NOTE ON THE MEETING OF 27 MAY TO 6 JUNE 1991

1. The Chairman at the thirty-eighth meeting of the GNS noted that the agenda for the meeting was to be found in GATT/AIR/3183 of 17 May 1991 and after requesting whether anyone would like any matter to be taken up under "other business" he turned to item 2.1 on matters relating to the scheduling of commitments. He referred to the two informal secretariat notes of 21 May which were introduced by the representative of the secretariat. He then invited delegations to comment.

2. The representative of Switzerland noted that the schedule was the document that at the end of the negotiation would reflect what concessions had been made by any one party. It was a way of ensuring legal security and predictability. He considered that quantitative restrictions should be listed under the market access column. The scope of Article VI needed to be made clear in order to determine which qualitative non-discriminatory restrictions should be listed under market access.

3. The representative of the European Communities considered that measures covered by Article VI should not normally appear in the schedule, but a measure which discriminated between foreign and domestic providers should be scheduled. Measures deemed to fall under Article VI included qualifications, standards, and non-trade-distortive authorization/licensing procedures. Although these were not to be scheduled he wondered whether it was necessary to have further transparency. He warned that schedules should not contain the entirety of national regulatory regimes. He suggested that it would be useful to look at the adequacy of the transparency requirements of Article III, particularly the notification requirement. Some non-discriminatory measures did fall under Article VI and therefore need not be scheduled; in such cases it was necessary to develop criteria to distinguish between Article VI-type measures which were designed to ensure the quality of a service or verify the capacity of the provider to provide the service, and non-discriminatory measures which fell in the area of market access restrictions. Such measures were primarily of a quantitative nature, the extreme case being a monopoly. Agreement ought to be possible that quantitative types of non-discriminatory restriction should be scheduled where they existed. Regarding the distinction between market access and national treatment, he favoured applying the same "no less favourable" standard to a measure whether it affected entry to, or operation in, the market. All measures affecting both entry and operation that did not meet the "no less favourable" standard ought to be placed in the same column, leaving non-discriminatory market access restrictions in a separate column. Furthermore, the identification of the four modes of

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supply was preferable, although in some cases these were horizontal measures, particularly in relation to the purchase of services by consumers abroad. Personnel movement even if linked to another mode, probably had to be covered separately in terms of commitments. There could also be horizontal commitments.

4. The representative of Japan recalled his delegation's earlier proposal regarding three conceptual options for the scheduling of commitments. Turning to Article VI:2, he emphasised the need for further examination of what was meant by the term "objective criteria".

5. The representative of Sweden said that in sectors where specific commitments were made, all regulations that did not provide for national treatment had to be listed in the national treatment column. Regarding the question of what additional restrictions had to be scheduled, he noted that according to the present framework, regulations that restricted market access should be listed. Market access however was not specifically defined in Article XVI. Nevertheless three categories of market access restriction were relevant for listing under the market access column: first, all quantitative restrictions or numerical limitations, regardless of whether discriminatory or not, had to be scheduled; the second category involved regulations built on non-objective criteria within the meaning of Article VI, an illustrative list of such regulations could be elaborated; third, additional commitments which would result from the request/offer negotiations. An alternative to category 3 would be to have them in special protocols which could, for instance, contain sectoral commitments made by several countries. This approach seemed to be similar to the third option outlined by Japan, i.e. having discriminatory restrictions in the national treatment column and non-discriminatory restrictions in the market access column. He considered that the four modes of delivery were not very useful for scheduling purposes, as explained in the initial offers made by the Nordic countries.

6. The representative of the United States said the schedule of commitments would have three columns. The national treatment column would list any measures that were discriminatory whether the discrimination occurred upon, or after, entry into the market. The market access column would be used for measures where there was no discrimination between domestic and foreign service providers but where there were quantitative restrictions on market access; these could include any sort of numerical limitations (e.g. monopolies, limited number of licences, and economic needs tests that had the effect of a quantitative limit). A further issue related to what kind of qualitative measures (which were not covered by Article VI) would limit market access and therefore have to be scheduled under market access. A third column would be necessary to schedule other or additional commitments that provided access in ways that might not be clearly spelled out in the individual principles of the agreement.

7. The representative of Mexico favoured the scheduling of discriminatory measures. It was, however, important to include reference to all regulations which were relevant to the sectors offered, including those restrictions which entailed quantitative limitations on the number of service
providers. The final drafting of Article VI should establish criteria in order to identify those regulations which were not discriminatory. He considered it necessary to separate conditions and limitations on market entry from conditions and limitations on operations once market access had been granted. Non-discriminatory quantitative limitations should not be listed under the market access heading, but should be made clear under the provisions on transparency.

8. The representative of Austria said his delegation's offer had concentrated on the market access column mainly in order to provide a maximum of transparency. He added that their offer would be very much shorter if Article VI-type information were excluded. What should be included in the national schedule were quantitative limitations including monopolies, nationality requirements, discriminatory treatment for foreign providers (e.g. higher taxes or fees), or limitations on foreign ownership.

9. The representative of Korea said that his country had not listed non-discriminatory measures such as numerical limitations in its offer on the grounds that such measures fell under Article VI. His government was however flexible in this regard depending on agreement between parties on what kind of measures Article VI would cover. The representative of Canada agreed with several other delegations on the need to define what was covered by Article VI.

