Transition from GATT to WTO: A Most Pragmatic Operation

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Transition from GATT to WTO

A Most Pragmatic Operation

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I. INTRODUCTION

This article attempts to describe the legal route chosen by the GATT contracting parties to implement the transition from the GATT 1947 to the WTO Agreement following the conclusion of the Uruguay Round of negotiations. This discussion is preceded by an analysis of the now theoretical conflict of applications of substantive and procedural provisions of the GATT 1947 and the WTO Agreement. The GATT 1947 refers to the old GATT—the GATT which came into force on 1 January 1948. The GATT 1947 was integrated into the WTO Agreement as part of the GATT 1994, which contains the text of the old GATT, together with its amendments, corrections, decisions etc., plus six understandings and a protocol (new schedules). The GATT 1994 is one of the constituent parts of Annex 1A to the WTO Agreement. Indeed the WTO Agreement is composed of the Agreement Establishing the WTO and four groups of Annexes:

— Annex 1A: Multilateral Agreements on Trade in Goods;
— Annex 1B: General Agreement on Trade in Services;
— Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights;
— Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes;
— Annex 3: Trade Policy Review Mechanism; and
— Annex 4: Plurilateral Trade Agreements.

Although the old GATT has been integrated in the WTO Agreement as part of the GATT 1994, Article II.4 of the WTO Agreement makes it clear that the GATT 1947 and the GATT 1994 are legally distinct:

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The views expressed in this article are those of the author and should not be attributed to the WTO Secretariat. I am most grateful to Mark Koulen, Aaditya Mattoo, Petros C. Mavroidis, Bozena Mueller-Holyst, Geraldine Murphy, Peter Milthorp and Frieder Roeßler for their input in this work. All mistakes are mine only.

1 Indeed, the way of integrating the GATT 1947 into the GATT 1994 is, in itself, part of the transition process and follows the successful pattern which was used in the European Economic Agreement (EEA) for the European Community Law. Indeed the EEA includes the *aquis communautaire*, i.e. all the EC legislation and case-law since its inception. In this sense, one can maybe qualify the GATT 1994 as the "GATT *aquis*" although GATT case-law is not, as such, part of the GATT 1994, and the GATT 1994 is restricted to what is described in Articles 1, 2 and 3 of the GATT 1994.

2 See Article 1 of the General Agreement on Tariffs and Trade 1994, the first Agreement in Annex 1A: Multilateral Agreements on Trade in Goods, for a description of what the GATT 1994 consists of.
“The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as ‘GATT 1994’) is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as ‘GATT 1947’).”

The GATT 1947 and the GATT 1994 may, therefore, coexist. However, during the negotiation of the WTO Agreement, there were no discussions on the legal consequences of this coexistence. The issue of the legal “passage” from the period during which all States were parties only to the GATT 1947 to the stage where some States may become also Members of the WTO Agreement was not extensively debated. There were no further provisions dealing with the possibility that some GATT contracting parties may wish to withdraw from the GATT 1947, or any reference to rules applicable in case of conflict between the application of the GATT 1947 and any of the WTO Agreements, except for Article 3.11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), discussed in Section III.B.3 below; Article 18.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), discussed in Section III.4(i); and Article 32.3 of the Agreement on Subsidies and Countervailing Measures (SCM), discussed in Section III. 4(ii). This historical situation of successive treaties relating to the same subject-matter is the object of this article.

Before the entry into force of the WTO Agreement, the U.S. Administration announced that the United States was going to withdraw from the GATT 1947 as from 31 December 1994. Newspapers then reported that the United States refuted most legal arguments that obligations stemming from the GATT 1947 were to continue to have “legal effect” among the contracting parties concerned with such issues after U.S. withdrawal from the GATT 1947. Past actions and obligations were to disappear in “smoke”.

3 Article 3.11 of the DSU states that: “This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under 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 Agreement shall continue to apply.” In addition, footnote 2 to Article 3.11 states that “This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.”

4 Although discussed in Section III below, it should be mentioned immediately that the Anti-Dumping Agreement contains a specific provision (Article 18.3) for the application of the new Agreement 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 a Member of the WTO Agreement.”

5 Article 32.3 of the SCM Agreement contains a provision similar to that of Article 18.3 of the Anti-Dumping Agreement which states 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 a Member of the WTO Agreement.”

