

**PREPARATORY COMMITTEE
FOR THE
WORLD TRADE ORGANIZATION**

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(94-1822)

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

TRANSITIONAL ARRANGEMENTS

Note by the Secretariat

1. At its meeting on 31 May 1994, the Preparatory Committee agreed that the Sub-Committee on Institutional, Procedural and Legal Matters be given the task of making specific proposals concerning transitional arrangements to deal with ongoing activities under the GATT 1947 and the Tokyo Round Agreements after the entry into force of the WTO Agreement for consideration by the Preparatory Committee.
2. At its meeting on 13 June 1994, the Sub-Committee agreed that the Secretariat be requested to prepare a factual note describing the issues pertaining to transitional arrangements. This note presents the issues in broad conceptual terms leaving the detailed examination of specific transitional arrangements to any subsequent notes that might be requested by the Sub-Committee or other bodies.

I. Introduction

3. According to Article II:4 of the WTO Agreement, the GATT 1947 (the existing GATT) and the GATT 1994 (the GATT that has been incorporated into the WTO Agreement by reference) are legally distinct and may thus co-exist. This creates essentially three options for a contracting party after the entry into force of the WTO Agreement. It may:

- withdraw from the GATT 1947 and become a Member of the WTO,
- remain a contracting party to the GATT 1947 and not become a Member of the WTO,
or
- remain a contracting party to the GATT 1947 and become a Member of the WTO.

At least during a transitional period each of these cases is likely to arise. In each of them different legal issues regarding the applicability of the substantive and procedural provisions of the GATT 1947 and those of the WTO Agreement present themselves. There are essentially two categories of issues: (a) issues arising from the replacement of rights and obligations under the GATT 1947 by those under the WTO Agreement and (b) issues arising from the co-existence of the rights and obligations under the GATT 1947 and those under the WTO Agreement. The issues that can arise with respect to the Tokyo Round Agreements and their successor agreements annexed to the WTO Agreement can be similarly categorized. Some of the issues analyzed in this note can only be resolved through decisions of the CONTRACTING PARTIES to the GATT 1947 or the bodies established under the Tokyo Round Agreements. This applies in particular to decisions to phase out existing procedures or waive current obligations. To the extent that the resolution of issues requires a modification of the obligations of the Members of the WTO or new procedures within the WTO, the decisions would have to be taken by the Preparatory Committee or the WTO. This note discusses the issues of transition irrespective of which body would eventually have to resolve them.

4. The replacement of the GATT as an institution by the WTO requires the creation of a legal basis for that transition, that is some arrangement, endorsed by the CONTRACTING PARTIES to the GATT 1947, the Interim Commission for the International Trade Organization and the Preparatory Committee or the WTO, transferring assets, liabilities, records and staff from one to the other, as foreseen in Article XVI:2 of the WTO Agreement. It is assumed that the legal issues arising from this institutional transition will be dealt with in the Sub-Committee on Budget, Finance and Administration. This note, therefore, does not address them.

II. Withdrawal from and Termination of the Agreements to be Replaced by the WTO Agreement

5. According to paragraph 5 of the Protocol of Provisional Application and corresponding provisions in the protocols of accession, each contracting party may withdraw from the GATT 1947. The withdrawal takes effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations. These provisions override Article XXXI of the General Agreement, which provides for six-month withdrawal notice, because the General Agreement is applied only on the basis of the Protocol of Provisional Application and the protocols of accession but has itself not entered into effect. The Tokyo Round Agreements similarly provide for a sixty-day withdrawal notice. During the legal drafting process the inclusion of a denunciation clause into the Final Act, according to which acceptance of the WTO Agreement would carry denunciation of the Tokyo Round Agreements (similar to the one included in Article 16:5 of the Anti-Dumping Code) was briefly considered, but the idea found no support.

6. Rather than individually withdrawing from a treaty, all parties to a treaty may decide to terminate the treaty even if, as is the case for the GATT 1947 and the Tokyo Round Agreements, the treaty does not explicitly provide for its termination (Article 54 of the Vienna Convention on the Law of Treaties). The formalities required for the entry into force of a treaty need not be observed for its termination. For instance, the parties to a treaty may decide on the occasion of an assembly of the representatives of all parties to terminate the treaty. The parties to the Arrangement Regarding Bovine Meat have decided to terminate the Arrangement as of the date of entry into of the WTO Agreement. Such a collective decision to terminate a Tokyo Round Agreement that is to be replaced by an agreement annexed to the WTO Agreement permits a more orderly termination than one resulting from individual withdrawal notices.