10. The representative of India noted that the framework was built on a theoretical model where there was a distinction between entry and operating conditions. The distinction was also valid and essential for scheduling purposes. The issue which required resolution concerned the question of what measures were covered by Article VI:2 where some principles had been laid down about the requirements that service providers might have to fulfill in operating in the market. Since the group had accepted a "bottom-up" approach in scheduling commitments, i.e. of listing those sub-sectors where commitments were being made, the issue was how to inscribe conditions and limitations in the national treatment and market access columns. In his view, this issue was more a matter of convenience than a question of a "top-down" or a "bottom-up" approach. He noted that the suggestion had been made that all non-discriminatory restrictions should also be scheduled in the market access column; in the case of monopolies, since there was no access it should not be scheduled. His delegation was willing to examine the need to better define market access as long as the column was not reduced to only including non-discriminatory restrictions and nothing else.

11. The representative of Hungary could not see the basis for distinguishing between non-discriminatory measures of a quantitative and of a qualitative kind as both could be trade restrictive. A uniform approach would be needed to deal with both types of measures.

12. The representative of New Zealand said she supported the need for two headings in the schedules: one was the "no less favourable" or discriminatory column taking both access and operation into account; the second column would deal with non-discriminatory measures with respect to market
access. Under the second column quantitative or numerical restrictions should be covered, but these were not all the measures that should be listed. Discriminatory measures would be dealt with under the national treatment heading; there were also quantitative restrictions and measures that were preferential or discriminatory in effect. Whether this third category was part of a broader definition of national treatment or should come under the market access heading needed to be addressed. She saw Article VI measures as definitely not being bound and not being entered into schedules. However, for a sector where a binding had been undertaken, she noted that the GATS agreement should ensure the security of concessions by allowing for non-violation cases. Regarding the binding of horizontal measures, the precise legal status of including such measures in a headnote to the schedule needed to be made clear. The representative of Australia agreed that it was necessary to schedule discriminatory measures as well as both quantitative and qualitative non-discriminatory measures which affected market access.

13. The representatives of Egypt and Pakistan considered that the distinction between conditions on access and conditions affecting operation in a market was a valid one which should be maintained. The representative of Argentina stressed the need for clarity when inscribing commitments in national schedules.

14. The representative of Hong Kong considered that non-discriminatory measures imposing a quantitative limit on market access should be scheduled. To devise a clear rule for other non-discriminatory measures would be difficult, if the measures conformed to the criteria contained in Article VI they should not as a general rule be scheduled. In this regard, an illustrative list of examples of non-discriminatory qualitative measures which were trade distorting would be useful. Countries would have to rely on an effective dispute settlement mechanism to ensure that benefits were not unduly impaired or nullified.

15. The representative of Yugoslavia considered that non-discriminatory measures should not be scheduled or subject to negotiation, but should be subject to a transparency obligation. The objective criteria in Article VI:2 should be defined precisely in order to cover all possible cases.

16. The representative of the European Communities, supported by several delegations, suggested that, in order to facilitate further discussion, the secretariat put forward, on the basis of the discussion held, a certain number of complete options that had materialized regarding the implications for the coverage of Articles VI and XVI in particular.

17. The Chairman opened the discussion on item 2.2 of the meeting’s agenda on matters relating to the classification list and invited the representative of the secretariat to introduce the note prepared on the subject. After this introduction, the Chairman opened the floor for comments.

18. The representatives of the European Communities, Canada, Chile, the United States, Japan, Poland, Sweden on behalf of the Nordic countries and Mexico found that the proposed classification contained in the informal
note by the secretariat constituted an improvement over the list contained in MTN.GNS/W/50. There was confirmation of the agreement to base the classification of services sectors and sub-sectors as much as possible on the Central Product Classification (CPC) list. There was some agreement that putting together a classification list of services was an on-going work which required coordination with efforts undertaken in other fora. The representative of Austria stressed the need to involve statistical experts in the work since the classification list resulting from the GNS would in the future serve as the basis for the compilation of statistics on services. The representative of Japan said not only statistical but also sectoral experts should take part in drawing up the list.

19. The representative of the United States did not wish to have extensive discussions on the matter and stressed that the composition of the list was not a matter for negotiations. This view was shared by the representative of the European Communities. The representatives of the United States, Poland, Malaysia and Austria said that the list should be illustrative or indicative and not bind parties to any specific nomenclature. The representative of Malaysia suggested that it would be important to have the definitions behind individual items in the list, especially where there was a high degree of aggregation.

20. The Chairman confirmed that he expected participants to submit written comments on the proposed classification list to the secretariat by Friday, 14 June 1991, so that a new and final version incorporating these comments could be made available by the end of June or as soon as possible thereafter.

21. The Chairman opened the discussion on dispute settlement as contained in item 2.5 of the meeting’s agenda.

22. The representative of Canada said that dispute settlement provisions constituted an essential element of the framework and should be coherent and credible in nature. The focus of the discussion on dispute settlement should be on draft Article XXIII (dispute settlement and enforcement) and associated procedures. Traditional GATT procedures should be for the most part applicable to the services agreement. In considering the issue of exhaustion of local remedies, a distinction should be drawn between processes to be settled through a multilateral dispute settlement system among states and those to be settled within individual states involving natural or juridical persons. A related issue was whether individual cases could be brought to the GATS and whether patterns of practice would, in all instances, serve as conditions for bringing them before a GATS panel. For his delegation, patterns of practice would not suffice for all cases (e.g. cases arising in countries where there was no recourse to appeal processes).

23. He said that, generally, the draft Article XXIII was adequate in its treatment of violation cases for which Parties should be entitled to seek mutually satisfactory resolutions. However, the treatment of non-violation cases, which appeared within square brackets under paragraph 4 of the draft Article XXIII, still required further detail and precision. It was
essential to provide adequate assurance for expert input into the work of services panels. Provisions on expert participation could cover aspects such as the number of panellists, the proportion of such panels which should be filled by experts, the types of panels envisaged and the conditions for recourse to experts if panels were not to include experts in their structure. He asked whether participation of experts on panels should be mandated and whether experts consulted by a panel should be from a previously constituted group.

