

**CLARIFYING AND IMPROVING GATT ARTICLE V:
AIRCRAFT IN TRANSIT**

Communication from Canada

The following communication, dated 3 July 2012, is being circulated at the request of the delegation of Canada for consideration by the Negotiating Group on Trade Facilitation at its meeting on 9-12 July 2012.

Explanation

At a facilitator led open-ended meeting on 31 January 2011, during an intensive streamlining phase of trade facilitation negotiations, it was agreed by those present that former paragraph 1.3 of Article 11 would be deleted from the next revision of the consolidated text as part of the effort to reduce duplication and eliminate unnecessary text. This change was subsequently formally adopted by the NGTF as part of the overall changes to Article 11. Former paragraph 1.3 of Article 11 provided the exception for aircraft in transit found in GATT Article V (7) by stating: "The provisions on traffic in transit of this agreement shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)".

While Canada initially did not object to this deletion, subsequent policy and legal analysis that Canada has conducted indicates that inclusion of this exception language serves a valuable purpose in clarifying the scope of the article on traffic in transit, and that its deletion risks being interpreted as a widening of the scope to encompass aircraft in transit. This interpretation is supported by provisions under the Vienna Convention, and Panel and Appellate Body reports, which demonstrate that omissions in a later treaty covering the same subject matter must have some meaning, supporting the need to reinsert this exemption.

Canada has raised this concern on many occasions, and has since discussed the issue extensively with Members over the last 12 months in bilateral, small group and open-ended formats, with the assistance of the Chair appointed facilitator. While all Members have agreed that Article 11 should not cover aircraft in transit, there is no agreement over whether specific text excluding aircraft in transit is necessary to ensure this interpretation prevails, with several indicating that they believe the issue will be resolved through the text on Relationship to Other WTO Agreements. Members agree, however, that with no current text proposals regarding the Relationship of the Trade Facilitation Agreement to Other WTO Agreements, it is not possible to resolve this issue at this time.

Canada continues to believe that it is essential to reinsert the text excluding aircraft in transit into Article 11, even after text on the Relationship to Other WTO Agreements is resolved. However, mindful of the sensitivity of Members regarding the addition of bracketed text to the consolidated text, Canada requests that, as an interim measure, the following footnote be added to Article 11 as a placeholder to ensure this issue is dealt with at the appropriate time and to ensure that Canada's position on this issue is duly reflected in the consolidated text.

Proposed New Text – Footnote to Article 11

Members agree that aircraft in transit shall not be subject to the provisions of this Article, consistent with the scope of GATT Article V. Members will review whether the specific exemption language proposed by Canada: "In accordance with Article V:7 of the GATT 1994, the provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)" should be included in Article 11 when the Relationship to other WTO Agreements is discussed.
