

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG13/W/29/Rev.1  
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Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

COMPARISON OF EXISTING TEXTS AND PROPOSALS FOR  
IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT SYSTEM

Revised Note by the Secretariat

At its meeting of 6-7 September 1988, the Negotiating Group requested the secretariat to revise its two-column note on "Comparison of Existing Texts and Proposals for Improvements to the GATT Dispute Settlement System" (MTN.GNG/NG13/W/29) in the light of the discussions and proposals made at this meeting. It was agreed that the left-hand column (presented on the left-hand pages of this note) should reproduce all relevant portions of existing texts on GATT dispute settlement rules and procedures<sup>1</sup>, and that the right-hand column (presented on the right-hand pages of this note) should remain an "operational" text focusing on proposals supported, at least in principle, by most participants<sup>2</sup>. It was further agreed that the revised note should reflect the proposals made in the Group for additional provisions on differential and more favourable treatment of developing countries in the GATT dispute settlement system, as listed in part III of the secretariat note in document MTN.GNG/NG13/W/27/Rev.1, taking into account the discussions at the recent meetings of the Group.

The secretariat bears sole responsibility for the preparation of this document. Although the right column is intended to reflect the present status of the Group's deliberations, it is not to be implied that proposals not mentioned should receive less attention. Following a proposal made by various participants, the secretariat has placed brackets around those proposals listed in the right-hand column that were objected to by several participants. Due to the Group's request to circulate this note at the earliest possible date, references to the note on the last meeting (MTN.GNG/NG13/10), which will be finalized only after the circulation of this document, are without indication of the pertinent paragraphs.

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The following abbreviations are used to identify GATT texts: "1966 Decision" denotes the Decision of 5 April 1966 regarding Procedures under Article XXIII (BISD 14S/18); "1979 Understanding" denotes the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979 (BISD 26S/210); "1979 Understanding - Annex" denotes the Annex to the "1979 Understanding"; "1982 Declaration" denotes the Ministerial Declaration adopted on 29 November 1982, section on Dispute Settlement Procedures (BISD 2929S/13/13); and "1984 Action" denotes the Action taken on 30 November 1984, section on Dispute Settlement Procedures (BISD 31S/9). All of the above texts can be found in MTN.GNG/NG13/W/4.

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For a compilation and comparative analysis of proposals for negotiations see the secretariat note MTN.GNG/NG13/W/14/Rev.2.

TEXT OF GATT ARTICLE XXII (BISD IV/39)

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

TEXT OF GATT ARTICLE XXIII (BISD IV/39)

Nullification or Impairment

1. If any contracting party should consider 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 as the result of:
  - (a) the failure of another contracting party to carry out its obligations under this Agreement, or
  - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
  - (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. 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. 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 CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where they consider such consultation necessary. 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 Secretary 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.

TEXT OF GATT ARTICLE XXV (paragraphs 4-5) (BISD IV/44)<sup>1</sup>

Joint Action by the Contracting Parties

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph.

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<sup>1</sup>The footnote to paragraph 1 of the 1979 Understanding reads:

"It is noted that Article XXV may, as recognized by the CONTRACTING PARTIES, inter alia, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930), also afford an appropriate avenue for consultation and disputed settlement in certain circumstances."

See also the footnote to paragraph (x) of the section relating to dispute settlement procedures in the 1982 Declaration (BISD 29S/16).

I. OBJECTIVES OF GATT DISPUTE SETTLEMENT SYSTEM (existing texts)

1. In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations. (1982 Punta del Este Declaration, negotiating objective as regards dispute settlement, BISD 33S/25)
2. The CONTRACTING PARTIES reaffirm their adherence to the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII. (1979 Understanding, para. 1)
3. The CONTRACTING PARTIES agree that the customary practice of the GATT in the field of dispute settlement ... should be continued in the future, with the improvements set out below. They recognize that the efficient functioning of the system depends on their will to abide by the present understanding. The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 (BISD 14S/18) and that these remain available to less-developed contracting parties wishing to use them. (1979 Understanding, para. 7)
4. It is understood that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts and that, if disputes arise, all contracting parties will engage in these procedures in good faith in a effort to resolve the disputes. (1979 Understanding, para. 9)
5. Any dispute which has not been settled bilaterally under the relevant provisions of the General Agreement may be referred to the CONTRACTING PARTIES which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel. (1979 Understanding - Annex, para. 1)
6. Before bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. 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

I. OBJECTIVES OF GATT DISPUTE SETTLEMENT SYSTEM (revised non-paper)

1. In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, the CONTRACTING PARTIES reaffirm their adherence to the multilateral framework of GATT rules and procedures for the settlement of disputes based on Articles XXII and XXIII [and XXV]. They agree that the rules and procedures of the GATT dispute settlement process, including the arrangements for overseeing and monitoring of compliance with adopted recommendations, shall be improved and strengthened. (Punta del Este Declaration, negotiating objective for dispute settlement; 1979 Understanding, para. 1; MTN.GNG/NG13/9, para. 24; MTN.GNG/NG13/10)

2. The aim of the GATT dispute settlement system is to secure positive solutions to disputes that are compatible with the multilateral GATT rules. A solution mutually acceptable to the parties to a dispute is clearly preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES should be to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. (1979 Understanding, Annex, para. 4; MTN.GNG/NG13/9, para. 24; MTN.GNG/NG13/10)

The CONTRACTING PARTIES reaffirm that:

- (a) regular adoption by the CONTRACTING PARTIES of panel reports and recommendations will reinforce the GATT rules and contribute to the maintenance of a proper balance between the rights and obligations of all contracting parties; (MTN.GNG/NG13/10; 1966 Decision, preamble)
- (b) decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement nor replace the negotiating process; (MTN.GNG/NG13/10; 1982 Declaration, para. x; MTN.GNG/NG13/W/12)