This U.S. position forced contracting parties to examine the legal consequences of successive treaties on the same subject-matter, the legal consequences of a withdrawal from a treaty for some parties only, and how to deal with the parallel existence of the GATT 1947 and the GATT 1994 with distinct membership. Before the actual decisions of the CONTRACTING PARTIES are discussed in this article, the following Section will first analyze the solutions suggested by the Vienna Convention on Treaties (Vienna Convention) concerning the various possibilities of temporary or permanent coexistence of successive treaties on the same subject-matter in order to better appreciate the pragmatic ways chosen by CONTRACTING PARTIES to force the rapid adherence to the newly born WTO Agreement and to terminate the old GATT.\footnote{The discussion is limited to the main GATT 1947, without any reference to the Tokyo Round Codes. It should be remembered, however, that a parallel discussion can take place for the Tokyo Round Codes since, legally, they constituted separate agreements and, in fact, explicit decisions were taken for some of these Codes as discussed below in Section III. Although membership in the Tokyo Round Codes was very limited, some States argued that they should be applicable to all GATT contracting parties, even those not parties to a specific Code, by application of the most-favoured-nation (MFN) clause contained in the GATT 1947.}

II. SOLUTIONS ENVISAGED BY THE VIENNA CONVENTION FOR THE COEXISTENCE OF THE GATT 1947 AND THE WTO AGREEMENT

A. POSSIBILITIES OF THE COEXISTENCE OF TREATIES

Following the ratification by some States of the WTO Agreement and with the parallel continuation of the GATT 1947, various situations could have existed. The most complex and interesting one would have been where four groups of States could have coexisted at one time:

- some States remain parties to the GATT 1947 only;
- others remain parties to the GATT 1947 after having joined the WTO Agreement;
- others leave the GATT 1947 and join the WTO Agreement only; and
- other States which have never been parties to the GATT 1947 become Members of the WTO Agreement.\footnote{This pattern subsumes all the following possible situations: (1) all States are parties to both agreements, the GATT 1947 and the WTO Agreement; (2) all States decide to leave the GATT 1947 and all become Members of the WTO Agreement only; (3) some States are parties to the GATT 1947 only, and others continue to be parties to the GATT 1947 while becoming, at the same time, Members of the WTO Agreement; (4) some States continue to be parties to the GATT 1947 while becoming Members of the WTO Agreement, and others leave the GATT 1947 to become Members of the WTO Agreement only; (5) some States are parties to the GATT 1947 only, while others have left the GATT 1947 and have become Members of the WTO Agreement only; (6) to any of situations (3), (4) and (5), it could be added that some States which were not parties to the GATT 1947 become Members of the WTO Agreement; and (7) in theory, the situation where all States are parties to the GATT 1947 only and never join the WTO Agreement is also possible.}

The question, therefore, is which treaty will apply to the various relations between the different groups of countries. The issue of the relevant application of successive treaties on the same subject-matter is not new and is explicitly dealt with in the Vienna Convention. The Vienna Convention is the outcome of the work of the International
Law Commission and two sessions of the United Nations Conference on the Law of Treaties held in 1968 and 1969 on the application, interpretation and other aspects of the law of international treaties. Some provisions of the Convention are declaratory of general international law while "others involve the progressive development of international law".9 The Vienna Convention entered into force on 27 January 1980 and, therefore, can be used to identify solutions to any situations which involve a period of time during which some States are still parties to a prior treaty—for instance, the GATT 1947—while being, at the same time, parties to a subsequent treaty on the same subject-matter—for instance, the WTO Agreement containing the GATT 1994—with only some of the same States.

Two general issues must be clarified at this stage before discussing the rules governing the conflict of application of different treaties. These assessments do not constitute rules of transition on conflict of application but they do address issues related to the termination of treaties.

First, the GATT 1947 is part of the GATT 1994 (the so-called GATT acquis). Therefore, if all States parties to the GATT 1947 were now parties to the WTO Agreement, it could be argued that it is useless to keep the GATT 1947 active. This conclusion would find support in Article 59.1(a) of the Vienna Convention, which discusses the termination of a treaty following the conclusion of a later treaty:

1. A treaty shall be considered to be terminated if all parties to it conclude a later treaty relating to the same subject-matter and:
   (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
   (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.”

In any case, Article 30.3 of the Vienna Convention envisages that the later treaty will have primacy over an earlier one which has not been terminated:

"When all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

This means that, once all contracting parties to the GATT 1947 have become Members of the WTO Agreement, the GATT 1947 could be considered to be terminated and States would, therefore, be governed exclusively by the WTO Agreement. Even if one argues that the GATT 1947 would not be terminated, it would

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remain applicable only to the extent that it is compatible with the WTO Agreement. In other words, the provisions of the WTO Agreement have primacy.\textsuperscript{10} Second, according to Article 70 of the Vienna Convention, even if a treaty is terminated, States remain liable for obligations born during the period while they were parties to the GATT 1947, i.e. while the treaty was in force. Article 70 of the Vienna Convention envisages that:

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or 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.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

Therefore, States would remain liable for the acts or omissions which infringed a prior treaty, namely the GATT 1947, even after this prior treaty was terminated, assuming that the facts which triggered the complaint took place before this treaty was terminated for that State.

Keeping these rules in mind, it is now possible to look at the solutions which would have been provided by the Vienna Convention if no other decision had been negotiated.