24. Regarding retaliation, he said that further discussion was necessary on the question of proportionality or "equivalent commercial effect". On cross-sectoral retaliation, he suggested that countries should strive towards resolutions within the same sector before involving other sectors in the settlement of disputes. As circumstances might not permit satisfactory resolutions within the limits of a single sector, provisions in Article XXIII should not be overly rigid with respect to cross-retaliation. An additional decision might be envisaged by the Parties as to whether retaliation could go beyond certain sectors in certain cases. Another important issue was whether countries should be permitted to retaliate against juridical or natural persons already present in a particular market. This type of retaliation could pose enormous problems since it would be directed against rights which had presumably been acquired by such persons. Perhaps a feasible approach would be to prohibit the entry of, or limit the rights granted to, new juridical or natural persons.

25. He noted that the Group should also agree on the relationship of dispute settlement provisions in GATS to similar provisions in other agreements. In order to avoid or limit cases where conflicts could arise, Article XXIII could provide for the overriding of existing agreements in the area of dispute settlement and retaliation. A related question would be whether subsequent agreements should also be overridden by the provisions of the draft article.

26. The representative of the European Communities said that all rights dealt with in the agreement were those derived from obligations taken by Parties. It was desirable for parties to exhaust local remedies before resorting to a multilateral dispute settlement system. He agreed that relying on patterns of practice did not always constitute the best means to deal with individual decisions. He found that the treatment of non-violation cases in paragraph 4 of draft Article XXIII tracked broadly with the approach usually adopted by the EC in its practice. The concept of non-violation should be carefully circumscribed in order to avoid abuses in its interpretation. He agreed that the Group needed to discuss whether panels should include or consult experts who were independent or members of sectoral bodies. However, the Group should not lose sight of the fact that panels should be subordinated to the Council which, as in the GATT, would be the highest body in the dispute settlement system applying to services trade. He agreed with the representative of Canada regarding the issues of retaliation and acquired rights of juridical and natural persons. He added that the issue of the conflict with other agreements was an important one, not only in the context of dispute settlement but also with respect to other important provisions such as draft Article II on m.f.n.
27. The representative of Switzerland agreed that GATT dispute settlement provisions should be in large measure applicable to the services agreement, including improvements which might result from current negotiations in the dispute settlement group. Provisions under draft Article XXIII were adequate in their application to both violation and non-violation cases. Though sectoral specificities might warrant the participation of experts in panels, an effort should be made to avoid departing from the notion of common interpretation of framework provisions. In order to avoid fragmentation or inconsistencies, all sectors should be subject to the same procedures. The main objective of the dispute settlement system applying to services trade should be to arrive at the elimination of measures found inconsistent with the provisions of the GATS. Remedies should include compensation, suspension of concessions and retaliation.

28. The representative of Sweden, speaking on behalf of the Nordic countries, agreed with others that having a common dispute settlement system for goods and services trade was desirable for both practical and legal reasons. His delegation found that the question of expertise in the choice of panellists did not require any special provision in Article XXIII or elsewhere since, as had been the case in the GATT, panels would be established on the basis of competence in individual cases. Presumably, sectoral expertise would be sought according to the specificities of the issues in question. He warned against an exaggeration of the issues involved in cross-sectoral and cross retaliation since retaliation, though an important element of any smoothly-functioning dispute settlement system, was likely to result in very few and exceptional cases. Cross-sectoral retaliation was nothing new to the GATT system where disputes were settled across sectors as diverse as steel and agriculture. It would constitute a useful instrument for small countries who might not possess sufficient "retaliatory strength" in more than one or a few sectors. This reasoning might be extended to justify retaliation between services and goods. He said that the danger of having retaliatory measures that were unreasonable and disproportionate to the harm caused by the initial action would in large measure be contained through Council decisions on remedies. On non-violation cases, he shared with others the view that the same rules should apply to the GATS and the GATT, including improvements which were currently under negotiation in the group on dispute settlement. Further discussion might be necessary as to what constituted a non-violation case in the services field.

29. The representative of Japan stressed the need for clear and precise provisions defining rights and obligations under the framework. This applied especially to dispute settlement provisions since, in the absence of clarity and precision, all the burden associated with decisions would fall onto panellists. Work in this area should follow closely the work already undertaken in the dispute settlement group with a view to arriving at common procedures applying to both goods and services trade. He enquired whether those in favour of a provision on the exhaustion of local remedies were in effect setting this as a precondition to be met before taking a case to the GATS. He said that governments should retain the sovereign right to bring cases to the GATS whether or not local remedies had been exhausted by the involved parties to a case. Regarding expert
participation in panels, he noted that in addition to having qualifications in relation to the specific sectors or issues involved, panellists should judge on legal, policy and factual matters while keeping in mind the integrity of the GATT system as a whole. There should be agreement that cases falling under the jurisdiction of the GATS should be resolved only through recourse to the GATS dispute settlement system. A provision on non-violation cases, if it were to exist, should be carefully circumscribed in order to prevent it from being used as a means to force deregulation upon signatories. He enquired whether it would be possible to limit through the framework the application of cross-retaliation across services sectors and between services and goods. He warned against the notion of the framework provisions overriding not only existing but also subsequent agreements in the area of dispute settlement.

30. The representative of Brazil said that given the lack of experience in settling disputes in services through multilateral channels, and the unclear status of a number of provisions of the draft framework, it might be premature to come to an agreement on the nature and content of dispute settlement provisions at this stage. Further experience might be necessary before such provisions could be multilaterally agreed. At the early stages, conciliation should be encouraged as much as possible. Though his country's position was not yet fully defined on the issue, he suggested that criteria might be established according to which governments could bring cases to the GATS once local remedies had been exhausted. His delegation did not deem it necessary for experts to participate in panels, though they could be consulted whenever the specificities of cases so warranted. He warned against the dangers of cross-retaliation, especially between services and goods. It was premature to assume that dispute settlement and other provisions of the framework could override other existing or subsequent agreements.

