

**PREPARATORY COMMITTEE  
FOR THE  
WORLD TRADE ORGANIZATION**

RESTRICTED  
PC/IPL/M/9  
13 December 1994

(94-2619)

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SUB-COMMITTEE ON INSTITUTIONAL,  
PROCEDURAL AND LEGAL MATTERS

MINUTES OF THE MEETING HELD ON 18 NOVEMBER 1994

1. The Sub-Committee on Institutional, Procedural and Legal Matters held its ninth meeting on 18 November 1994 under the Chairmanship of Mr. K. Kesavapany (Singapore).
- A. Paragraph 8(b)(ii) of the Decision establishing the Preparatory Committee
  - (i) Terms of reference for WTO bodies
2. The Chairman recalled that at its meeting on 11 November, the Sub-Committee had postponed consideration, until its present meeting, of the terms of reference proposed for the WTO Committee on Trade and Development (document 2736), as well as of those for the Committee on Market Access (document 2626), because of the late circulation of these texts. He drew attention to footnote 4 of the proposed terms of reference for the Committee on Trade and Development, which referred to action by the Sub-Committee, and recalled his suggestion at the 11 November meeting that paragraphs 6 and 7 of these terms of reference be deleted so as to be in conformity with the approach followed for terms of reference of other WTO Committees. Drawing attention to the Note on page 2 of document 2736, he said that as a result of the agreement on the draft terms of reference in the consultations, the following words at the end of the first sentence of the Note should have been deleted: "and the net food-importing developing country Members." He proposed that the Sub-Committee approve the terms of reference contained in document 2736, as amended by the deletion of paragraphs 6 and 7.
3. The Sub-Committee so agreed.
4. The Chairman then stated that the programme of work of the WTO Committee on Trade and Development for 1995 would include as a priority the review of the impact of the results of the Uruguay Round on developing country Members, in particular the least-developed country Members. It would also include consideration of the question of credit and recognition for autonomous trade liberalization measures.
5. The Sub-Committee took note of the statement.
6. The Chairman then drew attention to the terms of reference for the WTO Committee on Market Access in document 2626, and proposed that they be approved.
7. The Sub-Committee so agreed.
8. The Chairman then stated that the terms of reference for the Committee on Market Access did not create or diminish any rights and obligations of the Members under GATT 1994, including those in respect of notification.

9. The Sub-Committee took note of the statement.

10. The Chairman, turning to work under the Contact Groups, recalled that at its meeting on 11 October, the Sub-Committee had postponed action on the report by the Chairman of the Contact Group on Agriculture (document 2463), regarding the Agreement on Sanitary and Phytosanitary Measures. With regard to the term "international standard" in box 7 of the proposed format for the notification of sanitary and phytosanitary measures, he clarified that in the course of its discussions, the Contact Group had agreed that by this term was meant either a standard, guideline or recommendation. He proposed that the Sub-Committee approve the report by the Chairman of the Contact Group in document 2463, and the recommendations therein.

11. The Sub-Committee so agreed and took note of the statement.

12. The Chairman said that the Contact Group on Agriculture had met the day before to further consider notification requirements and formats for the WTO Committee on Agriculture, as well as the report to be made to the Sub-Committee. Although substantial progress had been made, with the potential for convergence on most issues, further informal consultations and work were necessary if substantial agreement on notification requirements was to be achieved. It had been agreed, therefore, that the Contact Group would hold a further meeting in the latter part of the month. The Secretariat was to prepare a revised and simplified version of the notification requirements and formats, with annotations as appropriate, in the near future.

13. The Sub-Committee took note of the statement.

14. With regard to the Contact Group on Anti-Dumping, Subsidies and Safeguards, Mr. Lundby (Norway), Coordinator of the Contact Group, said that the Group had held a number of meetings and had been working intensively. Agreement had been reached as regards the notifications on non-actionable subsidies under Article 8:3 of the Subsidies Agreement. With regard to notifications under Articles 28:1 and 29:3, there was also agreement in the Contact Group. On two questions, namely, notifications under paragraphs 11 and 12 of Article 27, some work remained to be done, and a meeting would be held on 21 November to try to resolve these matters. A written report from the Contact Group would subsequently be made available on 23 November. The Contact Group was also working on the question of arbitration under Article 8:5 of the Subsidies Agreement, and this work was considered important by all parties. If agreement were reached on certain elements considered to be useful in this context, the Group might wish to make a second report to the Sub-Committee at a later stage on this matter.

