

Committee on Trade-Related Investment Measures

MINUTES OF THE MEETING HELD ON 19 OCTOBER 1995

Chairman: Mr. Vassili Notis (Greece)

1. The Committee on Trade-Related Investment Measures held its third meeting on 19 October 1995.
2. The Committee adopted the following agenda:
 - A. Rules of Procedure
 - B. Notifications under Article 5.1 of the Agreement on Trade-Related Investment Measures
 - C. Format for Notifications under Article 5.5 of the Agreement
 - D. Notification Procedures under Article 6.2 of the Agreement
 - E. Brazil - Provisional Measure 1024 of 13 June 1995
 - F. Annual Report to the Council for Trade in Goods
 - G. Other Business
 - H. Dates of Next Meetings

A. RULES OF PROCEDURE

3. The Committee had before it in document G/TRIMS/W/3 proposed rules of procedure. The Committee agreed to adopt these rules and to forward them to the Council for Trade in Goods for approval in accordance with paragraph 6 of Article IV of the WTO Agreement.

B. NOTIFICATIONS UNDER ARTICLE 5.1 OF THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

4. The Chairman recalled that, at the meeting of the Committee held in June, comments of a specific or more general character had been made on notifications made under Article 5.1.¹ Since that meeting, the Committee had received new or supplementary notifications from Colombia, Cuba, Cyprus, Egypt, Honduras, Poland, Switzerland and Uruguay. He drew attention to his remarks at the meeting in June on the nature of the Committee's discussion of notifications submitted under Article 5.1.

¹G/TRIMS/M/2, paragraphs 8-32

5. The representative of Cuba informed the Committee that, following the enactment in September 1995 of a new foreign investment law, the local content provisions described in document G/TRIMS/N/1/CUB/1 were no longer applicable. Key features of the new investment law included a provision enabling the authorization of foreign investment in all sectors of the economy, except in health care, education and defence; guarantees for foreign investors in regard to conditions of expropriation and in regard to transfer of profits in freely convertible currency; the possibility to make investments through various forms, including joint ventures and wholly foreign-owned enterprises; and a provision granting foreign investors the right to export and import directly.²

6. The representatives of Venezuela, Peru and Mexico welcomed the recent developments in the Cuban foreign investment regime.

7. The representative of Japan said that several Members had not yet submitted notifications under Article 5.1. This was inconsistent with the requirements of Article 5.1 and he urged the delegations concerned to explain the reasons for the delay.

8. The representative of the European Communities said that, at the previous meeting, it was noted that several notifications did not conform to the agreed standard format and did not contain the required, detailed information. He regretted that some of the delegations in question had not provided supplementary information. In regard to notifications submitted after the expiry of the relevant deadline, he reiterated his delegation's position that Members which failed to submit notifications in time could not benefit from the transition period in Article 5.2.

9. The representative of Canada, referring to comments made at the previous meeting, seconded the point made by the representative of the European Communities regarding the need for supplementary information in case of some of the notifications made under Article 5.1.

10. The representative of New Zealand welcomed the statement in the notification submitted by Peru³ that the Peruvian authorities were examining the possibility of eliminating the mixing requirement applied in the dairy sector and asked whether some information was available on the outcome of this examination. Bilateral consultations were expected to be held between Peru and New Zealand to resolve a difference of opinion on whether or not this requirement had been tariffied in the Uruguay Round. In regard to paragraph 8 of the notification by Peru, he asked the delegation of Peru to explain the reasons for the specific ratio of domestically-produced fresh milk and imported milk powder.

11. In respect of the notification submitted by Thailand⁴, the representative of New Zealand noted the general statement in paragraph 4 of this notification that Thailand intended to maintain the application of trade-related investment measures during the five-year transition period provided for in Article 5.2. His delegation would appreciate receiving more specific information on the intentions of Thailand regarding the elimination or phase-out of measures applied to the dairy products identified in this notification. His delegation would seek more information on a bilateral basis on a mixing requirement notified by Indonesia⁵ concerning fresh milk and imported raw material milk.

²Copies of the new Cuban foreign investment law are available in the Secretariat (Intellectual Property and Investment Division).

³G/TRIMS/N/PER/1

⁴G/TRIMS/N/1/THA/1

⁵G/TRIMS/N/IDN/1

12. The representative of Uruguay drew the Committee's attention to a supplementary notification recently submitted by his delegation in accordance with the agreed standard format.⁶

13. The representative of Korea disagreed with the view expressed by the representative of the European Communities on the legal consequences of late notifications. As stated by his delegation at the previous meeting, there was no clear legal basis to deny the benefits of the transition period to Members which submitted notifications after the expiry of the deadline provided in Article 5.1.