7. Article 59 of the Vienna Convention on the Law of Treaties declares that "A treaty shall be considered to be terminated if all parties to it conclude a later treaty relating to the same subject matter and ... it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty...". This means that, once all contracting parties to the GATT 1947 or all parties to a Tokyo Round Agreement for which there is a successor agreement annexed to the WTO Agreement have become Members of the WTO, the GATT 1947 or the respective Tokyo Round Agreement could be considered to be terminated.

8. Issues: Should the agreements that are to be replaced by agreements annexed to the WTO Agreement be terminated by collective decisions of the parties to them? If so, by what procedures, at what point in time and under what conditions should these agreements be terminated?

III. Effects of the Withdrawal from, and Termination of, the Agreements to be Replaced by the WTO Agreement

9. Article 70(1) of the Vienna Convention provides that "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of

the treaty prior to its termination". Article 70(2) provides that Article 70(1) applies to the relations between a State which denounces or withdraws from a multilateral treaty and the other parties to the treaty from the date when such denunciation or withdrawal takes effect. It would appear that the principles of Article 70 apply also in the case foreseen in Article 59 of the Vienna Convention, that is the case of a termination of a treaty through the conclusion of a new treaty. Article 70 thus makes clear that a party withdrawing from a treaty is no longer obliged to implement the treaty but that certain rights, obligations and legal situations that have arisen prior to the withdrawal as a result of the execution of the treaty remain unaffected. It should be noted that Article 70 gives little guidance on how to determine the exact scope of these unaffected rights and obligations. This determination would appear to be particularly difficult in respect of procedural rights and obligations.

10. Article 70 of the Vienna Convention provides that the parties to a treaty may agree to specific rules regarding the effects of a withdrawal or termination. The Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes (MTN/FA, p. 419) can be seen as a suggestion that such specific rules be adopted by the GATT Council and the Committees established under the Tokyo Round Agreements. The Decision recalls a previous decision of 22 February 1994 that existing dispute settlement rules and procedures of GATT 1947 shall remain in effect until the date of entry into force of the WTO Agreement, and "invite[s] 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. This Ministerial Decision implies that the Ministers anticipated that certain of the agreements to be replaced by the WTO Agreement would be terminated or subject to withdrawals because the need for a continued operation of the Councils and Committees arises only in that case. The Decision further implies that the Ministers considered that not all substantive rights and obligations under the agreements would extinguish with their termination or a withdrawal because only in that case does the continuation of the existing Councils and Committees serve a purpose.

11. Issues: To what extent are the substantive and procedural rights and obligations under the GATT 1947 and the Tokyo Round Agreements unaffected by their termination? To what extent should they remain unaffected? Should any specific rules beyond those suggested in the above-mentioned Ministerial Decision governing the consequences of terminations or withdrawals be agreed?

IV. Relationship Between the Rights and Obligations under the GATT 1947 or a Tokyo Round Agreement and those under the WTO

12. In the relations between WTO Members that have remained contracting parties to the GATT 1947 or to the Tokyo Round Agreements these earlier agreements continue to apply, however only to the extent that they are compatible with those of the later WTO Agreement. This follows from the rules of general international law on the application of successive treaties relating to the same subject matter (Article 30 of the Vienna Convention).

13. In the relations between WTO Members that have remained contracting parties to the GATT 1947 and contracting parties that have not yet become WTO Members, the GATT 1947 will continue to be fully applicable. The most-favoured-nation clause of the GATT 1947 would in principle require that benefits extended to WTO Members also be extended to the contracting parties non-Members of the WTO. In this context it should be noted that, while the most-favoured-nation clause of the GATT 1947 does not apply to trade in services and to TRIPS, many of the tighter disciplines on trade policy measures and access to markets for goods agreed in the Uruguay Round would have to be applied to imports from contracting parties not bound by these disciplines. A further, and perhaps more basic, problem arises from the fact that a WTO Member which remained a contracting party to the GATT 1947 could not invoke vis-à-vis other contracting parties to the GATT 1947 that have not yet become

Members of the WTO those provisions of the WTO Agreement that justify departures from the GATT 1994.

