

MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND

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Group of Negotiations on Goods (GATT)  
Negotiating Group on Trade-Related  
Investment Measures

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SUBMISSION BY THE UNITED STATES

The following communication, dated 31 March 1987, has been received from the delegation of the United States with the request that it be circulated to members of the Group.

URUGUAY ROUND NEGOTIATING GROUP ON TRADE-RELATED  
INVESTMENT MEASURES

Introduction

In light of the language of the CONTRACTING PARTIES issued in the Punta del Este Declaration and the Negotiating Plans as agreed on January 29, 1987, the United States submits the following views on the negotiations under this group. These views are submitted with the objective of elaborating U.S. concerns regarding the trade restricting and distorting effects of investment measures, in the hope that this will contribute to the initiation of a concrete and productive initial negotiating phase. This is an initial submission. It is without prejudice to additional submissions which the U.S. anticipates will be necessary as this initial phase proceeds and as the issues raised by these practices become better understood.

The trade restricting and distorting effects of investment measures are a function of government actions or policies. The results of these measures are, inter alia, import, export and manufacturing patterns distorted relative to what the patterns would have been absent such government intervention. The ability of an enterprise to respond to developments in the marketplace is impaired. Depending on the "investment measures" chosen, these distortions and rigidities reach beyond the trade of the individual investor which may have agreed to them and even the broader bilateral trade of the two countries. The multiple use of investment measures correspondingly multiplies trade distortions.

The issue which the Punta del Este Declaration and our negotiating plan has framed is straightforward - to establish the relationship between the trade restricting and distorting effects of investment measures and the principles of the GATT trading system as reflected through the operation of GATT Articles.

In the view of the United States, these measures must be brought under effective multilateral trade discipline - through the recognition that the GATT already covers these practices, the understanding that these practices impact on international trade in ways equivalent to "trade policy practices" addressed more explicitly in the GATT, and, if necessary through the elaboration of additional disciplines to ensure the integrity of the GATT system.

The Operation of GATT Articles With Respect to the Trade Restricting and Distorting Effects of Investment Measures

The GATT Articles give effect to the principles underlying the liberal trading system. In certain instances, a principle/discipline is reflected in a single article. In others, the principle may appear as a recurring theme in a number of the GATT Articles. Based upon our analysis to date, the United States would like to briefly review a number of the Articles which we believe have particular relevance to investment measures. We anticipate that the work undertaken by this group in the initial phase should examine these relationships in detail.

As an initial point the United States would refer participants to the language of the preamble to the GATT which articulates certain objectives to which member countries can contribute by entering into mutually advantageous arrangements, reducing barriers to trade, and eliminating discriminatory treatment in international commerce. Article XXIII similarly is quite clear in its broad scope: it reaches any actions which nullify or impair benefits under the Agreement. Both of these points - the essential elements of the GATT system and the recognition that the integrity of the system requires broad scope - represent useful guideposts as we discuss investment measures, their impact on international trade, and the need to clarify their discipline under the GATT.

The GATT Articles set out a framework aimed at achieving certain rights and obligations: (1) that the products and traders of contracting parties have an equal opportunity to compete and sell into each others markets and vis-a-vis each other in third markets (the most-favored nation and national treatment principles); (2) that domestic policy is not used so as to protect domestic industries, with the corresponding impact that such protection has on exports, imports and levels of domestic production (the national treatment principle); (3) that in the application of policies which do interfere with trade, there is a clear preference for measures which introduce the least distortion and rigidity into international trade flows and the role of market forces; and (4) that when there are specified deviations from the basic principles of the GATT, they generally should be of a time limited nature.

These principles find expression in various articles of the GATT which the negotiating group will be examining in detail over the course of the next year. They include Article I, Article III, Article XI, and Article XV. As we engage in our specific examination of the relationship of the trade restricting and distorting effects of investment measures to specific GATT Articles, it will be equally important to assess the relationship of those measures to the objectives which the GATT Articles are intended to implement.