3. The agreed improvements in the GATT dispute settlement rules and procedures shall also:

- (a) facilitate the use of, and the choice among, the various alternative and complementary techniques of dispute settlement so that the GATT dispute settlement system adequately responds to the different nature of disputes and enhances mutually satisfactory settlements of disputes; (MTN.GNG/NG13/W/14/Rev.2, para. 3)

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. (1979 Understanding - Annex, para. 4)

7. The CONTRACTING PARTIES ... agree that the (1979) Understanding on Notification, Consultation, Surveillance and Dispute Settlement negotiated during the Tokyo round provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end. (1982 Declaration; 1984 Action)

8. 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. This does not prejudice the provisions on decision-making in the General Agreement. It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement. (1982 Declaration, para. viii)

9. The CONTRACTING PARTIES ...

[Recognize] that the prompt settlement of situations in which a contracting party considers that any benefits accruing to it directly or indirectly from the General Agreement are being impaired by measures taken by another contracting party, is essential to the effective functioning of the General Agreement and the maintenance of a proper balance between the rights and obligations of all contracting parties;

[Recognize] further that the existence of such a situation can cause severe damage to the trade and economic development of the less-developed contracting parties; and

[Affirm] their resolve to facilitate the solution of such situations while taking fully into account the need for safeguarding both the present and potential trade of less-developed contracting parties affected by such measures ... (1966 Decision, preamble)

10. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties (BISD 14S/18). This procedure provides, inter alia, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure. (1979 Understanding - Annex, para. 2)

- (b) strengthen the principles of GATT, reinforce the authority of the CONTRACTING PARTIES to interpret GATT law, ensure the consistency of the multilateral GATT legal system, and protect the rights of third contracting parties in respect of bilaterally agreed dispute settlements, mediation, conciliation and arbitration.  
(MTN.GNG/NG13/W/14/Rev.2, paras. 4 and 8; MTN.GNG/NG13/10)
- (c) further implement the principle of differential and more favourable treatment of developing countries, which is part of the GATT dispute settlement system, in order to address problems specific to less-developed contracting parties without prejudice to the need for a strong, unified and balanced system of dispute settlement affording equal opportunities to all contracting parties (MTN.GNG/NG13/W/14/Rev.2, paras. 6 and 9; MTN.GNG/NG13/9, paras. 5-20, 14, 24; MTN.GNG/NG13/10. For a list of proposals made in the Negotiating Group for additional provisions on differential and more favourable treatment of developing countries in the dispute settlement system, see MTN.GNG/NG13/W/27/Rev.1, pp. 7-13).

[As is the case in the ordinary judicial system of every country, there should be machinery to defend the weakest parties, so that when a conflict breaks out between developed and less-developed members, mechanisms can be found to 'improve' the defence of the latter ... Recourse of this kind calls above all for 'defenders', technical know-how and statistics as well as a whole set of background factors not always available to developing countries.] (MTN.GNG/NG13/5/Add.1, p. 3, para. (n))

II. NOTIFICATION (existing texts)

1. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification. (1979 Understanding, para. 2)

2. 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, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly ex post facto. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned. (1979 Understanding, para. 3)

III. CONSULTATIONS, GOOD OFFICES, MEDIATION AND CONCILIATION (existing texts)

1. The "Procedures under Article XXII on Questions affecting the Interests of a Number of Contracting Parties", adopted on 10 November 1958 (BISD 7S/24), provide for the following:

- (1) Any contracting party seeking a consultation under Article XXII shall, at the same time, so inform the Executive Secretary for the information of all contracting parties.
- (2) Any other contracting party asserting a substantial trade interest in the matter shall, within forty-five days of the notification by the Executive Secretary of the request for consultation, advise the consulting countries and the Executive Secretary of its desire to be joined in the consultation.
- (3) Such contracting party shall be joined in the consultation provided that the contracting party or parties to which the request for consultation is addressed agree that the claim of substantial interest is well-founded; in that event they shall so inform the contracting parties concerned and the Executive Secretary.
- (4) If the claim to be joined in the consultation is not accepted, the applicant contracting party shall be free to refer its claim to the CONTRACTING PARTIES.
- (5) At the close of the consultation, the consulting countries shall advise the Executive Secretary for the information of all contracting parties of the outcome.
- (6) The Executive Secretary shall provide such assistance in these consultations as the parties may request.



II. NOTIFICATION (revised non-paper)

4. The notification and transparency of trade measures affecting the operation of the General Agreement shall be improved. They can contribute to preventing disputes from developing. (MTN.GNG/NG13/W/14/Rev.2, para. 11)

All bilateral settlements of disputes submitted to the CONTRACTING PARTIES under GATT Articles XXII or XXIII shall be notified to the GATT Council. (MTN.GNG/NG13/8, paras. 8, 18)

III. CONSULTATIONS, GOOD OFFICES, MEDIATION AND CONCILIATION (revised non-paper)

2. The Decision of 5 April 1966 on "Procedures under Article XXIII" (BISD 14S/18) includes the following provisions relating to consultations and good offices:

The CONTRACTING PARTIES decide that:

- (1) If consultations between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 2 of Article XXIII do not lead to a satisfactory settlement, 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.
- (2) To this effect the contracting parties concerned shall, at the request of the Director-General, promptly furnish all relevant information.
- (3) On receipt of this information, the Director-General shall consult with the contracting parties concerned and with such other contracting parties or intergovernmental organizations as he considers appropriate with a view to promoting a mutually acceptable solution.
- (4) After a period of two months from the commencement of the consultations referred to in paragraph 3 above, if no mutually satisfactory solution has been reached, the Director-General shall, at the request of one of the contracting parties concerned, bring the matter to the attention of the CONTRACTING PARTIES or the Council, to whom he shall submit a report on the action taken by him, together with all background information.
- (11) If consultations, held under paragraph 2 of Article XXXVII, relate to restrictions for which there is no authority under any provisions of the General Agreement, any of the parties to the consultations may, in the absence of a satisfactory solution, request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII and in accordance with the procedures set out in the present decision, it being understood 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.