14. In the relations between the WTO Members that have withdrawn from the GATT 1947 or a Tokyo Round Agreement and the States or separate customs territories that have not yet become Members of the WTO, neither the GATT 1947 or the Tokyo Round Agreement nor the WTO Agreement applies. The only rights and obligations under the GATT 1947 or the Tokyo Round Agreement that would continue to apply in these relations are those created through the execution of the GATT 1947 or the Tokyo Round Agreement prior to the withdrawal (Article 70 of the Vienna Convention). However, such remaining rights and obligations may be of limited value in the relations between States and customs territories that are no longer bound to further perform the GATT 1947 and have therefore no longer any obligation under the GATT 1947 to refrain from imposing new restrictive trade measures.

15. Issue: Should the obligations under the GATT 1947 of WTO Members that wish to remain contracting parties to the GATT 1947 be modified, and, if so, by what procedures?

V. Summary

16. The following table summarizes the discussion in the previous paragraphs on the various legal relationships that may exist between contracting parties to the GATT 1947 and/or WTO Members after the entry into force of the WTO Agreement taking into account Articles 30 and 70 of the Vienna Convention on the Law of Treaties. The indications in the table apply, *mutatis mutandis*, also in the relations between parties to a Tokyo Round Agreement and/or WTO Members.

		A is a contracting party to or Member of		
		only GATT 1947	GATT 1947 and WTO	only WTO
B is a contracting party to or Member of	only GATT 1947	GATT 1947 fully applies	GATT 1947 fully applies; WTO Agreement must be implemented consistently with the GATT 1947	Neither the GATT 1947 nor the WTO Agreement applies; rights, obligations and legal situations created through the execution of GATT 1947 prior to the termination of GATT 1947 by A remain unaffected
	GATT 1947 and WTO	GATT 1947 fully applies	WTO Agreement applies; GATT 1947 continues to apply to the extent that its provisions are compatible with those of the WTO Agreement	WTO Agreement fully applies; rights, obligations and legal situations created through the execution of GATT 1947 prior to its termination by A remain unaffected
	only WTO	No obligation to further perform GATT 1947 obligations; rights, obligations and legal situations created through the execution of the GATT 1947 prior to termination of GATT 1947 by B are unaffected	WTO Agreement applies; GATT 1947 must be implemented consistently with the WTO Agreement; rights, obligations and legal situations created through the execution of the GATT 1947 prior to termination of GATT 1947 by B are unaffected	WTO Agreement applies; no obligation to further perform GATT 1947 obligations; rights, obligations and legal situations created through the execution of the GATT 1947 prior to termination of GATT 1947 by B are unaffected

VI. Procedural Issues

(a) Dispute Settlement Procedures

17. The WTO Dispute Settlement Understanding (DSU) applies only to disputes for which consultations were requested on or after the day of entry into force of the WTO Agreement. As to prior disputes, the relevant dispute settlement rules and procedures in effect immediately prior to the

entry into force of the WTO Agreement shall continue to apply" (Article 3:11 of the DSU). The Ministers decided in Marrakesh "to invite 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 [the date of entry into force of the WTO Agreement]." No such decisions have as yet been taken. This rule of the DSU and the corresponding Ministerial decision, once carried out by the GATT Council and the bodies established under the Tokyo Round Agreements, settle some of the procedural and institutional aspects of the transition from one dispute settlement system to the other for the cases in which the GATT or the Tokyo Round Agreement still applies, but not any of the substantive issues arising in the case of the termination of, or withdrawal from, one of these agreements.

18. In most panel proceedings the complaining party sought the cessation of an illegal measure and therefore requested the panel to recommend that the party complained against bring the measure into conformity with its obligations. To the extent that the termination of an agreement renders the challenged measure consistent with the international obligations of the party concerned, the right to a cessation of the measure lapses. Such a recommendation may therefore not have to be carried out after the party complained against withdraws from the agreement. Cases might arise in which a panel's recommendation relates to the performance of obligations under a Tokyo Round Agreement that have been taken over without modification into the WTO. In this case a good faith performance of the new obligations may require the carrying out of a panel recommendation relating to a provision by which the party is no longer formally bound. However, the right to performance arises in this case from the WTO Agreement and would have to be enforced through its procedures. In the case of recommendations by GATT 1947 panels, it has to be taken into account that the decisions by the CONTRACTING PARTIES before the entry into force of the WTO Agreement are incorporated into the GATT 1994 and are therefore incorporated into the WTO Agreement. There may also be cases in which the recommendation relates to a measure that was inconsistent with the GATT 1947 or a Tokyo Round Agreement but not with the WTO Agreement, in which case the party may not have to implement the panel's recommendations in relation to other Members of the WTO.

