PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

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SUB-COMMITTEE ON INSTITUTIONAL, PROCEDURAL AND LEGAL MATTERS

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TRANSITIONAL ARRANGEMENTS

Communication from Mexico

The following communication, dated 5 August, has been received from the Permanent Mission of Mexico with the request that it be circulated to members of the Sub-Committee.

At the latest meeting of the Sub-Committee on Institutional, Procedural and Legal Matters, discussion began on the subject of transitional arrangements. A large number of delegations present at the meeting, including the delegation of Mexico, emphasized the importance of the subject and expressed the hope that it would be a priority in the Sub-Committee's work.

The major issues which the Mexican delegation considers are relevant to the subject of transitional arrangements are set out below in the hope that they may help to clarify the situation and define possible solutions.

Scale of the problems

As indicated in the Secretariat's non-paper of 18 July 1994 and in accordance with the Sub-committee's terms of reference, the issues related to the transition of the current activities of GATT 47 and the Tokyo Round Codes (hereinafter called "GATT/Codes 47") to the new system (hereinafter called "GATT/Codes 94") are of three types:

(i) Procedural, which concerns the definition of the rules under which the GATT/Codes 47 bodies will have to operate in the framework of GATT/Codes 94;

(ii) Legal, which relates to the continuation and observance of rights and obligations among contracting parties and members of the present committees in the framework of GATT/Codes 94; and

(iii) Institutional, which mainly concerns the continuation of bodies such as the Council of Representatives and the present Committees in the framework of GATT/Codes 94.

As the Mexican delegation stated at the latest meeting of the Sub-Committee, procedural, institutional and legal aspects do not present any problems. With regard to the relationship between these three aspects and the settlement of disputes in particular, the provisions of Article 3.11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Ministerial Decision at Marrakesh on the Application and Review of this Understanding suffice.

Regarding procedural and legal aspects, Article 3.11 states that "With respect to disputes for which the request for consultations was made under GATT 1947 or any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO shall continue to apply."

Concerning the institutional aspect, the second paragraph of the aforementioned Ministerial Decision invites "... the relevant Councils and Committees to decide that they shall remain in operation for the purpose of dealing with any dispute for which the request for consultation was made before that date".

In view of the above, the only problem posed by the transition from GATT/Codes 47 to GATT/Codes 94 is to define the best way of ensuring the observance and effective implementation of the rights and obligations of contracting parties and members of the present Committees in the framework of GATT/Codes 94. This issue is analysed in greater detail below, starting with consideration of the different scenarios which might occur.

Scenarios

Relations between two contracting parties/members of WTO as a result of transition from GATT/Codes 47 to GATT/Codes 94 can be classified into six possible scenarios. As indicated in Annex 1 (Scenarios for relations between Parties/Members A and B):

1. In the first scenario, both parties remain in GATT/Codes 47 without becoming members of GATT/Codes 94. In such a scenario, nothing needs to be done because the application of the rights and obligations linking these two parties will conform to the provisions of GATT/Codes 47. A problem could arise, however, when one of the parties decides to withdraw from GATT/Codes 47 and/or becomes a member of GATT/Codes 94, in which case one of the scenarios below will apply with the consequences that ensue.

2. In the second scenario, one of the parties remains solely in GATT/Codes 47 and the other withdraws to become a member of GATT/Codes 94. In this scenario, nothing needs to be done because the contractual relationship ends; each party may act as it wishes in respect of the other party.

3. In the third scenario, both parties leave GATT/Codes 47 to become members of GATT/Codes 94. The situation regarding the pending rights and obligation between the two parties will depend on the transitional arrangement reached. If the form in which such rights and obligations are to be applied in the new system is not made clear, there will be uncertainty regarding their observance, thus impairing the rights of one of the parties and giving a reward to the party with the obligation (the violator in the settlement of disputes). This sort of situation should be avoided.

