

**PREPARATORY COMMITTEE
FOR THE
WORLD TRADE ORGANIZATION**

RESTRICTED
PC/IPL/M/7
10 November 1994

(94-2375)

SUB-COMMITTEE ON INSTITUTIONAL,
PROCEDURAL AND LEGAL MATTERS

MINUTES OF THE MEETING HELD ON 21 OCTOBER 1994

1. The Sub-Committee on Institutional, Procedural and Legal Matters held its seventh meeting on 21 October 1994 under the Chairmanship of Mr. K. Kesavapany (Singapore).

A. Paragraph 8(b)(ii) of the Decision establishing the Preparatory Committee

(i) Terms of reference for WTO bodies

2. The Chairman drew attention to proposed terms of reference for the WTO Committees on Balance-of-Payments Restrictions and Budget, Finance and Administration, circulated in document numbers 2460 and 2461, respectively. He then made the following statement with regard to the Committee on Balance-of-Payments Restrictions: "In respect of procedures for periodic balance-of-payments consultations, I note the understanding of delegations that the 'GATT 1994 procedures' as referred to by the footnote to paragraph 5(b) of Article XII of the General Agreement on Trade in Services, is meant to include paragraphs 5-13 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994. Procedures and elements covered by paragraphs 5-13 are actually scattered in the Decisions approved on 28 April 1970 (BISD 18S/48-53), 19 December 1972 (BISD 20S/47-49) and 28 November 1979 (BISD 26S/205-209), all of which have been incorporated in the 1994 Understanding by reference. In paragraphs 5-13 of the 1994 Understanding where these elements are covered, the references to Articles XII and XVIII of GATT 1994 will have to read so as to include Article XII of the GATS for purposes of looking at the substantive aspects of the obligations under the GATS."

3. The representative of the United States said that in his understanding the Chairman's statement with regard to the Committee on Balance-of-Payments Restrictions was a statement reflecting the understanding of delegations, which the United States fully shared, rather than an interpretation of one of the Uruguay Round Agreements. The United States would not wish to see precedents set with respect to the use of the Sub-Committee or the Preparatory Committee for the interpretation of Uruguay Round Agreements.

4. The representative of Switzerland said that while his delegation did not have any reservations on the terms of reference of the WTO Committee on Budget, Finance and Administration, it wished to note that the question of participation of governments that were not WTO Members on the date of entry into force of the WTO still had to be dealt with. It would be anomalous if a government contributed to the WTO budget but was unable to participate in the decision-making process. He wondered if this issue would be addressed under transitional arrangements.

5. The Chairman said that the concern raised by Switzerland was one that was being addressed in the discussions on transitional arrangements.

6. The Sub-Committee took note of the statements, including the Chairman's statement with regard to the WTO Committee on Balance-of-Payments Restrictions, and approved the terms of reference for the WTO Committees on Balance-of-Payment Restrictions and Budget, Finance and Administration.
7. The Chairman said that proposed terms of reference for the WTO Committee on Trade and Development were still to be agreed upon, and that this matter would be addressed urgently with a view to reaching a solution. The Sub-Committee would revert to this matter at its next meeting.
8. The Sub-Committee took note of the statement.
9. The Chairman, turning to terms of reference for the proposed WTO Committee on Market Access, drew attention to the Community's proposal circulated as PC/IPL/W/9.
10. The representative of Switzerland said that the Community's proposal was a good basis for further work in this area. His delegation had circulated its comments on the proposal to Members in the meeting room, and suggested that the Secretariat invite delegations to a consultation on how to deal with this matter.
11. The representative of Canada said that his delegation had only recently received the contributions from the Community and Switzerland, and might have substantive comments to make. He suggested inviting comments, perhaps in writing, and then holding a meeting of interested delegations.
12. The representative of Australia said that it would be important and useful to be able to have further discussions on a plurilateral basis on this matter.
13. The representatives of New Zealand, Japan and Brunei Darussalam on behalf of the ASEAN countries, expressed their Governments' interest in participating in consultations regarding this matter.
14. The Chairman said that he had noted delegations' desire for plurilateral consultations on this matter, and proposed that interested delegations be invited to submit their comments in writing and that a meeting, open to all that wished to participate, be held the following week.
15. The Sub-Committee took note of the statements and so agreed.
16. The Chairman, turning to the question of the Contact Groups, said that since the summer break, the Contact Group on Agriculture had held two meetings concerning the WTO Committee on Agriculture and another concerning the WTO Committee on Sanitary and Phytosanitary Measures. At its meeting on 22 September, the Contact Group had undertaken a detailed exchange of views on notification requirements and formats on the basis of an informal background note prepared by the Secretariat and suggestions put forward in the course of the discussion. A further meeting on this subject would be held on 21 October. The Contact Group had also met on 6 October to consider terms of reference for the WTO Committee on Agriculture which, he recalled, had subsequently been approved by the Sub-Committee at its meeting on 7 October, on the understanding that for the purposes of the terms of reference the Ministerial Decision on net food-importing developing countries was an integral part of the Agreement on Agriculture in terms of Article 16 thereof. The approved terms of reference had subsequently been circulated as PC/IPL/1. At its meeting on 18-19 October, the Contact Group had consulted on the notification requirements under the Agreement on the Application of Sanitary and Phytosanitary Measures, and had reached substantial agreement on certain notification procedures and on a number of related issues. Once the report of the Contact Group was available in the three working languages, it would be circulated to Members for their consideration at the next meeting of the Sub-Committee.

17. As regards the Contact Group on Anti-dumping, Subsidies and Safeguards, there were no new developments to report. On the Contact Group on TRIPS, too, there was nothing new to report, except to note that the Director-General of WIPO had replied to his earlier letter, indicating that the WIPO was ready for a cooperative relationship with the WTO.¹ The three Contact Groups would continue their work with the intention of concluding it and reporting to the Sub-Committee by early November.