14. The representative of Malaysia recalled that, at the previous meeting, his delegation had made the point that the standard format for notifications under Article 5.1 was useful to facilitate the notification process but that compliance with the format was not an obligation under the Agreement. Nevertheless, his delegation had undertaken at that meeting to provide supplementary information in accordance with the standard format; he expected that this information would be forthcoming within the next few days.

15. The representative of Peru said that his delegation would pursue on a bilateral basis the points raised by New Zealand. He emphasized that Peru did not utilize the mechanism of tariffication, which was precisely the reason why the mixing requirement in the dairy sector had been notified under this Agreement.

16. The representative of India shared the views expressed by the delegation of Korea on the question of the consequences of late submission of notifications. He informed the Committee that his delegation would in the very near future submit a supplementary notification in accordance with the standard format.

17. The representative of Indonesia recalled that, at the previous meeting, his delegation had explained that the delay in the submission of his country's notification was caused by problems created by uncertainty over whether a particular measure was covered under this Agreement or under the Agreement on Subsidies and Countervailing Measures. He noted that more Members had submitted notifications after the deadline stipulated in Article 5.1 and expressed his agreement with the view of the Korean representative that there was no legal basis to deny Members which had submitted late notifications the benefits of the transition period under Article 5.2. He proposed that the Chairman conduct informal consultations on this matter. In regard to the question raised by the representative of New Zealand, his delegation would pursue this matter bilaterally.

18. The representative of the United States said that his delegation was pleased with the additional and supplementary notifications which had been received since the last meeting. At the same time, his authorities were concerned about the increasing number of late notifications. In this respect, his delegation agreed with the European Communities that Members which did not meet the deadline laid down in Article 5.1 did not benefit from the transition period. However, as stated by his delegation at the previous meeting, this did not mean that late notifications were devoid of value. To the extent that such late notifications reflected an unambiguous commitment to eliminate measures within the relevant period of time, other Members might well wish to take that commitment into account when exercising their rights.

19. The representative of Thailand said that she would seek information from her authorities on the question raised by the representative of New Zealand.

20. The representative of the European Communities welcomed the announcement by several delegations at this meeting that supplementary information on their notifications would be provided. In response to the statement by the representative of Korea, he said that the text of Article 5.1 was

⁶G/TRIMS/N/1/URY/1/Add.1

unambiguous on the issue of the consequences of late notifications and that there was therefore no need for informal consultations on this matter.

21. The representatives of Japan and the United States agreed with the representative of the European Communities that there was no need for informal consultations on the issue of late notifications.

22. The representative of Korea said that his delegation still felt that further consultations were necessary in order to arrive at a consensus on the question of whether Members which had submitted notifications after the expiry of the deadline could benefit from the transition period in Article 5.2.

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

C. FORMAT FOR NOTIFICATIONS UNDER ARTICLE 5.5 OF THE AGREEMENT

24. The Chairman recalled that, at its meeting in June, the Committee had discussed a Secretariat proposal for a format for notifications under Article 5.5.⁷ It was generally agreed that this proposal was a good basis for developing a standard format. The Committee had decided to hold further informal consultations on this proposed format if necessary in light of specific drafting proposals by delegations. Such proposals had not been made, which suggested that the proposed format was acceptable to Members. The Chairman therefore proposed that the Committee adopt the draft format proposed in the Secretariat Non-Paper.

25. It was so decided.

26. The Chairman said that the Secretariat would circulate the adopted standard format as a document of the Committee.⁸

D. NOTIFICATION PROCEDURES UNDER ARTICLE 6.2 OF THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

27. The Chairman noted that, at its two previous meetings, the Committee had considered ways of giving effect to the requirement of Article 6.2 that Members notify the Secretariat of "the publications in which TRIMs may be found, including those applied by regional and local governments within their territories". However, the Committee's deliberations on this matter had not made much progress. So far, only one concrete proposal had been made. This proposal envisaged the identification of publications in which information on investment measures generally could be found. In view of the importance of Article 6.2 as a means for ensuring transparency, it was appropriate that the Committee intensify its efforts to find a sensible way of implementing this provision. In light of a concern which might exist that compliance with Article 6.2 could prove to be unduly burdensome, it was useful to stress the rather limited scope of this notification requirement. Article 6.2 required an identification of relevant publications, which could be done simply through a list of names of such publications, rather than the actual submission of copies of publications. Moreover, such a listing of relevant publications would not necessarily have to be made on a periodic basis. Another relevant point was that, as suggested by one delegation at the last meeting, the Committee could decide that Members would not need to identify under Article 6.2 laws and regulations already notified under Article 5.1.

