

WORLD TRADE ORGANIZATION

RESTRICTED

G/TRIMS/M/1

2 May 1995

(95-1118)

Committee on Trade-Related Investment Measures

MINUTES OF THE MEETING HELD ON 3 MARCH 1995

Chairman: Mr. Vassilis Notis (Greece)

1. The Committee on Trade-Related Investment Measures held its first meeting on 3 March 1995.
2. The Committee adopted the following agenda:
 - A. Election of Officers
 - B. Rules of Procedure
 - C. Notifications under Article 5.1 of the Agreement on Trade-Related Investment Measures
 - D. Operation of Article 5.1 of the Agreement in case of Governments which Accept the Agreement after 1 January 1995
 - E. Notification Procedures under Article 5.5 and Article 6 of the Agreement
 - F. Procedures for Implementing Article 7.3 of the Agreement
 - G. Dates of Meetings of the Committee
- A. ELECTION OF OFFICERS
3. The Committee elected Mr. Vassilis Notis (Greece) as Chairman.
4. The Committee authorized the Chairman to hold informal consultations on the question of the election of a vice-chairperson.
5. The Chairman noted that an invitation to attend this meeting had been addressed to (i) Members of the WTO; (ii) signatories of the Final Act that were contracting parties to the GATT 1947 and were eligible to become original WTO Members; (iii) other governments with observer status in the WTO; and (iv) certain intergovernmental organizations. The invitation to the second group of participants was based on a decision taken by the WTO General Council at its meeting of 31 January 1995.¹ In respect of observer governments, he referred to a decision taken by the General Council at the same meeting on guidelines for observer status in the WTO for governments² and to a decision of the General Council, also taken on 31 January 1995, to accord observer status in the WTO to a number of countries.

¹WT/L/27

²WT/L/28, Annex 2

6. With reference to paragraph 6 of Annex 2 of document WT/L/27, the Chairman noted that governments with observer status were allowed to participate as observers at meetings of working parties and other subsidiary bodies of the General Council as appropriate, with the exception of the Committee on Budget, Finance and Administration. This did not prevent this Committee, if and when it considered it appropriate, from holding closed sessions without the presence of observers. He proposed that the Committee proceed likewise with any governments which might be granted observer status in the General Council in the future.

7. It was so decided.

8. The Chairman recalled that the question of guidelines on observer status in the WTO for intergovernmental organizations had not yet been resolved. Pending final agreement on this matter, an interim procedural arrangement had been worked out regarding the attendance by such organizations at the first meetings of WTO bodies.³ Pursuant to this arrangement, the Council for Trade in Goods had decided at its meeting of 20 February 1995 that the IBRD and the IMF would be invited to attend this first meeting of the Committee.

B. RULES OF PROCEDURE

9. The Chairman said that the issue of the Committee's rules of procedure had been inscribed on the agenda of this meeting because under Article IV:6 of the WTO Agreement the Committee, as a subsidiary body of the Council for Trade in Goods, was required to establish its rules of procedure, subject to the approval of the Council for Trade in Goods. So far rules of procedure had been adopted only for the WTO Ministerial Conference and the WTO General Council.⁴ He proposed that the Committee authorize him to hold informal consultations on the question of the rules of procedure of the Committee and that in the meantime the Committee conduct its business in accordance with established GATT practice.

10. It was so decided.

C. NOTIFICATIONS UNDER ARTICLE 5.1 OF THE AGREEMENT

11. The Chairman noted that Article 5.1 of the Agreement requires Members to notify all trade-related investment measures that are not in conformity with the Agreement within 90 days of the date of entry into force of the WTO Agreement. The Preparatory Committee had approved a recommended format for notifications under this provision which appeared in PC/IPL/8 and had also been reproduced in G/TRIMS/1. As a result of decisions taken by the General Council on 31 January 1995 and by the Council for Trade in Goods on 20 February 1995, this recommended format, and other issues relating to notifications under the Agreement, had been referred to the Committee for further action and/or consideration as appropriate. In addition, the Council for Trade in Goods had decided that the Committee should carry out the tasks assigned to that Council under the Agreement with respect to notifications. In light of these decisions of the General Council and the Council for Trade in Goods, the Chairman proposed that the Committee endorse the recommended format for notifications under Article 5.1 and take note of the fact that the Council for Trade in Goods had instructed the Committee to carry out the tasks assigned under the Agreement to the Council with respect to notifications. As a result, notifications received pursuant to the provisions of the Agreement would be circulated as documents of the Committee.

