

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

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COMMUNICATION FROM MEXICO

The following communication has been received from the delegation of Mexico with the request that it circulated to the members of the Group.

This proposal is aimed at facilitating dialogue among participants in the Uruguay Round in order to attain the negotiating objective set out in the Ministerial Declaration of Punta Del Este in the field of dispute settlement as rapidly as possible.

The proposal seeks to cover the basic elements of the negotiations taking into account the positions and arguments stated so far by the various participants who have submitted written proposals to the Group.

The proposal starts from the fact that while generally speaking the GATT dispute settlement machinery has functioned reasonably well and satisfactorily, it is both possible and desirable to perfect it in the light of present conditions and of the experience gained in recent years in the field of dispute settlement. The aim is to improve and strengthen the rules and procedures of the dispute settlement machinery in order to ensure the speedy and effective solution of disputes for the benefit of all contracting parties.

It should be stressed that this proposal is not exhaustive and the delegations sponsoring it reserve the right to submit, individually or collectively, other proposals in future.

I. CONSULTATIONS

1. The existing provisions on consultations are considered basically satisfactory. Consequently, the following paragraphs are confined to highlighting some of them and proposing in general terms the improvement or clarification of others.

2. It is essential to try to solve disputes primarily on the basis of the holding of consultations among the parties concerned.

3. No contracting party should refuse to hold consultations when such a request has been made in conformity with Article XXII or Article XXIII:1, and furthermore contracting parties should undertake to reply promptly to requests and carry out consultations without delay, with a view to reaching mutually satisfactory conclusions.

4. Any request for consultations should give in written form the reasons for the request.

5. Contracting parties should try to reach a satisfactory solution to the issue in accordance with the provisions of Article XXII or Article XXIII:1 before resorting to Article XXIII:2.

6. A matter may be referred directly to the CONTRACTING PARTIES, i.e. without it being necessary to hold consultations, when the party to which the request is addressed does not agree to hold consultations, or in the case of a difficulty arising under Article XXIII:1(c) of the General Agreement. Recourse may also be had to Article XXIII:2 when the contracting parties concerned cannot reach a mutually satisfactory adjustment within a reasonable period.

7. The reasonable period mentioned in the previous paragraph is considered to be thirty days, unless the parties concerned decide to extend it by mutual agreement. If an extension is agreed upon, any of the parties may have recourse to the CONTRACTING PARTIES whenever it sees fit to do so.

8. During the process of consultations between a developed contracting party and a developing contracting party, regardless of which of the two is the affected party, the developed contracting party shall take account of the finance, trade and development needs of the developing contracting party.

9. Even where consultations lead to a mutually acceptable solution, the developing contracting party may, if the solution is not wholly satisfactory in terms of its development needs, request the CONTRACTING PARTIES to review the solution. Such review shall be conducted in the light of the principles, objectives and commitments of Part IV of the General Agreement and of the spirit and letter of the Enabling Clause and with a view, inter alia, and if necessary, to determining specific measures under Articles XXV and XXXVIII of the General Agreement.

II. MEDIATION (Good offices, mediation and conciliation)

1. The parties to a dispute must have the possibility of choosing from among various alternative and/or complementary techniques and mechanisms for dispute settlement with a view to reaching a solution to the issue in question.

2. Mediation is defined as a continuous process aimed towards the solution of a dispute through the more or less active participation, as the case may be, of an independent third party. Mediation is a process which begins at the time when the parties to the dispute consider that the

process of bilateral consultation has been exhausted without reaching a mutually satisfactory solution. Mediation is seen as a rapid and expeditious process aimed towards obtaining a solution in order to avoid recourse to panel proceedings.

3. Mediation may be conducted at two levels:

- (A) Good offices, consisting of encouraging parties to a dispute to continue seeking solutions through consultations; and
- (B) Mediation proper, involving active participation by the mediator through the transmission and interpretation of proposals from one party to another, and the presentation of his own proposals, with a view to developing a solution.