⁷Secretariat Non-Paper No. 1853

⁸See document G/TRIMS/3

28. The representative of the United States proposed that the Secretariat prepare a specific proposal on the implementation of Article 6.2 to serve as a basis for informal consultations prior to the next meeting of the Committee.

29. It was so decided.

E. BRAZIL - PROVISIONAL MEASURE 1024 OF 13 JUNE 1995

30. The Chairman noted that this subject appeared on the agenda of this meeting at the request of the delegation of the United States.

31. The representative of the United States recalled that, on 3 July 1995, Brazil had notified Provisional Measure 1024 to the Council for Trade in Goods.⁹ The Measure applied to manufacturers and assembling companies of, *inter alia*, automobiles, trucks, buses, and automobile parts, and included quantitative restraints and investment restraints. In the analysis of his delegation, the investment-related provisions of the Provisional Measure conflicted with the rules of the Agreement regarding trade-balancing and local content requirements. These provisions were not addressed in the recent balance-of-payments consultations and Brazil therefore could not claim balance-of-payments coverage for them. He asked the delegation of Brazil to explain how the Government of Brazil intended to ensure that the investment-related provisions in Provisional Measure 1024 conformed with Brazil's obligations under the WTO.

32. The representative of Korea shared the concerns expressed by the delegation of the United States in regard to compatibility with the Agreement of the investment-related measures contained in Provisional Measure 1024. The Committee on Balance-of-Payments Restrictions had recently found that Brazil was not facing a serious balance-of-payments problem. In the light of this finding, Korea wondered how Brazil's proposed measures could be justified on the basis of Article 4 of the Agreement and considered that they could be in violation of the illustrative list annexed to the Agreement. His delegation was also concerned that the Brazilian investment measures had not been notified to the Committee on Trade-Related Investment Measures. Korea had commended Brazil for the successful implementation of its Plano Real, launched in 1993, which included actions to strengthen fiscal and monetary policies and which had reduced inflation from approximately 50 per cent in June 1994 to less than 2 per cent at present. Korea also recognized, along with other WTO Members, that Brazil needed to maintain an adequate level of reserves to preserve its creditworthiness. In addition, as a developing country, Korea understood the fundamental importance of the automotive sector to the Brazilian economy. Indeed, the performance of automobile production had a direct impact on almost all other sectors of the national economy. However, while fully understanding the desire of the Brazilian Government to maintain a competitive automotive industry, his authorities did not believe that the introduction of a WTO-inconsistent regime of trade-related investment measures would be the best way to achieve this goal. He understood that Brazil would decide by the end of this year whether or not it would enforce the announced measures. Pending that decision, this Committee should convey its concerns to the Brazilian authorities.

33. The representative of Brazil said that his delegation recognized the right of each delegation to raise in the Committee matters deemed to be of interest to WTO Members but failed to see the reasons for the inclusion on the agenda of this meeting of an item concerning Provisional Measure 1024. This Measure had been notified to the WTO in the interest of transparency. At recent meetings of the Council for Trade in Goods, the General Council and the Committee on Balance-of-Payments Restrictions, his delegation had explained that the Provisional Measure had not entered into force and that, if and

⁹WT/L/73

when the Measure was approved by the Brazilian Congress, the investment-related aspects of the Provisional Measure would need to be regulated by decree and would not become effective prior to 1996. There was no need to discuss in the Committee a legal framework which had not yet been approved and regulated and which consequently was not yet in force.

34. The representative of the European Communities said that his delegation realized that Provisional Measure 1024 was not yet in force and that the Measure had been notified to the WTO for transparency reasons only. He recalled that on another occasion Brazil had indicated that, if and when the Measure were to enter into force, a further notification would be provided. His delegation believed that if the Measure were to enter into force, it would be inconsistent with Brazil's obligations under the Agreement.

35. The representative of Canada stated that if the series of measures contained in Provisional Measure 1024 were put into effect they would not qualify for notification under Article 5.1 of the Agreement, nor would they qualify for treatment under Article 4.