[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.] (MTN.GNG/NG13/W/26, p. 2, para. 8)

[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.] (MTN.GNG/NG13/W/26, p. 2, para. 9)

3. The 1979 Understanding (BISD 26S/210) includes, inter alia, the following paragraphs:

- (4) Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connection, they 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 therefor.
- (5) During consultations, contracting parties should give special attention to the particular problems and interests of less-developed contracting parties.
- (6) 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.
- (8) If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council.

4. In the 1982 Ministerial Declaration, section on "Dispute Settlement Procedures" (BISD 29S/13), the CONTRACTING PARTIES agreed that:

- (1) 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.

5. In case of a request for consultations under GATT Articles XXII:1 or XXIII:1, the contracting parties concerned shall, within a period of no more than [e.g. thirty] days, enter into consultations in good faith with a view to reaching an acceptable solution. (MTN.GNG/NG13/10; MTN.GNG/NG13/W/9, para. 25)

6. If a request for consultations under GATT Articles XXII:1 or XXIII:1 has not been answered within a period of [e.g. thirty] days or if within a period of [e.g. 60 days or, in cases of urgency including perishable goods en route, 30 days] after such a request for consultations the contracting parties concerned have failed to settle a dispute, any party to the dispute may, without prejudice to its rights under GATT Article XXIII:2 or under the GATT Decision of 5 April 1966 (BISD 14S/18), request the Director-General, the Chairman of the CONTRACTING PARTIES or the Chairman of the GATT Council to assist, with the agreement of the other party to the dispute, in the settlement of the dispute by means of good offices, enquiries, mediation or conciliation. Good offices, enquiries, mediation (including ex aequo et bono) or conciliation may continue while the panel process proceeds. Dispute settlements reached through such consultations, good offices, enquiries, mediation or conciliation shall be notified to the GATT Council. They must be consistent with the General Agreement and must not nullify or impair any benefits accruing to other contracting parties under this Agreement. (MTN.GNG/NG13/W/14/Rev.2, paras. 18 to 21; MTN.GNG/NG13/10)

[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.] (MTN.GNG/NG13/W/26, p. 3, para. 9)

[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.] (MTN.GNG/NG13/W/26, p. 4, para. 10)

IV. REQUESTS FOR THE ESTABLISHMENT OF PANELS (existing texts)

1. 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 also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if this were requested by a contracting party invoking the Article. 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. (1979 Understanding, para. 10)

2. Before bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. (1979 Understanding - Annex, para. 4)

3. In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. A prima facie case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge. Paragraph 1(b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement, and paragraph 1(c) if any other situation exists. If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification. (1979 Understanding - Annex, para. 5)

V. COUNCIL DECISIONS ON THE ESTABLISHMENT OF PANELS (existing texts)

1. Upon receipt of the report, the CONTRACTING PARTIES or the Council shall forthwith appoint a panel of experts to examine the matter with a view to recommending appropriate solutions. (1966 Decision, para. 5)

2. In the case of dispute, the CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2.

IV. REQUESTS FOR THE ESTABLISHMENT OF PANELS (revised non-paper)

7. If within a period of [e.g. sixty] days, or in cases of urgency (including perishable goods en route) within [e.g. thirty] days, after a request for consultations pursuant to Articles XXII:1 or XXIII:1 the contracting parties concerned have failed to settle a dispute, the complaining party may request the establishment of a panel under Article XXIII:2. Such a request shall be made in writing with a brief summary of the factual and legal basis of the complaint and of the consultations held. If the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. In case of disagreement over whether the requirements of Article XXIII:2 have been met, it shall be for the Council to decide. (MTN.GNG/NG13/W/14/Rev.2, para. 37; MTN.GNG/NG13/10)

V. COUNCIL DECISIONS ON THE ESTABLISHMENT OF PANELS (revised non-paper)

8. It is for the Council to decide whether or not to establish a panel. The Council shall decide to establish a panel no later than at the first meeting following the Council meeting at which the request was made, unless the Council determines that the request lacks "GATT relevancy" or that the procedural requirements of Article XXIII:2 have not been met. If the Council cannot agree on the "GATT relevancy" of a request under GATT Article XXIII, the Council shall establish the panel which shall then decide on this issue as a preliminary matter. While the parties to the dispute would fully participate in the Council consideration of the request

Since 1952, panels have become the usual procedure. However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council. (1979 Understanding - Annex, para.6 (ii))

3. Working parties are instituted by the Council upon the request of one or several contracting parties. (1979 Understanding - Annex, para. 6(i))

4. The Director-General shall inform the Council of any case in which it has not been found possible to meet the time-limits for the establishment of a panel. (1982 Declaration, para. ii)

#### VI. TERMS OF REFERENCE (existing texts)

1. The terms of reference are discussed and approved by the Council. Normally, these terms of reference are "to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII". When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2. (1979 Understanding - Annex, para. 6(ii))

2. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". (1979 Understanding - Annex, para. 6(i))

3. The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. (1982 Declaration, para. v)

#### VII. COMPOSITION OF PANELS (existing texts)

1. The members of the panel shall act in a personal capacity and shall be appointed in consultation with and with the approval of, the contracting parties concerned. (1966 Decision, para. 5)

2. When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. It is understood that citizens of countries whose governments are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES. (1979 Understanding, para. 11)