³WT/GC/COM/2

⁴WT/L/28

12. It was so decided.

13. The Chairman then drew the Committee's attention to the fact that, while Members had been invited in document G/TRIMS/1 to submit notifications under Article 5.1 no later than 31 March 1995, so far no notifications had been received. This was a matter of some concern, given the importance of the notification provision in Article 5.1 to the operation of the Agreement. Apart from serving the purpose of ensuring transparency, notifications made within the time period stipulated in Article 5.1 were a precondition for the exercise by Members of their right to avail themselves of the transition provisions in Article 5.2. It would be unfortunate if disputes arose in respect of trade-related investment measures that were inconsistent with the Agreement where such disputes could have been avoided by a timely notification under Article 5.1. In this connection, he also noted that an important reason for convening a meeting of the Committee at this time was that this meeting could help to alert all Members to the importance of a timely compliance with the notification requirement of Article 5.1 and could provide an occasion for Members to discuss possible problems which might have arisen.

14. The representative of the United States seconded the comments made by the Chairman on the importance of notifications under Article 5.1. His delegation considered that the notification procedure in Article 5.1 was in many ways the centrepiece of the Agreement. He expressed the hope that Members would make notifications under Article 5.1 of trade-related investment measures falling within the scope of the Illustrative List annexed to the Agreement and noted that it would be very unfortunate if the burdens intended to be alleviated by this Agreement would have to be borne by the Dispute Settlement Dispute Understanding.

15. The Committee took note of the comments made and agreed to revert at its next meeting to the issue of the status of notifications under Article 5.1 of the Agreement.

D. OPERATION OF ARTICLE 5.1 IN CASE OF GOVERNMENTS WHICH ACCEPT THE WTO AGREEMENT AFTER 1 JANUARY 1995

16. The Chairman recalled that the Contact Group which had undertaken preparatory work on notification procedures under the Agreement had suggested the need for an examination by the competent WTO body of the question of the arrangements for notification of trade-related investment measures by countries eligible to become original Members of the WTO but that accepted the WTO Agreement after the date of its entry into force.⁵ It had been noted in this regard that for such countries the period of 90 days in Article 5.1 might have expired at the time these countries accepted the Agreement. At its meeting of 20 February 1995, the Council for Trade in Goods had referred this matter to this Committee, with the request that the Committee prepare appropriate recommendations. This matter obviously was of some urgency, as acknowledged in the report of the Contact Group which called for an examination of this matter "at an early stage".

17. The representative of Switzerland said that, as a country which had not yet accepted the WTO Agreement, Switzerland was directly affected by this matter. In order to facilitate the work of the Committee and in the interest of transparency, his authorities intended to make a notification as soon as possible, hopefully within the deadline applicable to Members. While Switzerland was not under a legal obligation to do so, it had taken this initiative in order to avoid possible operational difficulties in the implementation of the Agreement.

18. The representative of Egypt proposed that countries that accepted the WTO Agreement after 1 January 1995 be granted a period of 90 days after the date of the entry force of the WTO Agreement

⁵PC/IPL/8, paragraph 6.

for such countries to make notifications under Article 5.1, on the understanding that this would not entail an extension of the period provided for in Article 5.2 for the phase-out of measures notified under Article 5.1.

19. The representative of Japan considered that Article XIV:2 of the WTO Agreement did not allow for special arrangements regarding the starting date for the implementation of obligations by countries that accepted the WTO Agreement after its entry into force. Accordingly, the basic principle should be that countries that accepted the WTO Agreement within a period of 90 days after the entry into force of the WTO Agreement should make notifications within the time period provided in Article 5.1 and that countries that accepted the WTO Agreement at a later date should submit notifications at the time of the entry into force of the WTO Agreement for such countries. While his delegation did not oppose a practical solution, such a practical solution had to be regarded as something exceptional given this basic principle.