36. The representative of Uruguay said that any delegation had the right to raise matters it considered of interest but he was not convinced that discussion in the Committee of this particular subject was very useful.

37. The representative of Japan asked for a clarification of the current legal status of Provisional Measure 1024. He noted in this connection that, while the representative of Brazil had stated that the Measure was not yet effective, Article 19 of the Provisional Measure stipulated that it would become effective as of the date of its publication. As the Measure had been published, it seemed that it did have some legal force.

38. The representative of Brazil responded that his delegation had on several occasions provided an explanation of the precise legal status of Provisional Measure 1024. Only the quantitative restraints contained in this Measure had entered into force; in respect of other measures the Provisional Measure merely provided a legal basis for possible future action. He recalled that, at the previous meeting, the Chairman had, in the context of the discussion of notifications under Article 5.1, stated that it was not the task of the Committee to undertake a collective evaluation of the legal validity of individual notifications made under Article 5.1. If the Committee was not to undertake a collective evaluation of the legal validity of measures that were in force and had been notified, it followed logically that the Committee could also not engage in such a collective evaluation of measures which had not even entered into force.

39. The representative of Korea said that discussion of this item in the Committee was appropriate in light of the mandate of the Committee which, under Article 7.2, was to afford Members the opportunity to consult on any matter affecting the operation and implementation of the Agreement.

40. The representative of Brazil responded that his delegation's position was not that the Committee could not have a discussion of Provisional Measure 1024 but that the Committee could not engage in a collective evaluation of the legality of a measure which had not yet entered into force.

41. The representative of Japan stated that if and when the measures contained in Provisional Measure 1024 entered into force, they would constitute a violation by Brazil of its obligations under this Agreement.

42. The Committee took note of the statements made.

F. ANNUAL REPORT TO THE COUNCIL FOR TRADE IN GOODS

43. The Committee adopted its annual report to the Council for Trade in Goods.¹⁰

G. OTHER BUSINESS

44. The Committee provided an opportunity to representatives of intergovernmental organizations invited to attend this meeting as observers to make statements on the activities of their organizations relevant to the work of the Committee. The Committee noted the objections raised by the representative of India, who believed that a consideration of activities of other international organizations in the area of foreign investment was outside the scope of the Committee's mandate.

45. The representative of the IMF said that the IMF's responsibilities were normally divided into three main parts: surveillance, technical assistance, and balance-of-payments support. As part of its surveillance function, the IMF frequently reviewed various aspects of countries' policies, including investment incentives, and made recommendations on these policies. The IMF mission chiefs would certainly use any information which the Committee could provide, such as notifications of trade-related investment measures, which could give a more complete framework for discussion in this area. Any feedback from the Committee on implementation of the Agreement could be helpful in these consultations. One of the tasks of the IMF's Geneva office was to follow various Committees at the WTO and transmit any relevant information from the WTO to staff at headquarters working on member countries. He trusted that the Committee would be valuable in this respect. The technical assistance provided by the Fund also frequently involved advice on tax and investment incentives with the aim of recommending country policies to improve the efficient allocation of capital. In this context, it was important that the Fund's policy advice take into account the country's international obligations in the WTO, which included the Agreement on Trade-Related Investment Measures and its implementation. Issues raised in this context at the Committee could provide valuable information and guidance on implementation of these policies at the country level. In respect of the IMF's activities in the area of balance-of-payment support, the Fund-supported programmes and conditionality might also at times involve investment-related policies such as the design of tax incentives. However, it was not the IMF's responsibility to seek to enforce WTO undertakings through its support of countries' reform programmes. Finally, on a broader level, any discussion of international investment issues at the WTO or elsewhere was of great interest to the IMF with its links to global financial flows, macroeconomic stability and exchange arrangements. The representative of the IMF concluded by saying that the IMF was very much looking forward to participating in the meetings of the Committee, which was likely to provide useful insights on issues related to the implementation of the Agreement and thereby serve as an input to coherence in Fund policy advice to member countries. The IMF's Geneva Office would liaise between the Committee and IMF headquarters and was also available to respond to any requests for information the Committee might have on areas relevant to the IMF's competence.