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<sup>1</sup>In the case customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.



for a panel, they shall not [be able to] obstruct a consensus on the Council decision on the establishment of a panel. (Unofficial note on the informal meeting of 27-28 April 1988, para. 9; MTN.GNG/NG13/10)

9. In disputes affecting perishable goods en route and in other cases of urgency, the Council shall decide on the establishment of the panel at the Council meeting where the request was made. (MTN.GNG/NG13/8, para. 21; MTN.GNG/NG13/10)

#### VI. TERMS OF REFERENCE (revised non-paper)

10. Panels shall have standard terms of reference unless the Council approves [agrees to, takes note of], no later than at the Council meeting following the meeting at which the panel was established, the use of special terms of reference mutually agreed among the parties to the dispute [or otherwise determined by the Council]. The Council may authorize its Chairman to determine, within a period of 30 days after the establishment of a panel, the terms of reference after having consulted the parties to the dispute. (MTN.GNG/NG13/W/14/Rev.2, para. 43; MTN.GNG/NG13/9, para. 27; MTN.GNG/NG13/10)

#### VII. COMPOSITION OF PANELS (revised non-paper)

11. Panels shall be composed of three members unless the parties to the dispute agree to a panel composed of five members. If there is no agreement on the members within [e.g. 30] days of the establishment of a panel, the Director-General shall, at the request of either party and in consultation with the Chairman of the Council, complete the panel by appointing the panelists, after consulting both parties. (MTN.GNG/NG13/10; MTN.GNG/NG13/8, para. 23; 1984 Action, para. 3)

12. The Director-General may select panel members from regularly updated lists of governmental and/or non-governmental panelists approved by the Council. The roster of non-governmental panelists shall be expanded and improved (e.g. by increasing the number of proposed panelists and by making available their curriculum vitae). (MTN.GNG/NG13/10; MTN.GNG/NG13/8, para. 23; MTN.GNG/NG13/6, para. 16)

13. In disputes among developed and less-developed contracting parties, at least one panel member should be a national from a less-developed country unless the parties to the dispute agree otherwise. Citizens of the parties

3. The parties to the dispute would respond within a short period of time, i.e. seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons. (1979 Understanding, para. 12)

4. In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General<sup>1</sup> the name of one or two persons who would be available for such work. (1979 Understanding, para. 13)

5. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. (1979 Understanding, para. 14)

6. Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country. (1979 Understanding - Annex, para. 6(ii))

7. Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement. (1979 Understanding - Annex, para. 6(iii))

8. With reference to paragraph 13 of the Understanding, contracting parties will co-operate effectively with the Director-General in making suitably qualified experts available to serve on panels. Where experts are not drawn from Geneva, any expenses, including travel and subsistence allowance, shall be met from the GATT budget. (1982 Declaration, para. iii)

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<sup>1</sup>The coverage of travel expenses should be considered within the limits of budgetary possibilities.

to the dispute shall not serve as panelists unless the disputing parties agree. (MTN.GNG/NG13/W/14/Rev.2, paras. 43, 44 and 46; MTN.GNG/NG13/9, para. 28)

9. Contracting parties should indicate to the Director-General the names of persons they think qualified to serve as panelists, who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT. These names should be used to develop a short roster of non-governmental panelists to be agreed upon by the CONTRACTING PARTIES in consultation with the Director-General. The roster should be as representative as possible of contracting parties. (1984 Action, para. 1)

10. 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. (1984 Action, para. 2)

11. 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. (1984 Action, para. 3)

#### VIII. MULTI-COMPLAINANT PROCEDURES (existing texts)

1. It is understood that complaints and counter-complaints in regard to distinct matters should not be linked. (1979 Understanding, para. 9)

#### IX. THIRD PARTY PRACTICE (existing text)

1. Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel. (1979 Understanding, para. 15)

VIII. MULTI-COMPLAINANT PROCEDURES (revised non-paper)

14. Where more than one contracting party request the establishment of a panel related to the same matter, the Council may establish a single panel to examine these complaints taking into account the rights of all parties concerned. (MTN.GNG/NG13/10)

15. The panel will organize its examination and present its findings to the Council so that the procedural rights, which the parties to the dispute would have enjoyed if separate panels had examined the complaints, are in no way impaired. If one of the parties to the dispute so requests, the panel will submit separate reports on the dispute concerned. The written submissions by each of the complainants will be made available to the other complainants, and each complainant will have the right to be present when one of the other complainants presents its views to the panel. (MTN.GNG/NG13/10; MTN.GNG/NG13/9, para. 29; MTN.GNG/NG13/8, para. 33; MTN.GNG/NG13/W/28, paras. 9 and 10. For a more complete discussion on multi-complainant procedures and proposals relating thereto, see MTN.GNG/NG13/W/28, Part I and MTN.GNG/NG13/9, paras. 15-20.)

IX. THIRD PARTY PRACTICE (revised non-paper)

16. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council prior to the first meeting of the panel, shall have an opportunity to be heard by the panel

2. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. (1979 Understanding - Annex, para. 6(iv))

3. The panel deliberations are secret. (1979 Understanding - Annex, para. 6(viii))

4. If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any contracting party with an interest in the matter has a right to enquire about and be given appropriate information about that solution in so far as it relates to trade matters. (1979 Understanding, para. 19)

X. GENERAL PROCEDURES FOR PANELS (existing texts)

1. The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including and objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2 (1979 Understanding, para. 16)

2. 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 this connection, panels have consulted regularly with the parties to the dispute and have given them adequate opportunity to develop a mutually satisfactory solution. Panels have taken appropriate account of the particular interests of developing countries. 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. (1979 Understanding - Annex, para. 3)

3. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (1979 Understanding, para. 16)

4. After reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to ... a clear finding with respect to any contravention of GATT provisions or nullification and impairment of benefits. ... Where a finding establishing a contravention of GATT provisions or nullification and impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to contracting parties which they consider to be concerned or give a ruling on the matter as appropriate. (1982 Declaration, para. v)

and to make written submissions to the panel. These submissions shall be given also to the parties to the dispute and shall be reflected in the panel report. At the request of the intervening third contracting party, the panel may grant the intervening third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submission to the intervening third contracting party. (MTN.GNG/NG13/10; MTN.GNG/NG13/9, para. 30; MTN.GNG/NG13/8, para. 33) (For a more complete discussion of third party practice and proposals relating thereto, see MTN.GNG/NG13/W/28, Part II, and MTN.GNG/NG13/9, paras. 21-22.)