20. The representative of the United States said that the representative of Japan had raised some useful legal points. His delegation was of the view that, as it was some time since the WTO Agreement had been concluded, countries that had not yet accepted the WTO Agreement could be expected to have had sufficient time to become aware of the notification requirements of the WTO Agreements and should therefore be in a position to make notifications relatively quickly. However, his delegation also recognized that a country in the process of ratification of the WTO Agreement would make that ratification a priority. He therefore saw some room for flexibility on this issue, subject to the following conditions. Firstly, a period of 90 days from the date of the deposit of the instrument of acceptance would provide adequate time to make notifications under Article 5.1. Secondly, it should be clear that whatever arrangement the Committee would make with respect to notifications under Article 5.1 would not affect the duration of the period for the elimination under Article 5.2 of measures notified under Article 5.1. Thirdly, the issue under consideration pertained only to the situation arising from the *acceptance* of the WTO Agreement by certain countries; the question of the arrangements for notifications in case of countries *acceding* to the WTO Agreement would have to be dealt with in the context of negotiations on the protocols of accession. Finally, in view of the substantive legal implications of the matter under consideration, the appropriate course of action was for the Committee to submit a draft recommendation through the Council for Trade in Goods to the General Council.

21. The representative of Poland said that his country had not yet completed the process of ratification of the WTO Agreement. While the obligation to make notifications under Article 5.1 of the Agreement obviously applied only to Members, it would be useful if countries that were eligible to become original Members but had not yet accepted the WTO Agreement were allowed to make notifications within the period provided for in Article 5.1 so as to be able to benefit from the transition periods stipulated in Article 5.2.

22. The representative of the European Communities expressed sympathy for the legal concerns expressed by the representative of Japan, but considered that in the interest of transparency it was necessary to be flexible and allow countries that accepted the WTO Agreement at a later date some time to make notifications under Article 5.1. His delegation could accept the suggestions that such countries be given a period of 90 days for making notifications under Article 5.1, counted either from the date of the deposit of the instrument of acceptance or from the date of the entry into force of the WTO Agreement for such countries, it being understood that this would not in any way affect the period for the elimination of notified measures, which period would be counted from 1 January 1995, and that the situation regarding countries that would accede to the WTO Agreement would have to be dealt with in the context of the protocols of accession.

23. The representative of Canada stated that a pragmatic approach was warranted as the success of the Agreement depended very much upon the ability of Members to make notifications under

Article 5.1. Therefore, Members should not be discouraged from coming forward with such notifications. His delegation could agree to an approach whereby countries that accepted the WTO Agreement after 1 January 1995 would be allowed a period of 90 days to make notifications under Article 5.1. This period could be counted from the date of the deposit of the instrument of acceptance or from the date of the entry into force of the WTO Agreement for such countries.

24. The representative of Switzerland expressed his delegation's disagreement with the legal interpretation of Article XIV:2 of the WTO Agreement advanced by the representative of Japan. He noted with interest the flexibility shown by the representatives of the United States, the European Communities and Canada.

25. The representative of Japan said that his delegation was not opposed to a pragmatic approach to the question of the notification of trade-related investment measures by countries that accepted the WTO Agreement at a later time, but found it important not to lose sight of basic legal principles. Such countries should be encouraged to make notifications as soon as possible and if a solution were developed which would give such countries an additional period of time to make notifications, the exceptional nature of that solution had to be borne in mind.

26. The representative of Hungary said that his delegation initially believed that a period of 30 days after the date of acceptance of the WTO Agreement would provide sufficient time to countries that accepted the WTO Agreement after 1 January 1995 to make notifications under Article 5.1, but that he could go along with the approach suggested by the representatives of the United States, the European Communities and Canada.