B. RULES OF CONFLICT OF LAWS ENVISAGED BY THE VIENNA CONVENTION

It is worth repeating the potential scenarios mentioned above:
— some States remain parties to the GATT 1947 only;
— others remain parties to the GATT 1947 after having joined the WTO Agreement;
— others leave the GATT 1947 and join the WTO Agreement only; and
— other States which have never been parties to the GATT 1947 before Members of the WTO Agreement.

In the above scenarios, the relations between those States parties to the GATT 1947 only would be governed by the GATT 1947. The relations between those States which are Members of the WTO only would be governed by the WTO Agreement only. Between States which are parties to the GATT 1947 only and those Members of the WTO only, there would be no treaty relationship. However, according to Article 70 of the Vienna Convention, States which left the GATT 1947 and joined the WTO Agreement would remain liable for acts and omissions which occurred prior to their leaving the GATT 1947 \textit{vis-à-vis} the States then parties to the GATT 1947.

\textsuperscript{10} During the transitional period, i.e. when some States become Members of the WTO Agreement while other States are still only parties to the GATT 1947, the situation should be analyzed in the framework mentioned in Section III.B, infra.
The relations between States which are parties to the GATT 1947 only and those which are parties to both the GATT 1947 and the WTO Agreement would be governed by the provisions of the GATT 1947, according to Article 30.4(b) of the Vienna Convention, which reads as follows:

"4. When the parties to the later treaty do not include all the parties to the earlier one:

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

Paragraph 4 should be read in conjunction with paragraph 5 which states that:

"5. Paragraph 4 is without prejudice to Article 41, or to any question of termination or suspension of the operation of a treaty under Article 60, or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligation towards another State under another treaty."

The third setting for the coexistence of treaties is the following: on one side, States which were parties to the GATT 1947 and have left the GATT 1947 to become Members of the WTO Agreement exclusively, as well as those States which were never parties to the GATT 1947 but which are now Members of the WTO Agreement; and, on the other side, those States which would continue to be parties to the GATT 1947 while becoming Members of the WTO Agreement. The relations between these two groups would also be governed by the indications provided in Article 30.4(b) of the Vienna Convention: the WTO Agreement—which is the treaty to which all States are parties—would govern their relations.

In the fourth situation, if all States which were parties to the GATT 1947 were also Members of the WTO Agreement, and if the GATT 1947 were not terminated under the provisions of Article 59 of the Vienna Convention, the WTO Agreement would have primacy, according to Article 30.3 of the Vienna Convention.

It could be argued that the Vienna Convention would, therefore, have provided some solutions to the simultaneous application of multiple treaties. However, the difficulties of interpreting Article 70 of the Vienna Convention cannot be overlooked. It was legally and politically logical that the risk of having some States benefit from WTO rights through the most-favoured-nation (MFN) application of the GATT 1947, without being subject to the WTO disciplines, would trigger negotiations to alleviate the effects of this situation. On the other hand, many States had important interests at stake and were not prepared to relinquish panels in process or unadopted panel reports and, therefore, refused to accept the drastic and inconsequential disappearance of the GATT 1947.

Contracting parties therefore realized that they should clarify their rights and obligations under the GATT 1947 and agree on a single "transition route".
III. THE LEGAL ROUTE CHOSEN BY THE GATT CONTRACTING PARTIES TO IMPLEMENT THE TRANSITION FROM THE GATT TO THE WTO AGREEMENT

A. BEFORE THE IMPLEMENTATION CONFERENCE

In view of this matrix of possibilities, the U.S. Government refused to rely exclusively on Article 70 of the Vienna Convention to determine the legal rules applicable to their prior trade relations with other States. Moreover, one had to be realistic about the political difficulty of administering two legal systems of rights and obligations, two different administrations, two different sets of documents recording symbols, numbers, etc. Negotiations were therefore undertaken to maintain the GATT 1947, at least for a certain period, and to clarify rights and obligations following from the eventual termination of the GATT 1947, and also to encourage States to comply rapidly with the newly negotiated WTO Agreement.

At that time, many issues remained to be addressed, namely:

— whether both the GATT 1947 and the WTO Agreement were to remain in force for a certain period of time (and which period of time);

— which provisions, those of the GATT 1947 or those of the WTO Agreement, were to be given primacy during the transitional period and which bodies and institutions should be made responsible for the implementation process;

— which dispute settlement provisions were to be given primacy during the transitional period;

— whether the treatment of the seven Tokyo Round Codes (and the three Tokyo Round Agreements) was to follow the same legal route as the GATT 1947 and the WTO Agreement; and

— whether Committees established under the GATT and the Tokyo Round Codes were to remain active under the GATT or were to be terminated and/or re-initiated under the WTO.

B. DECISIONS TAKEN AT THE IMPLEMENTATION CONFERENCE

On 2 December 1994, the U.S. Senate approved the WTO Agreement. The EC Council of Ministers was expected to do the same on 15 December 1994 so that the Implementation Conference could take place on 8 December 1994. The date of 1 January 1995 had been the target date of the entry into force of the WTO Agreement since the conclusion of the Uruguay Round negotiations and it had been reiterated in the Marrakesh Declaration, in the Final Act and in the WTO Agreement.