31. The representative of the United States said that much useful work undertaken in the dispute settlement negotiating group should be incorporated into the GNS discussions. The aim of the GNS should be a unified dispute settlement system for both services and goods. He agreed that though countries would naturally tend to retaliate within sectors, this might not be feasible or sufficient in some cases and cross-retaliation might be the only reliable means for countries to resort to in settling disputes. Non-violation cases needed careful circumscription and definition but could in some cases imply deregulation. A balance should be struck in the composition of panels between sectoral expertise and a good understanding of the GATT system as a whole.

32. The representative of India said that the argument for an independent and self-sufficient dispute settlement system under a legally independent agreement governing trade in services was more applicable now than ever. It was premature to assume that the Group should borrow wholesale from work undertaken under the negotiating group on dispute settlement since there was relatively little experience dealing with such matters in the services field to know if that was the best manner to proceed. Though he agreed that the agreement would deal with the rights of governments and not those of individuals, these rights should not be equated to the sovereign rights
associated with nation-states but rather with contractual rights acquired by contracting parties to the GATS. It was imperative that the enforcement of individual rights did not become an issue of dispute settlement. As to the exhaustion of local remedies, he pointed out that related aspects such as time periods should all be treated in the context of the national legal systems in question. He detected great wisdom in confining provisions on dispute settlement to consultation and conciliation at this early stage of the deliberations on the matter. Non-violation cases deserved a great deal more attention, especially with respect to the expressed intention of circumscribing and defining with precision the meaning of such cases. In the establishment of panels, all sectors should be treated equally. Cross-retaliation across services sectors might need to be envisaged. It was premature to assume that provisions of the framework, on dispute settlement and other matters, would override existing or subsequent agreements.

33. The representative of New Zealand said that GATS dispute settlement provisions should deal with more than consultation and conciliation in order to be credible and effective for small countries such as her own. She suggested that the Group could borrow from dispute settlement provisions in the GATT and from improvements currently negotiated in the dispute settlement group. A distinction should be drawn between procedures applying to dispute settlement and the dispute settlement mechanism itself. Discussion of procedures should not in any way prejudge the nature of the legal relationship that the services agreement and its dispute settlement provisions would have to agreements under Part I of the Punta del Este Declaration. Her delegation was not sure of the utility of confining dispute settlement procedures to instances where a pattern of practice had been established; what recourse would countries have in cases where they were adversely affected by a practice which did not yet reflect an established pattern? She agreed that more work was necessary on non-violation cases, including matters such as the extent to which recourse to non-violation provisions would be possible on measures in place at the time a concession was negotiated. Her delegation favoured confining the participation of experts to an advisory role unless parties to a dispute agreed otherwise. On retaliation, she suggested the introduction of a hierarchy between retaliation in the same sector, retaliation across services sectors and retaliation between services and goods. The issue of acquired rights was of utmost importance and should be reflected in specific provisions of the agreement.

34. The representative of Egypt said that his delegation opposed the notion of a unified dispute settlement system applying to services and goods since services differed in some crucial ways from goods. GATT procedures should not be applied a priori to the GATS in the absence of further examination of the implications deriving from such an application. Independent dispute settlement systems for services and goods should prevent countries from cross-retaliating beyond services sectors.

35. The representative of Hong Kong said that work undertaken in the dispute settlement group could be of use to the GNS though there was not yet agreement on elements such as implementation, recommendation,
retaliation procedures and degree of automaticity. The latter two elements deserved careful attention by the GNS as to their applicability to services trade. The adoption of common dispute settlement procedures for services and goods should not necessarily imply a direct linkage between GATS and GATT, particularly with respect to retaliation. The draft non-violation provision contained in Article XXIII:4 was not entirely satisfactory and required further study by the Group.

36. The representative of Malaysia said that her delegation did not favour a unified dispute settlement system for services and goods. She suggested that a roster of experts should be established. Experts should have a binding and not merely advisory function. The notion of introducing a hierarchy in the forms of retaliation sanctioned under the agreement was very useful, though her delegation could not accept cross-retaliation being extended between services and goods. The formulation of non-violation cases in the draft framework was too encompassing and required much more precision and circumscription. She agreed with others that, as a first step, work on dispute settlement could concentrate on conciliation matters. As to the relationship to other agreements, she highlighted the practical difficulty with bestowing supremacy of one agreement over another. The issue of acquired rights also required much further work.

37. The representative of Argentina said that dispute settlement provisions under the GATT should not be merely transposed to the GATS. The general sequence followed in the GATT system could be retained, namely, resort to bilateral consultations, resort to panels and opinions of the contracting parties, resort to compensatory mechanism in case panel recommendations were not complied with, and resort to retaliation. The question of proportionality and equivalence of concessions was closely associated with the compensatory mechanism which should be activated in light of the injury inflicted. It should be clear in the framework that retaliation should only occur when authorized by the contracting parties. His delegation did not see the need to draw a distinction in the framework between violation and non-violation cases. In putting together panels, contracting parties could draw on a general list of persons whose expertise should include a good knowledge of the GATT system. The implications of cross-retaliation among or beyond services sectors could be very serious and should be carefully examined, especially with respect to the application of principles such as national treatment whose nature and content had evolved considerably. His delegation did not agree that framework provisions, dispute settlement and otherwise, should override provisions of existing or subsequent agreements.

38. The representative of Uruguay favoured clear and precise provisions on dispute settlement, especially with respect to retaliation. GATT-related provisions could be relied upon whenever there was no similar provision under GATS which could cover a particular issue or dispute.