4. Any of the parties to the dispute may at any time during the mediation process exercise its right to the establishment of a panel without this necessarily implying the suspension of the initial mediation process. It is the responsibility of a panel to encourage mutually acceptable solutions at any stage of the proceedings, as is clear from paragraphs 16, 17 and 18 of the 1979 Understanding.

5. The customary practice of the GATT establishes that mediation may be carried out by the Director-General, the Chairman of the CONTRACTING PARTIES or the Chairman of the GATT Council of Representatives. The mediation process could be strengthened by being conducted by the Chairman of the Dispute Settlement Council which is provided for below. In this process, the assistance of experts, preferably chosen from the lists of governmental and non-governmental experts, should be available.

6. If any of the parties to a dispute decides to request a panel, the steps taken under any of the above-mentioned procedures shall be understood to fulfil the conditions provided for in Article XXIII:1, exclusively in regard to the holding of consultations.

7. Proposals made in the course of mediation or conciliation may be based on considerations ex aequo et bono, but the settlement finally reached must be consistent with the GATT rules.

8. If the use of good offices, mediation or conciliation leads to a mutually satisfactory solution for the parties to the dispute, that solution shall be communicated to the Council for the information of the CONTRACTING PARTIES, which maintain their individual and/or collective rights under the General Agreement.

9. In the case of disputes between a developed contracting party and a developing contracting party, regardless of which of the two is the affected party, the persons undertaking the good offices, mediation or conciliation shall take particularly into account the finance, trade and development needs of the developing contracting party.

10. Even where the mediation process leads to a mutually acceptable solution, the developing contracting party may, if the solution is not wholly satisfactory in terms of its development needs, request the CONTRACTING PARTIES to review the solution. Such review shall be conducted in the light of the principles, objectives and commitments of Part IV of the General Agreement and of the spirit and letter of the Enabling Clause, and with a view, inter alia, and if necessary, to determining specific measures under Articles XXV and XXXVIII of the General Agreement.

III. ARBITRATION

1. The institutionalisation within GATT of a rapid arbitration procedure, to supplement the dispute settlement system, could facilitate the solution of certain disputes that essentially concern issues that are clearly defined by both parties.

2. Use of the arbitration procedure would be subject to mutual agreement of the parties.

3. The arbitration award would be binding for the parties concerned but should not impair the rights of third parties under the General Agreement; the GATT Council would be informed of the outcome of the arbitration, and could, if necessary, adopt the appropriate decisions.

4. Recourse may be had to binding arbitration whenever the parties to the dispute so agree as an alternative to the normal dispute settlement process. If arbitration works and proves useful in practice, its use could subsequently be extended.

IV. COUNCIL OF REPRESENTATIVES MEETING IN DISPUTE SETTLEMENT MODE

1. The Council of Representatives shall hold special meetings for dispute settlement purposes, in order to carry out all the functions relating to disputes. These functions include all those which are spelt out in the procedures adopted on 10 November 1958 in respect of Article XXII (BISD 7S/24), the Decision of 5 April 1966 on Procedures under Article XXIII (BISD 14S/18), the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 (L/4907), the Ministerial Declaration adopted on 29 November 1982 (BISD 29S/9 and BISD 29S/13), and the Action taken on 30 November 1984 at the 40th session of the CONTRACTING PARTIES on Dispute Settlement Procedures (BISD 31S/9), as well as any new ones that may emerge as a result of the negotiations under the Uruguay Round. The present proposal would not alter the rights and obligations of contracting parties under the General Agreement.

2. It is envisaged that the Council meeting in dispute settlement mode shall carry out the following functions:

- (a) as soon as a dispute is brought to the attention of the CONTRACTING PARTIES, the Chairman of the Dispute Settlement Council is authorized to take appropriate action with the

agreement of the parties concerned, including the convening of consultations, and to explore the possibilities for a satisfactory solution to individual disputes through the methods mentioned in section II above;