Paragraph 6 of the Marrakesh Declaration of 15 April 1994 stated:

"Ministers declare that their signature of the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' and their adoption of associated Ministerial Decisions initiates the transition from the GATT to the WTO. They have in particular established a Preparatory Committee to lay the ground for the entry into force of the WTO Agreement and commit themselves to seek to complete all steps necessary to
ratify the WTO Agreement so that it can enter into force by 1 January 1995 or as early as possible thereafter."

Paragraph 3 of the Final Act reads as follows:

"The representatives agree on the desirability of acceptance of the WTO Agreement by all participants in the Uruguay Round of Multilateral Trade Negotiations (hereafter referred to as ‘participants’) with a view to its entry into force by 1 January 1995, or as early as possible thereafter. Not later than late 1994, Ministers will meet, in accordance with the final paragraph of the Punta del Este Ministerial Declaration, to decide on the international implementation of the results, including the timing of their entry into force.” (emphasis in the original).

According to Article XIV.1 of the WTO Agreement:

"This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations…”

Indeed, as envisaged in the Final Act, the contracting parties met in Geneva on 8 December 1994 for the Implementation Conference and confirmed that the WTO Agreement would enter into force on 1 January 1995. Ministers also adopted a series of decisions recommended by the Preparatory Committee for the transitional period and these will be discussed below.

1. Whether or not Both Agreements Were to Coexist for a Certain Period of Time

Following intensive negotiations, it was finally decided that the GATT 1947 would coexist with the WTO Agreement for one year. This would provide contracting parties with time to complete their ratification of the WTO Agreement while permitting a rational termination and finalization of the work undertaken by Committees, panels and other bodies.

Therefore, the following Decision was taken:

“Contracting Parties Decide as follows:

3. The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.” 11

Panel reports not adopted at the end of that one year would simply disappear. 12

Although the period of one year of coexistence was rather short, this was the concession offered by the United States and accepted by the other contracting parties. It may have


12 These panel reports would, none the less, still constitute documents having a legal value similar to that of the doctrine or that of non-adopted panel reports, which are de facto cited and referred to in panel reports.
been hoped that some issues, still unresolved, would be settled but, from a practical point of view, one could presume that nothing new would be undertaken during this year and that governments' positions (such as whether or not a panel report should be adopted) would probably not change during that one-year period.

2. **Whether to Give Primacy to Substantive Provisions of the WTO Agreement**

The "free-rider" argument was one of the main concerns of those States who favoured rapid adherence to the WTO and the termination of the GATT 1947: they worried that States which were parties to both the GATT 1947 and the WTO Agreement might have to give the benefits of the WTO Agreement to States which were Members of the GATT 1947 only because of the MFN clause of the GATT 1947, without the latter States being subject to the obligations and disciplines created by the WTO Agreement.

It was finally decided that, during the transitional period of one year, notwithstanding the GATT 1947 MFN application, those who joined the WTO Agreement would not have to give to other GATT contracting parties the same privileges and rights that they would give to WTO Members; in other words, the decision taken established the primacy of the WTO Agreement over the GATT 1947:

"Contracting Parties Decide as follows:

1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947:
   (a) accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and
   (b) maintain or adopt any measure consistent with the provisions of the WTO Agreement ..."  

3. **The Dispute Settlement Provisions**

Under the new DSU, panel reports are to be adopted automatically unless Members, by consensus, refuse to do so. This quasi "automaticity" principle was one of the revolutionary provisions of the DSU and the WTO Agreement. It became, therefore, very important to decide whether the new rules of the DSU would be applicable to old cases or to new cases initiated under the old GATT.

According to the first sentence of Article 3.11 of the DSU, the DSU rules apply only to disputes for which consultations were requested on or after the date of entry into force of the WTO Agreement.

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13 Decision on Transitional Coexistence, *supra*, footnote 11.
14 Article 16.4 of the DSU.
“This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement.”

With respect to disputes for which the request for consultations was made before the entry into force of the WTO Agreement, as well as for disputes on which panel reports have not been adopted or fully implemented, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply. Immediately before the entry into force of the WTO, the dispute settlement rules in force were the so-called “Montreal Rules”. The Montreal Rules are those implemented following the Mid-Term Review Conference which took place in Montreal in December 1988. By a decision of the CONTRACTING PARTIES of 12 April 1989, a series of improvements (those negotiated at the Mid-Term Review) were adopted on a trial basis until the end of the Uruguay Round. However, there was no automatic adoption of panel reports nor any appeal of panel decisions envisaged by the Montreal Rules. In fact, these Rules constitute most of the new WTO DSU.