18. The Sub-Committee took note of the statements.

(ii) Rules of procedure for WTO bodies

19. The Chairman said that after checking with the respective delegations with a view to resolving possible conflicts in the various submissions on this subject, the Secretariat had circulated revised draft rules of procedure for the Ministerial Conference in documents 2028/Rev.1 and 2028/Rev.1/Add.1, and for the General Council in documents 2029/Rev.1 and 2029/Rev.1/Add.1. In the revised Rules for the Ministerial Conference, a distinction had now been made between regular and special sessions in Rules 1 and 2. As regards Rule 7, on credentials, attention had been drawn in a Note to a particular concern on the part of one Member. In this connection, he proposed removing any reference to a "Minister for Foreign Affairs" in the second sentence, and making clear, perhaps in a footnote, that communications concerning credentials would not have any implications as to sovereignty. Finally, the provisions on decision-making in Rules 27 and 28 had been redrafted, and the rules on airmail and telegraphic ballots had been transferred to Rules of Procedure for the General Council, for reasons indicated in the Note following Rule 38.

20. In the revised Rules for the General Council, Rule 10 regarding submission of formal credentials for meetings of the General Council had been deleted. Delegations would agree that it was unnecessary to have formal credentials for every meeting of the General Council. Rules 26 and 27 had been compressed, and the provisions on decision-making in Rules 35 and 36 had been redrafted along the same lines as those for the Ministerial Conference. While he believed that the revised texts had taken account of the concerns of those that had submitted comments, he would give all delegations a final opportunity to comment on the two papers at the present meeting and, subject to those comments, would propose that the rules, with any amendments be approved at the next meeting.

21. He recalled that the General Council would convene as appropriate as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB), and that these bodies could establish their own rules of procedure. He suggested that draft rules for these bodies also be drawn up, which would propose that these bodies follow, to the extent necessary, the Rules for the General Council, with some exceptions that would be spelled out. Exceptions might be needed, for example, on the rules for the Chairpersons of these bodies. In this regard, it could be proposed that the Chairperson or Vice-Chairperson of the General Council serve as Chairperson, or that these bodies elect their own Chairpersons, either from among the representatives or the nationals of Members. Another exception might be needed on decision-making and on observers in respect of the DSB. A further exception might be needed in respect of the Rule on quorum when the TPRB conducted trade policy reviews, while maintaining that Rule for any decisions that might be taken by the TPRB. He invited suggestions on possible variations of the rules for the General Council for these purposes.

22. In connection with the Rules regarding observers in the Ministerial Conference and the General Council, two other non-papers by the Secretariat were before the Sub-Committee. The first (document 2035/Rev.1) was a revision of the guidelines for observer status for international organizations,

¹The communication from the Director-General of the WIPO was subsequently circulated as PC/IPL/W/11.

based on comments by delegations, both oral and written. The revised guidelines now applied to "international inter-governmental organizations" as defined in footnote 1 of the non-paper. If this terminology were to be agreed, Rule 9 bis for the Ministerial Conference and Rule 12 bis for the General Council would be amended by removing the square brackets around the words "international" and "inter-governmental" therein. The second non-paper (document 2369), on guidelines for observer status for governments, was new and was based on guidelines adopted by the GATT 1947 Council. Although this was the first time the Sub-Committee was addressing this matter, he hoped that the approach would be acceptable, and that progress could be made on both these sets of guidelines soon. He suggested that both these issues be considered under this part of the Sub-Committee's mandate since guidelines on observers were intended to be annexed to the Rules of Procedure.

23. It was his view that, once all the work has been completed on rules of procedure, the various rules could be put together as follows: (1) Chapter on the Ministerial Conference; (2) Chapter on the General Council; (3) Chapter on additional rules for the General Council when convened as the DSB; (4) Chapter on additional rules for the General Council when convened as the TPRB; (5) Chapter on rules for Subsidiary bodies - which had been left for consideration until after the entry into force of the WTO - and the three annexes on observer governments, on observer organizations and on derestriction procedures, respectively. He noted that agreement on derestriction procedures was still pending in the GATT context, and that the procedures to be agreed therein would form the basis for the procedures for WTO documents. He suggested that delegations indicate their views to the Secretariat, either orally or in writing, on all of these non-papers, so that they could be revised before the next meeting with a view to advancing the Sub-Committee's work on this part of its mandate.

24. The representative of the United States said that, rather than present rules for the DSB and the TPRB as additional to those for the General Council, it might be clearer to have specific documents on rules for those two bodies, which would make it easier for the Sub-Committee to consider and make progress thereon. It would be helpful if the Secretariat could draw up such documents.

25. The representative of Switzerland said that his delegation was particularly interested in the provisions on observers, given that some governments which might be unable to ratify the WTO Agreement by the time of its entry into force might nevertheless wish to participate in the work of the WTO. It was his understanding that this matter would also be dealt with under transitional arrangements.

26. The Chairman said that Switzerland's concerns could be resolved through consultations regarding transitional arrangements.

27. The representative of the European Communities supported the United States' suggestion that the Secretariat draw up draft rules of procedure for the General Council when it convened as the DSB or the TPRB, which would assist delegations in their consideration of this matter. With regard to Rules for the General Council, it was not clear from the last sentence of Rule 36 as to how a postal ballot would be launched. It appeared that it could only be launched in the interval between meetings of the General Council, while this should really be an alternative to a ballot at the meeting. The Community might wish to amend that sentence.

28. The Chairman said that, in response to the suggestions made, he would request the Secretariat to draw up draft rules for the General Council when convened as the DSB or TPRB.

29. The representative of New Zealand supported the suggestions by the United States and the Community for the Secretariat to prepare draft rules of procedure for the DSB and the TPRB. His delegation believed it would be helpful if the Secretariat could also attempt a first draft of generic rules for subsidiary bodies so that these too could be considered before the entry into force of the WTO.

This was a necessary part of the Sub-Committee's work and was reflected in the mandate given to it. It would be unfortunate for the subsidiary bodies of the WTO to have to spend a large part of their early meetings deciding on rules of procedure that might turn out to be extremely divergent if they were done on a case-by-case basis. His delegation would be willing to make a contribution towards that work.