X. GENERAL PROCEDURES FOR PANELS (revised non-paper)

17. Panels shall use "standard working procedures" to be approved by the GATT CONTRACTING PARTIES. Panels shall submit the panel report to the GATT Council within a reasonable period of time, extending from three months after the establishment of a panel in the case of "urgency procedures", to no more than [six] nine months, in normal cases. This is without prejudice to the Decision of 5 April 1966 (BISD 14S/18). In the event that a panel is unable to meet the applicable time limit for the completion of its work, it shall inform the Council in writing of the reasons for the delay and the anticipated additional time required. (MTN.GNG/NG13/W/14/Rev.2, para. 52; MTN.GNG/NG13/9, para. 31. See also MTN.GNG/NG13/W/4, pp. 48f for the text of the "Suggested Working Procedures" regularly used by GATT panels since 1985.)

Impartiality of panels

5. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. (1979 Understanding, para. 14)

Setting up of working procedures and organization of work

6. Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the Parties concerned. The panel invites the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. (1979 Understanding - Annex, para. 6(iv))

7. [W]here 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. (1984 Action)

Right of the panel to seek information and advice

8. Each panel should have the right to seek information and technical advice from any individual or body within the jurisdiction of a State it shall inform the government of that State. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information. (1979 Understanding, para. 15)

9. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. (1979 Understanding - Annex, para. 6 (iv))

Confidentiality

10. [T]he panel deliberations are secret. (1979 Understanding - Annex, para. 6(viii))

11. Written memoranda submitted to the panel have been considered confidential, but are made available to the Parties to the dispute. (1979 Understanding - Annex, para. 6(iv))



Drafting of the report and its submission to the parties

12. The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made. (1979 Understanding - Annex, para. 6(vi))

13. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes. (1979 Understanding, para.17)

14. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made. 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. (1979 Understanding - Annex, para. 6(v))

15. The opinions expressed by the panel members on the matters are anonymous. (1979 Understanding - Annex, para. 6(viii))

16. To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel should first submit the descriptive part of its report to the Parties concerned, and should subsequently submit to the Parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are circulated to the CONTRACTING PARTIES. (1979 Understanding, para. 18; see also 1979 Understanding - Annex, para. 6(v))

17. In accordance with their terms of reference established by the CONTRACTING PARTIES panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, if so requested by the CONTRACTING PARTIES, formulated draft recommendations addressed to the parties. In yet other cases panels were invited to give a technical opinion on some precise aspect of the matter (e.g. on the modalities of a withdrawal or suspension in regard to the volume of trade involved). (1979 Understanding - Annex, para. 6(viii))

Circulation of the report to the CONTRACTING PARTIES

18. Where the Parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. Where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached. (1979 Understanding, para. 17)

Avoidance of delays

19. 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. (1979 Understanding, para.20; 1982 Declaration, para. vi)

20. 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. (1979 Understanding - Annex, para. 6(ix))

21. 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. (1979 Understanding, para. 20)

#### Report to the Council on delays

22. Panels would aim to deliver their findings without undue delay, as provided in paragraph 20 of the Understanding. If a complete report cannot be made within the period foreseen (i.e. three to nine months), panels would be expected to so advise the Council and the report should be submitted as soon as possible thereafter. (1982 Declaration, para. vi)

#### Special procedures under 1966 Decision

23. In conducting its examination and having before it all the background information, the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected contracting parties. (1966 Decision, para. 6)

24. The panel shall, within a period of sixty days from the date the matter was referred to it, submit its findings and recommendations to the CONTRACTING PARTIES or to the Council, for consideration and decision. Where the matter is referred to the Council, it may, in accordance with Rule 8 of the Intersessional Procedures adopted by the CONTRACTING PARTIES at their thirteenth session (BISD, 7S/9), address its recommendations directly to the interested contracting parties and concurrently report to the CONTRACTING PARTIES. (1966 Decision, para.7)

#### Particular interests of developing countries

25. Panels have taken appropriate account of the particular interests of developing countries. (1979 Understanding - Annex, para. 3)

[In cases where the Council establishes a panel upon the receipt of the report of the Director-General, whose good offices, initiated at the request of a complaining less-developed contracting party, failed to produce a mutually satisfactory solution, the panel shall endeavour to complete its work within a period of 60 days from the date the matter was referred to it in accordance with the 1966 Decision on Procedures under Article XXIII. If the panel is unable to meet the above time-limit, it shall report to the Council the reasons for the delay and the Council would grant extension as appropriate.] (MTN.GNG/NG13/W/19, para. 2,d)

[At the request of a (less-developed) contracting party which has only limited retaliatory power vis-à-vis major trading partners, panel reports may include an appropriate recommendation on the amount of compensation due in case the main panel findings are not implemented by a developed contracting party within such time-limit.] (MTN.GNG/NG13/W/19, p. 6, para. 3,b; MTN.GNG/NG13/5, para. 11)