As, during the transition period, disputes can still be raised under the GATT 1947, the issue arises of which dispute settlement rules would be applicable to such disputes. As mentioned, at the Montreal Mid-Term Review, new Rules for the settlement of disputes were adopted on a trial basis until the end of the Uruguay Round. This provision was extended by the decision of the CONTRACTING PARTIES of 22 February 1994, until the entry into force of the DSU, i.e. until 1 January 1995. Therefore, with the entry into force of the DSU, these so-called Montreal Rules were automatically abolished unless they were explicitly reactivated or referred to, as in the case of “situation complaints” under Article 26.2 of the DSU. It could, therefore, be argued that a complaint lodged under the GATT 1947 after 1 January 1995, would have to be determined in accordance with the pre-Montreal Rules.

On the other hand, it could be argued that, according to Article 70 of the Vienna Convention, the Montreal Rules on dispute settlement, in force from April 1989 to December 1994, would continue to be applicable to conflicts which arose during the same period, even if contested and litigated after that period. In other words, it could be argued that, for reasons of consistence and coherence and because procedural rules are often so important that they are equivalent to substantive rules, the principles contained in Article 70 of the Vienna Convention cover both substantive and procedural rules, including the dispute settlement rules. This ambiguity led contracting parties to favour a pragmatic approach, whereby the applicable rules would be decided

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15 See Article 3.11 of the DSU, supra, footnote 3. In addition, footnote 2 to Article 3.11 states that: “This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.”

16 “… it is also agreed to keep the application of these improvements under review during the remainder of the Round and to decide on their adoption before the end of the Round”: BISD 36/S, GATT Secretariat, Geneva, 61 at p. 62.

in advance and the choice made would favour the rapid adherence of the contracting parties to the WTO Agreement.

On 8 December 1994, at the Implementation Conference on Transitional Arrangements, it was decided that the dispute settlement rules under the GATT 1947 (the pre-Montreal Rules) would not be applicable to disputes initiated under the DSU. A contrario, this means that for new disputes initiated under the GATT 1947, the pre-Montreal Rules apply and those disputes have one year to run, i.e. until the termination of the GATT 1947.\textsuperscript{18} According to Article 3.11 of the DSU, for disputes still in process, including those for which consultations were requested as well as those for which panel reports have not been adopted or implemented, the rules applicable immediately before the entry into force of the WTO—the Montreal Rules—would apply.

Therefore until the end of 1995, four sets of dispute rules are applicable in the WTO forum:

- the DSU is applicable for all disputes initiated after 1 January 1995 under any of the WTO Agreements listed in Appendix 1 of the DSU;
- the Montreal Rules are applicable to disputes in process on 1 January 1995, and the provisions in the Montreal Rules for the adoption, surveillance and implementation of recommendations and rulings are applicable to the so-called situation complaints under Article 26.2 of the DSU;
- the rules described in the Decision of 5 April 1966 may be used if a complaint based on any of the WTO covered agreements is brought by a developing country against a developed country, according to Article 3.12 of the DSU;
- the pre-Montreal Rules are applicable to complaints initiated after 1 January 1995 under the GATT 1947 or any of the Tokyo Round Codes, as discussed.

4. \textit{The Tokyo Round Codes}

The situation is different for each of these Codes.

(i) \textit{The Tokyo Round Anti-Dumping Code}

Article 18.3 of the WTO Anti-Dumping 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 a Member of the WTO Agreement."

Complaints related to anti-dumping investigations initiated pursuant to an

\textsuperscript{18} "Contracting Parties Decide as follows:... 2. The provisions of Article XXIII of the GATT 1947 shall not apply: (a) to disputes brought against a contracting party which is a Member of the WTO if the dispute concerns a measure that is identified as a specific measure at issue in a request for the establishment of a panel made in accordance with Article 6 of the Understanding on Rules and Procedure Governing the Settlement of Disputes in Annex 2 of the WTO Agreement and the dispute settlement proceedings following that request are being pursued or are completed; and (b) in respect of measures covered by paragraph 1 above.": Decision on Transitional Coexistence, supra, footnote 11.
application made prior to the entry into force of the WTO Agreement, therefore, could not be brought under the WTO Anti-Dumping Agreement. Since, in some States, the period of an investigation can be very long—up to six months or more—it would be possible to have a measure imposed after the entry into force of the WTO Anti-Dumping Agreement resulting from an investigation or a review initiated many months prior to that date. Concerning such earlier initiated investigations or reviews, the only possibility would be to initiate a complaint under the GATT 1947 or the Tokyo Round Anti-Dumping Code (assuming that they would not have been terminated before the imposition of a measure leading to an investigation of the complaint). However, for such a complaint under the GATT 1947 or the Tokyo Round Anti-Dumping Code, the rules of the DSU would not apply since the DSU applies only to agreements explicitly enumerated in Appendix I (the covered agreements), and the GATT 1947 and the Tokyo Round Agreements do not figure among them. Since the United States wanted to withdraw from the Tokyo Round Anti-Dumping Code as of 31 December 1994 and not remain subject to its obligations, it was, therefore, necessary to clarify the dispute settlement rules for applications for investigations or reviews made before the entry into force of the WTO Anti-Dumping Agreement.

