RESTRICTED
PC/IPL/W/7
23 September 1994

(94-1931)

PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

SUB-COMMITTEE ON INSTITUTIONAL, PROCEDURAL AND LEGAL MATTERS

Original: English

TRANSITIONAL ARRANGEMENTS

Communication from Hong Kong

The following communication, dated 22 September 1994, has been received from the Hong Kong Economic and Trade Office in Geneva.

Introduction

1. As part of the preparatory process for the implementation of the Uruguay Round, a mechanism needs to be found so that in between the entry into force of the WTO and the time when an overwhelming majority of GATT contracting parties are in the WTO, there will be no unintended loss of rights and obligations and no disruption to the functioning of the multinational trading system. A perfect solution may elude us but as a working target we should look for a formula which is neutral (i.e. without upsetting the rights and obligations negotiated in the Uruguay Round), effective and simple. Overall, it must not act as a disincentive to ratifying the WTO early. This papers lays out some of the more obvious problems in the hope that a careful analysis of them will help to find the way forward.

The Problems

2. In the Uruguay Round we have decided that the agreements under the WTO are no replacements for GATT 47 and the Tokyo Round Codes (the entry into force of the new does not extinguish the old), which makes it possible for all agreements to co-exist for an indefinite period of time. Amongst them, only GATT 47 and its associated legal instruments and decisions are fully incorporated in GATT 94 but both GATT 47 and the Tokyo Round Codes provide for withdrawal, which is a right not taken away as a result of the Uruguay Round.

3. Given the situation, some parties may contemplate withdrawal from GATT 47 and/or the Tokyo Round Codes upon their coming onto the WTO. The reasons can be various. For example, to avoid the co-existence of two MFN obligations which may give rise to "free-riders" and which may thus offer a disincentive for ratifying the WTO early; to prevent a legally messy situation created by the conflict of law between GATT 47 and GATT 94 (e.g. tariffication in agriculture); to avoid administrative burden arising out of two separate but similar sets of institutional and procedural obligations, etc.

4. When a party withdraws from an agreement, it leaves the agreement. Unless withdrawal is to be of no legal consequence, inevitably doubts will arise as to that party's obligations under the agreement, especially in respect of its continued participation in the institutions and procedures under the agreement. True that Article 70 of the Vienna Convention stipulates that the termination of a treaty

"does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination"; but at the same time it is also clear that the termination "releases the parties from any obligation further to perform the treaty". Furthermore, in respect of dispute settlement, while Article 3:11 of the Understanding on Dispute Settlement specifies the procedures to apply in respect of disputes for which the request for consultations was made under GATT 47 or any predecessor agreement, it does not go on to explicitly require a party which has withdrawn from an agreement in force immediately prior to the entry into force of the WTO to take part in such procedures. In sum, the first question is that do established international law (including the Vienna Convention) and Article 3:11 of the Dispute Settlement Understanding provide sufficient guidance as to whether a party having withdrawn from a treaty would still be bound to attend meetings and respond to dispute settlement requests arising out of obligations created through the execution of the treaty?

5. Some have suggested that a way to overcome the problem as described above is for existing members of agreements to get into a commitment case-by-case under the existing institutions and agreements. This would appear to be the intention behind the Ministerial Decision at Marrakesh which invites "the relevant Councils and Committees to decide that they shall remain in operation for the purpose of dealing with any dispute for which the request for consultation was made before that date". But in order to achieve a degree of legal certainty, which is extremely important in the area of dispute settlement, perhaps we need to be abundantly clear on two points :

(a) are decisions made under existing agreements binding on parties which later withdraws and, if so, how can such decisions be enforced if the party refuses to participate further in the institutions? A point to bear in mind is that when concessions under the agreement, which can be withdrawn by others as the final sanction against non-performance, cease to be of practical value to a party that has left the agreement. Certainly it will be futile to take somebody to dispute settlement for not responding to requests for dispute settlement; and withdrawal of valueless concessions will be no deterrent to non-implementation of panel reports.

(b) can such decisions allow the initiation of new dispute settlement cases and carry with them a useful obligation on implementation of panel reports? This is particularly important in two areas : Anti-dumping and Subsidies & Countervailing Measures. Both Article 18:3 of the Anti-dumping Agreement and Article 32:3 of the Agreement on Subsidies & Countervailing Measures stipulate that new rules are applicable only to investigations and reviews initiated pursuant to applications made after the entry into force of the WTO for a member. In the situation, it is clear that unless some supplementary and effective rules are available, cases which started before the WTO but are of ongoing effect will be totally outside the ambit of dispute settlement.

6. There are other issues such as how to deal with unimplemented or unadopted panel reports, dispute settlement cases in the pipeline, the duration of transitional arrangements, as well as the many practical problems raised in the papers from the Secretariat, Mexico and Austria. But before we start developing solutions we have to consider two fundamental questions:

(a) what approach to take? A case-by-case consideration under the respective Councils and Committees will answer the Ministerial Decision but will be difficult and may result in complicated or diverse structures. On the other hand, the solutions so developed may be more focused and thus more effective. A generic approach looking for across-the-board solutions may be quicker and probably more appropriate within the PrepCom process. Also, in a wider context perhaps we can be freed from taking too parochial a view, which may offer a better chance for a comprehensive solution with some internal balance for everybody.

(b) what should be the nature of the decision? This will depend on the legal analysis of the issues raised in this paper and the others, but basically GATT has the tradition of going for pragmatic solutions which might not be legally perfect but are totally workable, given good faith.

Conclusion

7. Time is short and the problem complex. We are no longer in a negotiating situation and we should not aim to redefine the balance of rights and obligations in the Final Act. What we need now is an arrangement which will see us smoothly and safely into the new situation. In this connection it is worthwhile to remember that Article XIV:1 of the Agreement Establishing the WTO allows those eligible to become original members two years for acceptance. We need to provide the means for the satisfactory operation of this particular provision.