30. The Chairman noted that he had already agreed to request the Secretariat to draw up separate rules for the DSB and the TPRB. As regards rules for subsidiary bodies, he believed that because of the large number of such bodies, it would not be possible, within the limited time frame available to the Sub-Committee, to venture into this exercise. However, if New Zealand, which had consistently raised this issue, could prepare a first draft, the Sub-Committee would be prepared to consider it. Accordingly, he requested that New Zealand show leadership and produce the first draft of rules for subsidiary bodies.

31. The representative of Canada said that her delegation wished to reserve its position on the Rules for the Ministerial Conference and the General Council until ongoing discussions with regard to observers and derestriction were concluded.

32. The representative of Jamaica said that her delegation had noted the transfer of the rules for airmail and telegraphic ballots from the Ministerial Conference to the General Council. Jamaica was concerned that, as a result, there would now be no provision for Members unable to attend sessions of the Ministerial Conference to vote by postal ballot, thus depriving them of the opportunity to participate in important decisions.

33. The Chairman invited Jamaica to submit its concerns in writing so as to enable them to be addressed.

34. The representative of Hong Kong said that, in view of the work load before the Sub-Committee, it should do the minimum necessary for the effective implementation of the WTO, and should not be too ambitious or depart too much from the written provisions of the WTO Agreement. As regards New Zealand's suggestion concerning rules for subsidiary bodies, this should be approached with some restraint both for practical reasons and because the relevant Agreements themselves called on the bodies concerned to establish their own working procedures. It would not be inappropriate to allow some time for these bodies to benefit from actual working experience, before considering rules of procedure therefor.

35. The representative of China said that his delegation would submit any comments it might have on rules of procedure to the Secretariat.

36. The representative of Morocco, addressing the question of government observers, said that there would probably be two categories of such observers. The first would consist of signatories to the Final Act that could not ratify the WTO Agreement until some time after its entry into force, and the second those invited as observers. Morocco believed that consideration should be given to avoiding a confusion between these two categories.

37. The Chairman said that it would be useful if Morocco submitted its comments in writing. While he did not wish to rush delegations to a decision, the Sub-Committee did not have the luxury of time. Accordingly, he would urge delegations to come prepared to take decisions on the various aspects of the rules of procedure for the Ministerial Conference and the General Council at the next meeting of the Sub-Committee.

38. The Sub-Committee took note of the statements.

B. Transitional arrangements

39. The Chairman said that the issue of transitional arrangements was important for a number of Members. His discussions with various delegations had indicated that almost 99 per cent of delegations wished to see both the GATT 1947 and the WTO coexist for a certain period of time. There was, however, at least one delegation, and at most two, that believed that only one organization should exist as of the date of entry into force of the WTO. In this connection, he wished to recall the tradition in the GATT for the minority to move towards the majority view. In this particular case, since there was a large majority, the minority should try and see how it could accommodate the interests of the majority. The minority in this case might have legitimate concerns, and he was trying to address these in his consultations with the delegations concerned. He proposed to continue his consultations, and to have the Sub-Committee revert to this matter at an appropriate time.

40. The representative of the United States said that his delegation had been involved in informal discussions over the past several weeks on the subject of transitional arrangements, in particular to try to find solutions to the problems that the Secretariat and others had identified with respect to the coexistence of the GATT 1947 and the Tokyo Round Codes and the WTO Agreement. Unfortunately, and despite its best efforts thus far, no such solutions had been reached. In particular, solutions to potential conflicts between obligations under the GATT 1947 and the Tokyo Round Codes on the one hand and the WTO Agreement on the other, to the free-rider problem and associated disincentives for rapid ratification, and to the dispute settlement issues, had proven illusive. As a result, the United States, at this stage, planned to proceed with withdrawal from the GATT 1947 and the Tokyo Round Codes effective upon entry into force of the WTO Agreement, and had started to take the necessary steps internally to prepare for this. He noted that the Uruguay Round implementing legislation submitted to Congress on 27 September, and still under consideration, would enable the United States to apply WTO benefits, on a *de facto* basis, to GATT 1947 contracting parties that had not as yet ratified the WTO Agreement prior to its entry into force. The United States expected to continue to provide such benefits during the two-year acceptance period provided for in the WTO Agreement, consistent with its objective of encouraging full participation in the WTO by all GATT 1947 contracting parties as quickly as possible. The United States would also continue to work toward a smooth transition, and believed that withdrawal was the simplest and most effective approach to such transition. Nevertheless, the United States recognized that other governments preferred a period of coexistence during which they would remain in the GATT 1947 and the Tokyo Round Codes as well as accept the WTO Agreement. Notwithstanding its plans, the United States would continue to work with other governments in the process indicated by the Chairman in order to address the entire spectrum of transition issues so that, in accordance with the differing views of various governments, both withdrawal and coexistence could be taken into account in the decisions of the Preparatory Committee.

41. The representative of the European Communities expressed the hope that the United States' statement was an expression of intent rather than a final decision, and that consultations until the next meeting of the Sub-Committee would lead to a result satisfactory to all those that believed that coexistence was possible and that it was not advisable for governments such as the United States, and possibly others, to withdraw from GATT 1947 upon entry into force of the WTO. The Community believed, upon careful reflection, that it was legally possible to find answers to the questions raised by the United States. If the United States were indeed to withdraw from the GATT 1947 upon the WTO's entry into force, this would create a situation that would force the hand of those that today believed that coexistence was possible, to review their approach.

42. The representative of Malaysia, speaking on behalf of the developing countries, said that the matter raised by the United States was of serious concern to their countries, and expressed the hope that there was still some way for the United States to accommodate the idea of coexistence. A number

of developing countries would find themselves in a very difficult situation if the United States indeed withdrew from the GATT 1947 upon entry into force of the WTO. He hoped the matter could still be resolved, and urged the United States and others to be considerate on this issue.