4. In the fourth scenario, both parties remain in GATT/Codes 47 and also become members of GATT/Codes 94. The situation of pending rights and obligations will depend on the transitional arrangement reached. If this does not define the form in which they are to be applied in the new system, they could be exercised under the GATT/Codes 47 system, causing a transitory conflict between GATT/Codes 47 and GATT/Codes 94 (for example, when one of the parties exercises its right to withdraw concessions through a tariff increase, the resulting tariff level could be higher in GATT/Codes 47 than in GATT/Codes 94, despite the fact that both instruments are equally valid for both parties). In addition, when the party with the obligation (violator) decides to

withdraw from GATT/Codes 47, the party with the right (for example, the party seeking to obtain withdrawal of the concessions) might see such a right impaired (see scenario 5).

5. In the fifth scenario, one party decides to remain in GATT/Codes 47, and is also a member of GATT/Codes 94, while the other party decides to withdraw from GATT/Codes 47 to become a member of GATT/Codes 94 alone. In such a case, if there is no transitional arrangement clarifying the form in which rights and obligations should be applied in the new system, the party remaining in GATT/Codes 47 risks seeing its rights impaired, despite having become a member of GATT/Codes 94. This would imply rewarding the violating party.

6. In the sixth scenario, both parties remain in GATT/Codes 47 and only one of them decides to become a member of GATT/Codes 94. In this scenario, nothing needs to be done. GATT/Codes 47 would apply. Nevertheless, if no final solution can be found in GATT/Codes 47 and the situation of one of the two parties changes, one of the other scenarios described above and its consequences will apply.

The foregoing can be resumed as follows:

- If there is no transitional arrangement which defines the form in which current rights and obligations are to be applied in the new system, there is a risk of conflict/incompatibility between GATT/Codes 47 and GATT/Codes 94 and it is highly probable that this will become a generalized problem (scenario 4);

- If such an agreement is not reached, in two cases the party violating its obligations could be rewarded (scenarios 3 and 5);

- In two other cases, if a definitive solution is not found to the case pending in the current system, sooner or later one of the other scenarios mentioned above will occur (scenarios 1 and 6); and

- In extreme cases, the contractual relationship between the parties will end (scenario 2). This is not, however, directly attributable to the transfer of rights.

In conclusion, the form in which the current rights and obligations are to be applied in the future WTO System (GATT/Codes 94) must be clarified so that:

- There is no possible conflict/incompatibility between the agreements concerned, and

- no party wins or loses in the transition to the new system.

Solution

Within the WTO, there should be a transitional arrangement in which:

- In conformity with the provisions of Article 3.11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and the above-mentioned Ministerial Decision, the rights and obligations, provisions, procedures (including those on the settlement of disputes), terms of reference, composition and institutional structure of GATT/Codes 47, as at present, continue to be maintained;

- It is specified that the effects of decisions adopted in GATT/Codes 47 in its current state are equally valid in GATT/Codes 94 if the party possessing the rights so decides; and

- It is agreed that there should be a major review within ..... years following the entry into force of the WTO in order to decide on the continuation or termination of the transitional arrangement.

The functioning of an arrangement like the one proposed could be shown by taking a Committee of the Tokyo Round as an example, even though this is equally valid for any other GATT body:

- Meetings of the current Committee would discuss matters of interest to members of the current Committee, as done up till now.

- Members of the current Committee which are also members of the WTO would apply decisions adopted by the current Committee within the WTO Committee. These decisions would only have effect for members of the WTO Committee which are also members of the current Committee.

- At meetings of the Committee in question, some members would be "wearing two hats" at the same time: as members of the current Committee and as members of the WTO Committee (see Annex 2).

- When the meeting of the current Committee ended, there would be a meeting of the WTO Committee, in which only WTO members would participate.

In order to facilitate the transition, it could be agreed that non-members of the current Committee which are members of the WTO could attend meetings of the current Committee as observers and that non-members of the WTO which are members of the current Committee could attend meetings of the WTO Committee as observers.

Advantages

This solution has the following advantages:

- There is no need to create new bodies. Meetings could have one agenda divided into two parts (one as a GATT/Codes 47 body and the other as a WTO body).

- There would be no need to establish new rules of procedure as the rules of GATT/Codes 47 or of GATT/Codes 94 could be used alternately and sequentially where appropriate.

- Decision-making problems could be avoided because decisions would be adopted by the same countries/customs territories as previously.