XI. SECRETARIAT ASSISTANCE TO PANELS AND PARTIES (existing texts)

1. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels. (1979 Understanding - Annex, para. 6(iv))
2. The technical assistance services of the GATT secretariat shall, at the request of a less-developed contracting party, assist it in connection with matters dealt with in this understanding. (1979 Understanding, para. 25)
3. The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with. (1982 Declaration, para. iv)

[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.] (MTN.GNG/NG13/W/26, p. 7, para. 4)

[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.] (MTN.GNG/NG13/W/26, p. 7, para. 6)

XI. SECRETARIAT ASSISTANCE TO PANELS AND PARTIES (revised non-paper)

18. The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with. (1982 Declaration, para. iv; MTN.GNG/NG13/6, para. 16; MTN.GNG/NG13/8, para. 25; MTN.GNG/NG13/10)

[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.] (MTN.GNG/NG13/W/26, p. 7, para. 7)

[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.] (MTN.GNG/NG13/W/26, p. 7, para. 8)

## XII. OBJECTIONS TO PANEL FINDINGS

### XIII. COUNCIL DECISIONS ON ADOPTION OF PANEL REPORTS AND RECOMMENDATIONS (existing texts)

1. 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. (1979 Understanding, para. 21)

2. 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. (1982 Declaration, para. vii)

3. 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. This does not prejudice the provisions on decision-making in the General Agreement. (1982 Declaration, para. x)

4. It is noted that Article XXV may, as recognized by the CONTRACTING PARTIES, inter alia, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930), also afford an appropriate avenue for consultation and dispute settlement in certain circumstances. (1979 Understanding, para. 1)

### XIV. PARTICIPATION OF PARTIES TO A DISPUTE IN COUNCIL DECISIONS ON PANEL REPORTS (existing texts)

1. 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. (1982 Declaration, para. viii)

XII. OBJECTIONS TO PANEL FINDINGS (revised non-paper)

19. Objections to panel findings shall be justified in a written submission to the Council at the meeting at which the panel report is presented to the Council. (MTN.GNG/NG13/10)

20. If the panel report was circulated to contracting parties less than 30 days prior to the meeting at which it is presented to the Council, a third contracting party may at this Council meeting reserve the right to submit written, reasoned objections to the adoption of the panel report prior to the subsequent Council meeting at which the Council shall then decide on the adoption of the report. (MTN.GNG/NG13/10; MTN.GNG/NG13/9, para. 32; MTN.GNG/NG13/8, para. 26)

XIII. COUNCIL DECISIONS ON ADOPTION OF PANEL REPORTS AND RECOMMENDATIONS (revised non-paper)

21. Council decisions on the adoption of panel reports and on specific recommendations for remedy shall normally be taken at the meeting at which the panel report is first presented to the Council. In case of objections to the adoption of a panel report, the Council shall dispose of the panel report and of the objections within a period of [normally no more than, e.g. two months] after the report is first presented to the Council. (MTN.GNG/NG13/8, para. 26; MTN.GNG/NG13/9, para. 33; MTN.GNG/NG13/10)

[In the case of a matter raised by a less-developed contracting party, the recommendations of the CONTRACTING PARTIES may include measures of compensation for injury caused if the circumstances are serious enough to justify such measures.] (MTN.GNG/NG13/W/15, p. 8, para. 11)

[In the case of a matter raised by a less-developed contracting party, the time-limit for implementation of the recommendations of the CONTRACTING PARTIES shall not exceed ninety days.] (MTN.GNG/NG13/W/15, p. 9, para. 12)

XIV. PARTICIPATION OF PARTIES TO A DISPUTE IN COUNCIL DECISIONS ON PANEL REPORTS (revised non-paper)

22. The parties to a dispute shall have the right to fully participate in the consideration of the panel report by the CONTRACTING PARTIES, including the consideration of any rulings or recommendations the CONTRACTING PARTIES might make pursuant to Article XXIII:2 of the General Agreement, and their

2. The Parties to a dispute would fully participate in the consideration of the matter by the CONTRACTING PARTIES ... 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 ... 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.<sup>1</sup> It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement. [1982 Declaration, para. x]

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<sup>1</sup>This does not prejudice the provisions on decision-making in the General Agreement.



views shall be fully recorded. They shall likewise have the right to participate and have their views recorded in the consideration of any further actions taken by the CONTRACTING PARTIES under Article XXIII:2. The CONTRACTING PARTIES reaffirm that consensus will continue to be the traditional method of resolving disputes. However, the CONTRACTING PARTIES further resolve that obstruction in the process of dispute settlement shall be avoided and that the provisions on decision-making in the General Agreement [Article XXV] remain applicable. [Parties to a dispute shall have the opportunity to disassociate themselves from a consensus decision on the adoption of a panel report.] It is understood that Council decisions in the dispute settlement process cannot add to or diminish the rights and obligations provided in the General Agreement. (BISD 29S/16; MTN.GNG/NG13/8, para. 27; MTN.GNG/NG13/9, paras. 2 and 34, MTN.GNG/NG13/10)

[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 had made presentations to a panel, 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.] (MTN.GNG/NG13/W/14/Rev.2, para. 66; MTN.GNG/NG13/10)

[The CONTRACTING PARTIES should continue the present practice of adoption by consensus but should make it more difficult in political terms to resist a consensus. This might be achieved by having a more structured arrangement for justifying opposition - e.g. written submissions to the GATT Council or Code Committees which could then be discussed] (MTN.GNG/NG13/W/22, para. 3; MTN.GNG/NG13/10)