More specifically:

The integrity of concessions negotiated in the GATT as reflected in the provisions of Article II has direct relevance to the trade restricting and distorting effects of investment measures. Grounded as it is in the principle of mutual advantage, the GATT provides that these concessions should not be impaired unilaterally either by direct or indirect action. In the view of the United States, there are a number of investment measures which give rise to direct or indirect impairment. For example, governments may require that the investor use its facility as a sole source for one or a number of products which are sold regionally. In other instances, governments arbitrarily may limit, prohibit or direct the products or markets of the investors facility. In both of these instances, both imports and exports of the designated products are distorted and consequently, concessions negotiated by other countries are affected.

The principle of national treatment as embodied in Article III:4 has already been addressed and found to be applicable to local content requirements. The 1983 report of the panel concerning the administration of Canada's Foreign Investment Review Act was clear in its conclusion that Article III:4 precluded contracting parties from engaging in this type of discrimination. The logic underpinning that decision would also seem to be directly applicable to other investment measures such as the requirement that an investor may only import an amount equal to a percentage of his exports. There are questions which require further examination in this area, such as the application of Article XVIII:C but there can be no question that the rule embodied in Article III generally applies to all contracting parties.

Dumping and subsidies are also well established under the GATT with respect to their potential for adverse impact on trade as set out in Article VI and Article XVI. Export performance requirements imposed on foreign direct investors may induce dumping and may be equivalent in effect to subsidies. The trade restricting and distorting effects of export performance requirements should be examined in the light of both of these articles, among others.

The activities of state trading enterprises are also recognized to require special disciplines under the GATT through the provisions of Article XVII. There are a number of contracting parties who believe that this round of trade negotiations needs to specifically address and clarify the nature of those disciplines to improve its contribution to the integrity of the GATT system. In the view of the United States, there are a number of investment measures which have a trade restricting or distorting effect which may involve the concepts reflected in this Article. It is particularly appropriate for this group to examine the issues raised in this area in view of the work which will be ongoing in other negotiating groups on this matter. Through the use of investment measures, private firms should not be prevented from acting in accordance with commercial considerations.

Transparency is also central to the GATT system. Repeatedly, GATT Articles specifically incorporate obligations for notification and consultation in order to emphasize transparency. For example, Article X, Article XVI, Article XVII, and Article XVIII, all embody that notion. In the view of the United States, trade restricting and distorting effects of investment measures are often created and compounded by the lack of transparency. We believe that this group should examine the contribution which increased transparency can make to mitigating those adverse trade effects. Transparency is critical to the international trader - it is no less so if the lack of transparency in importing, exporting and manufacturing is the result of an investment restriction.

These more detailed examples should provide some additional insights into the views of the United States regarding the types of practices and GATT disciplines which should emerge from the negotiations.

#### Proposal for Initial Work Program

The initial phase of the negotiating process is to be completed by the end of 1987. In order to make the judgments called for in the subsequent negotiating phase, it is necessary to have far more complete and detailed information regarding the trade restricting and distorting effects created by investment measures, their relationship to GATT principles as embodied in the GATT Articles, and some assessment of how those Articles and corresponding principles should operate in respect of these measures.

Successful completion of that process will involve developing information with regard to a broad range of measures and articles of the GATT as well as the opportunity to explore their relationship. With regard to the first, the United States has submitted a proposal to the group for organizing the work of the coming year and suggests certain common elements for submissions by delegations. We believe that the work of the Secretariat will be facilitated by the adoption of a common framework for the information, especially as it will organize the information in a way consistent with the policy questions which this group will be called upon to address by year-end. With regard to the second, the United States would call upon countries to be flexible on the timing and structure of meetings. We would suggest that the second meeting of this group be held if at all possible before the sequential scheduling of meetings would establish. The adoption of certain common elements for country submissions could expedite collection of information upon which to base a second meeting. More generally, we should recognize at this stage that during the course of the year, this group may well require more meetings than the sequential schedule would contemplate.