15. The Sub-Committee took note of the statement.

16. With regard to the Contact Group on TRIPS, the Chairman recalled that at its meeting on 11 November, the Sub-Committee had postponed action on the report by the Chairman of that Group (document 2666). He proposed that the Sub-Committee approve the report by the Chairman of the Contact Group in document 2666, and the recommendations therein.

17. The Sub-Committee so agreed.

18. With regard to matters relating to TRIMs, the Chairman recalled that at its meeting on 23 September, the Sub-Committee had asked the Contact Group on TRIPS to undertake any necessary preparatory work on notification procedures for the TRIMs Agreement. A report by the Chairman of that Contact Group containing a recommended format for notifications under Article 5:1 of the TRIMs Agreement had been circulated in document 2766. However, some questions regarding the format had subsequently been raised. Amendments to the document would therefore be needed, which the

Secretariat intended to circulate as soon as possible. He suggested that the Sub-Committee revert to this matter at its next meeting.

19. The Sub-Committee took note of the statement and so agreed.

20. The Chairman added that the Contact Groups which had work outstanding should try to complete it by the middle of the following week.

21. The Sub-Committee took note of the statement.

(ii) Rules of procedure for WTO Bodies

22. The Chairman recalled that at its meeting on 11 November, the Sub-Committee had had a preliminary discussion on document 2627/Rev.1, which was a compilation of the Secretariat's non-papers concerning draft rules of procedure for the Ministerial Conference, the General Council, the Trade Policy Review Body and the Dispute Settlement Body (DSB), as well as draft guidelines for observer status for governments and organizations. Because of the late circulation of this document, the Sub-Committee had postponed action on these papers until the present meeting.

23. With regard to paragraph 3 of the draft guidelines for observer status for international intergovernmental organizations, he recalled that at the 11 November meeting, the Community, supported by India, had asked that the words "or of the Dispute Settlement Body" at the end of the paragraph be retained without square brackets in the final text approved by the Sub-Committee. He had since held consultations on this matter, and was not in a position to report agreement thereon.

24. With regard to Rule 28 of the rules of procedure for the Ministerial Conference and Rule 36 of those for the General Council, relating to decision-making, the question had been raised that when a member requested, or the Chairman suggested, that a vote be taken by the raising of cards or by roll call, how this should be decided upon. In this connection, it was the understanding of delegations, based on customary practice, that if such a request or suggestion were made, it would be decided on by the meeting.

25. On another matter, and on the basis of consultations, he suggested that Rule 9 of Rules for the Ministerial Conference and Rule 12 of those for the General Council, which dealt with observer status of signatories of the Final Act which had not yet become WTO members at the time of the WTO's entry into force, be deleted from the Rules on the condition that specific transitional arrangements be agreed upon regarding the nature of the participation of these governments in the WTO. These two Rules, indeed, addressed an issue of a provisional and transitional nature, and did not have any place in rules of procedures which were meant to be of a more permanent nature. It therefore made sense to deal with the matter referred to in Rules 9 and 12 in the context of transitional arrangements. Consultations on this issue were under way, and one would also address in that context the participation of States or separate customs territories that were GATT 1947 contracting parties in the process of ratification of the WTO Agreement and which were not in a position to become members of the WTO from day one.

26. The representative of the European Communities said that while his delegation could agree to the rules of procedure contained in document 2627/Rev.1, it could not agree to the guidelines on observer status for international intergovernmental organizations because of the lack of consensus on the language to be retained in paragraph 3, and to which the Chairman had referred. Given that this was not an urgent matter that necessarily had to be decided before the entry into force of the WTO, and given the stage of the Sub-Committee's work, it would be best to withdraw the text of the proposed guidelines and to resume discussion on it at the first meeting of the WTO's General Council. In the

meantime, one could continue the practice that had been followed in the Preparatory Committee on observers and invite to meetings of the General Council the four international organizations which had thus far been invited to meetings of the Committee. The question of observer status in the Dispute Settlement Body was very sensitive for the Community, and since it would not be possible to agree on this at the present time, the Community preferred to postpone the matter until later.