39. The representative of Hungary said that no rigid rule should be applied with respect to the exhaustion of local remedies. Though his delegation favoured resort to local remedies as a first step towards the settlement of disputes, he opposed the inclusion of a formal requirement to
that effect or of precise rules on aspects such as time limits or patterns of practice. A non-violation provision was all the more necessary in the absence of clarity on which measures should be entered in a country's schedule. He felt that the prerogative to bring a case to the GATS should be left to governments and that no detailed or specific framework guidelines on such matters would be feasible or desirable. No detailed rules on expert participation in panels should be necessary and all sectors should be treated equally in that respect. He favoured the notion of a hierarchy for the types of retaliation. The issue of cross-retaliation between services and goods was broader than the dispute settlement debate and could not be resolved through dispute settlement provisions. Proportionality was a central notion in the consideration of retaliation. He suggested that a provision might be necessary stipulating that retaliation should not injure acquired rights. Further discussion should take place on the meaning of acquired rights under the framework, especially with respect to the treatment of both capital and labour.

40. The representative of Mexico stressed that though dispute settlement provisions applying to services could be quite similar to those that had traditionally applied to goods, GATS and GATT should have independent dispute settlement systems. As in the GATT, the GATS system should apply equally to all services sectors. His delegation was not yet convinced that, in addition to rosters of trade in services and sectoral experts, the agreement should provide for direct, as opposed to advisory, participation of experts in panels. He did not see the need to distinguish between violation and non-violation cases, since only those measures which conflicted with rights and obligations stemming from the agreement itself should be in question. He said it was premature to claim that the provisions of the framework should override the provisions of other existing or subsequent agreements.

41. The representative of Pakistan agreed with the previous two speakers on procedures, expert participation, retaliation and the relationship of the provisions of the GATS to those of other existing and subsequent agreements. He added that further discussion was necessary regarding the role of governments in bringing cases to the dispute settlement system on behalf of individual firms or parties.

42. The representative of Yugoslavia said that his country opposed a unified dispute settlement system applying to both services and goods. He suggested that Article XXIII:4 on non-violation cases would require further work and should be dealt in a fashion similar to draft Articles XIII and XV on procurement and subsidies respectively. Retaliation should first be limited to a sub-sector before involving an entire services sector. He highlighted the importance of proportionality in that connection. He found merit in the suggestion by the representative of New Zealand that experts should play an advisory role. He shared the views of the representative of Hungary on the issue of acquired rights. It was not feasible for framework dispute settlement provisions to override related provisions in other agreements.
43. The representative of Austria agreed with the representatives of Canada, the European Communities, Switzerland and Sweden, that previous GATT experience on the settlement of disputes should be of great use to the GNS. For example, it might be useful to consider how parties had dealt with the findings of a panel under the GATT. Solutions for services might include consensus or consensus minus two rather than the simple majority provided for in draft Article XXIV:3. Aspects deserving further in-depth discussion included: non-violation cases, cross-retaliation, acquired rights and proportionality.

44. The representative of Morocco said that the GATT dispute settlement system should not be merely transposed to the GATS. Further clarity on the draft dispute settlement provisions in the framework would only be possible once principles such as market access, national treatment and modes of delivery were more precise. He supported the establishment of a roster of experts who could participate either directly or in an advisory capacity in panels. Retaliation should be subject to multilateral authorization and procedural rules. Services and goods should have independent dispute settlement systems. The superiority of the services agreement over other agreements, whether multilateral, plurilateral, bilateral, or sector-specific, was difficult at this stage of the negotiations and might be infeasible in practice in the future.

45. The representative of Korea said that, with a few exceptions, traditional GATT procedures, alongside improvements negotiated under the dispute settlement group, should be applied to GATS. Common procedures should not, however, imply a unified dispute settlement system. Though he did not yet have a final position on cross-retaliation between services and goods, he favoured retaliation across services sectors. He trusted that the Group could agree on matters relating to individual cases. Non-violation issues were associated with the debate on draft Article VI. The Group should ensure that all changes in domestic regulation were not disputed, while avoiding the nullification or impairment of commitments made.

46. The representative of Thailand stressed that a very clear definition and circumscription of non-violation cases was necessary to permit national regulators to exert their widely-accepted prerogative of adapting regulatory systems to changes and evolutions in economic systems, especially given the recognition in draft Article VI that parties had the right to regulate. The representative of China added that in many cases it might not be easy to trace the nullification and impairment of certain commitments back to any specific measure.

47. The representative of Australia said that a provision on non-violation cases could play an important role in eliminating some of the shortcomings or ambiguities of the framework and cited draft provision on subsidies as an example of where bound commitments could be nullified and impaired. Non-violation provisions could address cases which might otherwise escape the purview of the framework at its time of entry into force. The linkage made in draft Article XXIII:4 on non-violation cases to draft Article XXI:2 and 3 on modification of scheduled commitments should be examined carefully in order to prevent a deliberalizing retaliation. In that context,
provision should be made to place the onus clearly on the party which was the object of an adverse finding to remove trade-restricting measures.

48. The representative of Singapore said that in a unified dispute settlement system for services and goods, the measurement of compensation could be very difficult. He questioned the need for Article VI:3(a) regarding the establishment of a local review mechanism, if individual rights were not formally recognized under the dispute settlement provisions. He supported the need to circumscribe and define in very precise terms the meaning of non-violation cases.

