

**PREPARATORY COMMITTEE  
FOR THE  
WORLD TRADE ORGANIZATION**

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**SUB-COMMITTEE ON INSTITUTIONAL,  
PROCEDURAL AND LEGAL MATTERS**

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**TRANSITIONAL ARRANGEMENTS**

**Communication from Austria**

The following communication, dated 2 September, has been received from the Permanent Mission of Austria with the request that it be circulated to members of the Sub-Committee.

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Some initial comments to the Discussion Paper on Transitional Arrangements, dated 18 July 1994, are hereby presented.

It is timely and useful to undertake first steps to clarify the complexities and the necessities for solutions resulting from the institutional set up of GATT 1947, the Tokyo Round Agreements and the WTO Agreements as legally distinct instruments before the entry into force of the WTO.

As correctly pointed out in paragraph 3 of the Discussion Paper, these agreements may well co-exist for some time with different participation. Although the options for membership described in paragraph 3 are correct in principle, it should in addition be pointed out that it might take some time after the entry into force of the WTO Agreement before countries, separate customs territories and the EU (hereinafter referred to as countries) decide definitely on their preferred policy option. According to Article XIV of the WTO Agreement, during a two year period the Agreement remains open for acceptance, which in accordance with its Article XI results in original membership. Some countries may wish to take advantage of these provisions, for example, to complete their constitutional requirements. Other parties to GATT 1947 and the WTO may feel reluctant to withdraw from GATT 1947 during this interim time, although their ultimate aim might be WTO membership only or the ultimate replacement of the GATT as an institution by the WTO. To increase complexities some countries - for example, present observers to GATT 1947 - may become contracting parties of GATT 1947 before or even after the entry into force of the WTO Agreement and not all of them might - in the foreseeable future - be able and willing to accept the additional obligations of the WTO Agreement. Some countries may also make their decision on joining the WTO or leaving the GATT 1947 and/or Tokyo Round Agreements dependent on the corresponding decision by their main trading partners.

It will therefore not be clear before the entry into force of the WTO Agreement - or even for some time thereafter - which distribution of possible combinations of membership in the respective agreements we may face. This should be borne in mind when the potential need for transitional arrangements is being discussed in the later paragraphs in order to ensure that all possible situations are duly considered and adequately dealt with. It needs further to be taken into account that the Preparatory Committee and - after the entry into force - the WTO can only regulate these questions as far as they fall into their competence. Corresponding considerations and decisions may often need to take place in the competent bodies of GATT 1947 and the Tokyo Round Agreements, which are

legally distinct and thus independent from the WTO Agreement and its institutional structures. Therefore, whatever transitional measures the Preparatory Committee or the WTO bodies may decide to take or recommend, in many cases they would need corresponding action in the GATT 1947 bodies and the bodies of the Tokyo Round Agreements; country representation in these bodies may significantly differ over the time.

Regarding paragraph 4, last sentence of the Discussion Paper, the exception from the 60 day rule for withdrawal contained in Article 9.6 of the Agreement on Trade in Civil Aircraft might be worth noting. In addition, thought should be given to the overall question of fitting this Agreement into the GATT 1947/WTO context. The Agreement on Trade in Civil Aircraft in its 1979 form (BISD, 26S/162) as subsequently modified, rectified or amended, has been introduced into the Uruguay Round Final Act of Marrakesh. At that time the question of a simple adaption of the old text was dismissed and no amendments were introduced to it in order to correspond to the WTO institutional environment, given the ongoing negotiations on a new Agreement on Trade in Civil Aircraft. Now the question arises if there will be a new agreement in time or if - at least for a transitional time after the entry into force of the WTO Agreement - the existing Agreement on Trade in Civil Aircraft, contained in the Uruguay Round package, should be amended to fit into the new institutional set up of the WTO. This could, however, imply to amend the Agreement on Trade in Civil Aircraft as it figures as a Plurilateral Trade Agreement under the WTO (not yet in force) and not to amend the identical old Tokyo Round Agreement as such (at least unless all parties to that Agreement become Members of the WTO from day one).

In paragraph 5 of the Discussion Paper, the reference to Article 59 of the Vienna Convention on the Law of Treaties is formulated in a way that it may create the false hope that indeed all parties to all the Tokyo Round Agreements and/or the GATT 1947 would - immediately or within a very short period of time - join the WTO Agreement. That, however, is difficult to prejudge at the present juncture.