43. The representative of Australia said that the United States' statement was of great concern. It was in the collective interest of all to ensure that the transition from the GATT 1947 to the WTO was undertaken with a minimum of confusion and recrimination. As his delegation had stated on previous occasions, it believed that this could best be done by allowing a period of coexistence of both GATT 1947 and the WTO. If the WTO were to come into existence in circumstances in which countries were denied recourse to legitimate dispute settlement procedures as a result of any arrangements that were made with regard to the transition from the GATT 1947 to the WTO, that would create a negative environment for the new organization's entry into force. It was essential to prevent this from happening.

44. The representative of Japan supported the statements by the Community and Australia.

45. The representative of Canada supported the Community's statement. Canada, like the Community, believed that there were solutions to the problems that the United States was concerned about. Also, like Australia, he wished to remind all that they were committed to a smooth transition, to which the United States' announcement would not contribute.

46. The representative of Hong Kong expressed concern that one had yet to work out an agreeable solution to the question of transition. Hong Kong was particularly concerned about the areas of anti-dumping and subsidies. Hong Kong, like the Community, hoped that a solution could be worked out between then and the next meeting.

47. The representative of Switzerland said that, like others, Switzerland wished to see a smooth transition from the GATT 1947 to the WTO, and hoped that the problems that had been raised could be successfully resolved through consultations.

48. The representative of Norway, speaking on behalf of the Nordic countries, expressed regret at the United States' statement. Their countries hoped, like the Community, that this was not necessarily the final word on the subject from the United States. It would be possible to notify withdrawal from the GATT 1947 and still continue to consult in order to try and reach a solution. The main concern of the Nordic countries was in the area of dispute settlement, and it was important to be able to work in a constructive atmosphere in order to reach a satisfactory solution in that area.

49. The representative of Morocco expressed his delegation's interest in this issue and its support for the statements by the Community and by Malaysia, on behalf of the developing countries.

50. The representative of New Zealand agreed that transition should not deprive countries of the opportunity of recourse to effective dispute settlement procedures.

51. The representative of Poland expressed concern that the United States' statement might give rise to a situation that might be prejudicial to the legitimate interests of many of the governments that had signed the Marrakesh documents in good faith. His delegation wished to be associated with the process that would lead to finding a solution to this problem.

52. The representative of Brunei Darussalam, speaking on behalf of the ASEAN countries, said that they, like the Community, hoped that the United States' statement was one of intent, and that further consultations would be carried out to resolve the problems towards a smooth transition.

53. The representative of Uruguay expressed her delegation's concern at the United States' announcement, and supported the Community's statement as well as any efforts aimed at permitting coexistence of the GATT 1947 and the WTO.

54. The representative of Korea expressed the hope that this matter could be resolved in a satisfactory manner so as to enable a smooth transition to the WTO.

55. The representative of Colombia joined others in expressing concern at the United States' statement.

56. The representative of Argentina joined in the concerns expressed by previous speakers, and urged all participants in the consultations to provide for adequate arrangements for transition to the WTO and ensure the rights of all parties to have recourse to dispute settlement.

57. The representative of Turkey said that his Government had legitimate interests in this matter, and believed that a smooth transition and coexistence were necessary.

58. The representative of Brazil associated his delegation with the Community's statement.

59. The Chairman said that the discussion had helped to underscore his introductory remark that almost 99 per cent of all delegations was in favour of coexistence of the GATT 1947 and the WTO. He reiterated that it was the tradition in the GATT for the minority to try to move towards the majority view. He hoped that a resolution could be found through further consultations.

C. Paragraph 8(b)(iii) of the Decision establishing the Preparatory Committee

(i) Arrangements for effective cooperation with other inter-governmental organizations

60. The Chairman recalled that at the 7 October meeting of the Sub-Committee, the Secretariat had been requested to prepare a paper identifying the arrangements that would have to be put in place by 1 January 1995 with the IMF and the World Bank. While the paper was ready in English, it had not yet been translated into the other two languages. He suggested therefore that the Sub-Committee revert to this matter at its next meeting. With regard to the question of relations with the UN, he recalled that the Sub-Committee had agreed to revert to this matter at a future meeting. He asked whether delegations wished to comment on the question of the WTO's relations with the UN, and with the UNCTAD in particular. However, if their preference was for the Secretariat and himself to put some thoughts on paper before reverting to this matter in the Sub-Committee, that approach would also be feasible. Indeed, work was already under way on identifying possible areas of future collaboration between the WTO and UNCTAD.

61. The representative of the European Communities said that it would be useful for all to reflect on the question of relations with the United Nations and for a paper to be prepared for consideration by the Sub-Committee at a subsequent meeting.

62. The representative of Egypt said that a close working relationship with the UNCTAD should be in place as of day one of the entry into force of the WTO, and that this should not be linked with the general relationship that might be envisaged between the WTO and the UN.

63. The Chairman said that discussions were taking place in other fora on the kind of relations the WTO should have with UN bodies. Rather than allowing others to decide this matter for the WTO, the latter should itself indicate what kind of relations it desired with other organizations. With this

in mind, he had requested the Secretariat to begin work on a paper that would address both the general aspect of relations with the UN and the technical aspect of relations with the UNCTAD, taking into account the fact that the ITC was a joint subsidiary organ of the two organizations.

64. The Sub-Committee took note of the statements.

(ii) Observer status for international organizations

65. The representative of India expressed concern that while the Sub-Committee was deliberating on draft criteria for granting observer status to inter-governmental organizations, and while its discussion was not yet concluded, some bodies were going ahead with decisions on observers already. While no one questioned that it was ultimately up to an individual body to take a decision on a case-by-case basis, such decisions had until now been taken largely in connection with IMF, World Bank and UNCTAD. However, the Negotiating Group on Maritime Transport Services had now taken a decision to invite the OECD as observer to its meetings. This was a substantive decision that had been taken while discussion in the Sub-Committee on guidelines was still ongoing. India had drawn attention to its concern in the Negotiating Group but, being an observer therein, had been unable to influence the decision taken. His delegation would therefore urge the Sub-Committee to move ahead quickly on the criteria for granting observer status to inter-governmental organizations before other bodies also began to take their own decisions as regards observers.