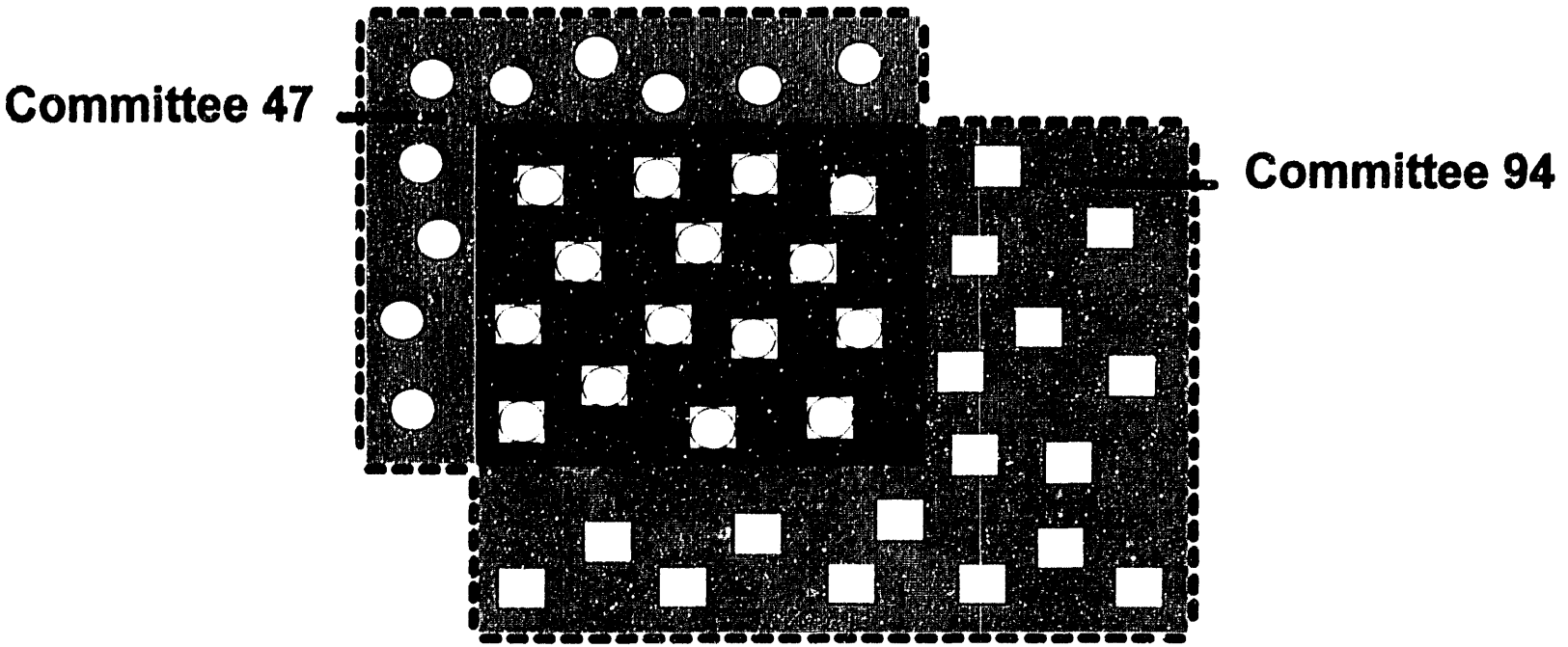
- Rights and obligations would be respected and the simple fact of moving from one instrument to another could not be used as an excuse to ignore pending obligations already undertaken.

- The transfer of rights and obligations could be assured without giving additional regulatory, procedural or institutional advantages to any of the parties.

- Inconsistencies between two legal regimes would be avoided during the transition.

Scenarios	GATT/CODES - 47 PARTIES		GATT/CODES - 94 MEMBERS	
1	A	B		
2	A		B	
	B		A	
3			A	B
4	A	B	A	B
5	A		A	B
	B		A	B
6	A	B	A	
	A	B	B	

TRANSITIONAL COMMITTEE



- Members Committee 47
- Members Committee 94 (WTO)
- Members Committee 47 and Members Committee 94 (WTO)
- Transitional Committee