[The adoption of panel reports could be facilitated by considering the general conclusions as regards GATT conformity separately from the specific recommendations for remedy. As regards a legal finding, the traditional consensus of all CONTRACTING PARTIES would still be required, whereas a decision on the recommendations for action would be taken in a more flexible manner, e.g. where a consensus might be considered to exist although the recommendations raise difficulties for one of the parties to the dispute.] (MTN.GNG/NG13/W/22, para. 3; MTN.GNG/NG13/10)

[A third option might be, in cases where the full consensus as regards the legal finding is not possible, to follow the procedure of taking note (which has a weaker connotation as regards the legal precedent); but nonetheless to seek a decision on the recommendations in a pragmatic way as suggested above.] (MTN.GNG/NG13/W/22, para. 3; MTN.GNG/NG13/10)

XV. IMPLEMENTATION OF ADOPTED PANEL REPORTS AND RECOMMENDATIONS (existing texts)

1. 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. (1966 Decision, para. 8)

2. 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. (1966 Decision, para. 9)

3. 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. (1966 Decision, para. 10)

4. 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. (1979 Understanding - Annex, para. 4)

5. 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. 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. (1982 Declaration, paras. vii, viii)

XV. IMPLEMENTATION OF ADOPTED PANEL REPORTS AND RECOMMENDATIONS (revised non-paper)

23. [Panels may recommend, and] The Council shall decide upon a reasonable period for the [earliest possible] implementation of panel rulings and recommendations. No less than at every third Council meeting [every three months] after the adoption of such rulings and recommendations pursuant to Article XXIII:2, the Council shall review the implementation of such rulings and recommendations. For each such Council meeting, the contracting parties concerned shall provide the Council in due time with status reports on their implementation of the rulings and recommendation. In [recommending and] deciding upon schedules for implementation, [panels and] the Council shall take into account the particular [development] circumstances of the contracting parties concerned. (MTN.GNG/NG13/W/14/Rev.2, paras. 74-75; MTN.GNG/NG13/9, para. 35; MTN.GNG/NG13/10]

[Where a developing country is faced with implementing a panel recommendation involving structural adjustment measures, the panel and the Council, respectively, in recommending and deciding upon a schedule of implementation, shall take account of the developing country's need to continue to be in a position to assure its economic development in order to fulfil its obligations to international financial institutions and the broader international economic community.] (MTN.GNG/NG13/9, para. 35; MTN.GNG/NG13/10)

[Within three months of the Council's adoption of a panel report, the contracting party charged with implementing the panel's recommendations shall submit to the Council a plan for implementation of such recommendations.] (MTN.GNG/NG13/10)

[In appropriate circumstances, a contracting party concerned could request the Director-General to present a report to the Council on the status of implementation of adopted panel recommendations.] (MTN.GNG/NG13/10)

[In the case of a matter raised by a less-developed contracting party, the time-limit for implementation of the recommendations of the CONTRACTING PARTIES shall not exceed ninety days.] (MTN.GNG/NG13/W/15, p.9, para. 12)

[Where the contracting party concerned by a measure is a less-developed country, the Council shall require that the contracting party charged with implementation of an adopted panel recommendation complete such implementation within a maximum period of 15 days.] (MTN.GNG/NG13/10)

[Regarding the implementation of panel recommendations in disputes involving measures found to be inconsistent with the General Agreement, the panel shall recommend that the measures be withdrawn or brought into conformity with the General Agreement at the earliest possible time. Regarding the implementation of panel recommendations in "non-violation complaints" not involving allegations of inconsistency with the General Agreement, the panel may recommend a reasonable period of time for implementation.] (MTN.GNG/NG13/10)

6. 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. (1982 Declaration, para. viii)

7. 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. (1982 Declaration, para. ix)

24. If the immediate withdrawal of measures inconsistent with the General Agreement is impracticable and as a temporary relief pending the withdrawal of the measures, the contracting parties concerned may request compensation (1979 Understanding - Annex , para. 4; MTN.GNG/NG13/10). The failure to implement rulings or recommendations made under Article XXIII:2 gives rise to a right to compensation or, if compensation is not granted pending the withdrawal of the measures which are inconsistent with the General Agreement and if the circumstances are serious enough, to the authorization by the CONTRACTING PARTIES of suspension of concessions or other obligations as foreseen in Article XXIII:2. The Council may reconvene the panel, establish a working party, or request the Director-General to examine a request for compensation or for an authorization to suspend the application of obligations pursuant to Article XXIII:2. The CONTRACTING PARTIES affirm that, as an interim measure, compensation is to be given preference over the suspension of concessions or other obligations under this Agreement. The granting of compensation and the authorization to suspend GATT obligations do not relieve the contracting party concerned of its obligation to remove GATT-inconsistent trade measures. (MTN.GNG/NG13/W/14/Rev.2, para. 76; MTN.GNG/NG13/10; MTN.GNG/NG13/9, para. 35]

[In the event that a recommendation of the CONTRACTING PARTIES is not implemented within the prescribed period (of ninety days), the CONTRACTING PARTIES shall consider what measures, further to suspension of concessions by the party affected, should be taken to resolve the matter. In the case of a matter raised by a less-developed contracting party, those measures may be of a collective nature.] (MTN.GNG/NG13/W/15, para. 13)

[At the request of a less-developed contracting party which has only limited retaliatory power vis-à-vis major trading partners, panel reports may include an appropriate recommendation on the amount of compensation due in case the main panel findings are not implemented by a developed contracting party within the prescribed time-limit.] (MTN.GNG/NG13/W/19, para. 3b)

[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.] (MTN.GNG/NG13/W/26, p. 8, para. 5)

[When a developed contracting party cannot immediately comply with the recommendation 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.] (MTN.GNG/NG13/W/26, p. 8, para. 6)