27. In light of the statements made, the Chairman urged countries eligible to become original WTO Members to make notifications under Article 5.1 at the time of their acceptance of the WTO Agreement, if possible. He further noted that there seemed to be agreement in the Committee that, where such notifications were not practicable, the countries in question should be given some additional time to make notifications. He then suggested that the following elements might be included in a draft recommendation by the Committee to the Council for Trade in Goods. Firstly, the Committee recognized the desirability of ensuring the effective application of Articles 5.1 and 5.2 with respect to all WTO members. Secondly, the Committee noted the practical difficulty arising from the fact that the period of 90 days referred to in Article 5.1 may have expired at the time of the entry into force of the WTO Agreement for governments eligible to become original Members that accept the WTO Agreement after 1 January 1995. Thirdly, the Committee emphasized that the problem under consideration was limited to the period within which notifications are to be made under Article 5.1 and did not concern the duration of the phase-out periods in Article 5.2 or the requirements of Article 5.4, both of which would continue to be governed by reference to the date of entry into force of the WTO Agreement itself. The draft recommendation would then provide that governments eligible to become original Members that accepted the WTO Agreement after 1 January 1995 should have a period of 90 days after the date of their acceptance of the WTO Agreement to make notifications under Article 5.1. He proposed that, if the above elements were acceptable to the Committee as a basis for dealing with this matter, the Committee mandate him to prepare, with the assistance of the Secretariat, a draft recommendation of the Committee to the Council for Trade in Goods along these lines. This draft recommendation would be circulated to the Committee and would be deemed approved by the Committee and automatically forwarded to the Council for Trade in Goods if there were no objection to the draft recommendation within a period of 14 days. For the sake of legal certainty, the Chairman suggested that the Committee recommend that the proposed decision be sent by the Council for Trade in Goods to the General Council for final adoption.

28. The Committee took note of the statements made and decided to proceed in the manner proposed by the Chairman.

E. NOTIFICATION PROCEDURES UNDER ARTICLE 5.5 AND ARTICLE 6 OF THE AGREEMENT

29. The Chairman recalled that the Contact Group which had undertaken preparatory work on notification procedures under the Agreement had suggested that the notification requirements in Article 5.5 and Article 6 could be addressed by the Committee once the Agreement was in force.⁶ The General Council and the Council for Trade in Goods had recently remitted these matters to the Committee for further action and/or consideration, as appropriate. It was thus the Committee's task to consider whether there was a need to establish guidelines and/or procedures to implement the notification requirements under these two provisions.

30. In respect of the notification requirement of Article 5.5, the Chairman suggested that one possible way of proceeding might be to consider whether it was useful to develop a common format for notifications to be made under this provision. In developing such a common format, it had of course to be borne in mind that Article 5.5 dealt with the application to a new investment of trade-related investment measures that had already been notified under Article 5.1. The question then was what additional information should be provided under Article 5.5 with respect to the application to new investments of previously notified trade-related investment measures. Some specific elements of the recommended format for notifications under Article 5.1 might be relevant in this respect, in so far as they would generate information on the product and enterprises covered by the trade-related investment measures applied pursuant to Article 5.5 and on the duration of such measures. In addition, it might be useful to consider what information should be provided under Article 5.5 in relation to the requirement that the application to a new investment of a previously notified measure must be necessary to avoid distorting the conditions of competition between the new investment and the established enterprises, and in relation to the requirement that the terms of a trade-related investment measure applied to a new investment must be equivalent in their competitive effects to measures applied to established enterprises.

31. In respect of Article 6.2, the Chairman asked whether delegations had any suggestions to make on whether it would be useful that the Committee provide guidance on the type of "publications" covered under this provision.

32. The representative of the European Communities proposed that the Secretariat, in consultation with delegations, prepare a format for notifications under Article 5.5, which format would be based on the recommended format for notifications under Article 5.1, with the appropriate adaptations.

33. The representative of the United States agreed with the suggestion made by the representative of the European Communities in respect of the notification requirement of Article 5.5. With respect to Article 6.2, his delegation wished to reflect further on how to implement this provision. A format for notifications under this provision might not be necessary, but there were several questions which needed to be addressed regarding the precise scope of this provision. He noted in this regard that the Agreement made it clear in the Illustrative List what were prohibited trade-related investment measures, but did not contain a generic definition of a trade-related investment measure. As a result, there could be doubts as to what were permissible trade-related investment measures subject to the notification requirement in Article 6.2. He wondered whether it was advisable to provide some further guidance as to the nature of the measures covered by Article 6.2 or whether delegations should be advised to err on the side of generosity and to notify any publications dealing with general investment measures.