On 8 December 1994, on the recommendation of the Preparatory Committee, the Signatories of the Tokyo Round Code took a Decision along the lines of the main CONTRACTING PARTIES’ Decision on Transitional Measures. The Decision concerned the primacy of the WTO Anti-Dumping Agreement during the period of coexistence of one year. In another Decision the Signatories of the Tokyo Round Anti-Dumping Code decided to have that Anti-Dumping Code continue to have effect for a period of two years with respect to any anti-dumping investigations or reviews which were not subject to the WTO Anti-Dumping Agreement, pursuant to the terms of

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19 Article 1.1 of the DSU.
20 Transitional coexistence of the Agreement on Implementation of Article VI of the GATT and the Marrakesh Agreement Establishing the World Trade Organization: “The Agreement is herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the Parties may decide to postpone the date of termination by no more than one year.”
21 “The Signatories, Agree that, in the event of withdrawal by any Party from the Agreement taking effect on or after the date of entry into force for it of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter WTO Agreement), or in case of termination of the Agreement while this Decision is in effect: (a) The Agreement shall continue to apply with respect to any anti-dumping investigation or review which is not subject to application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 pursuant to the terms of Article 18.3 of this Agreement. (b) Parties that withdraw from the Agreement shall remain Members of the Committee on Anti-Dumping Practices exclusively for the purpose of dealing with any dispute arising out of any anti-dumping investigation or review identified in paragraph (a). (c) In case of termination of the Agreement during the period of validity of this Decision, the Committee on Anti-Dumping Practices shall remain in operation for the purpose of dealing with any dispute arising out of any anti-dumping investigation or review identified in paragraph (a). (d) The rules and procedures for the settlement of disputes arising under the Agreement applicable immediately prior to the date of entry into force of the WTO Agreement shall apply to disputes arising out of any investigation or review identified in paragraph (a). With respect to such disputes for which consultations are requested after the date of this Decision, Parties and panels will be guided by Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement. . . . This Decision shall remain in effect for a period of two years after the date of entry into force of the WTO Agreement. Any Party to the Agreement as of the date of this Decision may renounce this Decision. The renunciation shall take effect upon the expiration of sixty days from the day on which written notice of renunciation is received by the person who performs the depository function of the Directory-General to the CONTRACTING PARTIES to GATT 1947.”
Article 18.3, i.e. for those applications initiated before the entry into force of the WTO. Logically, and in parallel, membership for this purpose and activities in the Anti-Dumping Committee established at the Tokyo Round, as well as the rules and procedures under the Tokyo Round Anti-Dumping Code were continued for a period of two years.

(ii) The Subsidies Code

Article 32.3 of the WTO Agreement on Subsidies and Countervailing Measures contains a provision similar to that of Article 18.3 of the WTO Anti-Dumping Agreement.

"...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 a Member of the WTO Agreement."

The framework used for the Anti-Dumping Code was extended to the Tokyo Round Subsidies Code and a parallel Decision was taken by its Signatories to terminate this Subsidies Code after a transitional period of one year. At the same time, it was decided to have the Tokyo Round Subsidies Code continue to apply, for a period of two years, with respect to any countervailing duty investigation or review which was not subject to the WTO SCM Agreement, pursuant to the terms of Article 32.3 of that Agreement.

(iii) The Bovine Meat Arrangement

Article VI, Final Provisions, of the International Bovine Meat Agreement provides for the termination of the previous Arrangement Regarding Bovine Meat:

22 Transitional coexistence of the Agreement on Implementation of Articles VI, XVI and XXIII of the Marrakesh Agreement Establishing the World Trade Organization.
23 "Signatories, Agree that, in the event of withdrawal by any signatory from the Agreement taking effect on or after the date of entry into force for it of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter WTO Agreement), or in case of termination of the Agreement while this Decision is in effect: (a) The Agreement shall continue to apply with respect to any countervailing duty investigation or review which is not subject to application of the WTO Agreement on Subsidies and Countervailing Measures pursuant to the terms of Article 32.3 of that Agreement. (b) Signatories that withdraw from the Agreement shall remain Members of the Committee on Subsidies and Countervailing Measures exclusively for the purpose of dealing with any dispute arising out of any countervailing duty investigation or review identified in paragraph (a). (c) In case of termination of the Agreement during the period of validity of this Decision, the Committee on Subsidies and Countervailing Measures shall remain in operation for the purpose of dealing with any dispute arising out of any countervailing duty investigation or review identified in paragraph (a). (d) The rules and procedures for the settlement of disputes arising under the Agreement applicable immediately prior to the date of entry into force of the WTO Agreement shall apply to disputes arising out of any investigation or review identified in paragraph (a). With respect to such disputes for which consultations are requested after the date of this Decision, signatories and panels will be guided by Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement. ... This Decision shall remain in effect for a period of two years after the date of entry into force of the WTO Agreement. Any signatory to the Agreement as of the date of this Decision may renounce this Decision. The renunciation shall take effect upon the expiration of sixty days from the day on which written notice of renunciation is received by the person who performs the depository function of the Director-General to the CONTRACTING PARTIES TO GATT 1947; "Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT."
Acceptance of this Agreement shall carry denunciation of the Arrangement Regarding Bovine Meat, done at Geneva on 12 April 1979, which entered into force on 1 January 1980, for Parties having accepted the Arrangement. Such denunciation shall take effect on the date of entry into force of this Agreement for that Party.