27. The representative of India said that his Government believed, like the Community, that the DSB would be dealing with sensitive matters. India was reflecting further on whether international organizations should be invited as observers to meetings of the DSB, and supported the Community's suggestion that consideration of this matter be postponed. This would provide more time for reflection, and a decision thereon was not required immediately.

28. The representative of New Zealand said that his delegation would prefer to resolve the issue raised by the Community and India as soon as possible this year. New Zealand could support a consensus to have the reference to the DSB reinstated in the text of the guidelines, as proposed by the Community, and wished to underline that it attached importance to the principle of reciprocity that had been mentioned earlier by other delegations, and which was already identified in the guidelines. On the Chairman's suggestion to delete Rule 9 of the Rules for the Ministerial Conference and Rule 12 of those for the General Council, his delegation could support it but wished to be careful about the implications of possibly creating various classes of observership.

29. The representative of Switzerland said that, as his delegation had stated on earlier occasions, a solution had to be found concerning transitional arrangements for the participation in the WTO of States or separate customs territories that were GATT 1947 contracting parties in the process of ratification of the WTO Agreement, but which were not in a position to become members of the WTO from day one. The possibility that they could participate in the formal and informal work of WTO bodies should be provided. Such special arrangements should clearly be limited in time and should not give them the right to vote in WTO bodies. However, it appeared from ongoing consultations that an exception to the voting rule would exist in the joint GATT 1947/WTO Budget Committee. Such an approach seemed appropriate because work related to the texts signed in Marrakesh would have to be completed in the different WTO bodies, such as that in the services sector. Also, one needed to recall that there would be a common budget for the GATT 1947 and the WTO. His delegation believed that the contracting parties it was referring to could not be observers in the traditional sense. His delegation could only agree to the approval of the rules of procedures for the Ministerial Conference and the General Council as well as of the guidelines for observer status for governments in the WTO with the understanding that an adequate solution would be found, in the Chairman's consultations, to the concerns it had raised.

30. The representative of Mexico associated his delegation with the Community's statement and said that the question of reciprocity in the context of observer status would have to be considered in greater detail.

31. The representative of Canada said that since there was sensitivity on certain sections of the rules of procedure and their annexes, it might be appropriate to allow more time for the consideration of the issues still unresolved. It might, however, be unfortunate to remove the text on guidelines for international organization observers if that meant losing the benefit of the work that had been done thus far. An alternative might be to put that text in square brackets. Delegations could then be allowed more time to consider this matter, but would be able to revert to the text as it presently stood and perhaps to modify it. As regards Rule 9 of the Rules for the Ministerial Conference and Rule 12 of those for the General Council, Canada was satisfied with the present text. However, while it would be agreeable to deleting the two Rules and considering the matter raised in them in another forum, if this were so

decided, Canada would bring to that consideration the same underlying philosophy as it had in the context of the rules of procedure.

32. The representative of Poland said that the matter raised by Switzerland was of importance for a smooth and fair transition process, and that his delegation wished to be associated with the further consultations that might be held on this subject.

33. The representative of Brazil supported the Community's view that the square brackets around the words "or of the Dispute Settlement Body" in paragraph 3 of the guidelines for observer status for international organizations should be removed. His delegation would be agreeable to postponing approval of the text on the guidelines as a whole until later since there was no urgent need for it to be approved now. The guidelines as presently drafted were good, and with further reflection a solution acceptable to all could be reached on the text of paragraph 3 at a later stage.

34. The representative of Norway, speaking on behalf of the Nordic countries, associated their countries with the Community's statement.

35. The representative of Uruguay said that her delegation could agree to the Community's suggestion with regard to paragraph 3 of the guidelines on observer status for international organizations. Uruguay also understood Switzerland's concerns, to which a solution had to be found.

36. The representative of New Zealand supported Canada's proposal that square brackets be put around the text on guidelines for international organization observers as a whole.