Paragraph 7 of the Discussion Paper refers to Article 30 of the Vienna Convention on the Law of Treaties. However, the language seems to refer primarily to Article 30(3), whereas indeed any of the situations regulated under Article 30(4) might occur. The mutual obligations of any two countries party to any GATT instrument (i.e. either one or both of them being party to GATT 1947, any Tokyo Round Agreement and/or the WTO Agreement, any of the Plurilateral Trade Agreements under the WTO) may thus have to be identified in each particular case. Questions to be answered in this context might be: To which GATT/WTO-instruments are the countries party? Are the countries party to the same agreement(s)? Is there any double-membership of both parties in corresponding instruments? If so, are the obligations under these instruments compatible? If they are not compatible, which was the lex posterior?

The situation is further complicated, as the WTO Agreement contains "Plurilateral Trade Agreements", which are part of that Agreement only for those Members of the WTO that have accepted them and which are binding on those WTO Members only. Therefore even two WTO Members may find that between them exclusively the corresponding Tokyo Round Agreements apply in this particular respect.

With regard to dispute settlement the situation is slightly different from that of substantive obligations. In cases of double-membership of both parties to a dispute in the GATT 1947 and the WTO the Dispute Settlement Understanding of the WTO Agreement (DSU) largely prevents the possibility of forum shopping although the substantive obligations of two double-members might well remain in parallel under the GATT 1947, the Tokyo Round Agreement and under the WTO (comp. Article 23 DSU). This situation is, however, less clear with regard to obligations under the Plurilateral Trade Agreements and under the corresponding Tokyo Round Agreements. (When and

how will the condition of the last paragraph of Appendix I to the DSU be fulfilled in each case? This seems particularly doubtful for the Agreement on Trade in Civil Aircraft.)

Paragraph 8 of the Discussion Paper contains an important statement. Indeed there will be no GATT-obligations between contracting parties to the GATT 1947 or Tokyo Round Agreements not Members of the WTO on the one hand, and Members of the WTO that left the old GATT-system on the other. In such a trade relationship both sides would not be constrained by any GATT-obligations and there would be no dispute settlement mechanism (for new cases at least). This situation may work as an additional incentive to become a WTO Member, but it may also inhibit some WTO Members from leaving the old system of the GATT 1947 and the Tokyo Round Agreements.

Paragraph 9 of the Discussion Paper on dispute settlement procedures addresses primarily the issue of old cases for which consultations were requested before the entry into force of the WTO Agreement. In this respect particularly the two following cases might require transitional arrangements. Firstly, if it was decided by all contracting parties to one of the old agreements to terminate that agreement (as discussed in paragraph 5) nevertheless the respective institutions would need to be kept in place for a transitional period to deal with old cases in order to comply with Article 3, paragraph 11 of the DSU. Secondly, the possibility to leave GATT 1947 and almost all of the Tokyo Round Agreements at short notice (60 days) might require additional arrangements in two respects, namely:

- (a) Maintaining the competence of the respective bodies constituted under the GATT 1947 and the Tokyo Round Agreements to continue dealing with cases pertaining to non-members: Disputes between non-members and disputes between non-members and members of that Agreement may be involved (if only the non-member was a party to the respective agreement when the request for consultations was made at a time prior to the entry into force of the WTO).
- (b) Such non-parties to the old agreement, Members to the WTO, would need to be obliged to continue to submit themselves to dispute settlement in fora constituted under agreements they are no longer party to. Particular attention would have to be given in such an arrangement to the necessary adaptions of decision making rules with regard to the old agreements in order to allow non-members to the respective agreements to participate in cases of dispute settlement in which they are a party to the dispute, as if they still were a party to that agreement. It might also need consideration which legal form such provisions for dispute settlement during a transitional period of time might need to take in view of the constitutional requirements of the various contracting parties. In addition, the question of possible legal consequences of recommendations or rulings addressed to non-members of the GATT 1947 or a Tokyo Round Agreement may need to be addressed. Should there, for example, be also any provision to give effect to those recommendations or rulings under the WTO, particularly if the respective breach of GATT rules persists and both parties to the dispute are Members of the WTO? Could or should there be any effect of dispute related recommendations once one of the parties leaves the old treaty if the other party to the dispute is not yet also a Member of the WTO?