Therefore, no further provisions were needed unless some States decided not to join the new WTO Agreement. In these circumstances and since membership in both arrangements is not possible, there would be no treaty relationship between States which are parties to the Tokyo Round Bovine Meat Arrangement and those parties to the WTO. However, as discussed before, under Article 70 of the Vienna Convention, States would remain liable for obligations arising under the Tokyo Round Arrangement after they have joined the WTO Agreement.

(iv) The International Dairy Agreement

Article (1)(c) of the International Dairy Agreement states that:

Acceptance of this Agreement shall carry denunciation of the International Dairy Arrangement, done at Geneva on 12 April 1979, which entered into force on 1 January 1980, for Parties having accepted the Arrangement. Such denunciation shall take effect on the date of entry into force of this Agreement for that Party.

Since this provision is identical to Article VI of the International Bovine Meat Agreement, the same comments apply.

(v) The Agreement on Civil Aircraft

During the Uruguay Round negotiations, the discussions for a new Agreement on Trade in Civil Aircraft failed. Therefore, the Tokyo Round Agreement on Civil Aircraft is still in force. The Agreement will remain applicable between its parties, until replaced by a new one, on terms as agreed.

(vi) The Agreement on Government Procurement

The Tokyo Round Agreement on Government Procurement is still in force and the new WTO Agreement on Government Procurement will come into force on 1 January 1996. Since some countries have already announced that they will not join the WTO Government Procurement Agreement, this means that the Tokyo Round Code could not be generally terminated. It also implies that the comments made in Section II above about the possible coexistence of two successive treaties on the same subject-matter could be used to determine which of the two Agreements should have primacy in case of dual membership by some States. Between States which are parties to both Agreements and those parties to the Tokyo Round Agreement only, the Tokyo Round Agreement will apply.
(vii) The Agreements on Technical Barriers to Trade, on Implementation of Article VII and on Import Licensing Procedures

The three other Tokyo Round Codes are the Agreement on Technical Barriers to Trade, the Agreement on Implementation of Article VII (Customs Valuation) and the Agreement on Import Licensing Procedures. It would be possible for these three Codes to coexist in parallel with their related WTO Agreements. The Vienna Convention solutions can be used to identify all the factual possibilities of coexistence of successive treaties related to the same subject-matter. As Article 30.4 of the Convention provides, the treaty to which both States are parties would govern their relationship.

However, the transitional procedures so far adopted by GATT contracting parties and Members of the WTO would seem to favour the termination of these Tokyo Round Codes as well. The termination of these three Agreements could be dealt with according to one of two frameworks—the one used for the Subsidies and Anti-Dumping Codes or that of the International Dairy and International Bovine Meat Arrangements.

If one follows the pattern used for the Anti-Dumping and Subsidies Codes, a decision to terminate these three Tokyo Codes at the end of 1995 would have to be taken by the Signatories to these Codes. The work of the relevant Committees and of their members would then also be terminated by the end of 1995.

An alternative route could be for each responsible body to take a decision stating that the past and future acceptance of the WTO Agreement shall carry denunciation of the respective Tokyo Round Agreement or be interpreted as denunciation of the respective Agreement. Such denunciations would take effect on the date of entry into force of the WTO Agreement for that Party, or at a later date to be agreed upon depending on when these decisions are taken.

An interesting problem emerged under the Customs Valuation Agreement concerning the five-year time-period in favour of developing countries, permitting them to delay application of the provisions of the Tokyo Round Code. Article 20 of the new WTO Agreement on Customs Valuation contained a similar provision for a five-year delayed application in favour of developing country Members “not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979” (the Tokyo Round Code). This created a problem for those developing countries which had not completely used the five-year period before the entry into force of the new WTO Customs Valuation Agreement, while not qualifying as a Member not party to the Tokyo Round Code. Again with its normal pragmatism, the General Council of the WTO decided that the period for delayed application, invoked by a developing country party under the Tokyo Round Code, in force as from the date of entry into force of the WTO Customs Valuation Agreement for that developing country party concerned, would continue under the WTO Customs Valuation Agreement.
5. Whether Committees, Other Works and Procedures Established under the GATT were to Remain Active under the GATT or to be Terminated and/or Re-initiated under the WTO

As mentioned above, the Subsidies and Anti-Dumping Committees are to continue their activities until the end of 1996. At the Implementation Conference, it was also decided that GATT Committees are to continue to function as GATT Committees until the end of 1995 and co-ordinate their work with the WTO Committees. Notifications are to be circulated simultaneously to WTO Members and GATT 1947 contracting parties. It was also resolved that all such transitional procedures were not to be conducted “in a manner which ensures that the enjoyment of the rights and obligations of GATT 1947 contracting parties and WTO Members would be affected.”