49. The representative of Chile suggested that the duration of panels should be short and that recommendations should be accompanied with explanations. He stressed the need not only for sectoral and GATT expertise, but also expertise on legal matters in general. There could be a roster of persons who were highly specialized on the services agreement. Mediation and consultation could be made easier for services than was currently the case for goods. Deadlines could be established for countries to comply with reports and recommendations and contracting parties could judge whether the degree of compliance was sufficient at that point. He agreed with others that retaliation across services sectors might be a necessity for countries whose retaliatory strength was limited to one or a few sectors, but cross-retaliation between services and goods should not be permitted.

50. The representative of Japan said that the right of governments as contracting parties to bring a case under the dispute settlement provisions of the GATS would be severely restricted if the exhaustion of local remedies was made into a condition to be fulfilled before such a right could be exerted.

51. The representative of Canada clarified that he did not intend the consideration of common or similar procedures between dispute settlement provisions in GATT and GATS to prejudge in any way the much broader issue of the overall institutional relationship between the two agreements. His reference to other agreements was made in relation to the question of retaliation and was not intended, as seemed to be apparent from some of the interventions, to project the superiority of the GATS as a whole over all existing and subsequent agreements. The question of unilateralism did not relate to specific cases but rather to issues. He said that for the GATS dispute settlement system to be coherent and credible it should not be limited to conciliation as suggested by some delegations. Though retaliation within the same sector was desirable, it was not realistic, given certain economic realities, to make it obligatory under the framework. He shared the views expressed by the representative of Australia on the question of non-violation cases.

52. The representative of the European Communities disagreed with the representative of Australia saying that he objected to treating remedies in non-violation cases in exactly the same manner as remedies in violation cases. He suggested that while in violation cases the obligation fell on the accused party to remove an inconsistent measure, in non-violation cases
the obligation should be limited to compensation. This view was shared by the representative of Japan.

53. The representative of the United States said that though services were very different in nature from goods, he failed to detect the difficulty with having a common remedy such as retaliation for both services and goods. The representative of India replied that the fundamental problem with cross-retaliation stemmed from the fact that GATT and GATS were two different and distinct legal instruments.

54. The Chairman closed the discussion on dispute settlement.

55. The Chairman introduced the agenda item on definition of terms and referred to the terms contained in Article XXXIV of the draft framework text (MTN.TNC/W/35/Rev.1) as a basis for discussion. He recalled that this meeting was the first opportunity for the GNS to discuss Article XXXIV and invited participants comment.

56. Most participants expressed the view that the definitions would be of critical importance to the clarity and operation of the agreement. The representatives of Austria and Uruguay noted that clear definitions would be particularly important for the dispute settlement process.

57. The representative of India said that the draft definitions in Article XXXIV were biased toward one particular point of view with respect to some of the outstanding issues. He said that issues related to Article I needed to be resolved regarding, in particular, the movement of personnel and, in general, the symmetry of the factors of production. The representatives of Austria, Egypt, India and Japan noted that discussions could not be conclusive at this time, and that the definitions would need to be revisited once agreement was reached on outstanding issues.

58. Regarding Article XXXIV(a) on "measure", the representative of Malaysia suggested that it should refer to measures of general application rather than those of a specific nature such as "administrative actions" or "decisions." The representative of Egypt said that the definition was too wide, especially in view of the definition contained in XXXIV(c). The representative of Uruguay agreed with the spirit of the definition in XXXIV(a) as covering all types of government actions, but noted that greater detail might be needed.

59. Regarding the Article XXXIV(b) definition of "supply of a service", the representatives of Egypt, India and Malaysia expressed reservations about the use of the word "production". The representatives of Austria, Egypt and Malaysia were also concerned with use of the word "distribution". The representative of the European Communities said that perhaps only (c) rather than both (b) and (c) were needed.

60. Regarding Article XXXIV(c) on "measures by Parties affecting the supply of a service", the representative of India asked if c(i) was intended to refer to both import and export restrictions; if so, why was "sale" of a service not included. Regarding c(ii), he asked what was meant
by "commercial presence of a natural person"; did this phrase cover measures affecting temporary entry and temporary presence of natural persons? He said the definitions would contain an imbalance unless they addressed coverage of laws relating to temporary entry and movement of personnel. The representative of Canada said that other elements might be needed in c(ii) to ensure that service providers could function. The representative of Mexico suggested adding information networks or reservation systems to c(ii). The representative of Sweden, speaking on behalf of the Nordic countries, suggested that the words "communications systems" be substituted for the phrase concerning telecommunications. The representative of Malaysia saw no need for XXXIV(c) because the definition of "measure" would serve the same function. The representatives of Egypt and Malaysia thought the phrase "affecting the supply of a service" was too broad. The representative of the United States said that the mention of specific kinds of transactions in XXXIV(c) was critical in view of the way services were provided.

61. Regarding Article XXXIV(d) on "natural person of any other Party", the representatives of Hong Kong and Malaysia noted that some parties did not employ the term "national" in their legislation; the representative of Hong Kong suggested using the term "permanent resident" and the representative of Malaysia suggested "citizen". The representative of Canada said questions had arisen about whether immigrants would be covered under the definition and that the term "national" might address this concern, but would be left to each party to define. The representative of Sweden, on behalf of the Nordic countries, said that he preferred a definition of natural persons that included permanent residents.

62. Regarding the Article XXXIV(e) definition of "juridical person of any other Party", the representative of India asked if in e(i) the expression "whether organized for profit or not" meant that the agreement would give rights to voluntary associations supplying services. Regarding e(ii), the representatives of India, Chile, and Malaysia asked which laws would apply in determining how a company is "owned or controlled"; those of the country of establishment or those where the entity is legally constituted. The representative of the European Communities suggested using the word "incorporated" instead of "controlled". The representative of Malaysia stressed a need to address the problems arising from overlapping jurisdiction of Parties over the entities. The representative of Japan said that the definition was critical to developing rules of origin and that the current draft of e(ii) was not sufficient for this purpose. The representative of Canada said that XXXIV(e) was important to defining the entities to which the benefits of the agreements would accrue, but that it was not intended to imply that a Party was giving up regulatory control over a company operating within its territory.

