility of the CONTRACTING PARTIES: Should the Council pronounce on the (in)compatibility of arbitration clauses and arbitration awards with the General Agreement in order to ensure the coherence of the GATT system?

(e) Recognition that disputing countries may, by common agreement, request the GATT Council to establish a GATT panel under GATT Article XXIII with the special mandate of rendering an arbitration award binding on the disputing parties? Recognition that such an arbitration procedure shall be based on the standard panel procedures, as far as applicable, subject to any particular arbitration procedures which the CONTRACTING PARTIES might agree upon?

(f) Recognition that a GATT contracting party may also unilaterally request the GATT Council under GATT Article XXIII to establish a GATT panel with the special mandate of rendering an arbitration award binding on the disputing parties, provided that both parties to the dispute had previously concluded a "general compromis", duly submitted to the GATT Council and referring all or certain of their GATT disputes to arbitration, and this general compromissory clause provided for a right of the complaining country to unilaterally request the GATT Council to establish an arbitration panel? Should contracting parties be encouraged to conclude such general "compromissory clauses" under which they may unilaterally request the GATT Council to establish GATT arbitration panels?

(g) Recognition that GATT Article XXIII:2 and the pertinent GATT dispute settlement procedures may be applied, mutatis mutandis, also to arbitration panels established by the GATT Council and that arbitration panels established by the GATT Council may receive the same technical, economic, legal and administrative assistance from the GATT secretariat as other GATT panels established in accordance with the traditional GATT dispute settlement procedures?

VIII. Surveillance

A. Proposals

79. Many participants referred to the need for more effective monitoring of the implementation of rulings or recommendations under Article XXIII and proposed to strengthen the Council's surveillance function (e.g. through the setting up of an auxiliary body of the Council or through regular special Council meetings devoted to dispute settlement). It was suggested to specify reasonable time-limits for the implementation of recommendations adopted by the Council, to establish formal procedures for the regular surveillance by the Council of matters arising from disputes in the GATT, to examine the possibility of involving ministers directly in the dispute settlement process, and to require the contracting parties concerned to report regularly on their actions taken in order to implement Council rulings or recommendations under Article XXIII. Another proposal was that the failure to implement recommendations should give rise to a right to

compensation or retaliation for adversely affected contracting parties. It was further suggested to introduce arrangements to ensure that bilateral settlements reached through mediation, conciliation or arbitration conform to the general GATT rules and that retaliation does not adversely affect the rights of third contracting parties.

80. Divergent views were expressed as to whether the GATT dispute settlement procedures offered an appropriate means for the checking and monitoring of bilateral trade arrangements.

81. One participant proposed to promote the implementation of rulings and recommendations under Article XXIII by anchoring GATT obligations more effectively within the domestic trade laws and decision-making procedures of contracting parties (e.g. by giving affected private trade interests a greater rôle in the domestic enforcement of GATT obligations).

B. Present GATT Rules and Practices

82. The 1979 Understanding includes the following paragraph on "surveillance":

"24. 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."

Since 1980, the Council has held periodic special meetings to review developments in the trading system.

83. The 1966, 1979 and 1982 GATT dispute settlement procedures include various more specific provisions on the implementation of recommendations and rulings under Article XXIII (see above part VI.4).

C. Issues for Negotiations

84. Is there a need for additional procedural and institutional mechanisms for the regular monitoring of rulings and recommendations under GATT Article XXIII? Should the central GATT monitoring mechanism also be applicable to the particular dispute settlement proceedings under the Tokyo Round Agreements "to ensure the unity and consistency of the GATT system" (BISD 26S/201)? Should there be additional requirements to submit regular reports on the implementation of rulings or decisions under Article XXIII? Is there a need for additional rules on compensation and suspension of obligations under Article XXIII:2? Should the regular monitoring be extended also to bilaterally agreed dispute settlements?

IX. Strengthened Commitments and Integrated Dispute Settlement Procedures

A. Proposals

85. Many participants proposed to codify in a single instrument the various existing texts relating to dispute settlement (Article XXIII), as amended and improved through negotiations. It was also said that such an improved and consolidated instrument for dispute settlement in GATT should be elaborated after the negotiations on specific issues had been completed.

86. It was further suggested that such a single, consolidated text of GATT dispute settlement procedures would offer an adequate way of expressing a strengthened commitment to abide by the dispute settlement system in GATT. Another proposal was that the integrated GATT dispute settlement procedures should be accompanied by a declaration by the CONTRACTING PARTIES reaffirming their determination to respect these provisions and to have recourse to the machinery to settle their disputes.

87. It was also proposed that the dispute settlement procedures of the various Tokyo Round Agreements, while preserving possible particularities of those procedures, could include a reference to the single consolidated text of the GATT dispute settlement procedures.

B. Present GATT Rules and Practices

88. The present GATT dispute settlement procedures are set out in the General Agreement itself (notably Articles XXII and XXIII) as well as in a number of additional legal instruments adopted in 1958, 1966, 1979, 1982 and 1984. A compilation of all the relevant texts and of all past GATT dispute settlement proceedings has been published recently in a note by the secretariat (MTN.GNG/NG13/W/4) and, if published in a generally available GATT brochure, could already considerably reduce the present lack of transparency in GATT dispute settlement procedures and practices. The particular dispute settlement procedures of the various Tokyo Round Agreements differ among each other. But it does not seem that these procedural differences have caused any practical difficulties so far.

C. Issues for Negotiations

89. Is there a need for codifying the various GATT dispute settlement procedures, agreed upon in the past, in one single consolidated instrument? Is there a risk that any such "codification" could lead to a renegotiation of the already agreed procedures and ultimately put into doubt already accepted rules? Could a generally available GATT publication compiling all the existing dispute settlement texts and procedures serve as a substitute for such a new "consolidated text"?