In other words could or should - for example, in the absence of an interim arrangement - a Member to the WTO after the entry into force of the WTO be permitted to escape - as a result of withdrawing from the old agreement(s) - consequences of breaches of rules under GATT 1947 and the Tokyo Round Agreements if that conduct gave rise to a request for consultations prior to the entry into force of the WTO, perhaps even if that conduct is maintained? How would that correspond to the letter and spirit of Article 3, paragraph 11 of the DSU?

Paragraph 12 of the Discussion Paper addresses the parallel requirements for double-members to notify and consult under GATT 1947, the Tokyo Round Agreements and the WTO which might indeed be deemed cumbersome by some of the contracting parties. Nevertheless, parties to the old

instruments not immediately joining the WTO might wish to receive the relevant information and might wish to maintain their right to consultations with such double-members as well as with any other party to the GATT 1947 or a Tokyo Round Agreement. On the other hand, the WTO Agreement does not presently provide for any equivalent rights for non-members. Conversely, WTO Members which left the old agreements might have no (legitimate) interest in joining consultations with non-members of the WTO or notification procedures extended to non-members of the WTO. The parallelism is a consequence of the legally distinct concept, thus only limited solutions could be envisaged. It might, for example, be contemplated to create a mechanism, that in case of consultations taking place exclusively among double-members, these could be merged and considered as valid for the purposes of both corresponding but legally distinct agreements, under which consultations would have to be held. Similarly, it could be envisaged that in case of notifications of double-members under the corresponding provisions of two legally distinct agreements the more detailed notification would be acceptable for the purposes of both agreements if it was available to all parties to both agreements as provided for under their respective provisions and practices.

Regarding paragraph 13 of the Discussion Paper, where the parallel existence of bodies and procedures under GATT 1947, the Tokyo Round Agreements and the WTO Agreement is addressed, again the comments to paragraph 3 need to be considered. As long as GATT 1947 and/or the Tokyo Round Agreements continue to exist and they have a different membership as compared to the WTO, including parties that are not Members of the WTO, it might indeed for them and even for double-members be desirable to maintain competent bodies and procedures under the GATT 1947 and/or Tokyo Round Agreements that are parallel to those under the WTO. These bodies and procedures would continue to serve their purpose among non-members of the WTO and between non-members and Members of the WTO which are still parties to the corresponding old agreement. In the case of a Member of the WTO that for its purposes no longer considers these procedures and bodies under the GATT 1947 and the Tokyo Round Agreements as useful, there is the alternative to leave those agreements at 60 days' notice.

Paragraph 14 of the Discussion Paper points to four alternative choices. Alternatives (a) and (b) would require decisions by the competent bodies of the GATT 1947 and/or the Tokyo Round Agreements. Such decisions might, however, be difficult to obtain as long as there are parties to the GATT 1947 that are not Members of the WTO. Some particular interest, which asks for the prolongation of a parallelism might also arise regarding Tokyo Round Agreements which correspond to Plurilateral Trade Agreements under the WTO Agreement. Alternatives (c) and (d) suppose that the old agreements remain in force. Perhaps these preconditions for the four alternatives should be pointed out more explicitly in the paper too.

Paragraph 15 of the Discussion Paper takes up the issue of replacement of GATT as an institution by the WTO. Firstly, this would require a decision by the GATT CONTRACTING PARTIES and it would seem uncertain what should be the fate of any contracting party to the GATT 1947 not becoming Member of the WTO, its rights and duties. Secondly, some additional transitional measures might simultaneously become necessary for the Tokyo Round Agreements. Although they have a different membership and are legally distinct from the GATT 1947, the Tokyo Round Agreements rely on the GATT as an institution and are serviced by the GATT Secretariat, which would be absorbed by the WTO.

Finally, it should be remembered that while some transitional measures might need to be in place with the entry into force of the WTO Agreement, for other transitional arrangements it might be premature to decide their ultimate shape before the membership in the WTO - and thus the political choice of countries and their legislatures - becomes more apparent. Probably arrangements for dispute settlement with regard to old cases will fall into the first category, whereas decisions on dissolving existing bodies and procedures under the GATT 1947 and the Tokyo Round Agreements and replacing

GATT as an institution by the WTO might serve as examples for the second category. There is a consequential difference in urgency which the Preparatory Committee might wish to base its priorities on. Therefore, the focus of deliberations might usefully be directed at transitional measures which ought to be in place at the time of the entry into force of the WTO Agreement or early thereafter, without, however, losing sight of the remaining issues.