- (b) if the dispute is not resolved through the methods mentioned in sections I and II above, the Dispute Settlement Council will promptly consider the request by the complainant party for the establishment of a panel (or a working party) to assist the CONTRACTING PARTIES to deal with the matter and shall establish the panel in accordance with the agreed procedures;
- (c) to monitor observance of the procedures and, where applicable, the time-limits set out for different phases of the dispute settlement process such as the drawing up of the terms of reference for the panel (or working party), selection of panel members, deliberations of the panel proceedings and the adoption of the panel reports;
- (d) to keep under surveillance any matters arising from the operation of the dispute settlement mechanism on which the CONTRACTING PARTIES have made recommendations or given rulings, with a view to securing full compliance by the contracting parties to whom the recommendations and rulings of the CONTRACTING PARTIES are directed;
- (e) to conduct periodic/annual reviews of the operation of the dispute settlement mechanism, with a view to identifying problems and making recommendations for improvements; and
- (f) to meet as frequently as necessary, preferably about once a month, so as to discharge promptly its functions.

3. The Council, when meeting in its Dispute Settlement Mode, shall be chaired by a Chairman appointed or elected for that purpose by the CONTRACTING PARTIES. More specifically, it is envisaged that the Chairman will carry out the following functions:-

- (a) as soon as a dispute is brought to the attention of the Dispute Settlement Council, the Chairman shall offer his good offices to the disputing parties. With the agreement of the parties concerned, he will help to convene consultations and, wherever appropriate, try to mediate a solution through the methods mentioned in section II;
- (b) if the dispute is not resolved through consultation, good offices, mediation or conciliation, or if the disputing parties agree to seek binding arbitration, the Chairman, if necessary assisted by experts, could be available to provide such arbitration;

- (c) if a request is made for the establishment of a panel, the Chairman will help to facilitate and expedite the setting-up of the panel and the subsequent operation of the dispute settlement procedures, but he would have no rôle in the actual deliberations of the panel or in respect of the functions of its Chairman;
- (d) to keep the Dispute Settlement Council informed of developments of the disputes; and
- (e) to advise and assist the Council in the latter's discharge of its functions particularly with regard to those spelt out in sub-paragraphs (d) and (e) of the previous paragraph.

V. PANEL PROCEDURES

1. Establishment of panels

Every contracting party retains its right to establishment of a panel. The request shall be submitted together with a brief statement of the facts. The establishment of the panel shall be agreed at the Council meeting following that at which the request was submitted.

2. Composition of panels

The roster of experts who may be members of panels should be expanded by including names (of experts of recognized stature and unimpeachable impartiality) provided by the various delegations.

Panels shall be constituted with governmental officials and non-governmental experts whose ability and neutrality is universally recognized.

If within thirty days from the date of the establishment of a panel the parties to a dispute have not reached agreement on the composition of the panel, the Chairman of the Dispute Settlement Council shall decide on the composition of the panel, in consultation with the Director-General of GATT.

3. Terms of reference of panels

Panels shall have standardized terms of reference, with flexibility of adjustment for difficult and exceptional cases. If in such difficult and exceptional cases agreement cannot be reached on terms of reference within thirty days, the Chairman of the Dispute Settlement Council, in consultation with the Director-General of GATT, shall establish the standardized terms of reference.

4. Time devoted to the various work-phases of panels

In order to make the procedure more efficient, the period in which the panel shall conduct its examination, from the time when its composition and terms of reference have been determined to the time when it panel provides its report to the parties to the dispute, shall not exceed six months.

In general, the maximum period between the time when the request under Article XXIII:2 is submitted to the Council and the report is adopted by the Council shall not exceed nine months.

When the panel considers that the above-mentioned time-limits cannot be met, it shall inform the Council of the reasons for the delay together with an estimate of the period within which it will conclude its report.

When the establishment of a panel is requested to examine any measure adopted by a developing contracting party, longer time-limits than those provided for the normal situation shall be established in order that developing contracting parties may have the necessary time-frame flexibility to prepare and present their arguments.

5. Adoption of panel reports

Panel reports shall be adopted by the Council of Representatives by consensus in accordance with the established practice in GATT. In view of the difficulties which this procedure has encountered in the past, and in order to facilitate the shaping of a consensus, the parties to the dispute will be free to join in the consensus or not.