63. Regarding Article XXXIV(f) on "service provider of another party", the representative of India asked whether the definition meant to address the origin of a service? The representative of Austria said he was unsure whether the term was drafted with cross-border supply or with commercial presence in view.
64. Regarding the Article XXXIV(g) definition of "service consumer of a Party", the representative of Canada observed that the service consumer is not bestowed with any particular rights, and that the definition alone did not create any such rights. He said it should address situations in which certain services are needed by service providers in order to provide a service.

65. Regarding Article XXXIV(h) on "commercial presence", the representatives of Egypt and India expressed reservations about its inclusion, saying that many delegations did not view the agreement as one on investment, and that the treatment of factors of production was not yet resolved. The representative of the United States observed that excluding commercial presence from the definitions and the agreement would introduce asymmetries because so many services were provided on this basis. The representative of Malaysia said that commercial presence with respect to professionals needed to be made clear. The representative of Brazil noted that the term "representative office" might not be relevant. The representatives of Brazil and Chile noted that the words "or otherwise" made the scope of the term too broad. The representative of Mexico wondered if short-term mobility was covered by the draft wording. The representative of Hungary said the term should represent some form of permanent establishment. The representative of Chile called for a distinction between commercial presence and establishment or investment.

66. The representatives of Austria, Canada, the European Communities, Mexico, and the United States noted that additional definitions were needed. Among the terms suggested were: services provided through government functions, such as education or health services; public order; non-governmental bodies; and the modes of supply, in particular, cross-border supply. The gathering of definitions elsewhere in the agreement, such as the Article VIII:5 definition of monopoly supplier, into Article XXXIV was also suggested. The representative of Chile noted that framework definitions should have precedence over those in sectoral annexes. The representative of Canada said that the relationship between Article XXXIV and definitions in annexes would need to be made clear.

67. The representative of the European Communities asked whether the secretariat could redraft the definitions based on informal consultations. The representative of Switzerland suggested the establishment of a working group on definitions.

68. The Chairman proposed, and participants agreed, that the GNS ask the secretariat to produce a note on the definitions in the light of the discussions in the Group, as well as informal consultations. He noted that the secretariat's work would facilitate further progress as work proceeded on clarifying the underlying framework concepts.

69. The Chairman then introduced a member of the secretariat to discuss issues and questions raised earlier in the meeting with respect to definition of terms. The secretariat provided background on some of the issues and noted that continuing efforts on many of the terms would require further research and review.
70. The Chairman introduced the topic of **procedural guidelines** for negotiations on initial commitments and invited the secretariat to present the informal secretariat note on the issue. The Chairman then opened the floor to discussion.

71. Regarding the **sequence of work** on negotiating initial commitment, the representatives of **India**, **Mexico** and **Yugoslavia** emphasized that unresolved issues relating to the framework needed to be finalized before the negotiations, or work on a timetable for such negotiations, could proceed. The representative of **India** said that, in particular, Article IV, Article XVIII, and Part III of the framework needed to be sorted out. The representative of **Yugoslavia** said that fairly complete agreement was first necessary on Parts I, II, III, and IV of the framework and on the annexes. The representative of **Mexico** suggested adding a paragraph to the negotiating guidelines indicating that they would be valid once participants considered substantive negotiation on the framework and annexes to be concluded.

72. The representatives of the **United States**, **Australia**, **Hungary**, **Switzerland** and **Malaysia** said that proceeding on framework issues and the negotiation of commitments in a parallel fashion might be necessary. The representatives of the **United States** and **Australia** noted that participants all understood that offers were conditional depending on the outcome on framework issues, as well on other factors. The representative of **Hungary** said that parallel progress would be useful because arriving at a balance of rights and obligations, through both bilateral and multilateral negotiations, would take some time. The representative of **Malaysia** cautioned that parallel work should give equal importance to discussing the framework.

73. The representatives of the **European Communities**, **Japan**, **Thailand**, **Austria** and **Australia** noted that arriving at a common understanding on some of the unresolved framework issues could be needed in order to further the negotiations on initial offers. The representative of the **European Communities** said, however, that the need to resolve such issues should not preclude the establishing of a timetable at this time. He noted that issues his delegation saw as needing to be resolved were not necessarily the same as those suggested by the representative of **India**. The representative of **Japan** said that since commitments would be an integral part of the agreement, all aspects must be completed together, but work should begin urgently on the framework to develop a common understanding of the concepts and terms. **Austria** wondered whether a timetable was feasible so long as scheduling techniques remained unresolved.

74. The representative of **Morocco** said that three issues would determine whether progress could be made: whether participants were ready to resist the influence of the other negotiations; whether participants had finished arguing over sectors; and whether they were now ready to solve outstanding political problems.

75. Regarding the **establishment of deadlines** for the negotiation of initial commitments, the representatives of **Australia**, **Malaysia**,
Switzerland, the United States, Sweden, Hungary, Chile, Morocco, China, Mexico and Poland suggested that deadlines would be useful. A number of the representatives said that such deadlines should, however, be indicative rather than strict or contractual. The representative of Malaysia said although deadlines should be agreed, they might not need to be written into the guidelines.

76. The representative of Australia suggested possible deadlines of mid-July for offers and revised offers and end of July for requests, so that participants would be ready for negotiations in September. He noted that these date would not be feasible if no progress were made on framework issues.