46. The representative of the OECD stated that the OECD had for many years been working in the investment field. A number of international agreements, some of which were legally binding, served as the basis for promotion of liberalization of investment regimes by OECD members. Recently OECD members had come to the conclusion that the current approach was not sufficient and had launched a study on the development of a single, comprehensive instrument on foreign investment. Following this study, OECD members had formally launched negotiations on a Multilateral Agreement on Investment in May this year. The Negotiating Group established to conduct these negotiations had held its first meeting in September, at which it elected a bureau, agreed its working procedures and adopted a programme of work for the remainder of this year. The work programme was ambitious;

¹⁰Document G/L/37

most of the subjects were expected to be discussed at least once in the remainder of the year and draft texts might be available in some areas by the end of the year. The negotiations aimed at an agreement which would be comprehensive in scope, covering all sectors of the economy under a broad definition of investment and which would provide for a satisfactory balance of commitments among the signatories. The agreement was intended to set high standards for the treatment and protection of investment, going beyond the existing commitments in the OECD to achieve a high standard of liberalization covering both the establishment and post-establishment phase, with broad obligations on national treatment, non-discrimination, standstill, rollback and transparency and with new disciplines in areas not satisfactorily covered by existing OECD instruments, including investment incentives and performance requirements. The agreement would be legally binding and be applicable to all parties at all levels of government and deal with measures taken in the context of regional economic integration organizations. An important element of the agreement would be provisions to encourage conciliation and ensure effective dispute resolution, taking into account existing mechanisms. Account would be taken of existing international commitments, so as to avoid any possible conflicts with agreements in the WTO (notably TRIPS, GATS and TRIMs) and with international agreements on taxation. The agreement would be concluded as a free-standing treaty, open to all OECD members, the European Communities and non-OECD members. Non-OECD members would be consulted during the negotiations through a variety of mechanisms. It had been decided to grant the WTO observer status.

47. The representative of UNCTAD said that the UNCTAD Division on Transnational Corporations and Investment had been created in 1993, when the former UN Centre on Transnational Corporations was transferred from New York to Geneva. The Division served as secretariat to the Commission on International Investment and Transnational Corporations, which was the focal point within the UN system for all matters relating to foreign direct investment. The Commission reported to the Trade and Development Board. The work of the Commission over the last ten years showed a marked shift toward a more positive attitude to direct investment and transnational corporations. It had recently strengthened its role by agreeing to undertake reviews of the policies of individual countries and by undertaking work on investment incentives. Underlying UNCTAD's role in the area of foreign direct investment was a recognition of the importance of foreign direct investment and transnational corporations to the development process, as evidenced by the fact that the value of production and sales of foreign affiliates exceeded the value of world exports. This internationalized production was constantly increasing as foreign direct investment inflows, estimated at approximately US\$230 billion in 1995, were adding to a stock of more than US\$2.4 trillion. The main activities of the Division consisted of technical assistance and research and information analysis. The Division published the annual World Investment Report, maintained a comprehensive foreign direct investment data base and issued a journal "Transnational Corporations" which had recently begun to carry articles on questions relating to the international framework for foreign direct investment. In addition, the Division undertook research studies on specific aspects of foreign direct investment, such as small and medium-sized enterprises, trade-related investment measures, services and legal and political issues related to an international framework for foreign direct investment. Some of the results of these studies were disseminated through seminars. One such seminar was to take place on 24 October and was intended to enhance awareness of foreign direct investment issues among WTO and UNCTAD delegates based in Geneva. The Division had also undertaken technical assistance activities in response to specific requests from countries interested in attracting foreign investment. A special area of technical assistance activity was privatization, which had to be seen in the broader context of UNCTAD's activities on the subject of enterprise development and competitiveness. This subject was an important theme for discussion at the forthcoming UNCTAD IX conference. UNCTAD had undertaken several studies on investment-related matters in cooperation with other international organizations, including the OECD and the World Bank and had a programme of activities in this area with the private sector.

48. In respect of competition policy, there was a tradition of work in UNCTAD in this area as UNCTAD was responsible for the implementation of the UN Set of Multilaterally Agreed Equitable

Principles and Rules on Restrictive Business Practices adopted by the UN General Assembly in 1980. UNCTAD was now examining questions arising in the area of competition policy as a consequence of the globalization and liberalization of the world economy. The third UN conference to review the implementation of the Set would be held in November this year and was expected to chart the future direction of UNCTAD's work on competition policy.

49. The representative of Brazil stressed that the presentations just made by the representatives of international organizations were only aimed at providing useful information for the benefit of all Members and did not require the Committee to take a position on any matter.

50. The Committee took note of the statements made.

H. DATES OF NEXT MEETINGS

51. The Committee agreed to hold its next meetings in March and September 1996 and to request the Secretariat to decide on the exact dates for these meetings.