66. The representative of Australia agreed with India on the importance of the Sub-Committee moving ahead quickly in working out the arrangements for observer status for other inter-governmental organizations in WTO bodies. Speaking in his capacity as Chairman of the Negotiating Group on Maritime Transport Services, he said that arrangements had been worked out in the Sub-Committee on Services to provide for individual negotiating groups in the Services area to take decisions on observer status for other inter-governmental organizations on a case-by-case basis. The Negotiating Group on Maritime Transport Services had received a request from the OECD to observe its work and had had a preliminary discussion thereon at its meeting in July. A further discussion had been held at the Negotiating Group's meeting on 17 October, at which a decision had been taken by consensus to invite the OECD to be an observer to those negotiations.

67. The Chairman suggested that he consult on this matter with the Chairmen of the Sub-Committee on Services and the Negotiating Group on Maritime Transport Services.

68. The representative of Australia, speaking in his capacity as Chairman of the Negotiating Group on Maritime Transport Services, said it was his understanding that the Sub-Committee was engaged in developing criteria for observer status of other inter-governmental organizations in WTO bodies, and that this was an issue for the future, following the implementation of the WTO. The individual negotiating groups in the services area, which were doing their work now in advance of the WTO coming into effect, had been permitted by the Sub-Committee on Services to take decisions on a case-by-case basis to allow other inter-governmental organizations to observe the work of those groups now. There was a clear rationale for, and a logical distinction between, the respective functions of the Sub-Committee on Institutional, Procedural and Legal Matters and those of the services negotiating groups with regard to inter-governmental observers, which should not give rise to any confusion.

69. The Chairman said that the decision by the Negotiating Group on Maritime Transport Services appeared to have given rise to concerns that it should not be duplicated in other bodies and that an organization which had not been considered for observer status thus far in the WTO process should not appear into the picture. One was trying merely to safeguard against such a situation. For this reason, he wished to hold a discussion with the Chairman of the Sub-Committee on Services.

70. The representative of India said his delegation was also concerned that another Negotiating Group, that on Basic Telecommunications, had, at least for the moment, declined observer status to the Asia Pacific Telecommunications Union which was also an intergovernmental organization with less than universal membership. While it was true that under the proposed guidelines individual bodies would decide on a case-by-case basis, his delegation believed there should be some consistency within the negotiating groups in the services area, and that their decisions should be based on established criteria. He emphasized that India was not questioning the decision taken by the Negotiating Group on Maritime Transport Services.

71. The representative of the United States recalled that at its first meeting, the Preparatory Committee had agreed that it should be left to the Sub-Committees to decide on their own rules on observers and on the appropriate observers that might attend their respective meetings. Trying to coordinate the process between the various Sub-Committees should not be the job of this Sub-Committee, particularly since it had so much else to do. As Australia had indicated, there was an important distinction between the work of the Sub-Committees of the Preparatory Committee, where observer status may or may not be granted to a particular group, and observer status in the WTO bodies which would be subject to the rules that this Sub-Committee was trying to establish. He hoped India would have confidence that the situation after the date of entry into force of the WTO would not be prejudiced by what was done in the past under the negotiating groups on services or the Sub-Committees under the Preparatory Committee.

72. The Chairman acknowledged that the Preparatory Committee had agreed at its first meeting to leave it to its Sub-Committees to decide on the observers to be invited to their meetings. While he would not wish in any way to "coordinate" the work of the Sub-Committees in this regard, he believed that if any concerns arose that could be resolved through consultations, he should seek to undertake such consultations. He hoped to see, through a discussion with the Services Sub-Committee Chairman, whether India's concern could be addressed.

73. The representative of Norway, speaking on behalf of the Nordic countries, supported the statements by Australia and the United States. While the Nordic countries would not object to consultations being held, they would be concerned if the consultations cast any kind of doubt on the decision taken by the Negotiating Group on Maritime Transport Services. That decision had been taken and there was no reason to question its appropriateness.

74. The Chairman said it was clear that no-one was questioning the decision taken by the Maritime Transport Services Negotiating Group. At the same time, if that decision raised any concerns, he believed that these should be resolved through consultations.

75. The representative of Malaysia supported the Chairman's efforts to try and consult on the concern raised by India. While no-one wanted to cast doubt on the decisions of the negotiating groups in the Services area, the importance of consistency should be kept in mind.

76. The representative of Morocco said it was important that, within the framework of the Preparatory Committee's work and that of its sub-bodies, the granting of observer status to any organization should not prejudice the whole issue of the granting of observer status in the WTO. His delegation believed that objective criteria should be drawn up to guide Members in the granting of observer status in the framework of the WTO.

77. The representative of New Zealand said that although, as India had noted, the Negotiating Group on Maritime Transport Services had granted observer status to an organization with less than universal membership, the universality or otherwise of the membership of an organization was not necessarily

a relevant criteria for deciding, *per se*, whether it should be granted observer status to WTO bodies in the future.

78. The representative of Australia, speaking in his capacity as Chairman of the Negotiating Group on Maritime Transport Services, said he objected to any implication that the decision taken by the Negotiating Group on this particular issue was in any way improper. In the context of the procedures that had been worked out for the involvement of observers in the work of the negotiating groups in the services area, an important element was the composition of the individual negotiating groups, which consisted both of participating member governments and observers. The discussion at the present meeting seemed to have presented one of the best arguments for India to move from being an observer in the Maritime Transport Services negotiations to becoming a member of the Negotiating Group. Had India been a member at the time the Negotiating Group had discussed this issue, its voice would have been heard more fully.

79. The Chairman said that, as he had stated earlier, the Preparatory Committee at its first meeting had clearly left it to the Sub-Committees to decide on observers to be invited to their meetings, and he did not believe that anyone had intended to question this.

80. The representative of India said that he had intended really to raise a concern regarding lack of consistency in the decisions taken by the various negotiating groups in the services area, and was not questioning the decision by the Maritime Transport Services Negotiating Group. Since the Sub-Committee was considering draft criteria and conditions for observer status for intergovernmental organizations, his delegation had considered this to be the appropriate forum in which to raise its concern.