## XVI. ARBITRATION

### XVII. SURVEILLANCE BY COUNCIL (existing texts)

1. 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. (1979 Understanding, para. 22)
2. 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. (1979 Understanding, para. 23)
3. 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. (1979 Understanding, para. 24)

[Retroactive compensation could cover also the prejudice originating from a threat of retaliation, especially against a less-developed contracting party] (MTN.GNG/NG13/6, para. 10)

XVI. ARBITRATION (revised non-paper)

25. Arbitration may be entered into by mutual agreement of parties to a dispute. Without prejudice to other forms of mutually agreed arbitration, the parties to a dispute may, by common agreement, request the Council [or the Director-General] to establish a panel with an arbitration mandate mutually agreed by the parties to the dispute. The requested arbitration panel shall be established within thirty days after the request has been notified to the GATT Council unless the GATT Council [or the Director-General] concludes that the arbitration mandate is incompatible with the multilateral GATT legal system. Arbitration awards are legally binding on the parties to the dispute and on third contracting parties which have intervened in the arbitration proceeding. The arbitration award cannot nullify or impair the rights of third contracting parties not participating in the arbitration procedure, including their rights under Article XXIII, nor the competence of the CONTRACTING PARTIES to interpret GATT law and to decide on the authorization of the suspension of obligations pursuant to Article XXIII:2. The Council shall be informed of the results of the arbitration and shall, as circumstances warrant, take appropriate action in light thereof. (MTN.GNG/NG13/W/14/Rev.2, paras. 84 and 90; Unofficial note on the informal meeting of 27-28 April 1988, para. 17; MTN.GNG/NG13/9, para. 37)

XVII. SURVEILLANCE BY COUNCIL (revised non-paper)

26. The dispute settlement functions of the Council and its surveillance of the implementation of panel reports shall be strengthened by making these subjects regular agenda items of Council meetings. (MTN.GNG/NG13/W/14/Rev.2, paras. 26-28, 95-96)

[In order to give its full attention and focus to the settlement of disputes and to its surveillance of the implementation of rulings or recommendations under Article XXIII:2, the Council may decide to meet in a special "Dispute Settlement Mode" to carry out all its functions relating to disputes. The Council, when meeting in such a Dispute Settlement Mode, may decide to be chaired by a Chairman appointed or elected for that purpose by the CONTRACTING PARTIES] (MTN.GNG/NG13/W/14/Rev.2, paras. 29-31, 95-96; MTN.GNG/NG13/9, para. 38; MTN.GNG/NG13/10)

27. All bilateral settlements of matters brought under the GATT dispute settlement system shall be notified to the Council. The Council may, in appropriate circumstances, review mutually agreed settlements of GATT disputes for their consistency with the General Agreement. (MTN.GNG/NG13/W/26, p. 9, para. 2; MTN.GNG/NG13/8, paras. 5, 8 and 13)

4. In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendation. 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 or 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. (1982 Declaration, para. viii)

5. 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. (1982 Declaration, para. ix)

6. The 1966 Decision includes the following paragraphs:

"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."



[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.]  
(MTN.GNG/NG13/W/26, p. 9, para. 2)

[Even where consultations [and mediation] 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]  
(MTN.GNG/NG13/W/26, p.2, paras. 9 and 10)

XVIII. STRENGTHENED COMMITMENTS OF CONTRACTING PARTIES (existing texts)

1. If improvement in the whole system is to be achieved, it is necessary not only to make specific procedural improvements, but also to obtain a clear cut understanding by and commitment from the CONTRACTING PARTIES (or Signatories to the Codes) with respect to the nature and time-frame of (a) the panel process; (b) the decision on the dispute matter to be taken by the CONTRACTING PARTIES [or the Code Committee] on the basis of the panel's report; and (c) the follow-up to be given to that decision by the parties to the dispute. (1984 Action)

2. A number of procedural problems related to the panel process have been encountered which can be addressed within the existing framework. Such problems include the formation of panels in a timely manner, and the timely completion of panel work. Although the "Understanding" provides guidelines for these procedures (thirty days for the formation of a panel and three to nine months to complete the panel's work), experience has shown these time targets are seldom met. These are only a couple of difficulties related to the dispute settlement mechanism, so addressing them alone will not cure all its deficiencies. However, procedural improvements can lead to improvements in the quality of panel reports. (1984 Action)

XVIII. STRENGTHENED COMMITMENTS OF CONTRACTING PARTIES (revised non-paper)

28. Contracting parties shall strengthen their political commitment to abide by the dispute settlement rules and procedures in GATT. They shall have recourse to these GATT procedures for settling their international trade disputes and shall refrain from unilateral measures inconsistent with these GATT rules. To this effect, contracting parties undertake to adjust their domestic trade legislation and enforcement procedures in a manner ensuring the conformity of all measures with GATT [Article XXIII:2]. (Unofficial note on the informal meeting of 27-28 April 1988, para. 20; MTN.GNG/NG13/9, para. 39; MTN.GNG/NG13/10)

[Contracting parties undertake to adjust their domestic trade legislation and enforcement procedures in a manner ensuring their conformity with the General Agreement.] (MTN.GNG/NG13/10)

[Contracting parties shall incorporate their international GATT obligations into their domestic laws so as to ensure their conformity with the General Agreement.] (MTN.GNG/NG13/10)

29. The contracting parties agree to elaborate a consolidated instrument integrating the various GATT dispute settlement procedures and any agreed improvements into one single, transparent text. The transparency of the GATT dispute settlement procedures and practices shall be further enhanced by a handbook, to be prepared by the secretariat, with a compilation of all pertinent GATT dispute settlement rules, procedures and GATT practices relating to Articles XXII and XXIII. (Unofficial note on the informal meeting of 27-28 April 1988, para. 20; MTN.GNG/NG13/W/14/Rev.2, paras. 101 and 103)