19. In a few panel proceedings the complaining party sought retrospective remedies, such as the revocation of a countervailing duty order. In some cases the complaining party primarily sought satisfaction or assurances against repetition through a finding that a measure taken was illegal. As pointed out in paragraphs 9-10 above, a right to such remedial actions may possibly continue beyond the termination of a treaty. The DSU rules on prior disputes may therefore be particularly relevant for such complaints.

20. Article 18:3 of the Agreement on Anti-dumping annexed to the WTO Agreement provides that "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for the Member of the WTO Agreement". Article 32:3 of the WTO Agreement on Subsidies and Countervailing Measures contains a similar provision. Complaints related to anti-dumping or countervailing duty investigations initiated pursuant to an application prior to the entry into force of the WTO Agreement could therefore not be brought under the WTO Agreement on Anti-Dumping or Subsidies and Countervailing Measures. If such complaints were based on the GATT 1947 or a Tokyo Round Agreement, the dispute settlement procedures of the WTO would not apply: the DSU applies only to specified agreements ("covered agreements"), and the GATT 1947 and the Tokyo Round Agreements do not figure among them. It is noted in this context that the Secretariat is preparing at the request of the Committee on Anti-Dumping Practices a note on the issues relating to disputes in the field of anti-dumping and countervailing duties.

21. The Ministers have invited the relevant Councils and Committees to decide that they remain in operation for the purpose of dealing with any dispute for which the request for consultation was made before the date of entry into force of the WTO Agreement. A decision according to which these

bodies would deal only with disputes for which the request for consultations has been made before the entry into force would create a legal gap in respect of measures taken after the entry into force of the WTO Agreement under anti-dumping and countervailing investigations initiated pursuant to applications that have been made before the entry into force: the provisions on anti-dumping and countervailing duties in the WTO Agreement would not apply because the investigation resulted from an application before the entry into force and the dispute settlement procedures of the Tokyo Round Agreements would not apply because the consultations on the measure were requested after the entry into force. It would not be meaningful if the GATT Council and the bodies established under the Tokyo Round Agreements were to decide to remain in operation in accordance with the Ministerial Decision but the parties to disputes that had withdrawn from the GATT 1947 or the Tokyo Round Agreement could not participate in the meetings of these bodies. The decisions to remain in operation should therefore perhaps be taken in conjunction with a decision on the rights of participation of a party to a dispute that had withdrawn from the agreement at issue

22. Issues: How should the Ministerial Decision on the continued operation of bodies to deal with disputes that arose before the entry into force of the WTO Agreement be implemented? Should a decision on the continued operation of the bodies be supplemented by a decision on the procedural rights of parties to disputes that have withdrawn from an agreement?

(b) Other Procedures

23. Many of the notification and consultation requirements under the provisions of the GATT 1947 and the Tokyo Round Agreements can also be found in the provisions of the WTO Agreement. A WTO Member that has remained a party to the GATT 1947 or a Tokyo Round Agreement may therefore be legally required to make two notifications and consult twice, for instance both under the balance-of-payments provisions of the GATT 1947 and under those under the WTO Agreement. If only the WTO were to receive the notifications and hold the consultations, the rights of the contracting parties that have not yet joined the WTO to be informed and consulted would be abridged.

24. The bodies and procedures established by decisions of the GATT CONTRACTING PARTIES prior to the entry into force of the WTO Agreement will in principle continue both under the GATT 1947 and the GATT 1994, which is defined as comprising all decisions of the CONTRACTING PARTIES prior to the entry into force. In the case of their decisions on the dispute settlement procedures and the Trade Policy Review Mechanism, the CONTRACTING PARTIES have taken this into account: these decisions will lapse as of the date of entry into force of the WTO Agreement. But there are many other bodies and procedures, such as the Technical Group on Quantitative Restrictions and other Non-Tariff Measures and the notification requirements established in connection with it, that would in principle continue as legally separate bodies and procedures under the GATT 1947 and the WTO Agreement.

25. Issues: Should arrangements be negotiated according to which the notification and consultation procedures under the GATT 1947 (or a Tokyo Round Agreement) and those under the WTO Agreement are combined? Which bodies, procedures and requirements established by the CONTRACTING PARTIES to the GATT 1947 or by a Committee or Council under a Tokyo Round Agreement should:

- (a) cease to exist altogether as of the entry into force of the WTO Agreement;
- (b) continue only in the WTO;
- (c) continue only in the GATT 1947 or the Tokyo Round Agreement;
- (d) continue both under the GATT 1947 or the Tokyo Round Agreement and the WTO?