6. When a dispute involves a developing contracting party and a developed contracting party, regardless of which of the two is the affected party, the panel shall take account of the finance, trade and development needs of the developing contracting party.

7. Bearing in mind the lack of economic, material and human resources of developing contracting parties, it would be desirable that in addition to the technical assistance currently available there should be established specialized legal assistance for problems and provisions relating to differential and more favourable treatment for developing countries.

8. In addition to such specialized legal assistance, special training courses could be conducted on the GATT rules for developing countries and dispute settlement procedures, so that the developing countries' experts may be better informed in this regard.

9. Work of panels

Panel members shall take part in that work on a full-time basis. To that end, when submitting names of persons who could be members of panels, delegations should be aware of this situation and provide all necessary support.

* This is understood to be without prejudice to the provisions of the General Agreement and the established practice on the adoption of decisions.

VI. FOLLOW UP AND SURVEILLANCE OF IMPLEMENTATION OF THE DECISIONS OF THE CONTRACTING PARTIES

1. Rôle of the Council or of the CONTRACTING PARTIES

Within sixty days from the date of the ruling of the CONTRACTING PARTIES on the basis of the panel's report, the contracting party to which a recommendation is addressed shall inform the Council of the measures it has taken in conformity with that ruling.

2. Failure to implement recommendations shall give rise to compensation or retaliation. Retaliatory measures must be authorized in advance by the Council, which shall supervise their application.

3. If for any compelling reason one of the contracting parties to a dispute cannot immediately comply with the recommendations of a panel (for example, elimination of measures that are incompatible with the General Agreement), and the dispute involves one or more developing contracting parties, either as complainant(s) or as defendant(s), the CONTRACTING PARTIES shall give priority to ensuring, and do their utmost to ensure, that the interim solution adopted increases trade (compensatory adjustment) rather than restricting it (withdrawal of concessions and/or obligations).

4. When adopting an interim solution as indicated in the previous paragraph, the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of but also their impact on the economies of developing contracting parties concerned, and in the case of a matter raised by a developing contracting party, shall consider what further action they might take which would be appropriate to the circumstances, in conformity with paragraphs 21 and 23, respectively, of the 1979 Understanding.

5. When a developing contracting party cannot comply with the recommendations of a panel, the interim solution adopted shall be based on the compensation offered by the developing contracting party to the affected party, and not on the suspension of concessions and/or obligations by the latter. The aim is that the developing contracting party should be able itself to choose the form and products by which it can grant compensation restoring the balance of benefits for the affected party, taking into account its own trade, finance and development needs.

6. When a developed contracting party cannot immediately comply with the recommendations of a panel in a dispute in which the affected party is a developing contracting party, the interim solution adopted should be based as far as possible on the compensation sought by the developing contracting party. Furthermore, such compensation should be calculated retroactively from the time when the measure that is the subject of the dispute began to be applied.

VII. THIRD PARTIES AFFECTED OR HAVING A SUBSTANTIAL INTEREST

1. Mechanisms should be established to enable third parties to participate in the dispute settlement machinery more actively and with a greater ability to influence the results of the panel's report, in order to protect their interests and ensure that benefits are not impaired or nullified.

VIII. DIFFERENTIAL AND MORE FAVOURABLE TREATMENT FOR DEVELOPING CONTRACTING PARTIES

1. All the points set out above shall be applied without prejudice to the fact that when a developing contracting party sees fit it may invoke and make use of the procedures provided for in Article XXIII in accordance with the CONTRACTING PARTIES' decision of 5 April 1966 (BISD 14S/18) and/or any other provision contained in other instruments relating to GATT dispute settlement mechanisms.

2. When a developing contracting party has had to accept a bilateral solution at any stage of the mechanisms available for the settlement of disputes, including consultations, such contracting party may request the CONTRACTING PARTIES to review the solution. Such review shall be conducted in the light of the principles, objectives and commitments adopted in the field of differential and more favourable treatment for developing countries and with a view, inter alia, and if necessary, to determining specific measures under Articles XXV and XXXVIII of the General Agreement.