81. The Sub-Committee took note of the statements.

D. Paragraph 8(c)(iv) of the Decision establishing the Preparatory Committee (Composition of the Textiles Monitoring Body)

82. The Chairman said that the Chairman of the Contact Group on Textiles, Mr. Abdel-Fattah (Egypt), was consulting on the composition of the Textiles Monitoring Body (TMB). Consultations on the Chairmanship of the TMB, however, would have to be undertaken by someone else since Mr. Abdel-Fattah had announced his own candidacy for that post. He would consult with delegations on the question of designating someone for this task.

83. The Sub-Committee took note of the statement.

E. Issues relating to the Standing Appellate Body

84. The Chairman said that he wished to underscore the importance that all should attach to the Standing Appellate Body. The credibility of the dispute settlement mechanism rested on the prestige that the Appellate Body could attract to itself and the respect that individual members of the Body could command. If decisions of the Appellate Body were not treated with the respect they deserved, the WTO would be seriously injured.

85. The representative of the European Communities said that the new dispute settlement system under the WTO would be an essential element of that organization, and that the Appellate Body would clearly play a paramount role therein. It was therefore important to have a first exchange of views on the establishment of this Body and the selection of its members, and the Community would shortly be making a written contribution with a view to assisting the further consideration of this matter.

Although it was true that the first cases to be brought before the Appellate Body would not necessarily come immediately after the WTO's entry into force, the Body should have an opportunity to meet, to consider its rules of procedure and to study different aspects of its organization. Consideration therefore needed to be given to the establishment of the Appellate Body as soon as possible. The Community believed that Appellate Body members should be of the highest quality and that they should all be permanently available. Furthermore, the Appellate Body should be permitted to work as independently as possible, and its membership should reflect that of the WTO. Also, all members of the Appellate Body should be on an equal footing, and it should operate in a collegiate manner. In this connection, the Community noted with surprise that in the Director-General's budget estimates for 1995 (L/7550 and Corr.1) figures had been provided in respect of the Appellate Body, and believed that these could not be given much value at this stage. Budgetary provisions could only be made when it became clear what delegations had in mind or what they required in regard to the Appellate Body. The Director-General's estimates reflected a certain suggestion as to what the Appellate Body might look like. This was not, however, the way in which the Community saw the Appellate Body, and wished to hear the views of others in this regard. The Community found regrettable that in a budgetary document a political issue had been prejudged. It reserved the right to make a written contribution on the question of the Appellate Body the next time it was discussed.

86. The representative of Malaysia said that, like the Community, his delegation had a concern with regard to the Director-General's budget estimates on the Appellate Body, and requested clarification on this matter.

87. The representative of Australia said it was clear that the key issue with regard to the Appellate Body was its credibility. It was also clear that in the context of the new dispute settlement arrangements to operate under the WTO, the Appellate Body would have an important function and a very high profile, and would be influential in determining the reputation of the dispute settlement process of the WTO over time. It was therefore important to reflect carefully on the composition, the format, the working procedures and the expert staff that all agreed should be provided for the Appellate Body. In that regard, Australia shared the reservations expressed by the Community and Malaysia about any prejudgment, in the Director-General's budget estimates, of these important political decisions that were yet to be taken. The Dispute Settlement Understanding (DSU) made clear that members of the Appellate Body should be seven people of recognized authority in both international trade and in law. Australia believed it would be more practical to be able to secure the services of such people of recognized authority if they were made available to the dispute settlement process on an "as required" basis rather than being permanently appointed and resident in Geneva. It would not only be very difficult to attract people of sufficient experience and recognized authority to accept permanent employment in Geneva, but would also be very expensive. One would also need to think of highly professional, small and separate staff, including at least one or two highly qualified lawyers, who would provide advice to the members of the Appellate Body serving on any particular appeal so that one would, over time, obtain a certain legal consistency in the judgments. These issues needed to be discussed more fully before any political decisions were made.

88. The representative of Brazil said that if Appellate Body members were required to be resident, or virtually resident, in Geneva, one would substantially diminish the universe of recruitment and therefore lose substance and quality in the membership of the Body. One should therefore be flexible on this issue. As regards staff, one should beware of creating a large bureaucracy. The Appellate Body would not reinvent the wheel in every case. The research on each case should basically be done with a strong reliance upon the legal office and the pertinent divisions of the WTO Secretariat, although, clearly, staff that would work on writing the opinions of the Appellate Body should not be the same as those serving on the panel. Support staff should be small, and the possibility of bringing in further expertise should be provided. Appellate Body members should be able to call on the opinion of experts for a specific case, who need not enter into professional contracts with the organization. Brazil believed

that one should be careful not to burden the Appellate Body with features and characteristics that might impair its effective functioning.

89. The representative of Norway, speaking on behalf of the Nordic countries, agreed with the Community's statement. The Appellate Body was an extremely important body which would be a cornerstone institution in the WTO structure, and its credibility should be assured from the outset. There were good reasons to assume that the Appellate Body would be a very busy body. The Nordic countries did not agree that requiring the availability and presence in Geneva of Appellate Body members contradicted the aims of attracting high quality people to that Body. On the contrary, a full-time Body might be the best way of giving it the prestige that would attract the right type of person. As regards Brazil's comment on allowing the Appellate Body to call on expertise, it was his understanding that the Appellate Body was to rule on legal matters exclusively. While there was provision in the DSU for calling on expertise at the panel stage, it might not be appropriate to talk in terms of the Appellate Body calling on such expertise. As regards the provisions in the Director-General's budget estimates, where an assumption had been made, presumably for planning purposes only, that there would be three permanent members and four on a retainer basis, he would underline what had been said or implied by others that these should be disregarded and not seen as guidelines for the Sub-Committee's discussions on this subject.