77. Regarding multilateral consultations and periodic reviews and assessments, a number of participants said that some kind of multilateral process could be useful for the negotiation of initial commitments, but most noted that this process could not supplant bilateral negotiations. The representative of Australia suggested that a multilateral review and assessment should be short and should include a general overview of progress and problems encountered, and an examination of some of the aspects of offers that could be addressed more efficiently than in bilateral negotiations. He also noted that what kinds of considerations would be taken into account in an assessment process still remained to be determined. The representatives of Egypt and Hungary shared Australia’s views and the representative of Egypt suggested that further discussion was needed to determine how the secretariat could help with assessments.

78. The representative of the United States said that the purpose of a multilateral review and assessment should be clarification of offers rather than assessing the quality of offers. He added that he still remained open on whether clarification should be done in such a review or only in bilaterals. The representative of Poland agreed that multilateral consultations should serve as a review, while assessments should be done on a bilateral basis. He also noted that a multilateral review process might address some of the interests of smaller countries whose positions were weakened because the services negotiations were not employing the concept of initial negotiating rights.

79. The representative of Sweden said that participants should not underestimate practical value of multilateral reviews for saving time. The representatives of Malaysia and Venezuela noted that the multilateral review of offers that took place in May had been valuable and should continue.

80. The representatives of Canada, Australia and the European Communities said that only participants who have submitted offers should be allowed to join negotiations, whether multilateral or bilateral, on initial offers. The representative of Canada said that written notification of an intention to submit an offer might not be a sufficient basis for allowing a participant to join negotiations. The representative of the European Communities said that not only should the participants in the negotiations have tabled offers, but that the offers should be meaningful in terms of detail and
sectoral coverage; therefore, the guidelines needed to reflect what was meant by an initial offer.

81. The representative of Venezuela said that limiting the negotiations only to those participants that submitted offers would have serious repercussions because other issues of importance to the framework or sectors could arise. The representative of China said that a greater level of participation in negotiations would improve the effectiveness of the GATS, thus all participants should have an opportunity to join negotiations on initial commitments. He added that developing countries, in particular, should be given flexibility regarding participation in consideration of the technical difficulties being encountered in drafting offers.

82. Regarding the availability of requests to all participants, the representative of Australia said that, when possible, the maximum transparency should prevail, but that some limitations may be needed on the extent to which requests were made available to other parties in the negotiations. The representative of the European Communities noted that transparency was important because the concept of initial negotiating rights used in the GATT was not being employed in services. The representative of Hungary said that requests should be circulated to all participants.

83. The representatives of Japan, Poland and the United States said requests should be confidential. The representative of Japan said that he saw no reason why requests, and other aspects of bilateral negotiations should be subject to transparency and that they were better kept confidential. The representative of the United States agreed with the representative of Japan, but noted that in goods negotiations the requests were provided in confidence to the secretariat, who then would provide a general summary of the request for circulation to other parties. He said that this procedure might work in services. The representatives of Australia and Poland also supported the idea of summaries.

84. The representative of Sweden said that having requests open to other participants was valuable, but if this were not possible, then the suggestion made by the representative of the United States was a suitable alternative; the summaries used in goods contained the basic content of requests, their focus and were generally available to other participants.

85. With respect to substantive guidelines, the representatives of India and the European Communities noted that the attachment on initial commitments in MTN.TNC/W/35/Rev.1 was not final and needed to be addressed. The representative of the European Communities said that this or perhaps some other paper would need to include a reference date for negotiations; the offers currently made different assumptions about reference date. The representative of Poland asked what substantive guidelines would say more than to address issues such as how to schedule. He recalled an idea raised earlier to have some such material in the framework transferred to the guidelines and asked if this were still under consideration. The representative of the United States said that he saw procedural guidelines as timetables such as those submitted to the Brussels Ministerial. He said
that he was unsure whether his delegation would favour substantive guidelines on how to present offers, since negotiations currently underway of how to schedule commitments covered the same issues. The representative of Hungary said substantive guidelines would need to address such issues as freezes or standstill, which were currently in some offers but not in others.

86. The Chairman proposed that the GNS authorize him to undertake informal consultations with participants about procedural and substantive guidelines before next meeting of GNS.

87. Regarding the future work programme, the Chairman said that it was important to agree in broad terms on how to organize the work of the GNS up to the summer break. He proposed as a general working hypothesis that the GNS would finish negotiations by the end of 1991. In order to attain this goal, Parts I to IV of the framework needed to be completed by the end of July. Regarding the agenda of the next meeting on 24 June, he proposed that the following items be included: scheduling of commitments; considerations relating to Article I; matters relating to labour mobility; substantive guidelines for the negotiation of initial commitments; considerations to be taken into account when assessing offers; procedural guidelines; and further work on initial commitments. Also, a number of other areas would require consideration by the summer break. In particular outstanding matters relating to m.f.n. needed to be resolved along with how to meet concerns of individual participants without resorting to widespread derogations from this important concept. It might be useful to explore some options which did not require fully fledged multilateral agreement on sectoral annexes to accommodate the concerns of participating countries. Also, matters relating to both horizontal arrangements and techniques for dealing with sectoral considerations would need to be addressed.

88. It was also appropriate to address, prior to the summer break, any special arrangements that needed to be put in place for those sectors that participants had thought it necessary to prepare an annex. More specifically, regarding completion of work on the telecommunications and financial services annexes, it was agreed that this should be done fully within the context of the GNS, perhaps through the creation of ad hoc arrangements for the GNS. He notified his intention to consult with delegations in order to resolve this matter before the next meeting. Similarly, more negotiations might be needed to carry forward the process of improving offers through requests in the June/July period; these might be bilateral or plurilateral consultations or whatever arrangements participants might consider necessary to improve the quality of offers. Other subjects requiring discussion that had emerged in his consultations included balance of payments, payments and transfers, increasing participation of developing countries, disputes settlement and economic integration.

89. The Chairman then closed the proceedings.