37. The representative of China associated his delegation with Switzerland's statement with regard to Rule 9 of the Ministerial Conference and Rule 12 of the General Council.

38. The representative of Morocco said that his delegation had made proposals on the Rules of Procedure, in particular concerning the status of observers. Morocco would be flexible in its position to enable the Chairman to find a solution acceptable to all participants.

39. The representative of Pakistan shared Switzerland's concerns with regard to Rule 9 of the Ministerial Conference and Rule 12 of the General Council because of the importance it attached to a smooth transition to the WTO. His delegation would agree to the deletion of these rules and the discussion of the matter raised in them in the context of transitional arrangements. Like others, Pakistan hoped to be associated with the work on this subject.

40. The representative of the United States said that his delegation would be unable to join in any consensus on the text on observer status for international organizations if the text prohibited observer status in the DSB, given that international organizations had for many years observed discussions of dispute settlement matters in the GATT 1947 Council, as well as for the reasons his delegation had stated on earlier occasions concerning the perceived benefits of such observership. As Canada had suggested, the text as a whole could be put in square brackets. However, if the only area of disagreement was the relevant text in paragraph 3, which was in any event reflected in square brackets, the text could perhaps go forward as it stood. With respect to the deletion of Rule 9 of the Ministerial Conference and Rule 12 of the General Council, his delegation would reflect on the ramifications. In the future, a number of delegations would be in special situations with respect to obligations under both the WTO Agreement and GATT 1947, and his delegation looked forward to the consultations suggested by the Chairman.

41. The Chairman said that in light of the comments made, he would suggest that the whole text of the guidelines on observer status for international organizations be put into square brackets, so that

the considerable work done thereon would not be lost. The process would be furthered if all the square brackets could be removed in subsequent consideration. He noted that there was no disagreement over his proposal that Rule 9 of the Ministerial Conference and Rule 12 of the General Council be deleted. However, the ideas reflected therein, together with the comments by Switzerland, supported by China, would be taken into consideration in the ongoing discussions on transitional arrangements.

42. The representative of the European Communities said his delegation recognized that a large amount of work had already been done with respect to guidelines for international organization observers, and believed that this would not be "lost". His delegation could not, however, accept that the square brackets be expanded to embrace the whole of the text, because this was not a matter which could be resolved in the time left until the Implementation Conference. The Community believed this was a matter of substance which, in particular, concerned matters relating to reciprocity with a certain number of international organizations. This text should therefore be taken up again in the WTO's General Council. A reference to this matter could be made in the report of the Preparatory Committee to the WTO, and the whole of the text could be transmitted, as a basis for future work, to the General Council. In this way, the text would not be lost. He reiterated that the Community could not agree to the guidelines at this stage, nor within the very short period of time still left for the work of the Preparatory Committee to be concluded.

43. The Chairman proposed that the Sub-Committee agree to proceed as suggested by the Community, namely that the text on guidelines for international organization observers be transmitted, as a basis for future work, to the WTO's General Council. He proposed also that Rule 9 of the Ministerial Conference and Rule 12 of the General Council be deleted on the understanding that the issues reflected therein would be dealt with in the context of the consultations on transitional arrangements. He then proposed that the rules of procedure in document 2627/Rev.1, as amended at the present meeting, be approved.

44. The Sub-Committee took note of the statements and so agreed.

45. The representative of China said that his delegation was concerned about the issue of credentials of representatives from separate customs territory Members. China's understanding of the footnote to Rule 7 of the Rules of Procedure for Sessions of the Ministerial Conference was that the credentials of representatives from separate customs territory Members would be issued only by the competent authority in charge of its economic affairs relating to the WTO, and that such competent authority would not mean the so-called "Ministry of foreign affairs" of such separate customs territories, or any other organs which had implication as to sovereignty. This understanding was consistent with the statement made by the Chairman of the GATT 1947 Council on 29 September 1992, which embodied the understanding reached between China and contracting parties to the GATT 1947.<sup>1</sup>

46. The representative of Hong Kong said his delegation wished to make clear that although the Sub-Committee had approved the Rules of procedure in document 2627/Rev.1, as amended at the present meeting, some parts of the text still remained in square brackets.