90. The representative of Hong Kong said that while it was not essential to tie up all the loose ends at this stage, one needed to develop a coherent set of guidelines that were consistent with the outline set out in the DSU. Hong Kong noted that automaticity was one of the key principles underlying the DSU. From this it followed that the method of rotation of the seven members of the Appellate Body should be mechanical as far as possible. While due allowance should be made for conflicts of interest and so on, the system should be such as to forestall any attempt to manipulate the roster for tactical advantage. Nor should a selection system be introduced to take into account differing levels of expertise or experience among the members of the Body. Any attempt at management along these lines could turn out to be the start of a slippery slope. If one accepted the principle of strict rotation, one implicitly accepted the principle of equality among the seven members, which argued in favour of all seven being retained on exactly the same basis. It would clearly be very expensive to employ all seven members on a full-time basis and the need to do so in terms of workload was far from proven. All Appellate Body members should be employed on a retainer basis in order to ensure their availability, and be provided additional remuneration as and when their turn came up on the roster for case work. This approach might not be problem free. Indeed, it might not always be easy to obtain the services of the people of the very high calibre that one wanted on the basis that he had outlined. Hong Kong believed, however, that its approach struck a balance between the ideal and the practical. As to the attributes of the individuals, one was not looking for experts because the Appellate Body would be concerned with points of law. On the other hand, one did not want a Body of seven pure jurists either. One should therefore be looking for practically minded people with the qualifications set out in the DSU. Representativeness of the Appellate Body membership would have to be approached with sensitivity. In terms of institutional links, the Appellate Body was clearly related to the DSB. Administrative support would therefore have to come from the Secretariat, although a way might need to be found to provide legal advice that was independent from any advice that had already been given in the context of panels. This, too, might have budgetary implications.

91. The representative of the United States said that his delegation would welcome the Community's written submission. While the United States agreed that all the issues need not be tied down before the date of entry into force of the WTO, it might be difficult to leave the issue of representativeness and the composition of the Appellate Body open after that date because once a dispute was filed it tended to focus the minds of parties on the interests involved. One would have the best opportunity to be fair minded about composition before any dispute was filed, which could presumably be done soon after the date of entry into force of the WTO and have the potential of coming before the Appellate

Body several months later. This was therefore one issue that one could try to have some recommendations on before the date of entry into force. The United States favoured independence of the staffing but agreed that one should not create a huge bureaucracy. On the issue of expertise, Article 17:6 of the DSU made clear that the job of the Appellate Body was limited to issues of law and legal interpretation, and experts on factual issues should not therefore be required. Also, Article 17:7 made clear that the Appellate Body would be provided with the appropriate legal support, so that there might not be an occasion for it to seek out further expertise, particularly on factual issues. Finally, the United States agreed with others that the credibility of the Appellate Body was a key issue. In this context, he recalled that his delegation had mentioned on an earlier occasion its interest in an ethical code of conduct, particularly in the context of the Appellate Body. Article 17:3 of the DSU stated, for example, that Appellate Body members "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest". The United States hoped to submit shortly a written communication in this regard, which could be considered in light of the discussion on the Appellate Body at the present meeting.

92. The Chairman said that, like others, he had also been surprised by the implications in the Director-General's budget estimates as to the possible configuration of the Appellate Body. He assured delegations that he had not participated in the preparation of those proposals. However, he could understand that for planning purposes it might have been necessary to indicate approximate cost estimates for the Appellate Body.

93. The representative of Canada said that his delegation would either respond to a paper submitted by the Community or present a submission of its own. Canada agreed that the credibility and the functioning of the dispute settlement system in the WTO depended entirely on the functioning of the Appellate Body, and on the high quality and independence of the members thereof. Canada was flexible at this stage as to whether such members should be resident full-time or on call. However, in arriving at that decision, one would have to keep in mind the anticipated case load and the very short time-frames in which these persons would be called upon to render a decision. It would therefore be helpful if, at the next discussion of this issue, the Secretariat could provide some ideas as to what the caseload might be. It was likely that most, if not all, cases, would be appealed. Clearly, a loser in a panel proceeding would have great difficulty in justifying to its electorate why it had not used the appeal process. Appealing a case would make it easier for the Member concerned to explain that it had exhausted all possible avenues. Canada favoured a separate support system for the Appellate Body that should be lodged in the Secretariat but be independent of the legal office because that would be an inherent conflict of interest. With respect to the latter question, Canada had supported the United States from the outset on the necessity of having a code of conduct because this had a bearing on the question of credibility. As to working methods of the Appellate Body, the DSU made clear that these were matters for the Appellate Body itself to consider. Hong Kong's suggestion as to automatic rotation would, therefore, be something for the Appellate Body to decide on.

94. Speaking in his capacity as Chairman of the GATT 1947 Committee on Budget, Finance and Administration, he wished to recall, in defence of the figures that appeared in the Director-General's budget estimates, that a number of members of that Committee had some time earlier expressed the need to have from the Secretariat some idea of the costs of the Appellate Body. He believed that the estimates produced by the Secretariat were an honest attempt to try and give a rough estimate of the costs, although he would agree that they should not in any way prejudice the discussion in the Sub-Committee on the Appellate Body and its nature and composition.

95. Mr. Lavorel, Deputy Director-General, said that the provisions for the Appellate Body in the Director-General's budget estimates for 1995 were merely indicative and did not reflect any preference of the Secretariat or the Director-General as to how the Appellate Body should be set up. A number of delegations had expressed the need, some weeks earlier, for some indicative figure for the Appellate

Body. At about the same time, a number of delegations had also indicated to the Chairman of the Sub-Committee the need to have a discussion on the policy aspects of this question. The Secretariat was then faced with the options of delaying circulation of the budget estimates until after the Sub-Committee had fully discussed this issue, which might not have been timely from the point of view of the work of the Budget Committee, or of circulating the document with an indicative figure for the Appellate Body. Having decided on the latter option, three cost estimates were drawn up on the assumption that five appeal cases would be brought during the six-month period under consideration, i.e. July to December 1995. To these figures was added the estimated cost of a small staff consisting of one senior professional and two secretaries. The first estimate provided for the seven Appellate Body members to be hired on a retainer basis and paid consultancy fees when they were in Geneva on a case, the second for the Appellate Body members to reside permanently in Geneva and be full-time employees, and the third for the Appellate Body to be composed of three permanent members and four retainer members. It was decided to use the figures yielded by the third estimate in the budget document since they fell in between those yielded by the first and second estimates. As indicated in L/7550, the overall figure for this estimate was Sfr 1,150,000. Figures for the first and second estimates, were, respectively, Sfr 700,000 and Sfr 1,700,000. He reiterated that the figures in the budget document were merely indicative and for the use of the Budget Committee, and that they would obviously be changed on the basis of any policy decision by the Sub-Committee.