It was decided that:

"In the period between the date of entry into force of the WTO Agreement and the date of the termination of the legal instruments through which the contracting parties apply the GATT 1947 and the Tokyo Round Agreements, the following notification and co-ordination procedures shall apply under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement:

1. If a measure is subject to a notification obligation, both under the WTO Agreement and under the GATT 1947 or a Tokyo Round Agreement, the notification of such a measure to a WTO body shall, unless otherwise indicated in the notification, be deemed to be also a notification of that measure under the GATT 1947 or the Tokyo Round Agreement. Any such notification shall be circulated by the WTO Secretariat simultaneously to the Members of the WTO and to the contracting parties to the GATT 1947 and/or the parties to the Tokyo Round Agreement. These procedures are without prejudice to any notification procedures applicable in specific areas.

2. The co-ordination procedures set out in paragraphs 3 and 4 below shall apply in the relations between the bodies referred to in sub-paragraphs (a) to (d) below:

(a) The following Committees established under the GATT 1947 or a Tokyo Round Agreement shall co-ordinate their activities with the corresponding Committees established under the WTO Agreement:
- Committee on Trade and Development,
- Committee on Balance-of-Payments Restrictions,
- Committee on Anti-Dumping Practices,
- Committee on Customs Valuation,
- Committee on Import Licensing,
- Committee on Subsidies and Countervailing Measures,
- Committee on Technical Barriers to Trade.

(b) The Committee on Tariff Concessions and the Technical Group on Quantitative Restrictions and Other Non-Tariff Measures of the GATT 1947 shall co-ordinate their activities with the WTO Committee on Market Access proposed to be established.

(c) The Working Parties established under the GATT 1947 to examine a regional agreement or arrangement shall co-ordinate their activities with Working Parties of the WTO that examine the same regional agreement or arrangement.24

(d) The GATT 1947 Council of Representatives shall co-ordinate its trade policy reviews with those of the WTO Trade Policy Review Body.

24 The Working Parties of the WTO include Working Parties originating from decisions of the CONTRACTING PARTIES to the GATT 1947 that were adopted before the entry into force of the WTO Agreement, and, therefore, form part of the GATT 1994.
3. The bodies established under the GATT 1947 or a Tokyo Round Agreement that are referred to in paragraph 2 above shall hold their meetings jointly or consecutively, as appropriate, with the corresponding WTO bodies. In meetings held jointly, the rules of procedure to be applied by the WTO body shall be followed. The reports on joint meetings shall be submitted to the competent bodies established under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement.

4. The co-ordination of activities in accordance with paragraph 3 above shall be conducted in a manner which ensures that the enjoyment of the rights and the performance of the obligations under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement and the exercise of the competence of the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the bodies of the WTO are unaffected.

5. The CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the General Council of the WTO may decide independently to terminate the application of the provisions set out in paragraphs 1 to 4 above.25

For practical reasons, GATT contracting parties also decided that those States eligible to become original Members of the WTO who had not by then completed their ratification could, none the less, participate in the work of the WTO and could receive all notifications during a period of seven months following the entry into force of the WTO, but they would not have the right to participate in the decision-making of the bodies established under the WTO Agreement.26 The transition from the GATT 1947 to the WTO also includes the institutional transfer of goods and assets belonging to the Interim Commission of the International Trade Organization (ICITo) in favour of the WTO27 and the transfer of employees’ contracts with the ICITo in favour of the WTO.

IV. CONCLUSION

The passage from the GATT 1947 to the WTO is a unique experience of successive multilateral treaties sufficient to excite any public international lawyer. It is also a beautiful example of the pragmatism which is known to characterize the so-called GATT law, and international economic law in general. The termination of the GATT 1947 and the decisions that rights and obligations born under the GATT 1947 were to be terminated by the end of 1995 (or, for the Anti-Dumping and Subsidies Codes, were to continue until the end of 1996 for applications made before the entry into force of the WTO Agreement) provided all States with the opportunity to clarify their rights and obligations in advance in order to reduce uncertainty to its minimum level. We know now when the GATT 1947 started and when it will end, together with the parameters of its legal consequences. This has been a most pragmatic operation!

26 See the complete text of the Decision on the Participation in Meetings of WTO Bodies by Certain Signatories of the Final Act Eligible to Become Original Members of the WTO, id., at p. 5.
27 See the Decision on the Transfer Agreement Between GATT 1947, ICITo and the WTO of 8 December 1994, id., at p. 6.