47. The Sub-Committee took note of the statements.

48. The representative of the United States recalled that earlier drafts of the rules of procedure that the Sub-Committee had approved at its present meeting, had contained language about the treatment of records of meetings and other documents, in the expectation that the results of discussions in the GATT 1947 Council on derestriction procedures would be taken into account by the Sub-Committee

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<sup>1</sup> See C/M/259, item 2.

or the Preparatory Committee in connection with rules of procedure. His delegation, which had been the proponent of this issue, intended now to pursue it in the WTO, given the time constraints. The question of the issuance, circulation and derestriction of documents remained important for the United States, and his delegation might seek guidance in order to make some progress in the framework of the Preparatory Committee, so that the work done could be reflected in some form and that the WTO could then consider procedures in this regard early on.

49. The representative of the European Communities supported the United States' suggestion to pursue discussions on derestriction in the WTO context, and believed that one would be able to make more progress in that framework.

50. The Sub-Committee took note of the statements.

51. The Chairman, turning to rules of ethical conduct for the settlement of disputes, recalled that at the meeting of the Sub-Committee on 11 November, he had proposed that he request a member of the Sub-Committee to undertake plurilateral consultations on this matter. He informed the Sub-Committee that Mr. Armstrong (New Zealand), had accepted to help in the task of consulting on this matter. Interested delegations were invited to submit preliminary written comments on document PC/IPL/W/12 to the Secretariat by the morning of 22 November. He underlined that these comments would be preliminary, and that he was attempting to carry this process as far and as fast as he could, and that he would leave conclusions from that process to be drawn by Mr. Armstrong.

52. The Sub-Committee took note of the statement.

B. Paragraph 8(b)(iii) of the Decision establishing the Preparatory Committee

- Arrangements for effective cooperation with other intergovernmental organizations

53. The Chairman said that he had held consultations with delegations with a view to determining how to ensure that the arrangements currently in place between the GATT 1947 and the IMF would continue into the following year. These arrangements would need to be extended to balance-of-payments matters in the area of services. As a result of these consultations, he would be requesting, pending the conclusion of a more definitive arrangement with the IMF, that the Chairman of the GATT 1947 Committee on Balance-of-Payments Restrictions proceed to seek the agreement of the IMF in this respect.

54. The representative of Argentina said that at the meeting of the Sub-Committee on 11 November, it had been indicated that the Chairman, together with the Secretariat, would prepare a draft letter to be sent to the Managing Director of the IMF. He asked if the Chairman, in his statement, was referring to consultations on this draft letter or to something else.

55. The Chairman said that was precisely what he had been referring to. There would be a draft letter on which consultations would have to be held.

56. The Sub-Committee took note of the statements.

C. Transitional Arrangements

57. The Chairman recalled that at an informal consultation on this matter the day before, he had announced that he would be pursuing bilateral and plurilateral consultations in the coming days. In

doing so, he would take into account the views expressed at the present meeting by delegations, including by Switzerland and China, under item A(ii).

58. The Sub-Committee took note of the statement.

D. Issues relating to the Standing Appellate Body

59. The Chairman said that informal consultations had been held the day before to discuss a non-paper by the Secretariat (document 2788) containing proposed recommendations to the WTO regarding the composition and support staff of the Appellate Body. Delegations had generally approved the contents of the proposals. Several had raised questions concerning the type of legal expertise required on the Appellate Body, and on each three-member board. Some had wanted more emphasis on legal expertise, although not necessarily on formal qualifications as a lawyer. For some, the level of legal expertise and its distribution within the Appellate Body would determine in large part whether the automatic rotation of Appellate Body members would work in practice. Delegations had also commented on the balance between the personal qualifications of the Appellate Body members and the requirement that the Appellate Body be "broadly representative" of the members of the WTO. Several had said that the personal qualifications of the members should be "primordial", and others that the importance of geographical factors should not be diminished. On the initial conditions of employment of Appellate Body members, there had been broad approval for a retainer and consultation fee package that could be reviewed at a later stage. One delegation had said that additional flexibility in the terms of employment should be offered. Some had considered that the US\$5,000 figure for the retainer should not be specified at this point, but left to the selection committee to determine. One delegation had said that this figure should be retained as a minimum.