96. The Chairman said he did not believe that anyone questioned the good faith of the Secretariat in putting together the budget estimates. He suggested that on the question of the nature and the composition of the Appellate Body, one proceed on the basis of the discussions in the Sub-Committee, and overlook the budget proposals on this matter. The various estimates just outlined by the Deputy Director-General would be useful in terms of estimating the final cost of the Appellate Body.

97. The representative of New Zealand agreed that it was important that all members of the Appellate Body had equal status. Like Australia, his delegation believed that it was not necessary to go beyond the concept of a retainer being paid together with consultancy fees for the members of the Appellate Body, and in this context the indicative figures given by the Deputy Director-General had been helpful. Following from this, it appeared that Appellate Body members did not necessarily need to be based in Geneva. New Zealand envisaged a small support office comprising limited legal and administrative staff. It was important that that office should be independent, particularly in terms of legal advice. While the quality of the Appellate Body members was defined to a certain extent in Article 17 of the DSU, its members should have some familiarity with the body of GATT jurisprudence that had been developed over the years. While the order of rotation of members was to be determined in the Appellate Body's working procedures, New Zealand believed that this should involve a degree of automaticity. As to timing, New Zealand believed that the Appellate Body would need to be in place within about six months following the entry into force of the WTO. Like others, New Zealand would submit more detailed thoughts in writing in due course.

98. The representative of Uruguay agreed with several previous speakers that the Appellate Body should meet the requirements of the highest quality and independence in order to ensure the credibility of the WTO's dispute settlement system. Her delegation also agreed with others that thought should be given to selecting persons of the highest integrity with very broad experience in all the matters that fell within the competence of the WTO. As to whether Appellate Body members should serve full-time or part-time, her delegation had noted the comments made in this regard and would give this further consideration. With regard to rotation, her delegation believed this should be automatic. She hoped that after this first exchange of views further progress could be made on this issue, which was of fundamental importance.

99. The representative of India said that the working procedures of the Appellate Body could be similar to those for the DSB, and that the Appellate Body could establish these in consultation with

the Chairman of the DSB, among others. As to the nature of the persons to be appointed to the Appellate Body, the DSU indicated clearly that they should have "demonstrated expertise in law, international trade and the subject matter of the covered agreements generally". Since it might be difficult to find persons with expertise in all three areas, there should be some balance in the Appellate Body among persons with expertise in law and those with expertise in the covered agreements. This was important for the efficient functioning of the Appellate Body. The DSU provided also that Appellate Body membership should be "broadly representative", and it might be important to clarify at a later stage whether this meant geographically representative or representative of developed and developing countries, although India did not have strong views on this subject. Finally, in view of the provision in the DSU that members of Appellate Body "shall stay abreast of dispute settlement activities and other relevant activities of the WTO", having a small number of its members permanently resident in Geneva might provide an element of consistency and continuity for the functioning of the Body.

100. The Chairman said that while taking into account India's comment that the "broadly representative" nature of the membership might need clarification, the overall objective should be to obtain the seven best persons to serve on the Appellate Body.

101. The representative of Argentina said that all appeared to be in agreement as to the need for the high integrity and independence of the Appellate Body, and the importance of its credibility. If appropriate mechanisms were put in place, it might not be necessary to have a permanent body of eminent persons in Geneva. Article 17:8 of the DSU referred to "the expenses of the persons serving on the Appellate Body, including travel and subsistence allowance", which indicated that the drafters of this text, in principle, might have had in mind the type of possibility he had just outlined. The need to have a small group of independent legal rapporteurs should be looked at more carefully. Such support staff should be independent of the Secretariat, thus making a clear distinction between the dispute settlement system itself and the Appellate Body. This was clearly appropriate because a fresh approach would be required to assist and support the Appellate Body in its work, and because the persons involved in the previous phase of the dispute might have prejudged the issues. On rotation, automaticity was of fundamental importance, and a procedure that required any type of negotiations as to the members that should hear a particular appeal could not be considered. Argentina agreed with the United States that it would be ideal to decide on the composition of the Appellate Body before an appeal was brought to it.

102. The representative of Brunei Darussalam, speaking on behalf of the ASEAN countries, said that in reflecting on whether Appellate Body members should serve part-time or full-time, it would be helpful to have a copy of the options and the budget estimates therefor that the Deputy Director-General had read out earlier. It would also be useful for all to reflect on India's comments as to the "broadly representative" nature of the membership of the Appellate Body.

103. The representative of Norway, speaking on behalf of the Nordic countries, said that they would submit written proposals on this subject to the Chairman. The Nordic countries supported the suggestion that the Secretariat provide an indication of the workload that might be expected. Assuming that ten disputes each year went to the panel stage, and that six of those cases were appealed, the Appellate Body would be employed year-round, given that it had sixty days to complete its proceedings on any one case. As regards the comments by others on the Director-General's budget estimates, his delegation had already indicated that it looked on these as having been drawn up for planning purposes only, and underlined that the Sub-Committee's discussion should not be dependent on those figures.

104. The Chairman said that the question of the setting up of the Appellate Body should be addressed as carefully as possible so as to arrive at some final conclusions. In order to move the process forward, he suggested that he prepare a working paper to try and help focus ideas on this subject, which would include inputs from the Secretariat as well as from delegations, as also results of bilateral and plurilateral

consultations that he planned to hold shortly. He would try to have this paper available by the time of the next meeting of the Sub-Committee. He asked if such an approach would be acceptable.

105. The representative of Canada asked whether in that process one could be given an indication of possible caseloads and the basis for those estimates.

106. Mr. Lavorel, Deputy Director-General, said that the Secretariat would furnish such information.

107. The Sub-Committee took note of the statements and agreed with the approach suggested by the Chairman.