⁶PC/IPL/8, paragraph 5.

34. The representative of Canada said that Members could only avail themselves of Article 5.5 only if they had made notifications under Article 5.1. Given that thus far no such notifications had been received under Article 5.1, the question of notification procedures under Article 5.5 was not a matter of great urgency. However, if work were to be undertaken on a format for notifications under Article 5.5, the format that had been developed for the notifications under Article 5.1 would provide a solid basis. With respect to Article 6.2, he noted that his delegation attached great importance to the transparency requirement contained in this provision, particularly in light of the fact that Article 9 contemplated a review and possible expansion of the Agreement within a period of five years after the entry into force of the WTO Agreement. Article 6.2 was important in this respect in that it could be a means for gathering information that would allow Members to be better informed of the existence of trade-related investment measures when the time for that review came.

35. The representative of Poland said that several aspects of the notification requirements in Article 6.2 required further consideration. He noted in this respect the issue of the definition of the relevant "publications", the issue of whether the full text of such publications should be provided or only a reference to such publications and questions relating to the language in which these notifications were to be made. He suggested that informal consultations be held on these matters.

36. The Chairman requested delegations which wished to make suggestions on a format for notifications under Article 5.5 to submit their suggestions to the Secretariat. The Secretariat would then on the basis of these suggestions attempt to formulate an informal proposal for such a format. With respect to the notification requirement of Article 6.2, he said that it was clear from the statements made that this matter needed to be examined further. The Committee would revert to the notification requirements of Articles 5.5 and 6.2 at its next meeting.

37. The Committee took note of the statements made and decided to proceed as proposed by the Chairman.

F. PROCEDURES FOR IMPLEMENTING ARTICLE 7.3 OF THE AGREEMENT

38. The Chairman recalled that Article 7.3 of the Agreement provides that the Committee shall monitor the operation and implementation of the Agreement and shall report thereon annually to the Council for Trade in Goods. Several questions arose as to how to implement this provision. With respect to the requirement that the Committee monitor the operation and implementation of the Agreement, the question arose as to the information on the basis of which the Committee should conduct this monitoring, and the arrangements which should be made for undertaking this work. With respect to the requirement of an annual report to the Council for Trade in Goods, it might be useful to consider what could be the content of such a report. Comparable requirements regarding the submission of annual reports (to the CONTRACTING PARTIES to the General Agreement) had existed under the Tokyo Round Agreements and Arrangements. The experience gained in the implementation of those requirements might be relevant to the Committee's consideration of the procedures for implementing Article 7.3.

39. No statements were made under this agenda item. The Chairman said that the Committee would revert to this matter at its next meeting.

G. DATES OF MEETINGS OF THE COMMITTEE

40. The Chairman drew the attention of the Committee to Article 7.1 of the Agreement, which provides that the Committee shall meet not less than once a year and otherwise at the request of any Member. There were various ways in which this requirement could be met. The Committee could decide to establish a calendar of regular meetings, with a possibility of special meetings if requested

by any Member, as had been the practice of many GATT bodies in the past. While the Committee was required to have at least one regular meeting per year, it was free to decide to hold more than one such meeting every year. On the other hand, the Committee could adopt a more flexible approach and decide on the dates of its meetings on an *ad hoc* basis. The Chairman noted that it might be somewhat premature to take a decision on this matter at this time and that it might be wiser to wait until the Committee had a better idea of its workload. He therefore proposed that the Committee proceed in a pragmatic manner and hold a next meeting relatively soon in order to continue the consideration of matters discussed at this meeting, some of which were rather urgent. He mentioned in this connection the question of the Committee's rules of procedure, the status of notifications received under Article 5.1 and the implementation of the provisions of Articles 5.5, 6.2 and 7.3. In light of these considerations, he suggested that the Committee hold its next meeting at the end of April or in May. At that meeting the Committee might be in a position to take up the question of the schedule of its future meetings.

41. The Committee agreed to proceed as suggested by the Chairman.