60. With regard to the impartiality and conduct of Appellate Body members, several delegations had questioned whether persons who were government-paid, but not in government service, such as certain university professors, should be excluded from being members on the Appellate Body because of the requirement in the Dispute Settlement Understanding that members not be "affiliated" with any government. Some had felt that eligibility for the Appellate Body should not be determined solely by a formal employment relationship when the person was in fact independent of a government. Other delegations had commented that the rules of conduct should be drafted so that they did not lead to abuse by parties on the losing side of a case. Several delegations had considered that the rules of conduct should not be overly complex or lead to litigiousness. With regard to the selection of Appellate Body members, some delegations had felt that the membership of the selection committee should be broadened to include also, for instance, the Chairmen of the Councils on Goods, on Services and on TRIPS. Delegations had also felt it should be made clear that the Members would choose the Appellate Body, on the basis of a proposal by the selection committee. The selection committee would be expected to consult in arriving at its proposal, putting forward a list of seven names.

61. On the question of support staff for the Appellate Body, there had been broad agreement on the numbers of staff needed initially. One delegation had felt that the support staff should reflect a mix of legal and trade expertise. Some delegations had considered that the Appellate Body should be physically separate from the Secretariat, either in another building or in a separate part of the building housing the Secretariat.

62. He intended to continue his consultations the following week, and hoped that, at the end of the process, all would be in agreement on the issues relating to the establishment of the Appellate Body. He proposed that, following further consultations, he request the Secretariat to prepare a revised paper to address the concerns raised.

63. The Sub-Committee took note of the statement and so agreed.

E. Paragraph 8(c)(iv) of the Decision establishing the Preparatory Committee (Composition of the Textiles Monitoring Body)

64. The Chairman said that he had been informed by Mr. Abdel-Fattah, the Chairman of the Contact Group on Textiles, that consultations were still under way and that a little more time would be needed to bring the process to a close.

65. The Sub-Committee took note of the statement.

F. Paragraph 8(b)(iv) of the Decision establishing the Preparatory Committee (Report of the Preparatory Committee to the WTO)

66. The Chairman said that the first draft of the Preparatory Committee's report to the WTO had just been circulated to delegations in document PC/R/W/1. While the document was available only in English at present, the French and Spanish versions would be made available very shortly. He had derogated from his own rule of not circulating documents until they were available in the three official languages in order to give delegations an advance idea of the layout and the nature of the report that would be submitted to the Chairman of the Preparatory Committee, as part of the mandate of the Sub-Committee. In addition to the work done by the Sub-Committee, the draft report also described the work done by the other three Sub-Committees, and had therefore been forwarded to the respective Chairmen for their comments. He had also forwarded the draft report to the Chairman of the Preparatory Committee. The draft report would undergo considerable editing as one progressed through the outstanding issues. He drew attention to paragraph 2 of the draft report, and stressed that the minutes of the Preparatory Committee and those of its subsidiary bodies would remain the official record of the work of the Preparatory Committee, which meant that the draft report did not seek to repeat what was contained in those minutes nor to substitute for them.

67. While he did not intend to invite discussion on the draft report, he wished to draw attention to paragraphs 29 and 34, which stated that the Preparatory Committee had taken note of formal requests for observer status, as well as of the interest in concluding formal cooperation arrangements, from certain international organizations mentioned therein. These requests had been addressed either to him directly, or to the Chairman of the Preparatory Committee, who had referred them to him for appropriate action. Since these requests had been made in respect of the WTO and not the Preparatory Committee bodies, he had been waiting for the right occasion to bring them to the attention of the Sub-Committee. He had hoped to do this in the context of the Sub-Committee's approval of guidelines for observer status for international organizations. However, in light of the developments with regard to these guidelines at the present meeting,<sup>2</sup> he would suggest that the Sub-Committee, in taking note of these requests, also agree that the language in paragraphs 29 and 34 of the Preparatory Committee's report be modified appropriately to reflect the new situation.

68. The Sub-Committee took note of the statement and so agreed.

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<sup>2</sup>See under Section A(ii) above.