

The Agreement on Trade-Related Investment Measures (TRIMs)

Seminar on WTO Accession Rules

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Introduction

- * The TRIMs Agreement establishes disciplines on certain types of investment measures applied to enterprises
- * It prohibits the use of TRIMs that are inconsistent with:
 - * **Article III** of GATT 1994 (National Treatment), or
 - * **Article XI** of GATT 1994 (General Elimination of Quantitative Restrictions)



Foreign Direct Investment

- * Benefits and concerns
- * Bilateral **investment promotion and protection** agreements
- * **Performance requirements** as conditions for entry and operation often accompanied by **investment incentives**
 - * Local content requirements
 - * Export performance
 - * Trade balancing
 - * Production targets
 - * Technology transfer
 - * Tax breaks
 - * Infrastructure
 - * Resources at favourable prices



Performance Requirements

- * Applied by governments to influence the behaviour of firms (e.g., to substitute imports with local production, to increase exports, etc.)
- * FDI policy: as conditions for entry and operation, often accompanied by investment incentives
- * Sometimes applied also to domestic firms
- * Instruments to promote industrialization; import-substitution; exports; transfer of technology, etc.
- * TRIMs Agreement covers only a subset of PRs (i.e. local content, trade-balancing, and foreign-exchange balancing requirements, and import/export restrictions)

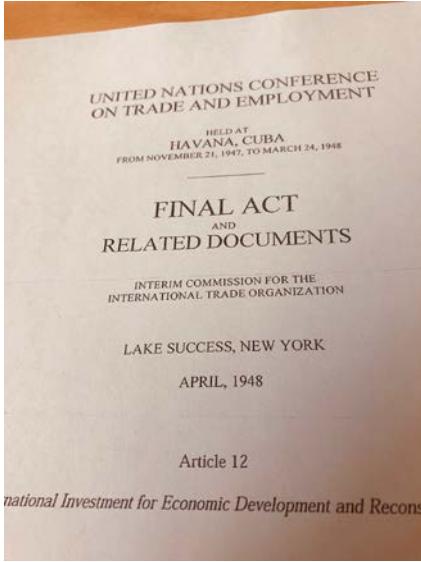


Legal background: GATT and Foreign Investment

- * Prior to the Uruguay Round negotiations, the linkage between trade & investment received little attention in the framework of the GATT
- * Havana Charter (1948) - Contained provisions on the treatment of foreign investment as part of a chapter on economic development. The Charter was never ratified and only its provisions on commercial policy were incorporated into the General Agreement on Tariffs and Trade (GATT)



Investment and International Trade Law: ITO Charter



- * Investment can be **beneficial** to economic development
- * Provide "**reasonable opportunities**" and "**adequate security**" for FDI, giving "**due regard**" to non-discrimination
- * Right to take "**any appropriate action**" to ensure **no interference** in internal affairs or national policies
- * Right to **regulate extent and terms** of FDI, including through imposition of **reasonable requirements**
- * Bilateral/multilateral agreements encouraged
- * Havana Charter signed but did not enter into force

Legal background: United States – Canada dispute (1982)

**Canada – Administration of the Foreign Investment Review Act (“FIRA” panel)*



BEST ANIMATIONS



WTO OMC

Legal background: United States – Canada dispute (1982)

- * Canada – Administration of the Foreign Investment Review Act (“FIRA” panel)
- * **Measure at issue:** Canada’s administration of its 1973 Foreign Investment Review Act
- * Under FIRA, foreign investment to be reviewed, assessed and allowed to proceed only if the government determined that it was, or was likely to be, of “significant benefit to Canada”



Legal background: United States – Canada dispute (1982)

- * FIRA did not require the submission of undertakings, but they became customary
 - * Purchase undertakings
 - * Manufacturing undertakings
 - * Export undertakings
- * Undertakings given by firms were legally binding on the investor if the investment was allowed
- * All investments approved were monitored by the government of Canada. If the investment involved undertakings, the investor was asked for periodic progress reports on the implementation of the undertakings



Legal background: United States – Canada dispute (1982)

- * FIRA panel report circulated in July 1983
- * The panel found:
 - * Right to regulate foreign investment was not an issue
 - * Undertakings to **purchase** goods of Canadian origin and to use Canadian sources or suppliers were inconsistent with the national treatment obligation of Article III:4 of GATT
 - * Undertakings to **export** specified quantities of production were not covered by GATT obligations
 - * Undertakings to manufacture goods in Canada were outside the panel's terms of reference – No findings



Canada – FIRA Dispute: Implications

- * **Right to regulate** foreign investment not affected by the GATT
- * But recognition that investment measures can **impact trade**
- * However, GATT rules provide only **limited discipline**

Uruguay Round

- * **Punta del Este** Ministerial Declaration (1986)
- * Mandate: examine **existing disciplines** and elaborate, as appropriate, **further provisions** to avoid the trade-restrictive and distorting effects of investment measures
- * Negotiations **not** intended to deal with the regulation of **investment per se**
- * Developed-developing countries **divide**:
 - * Developed: **prohibition** of a wide range of measures
 - * Developing: GATT not about investment; focus only on **trade-effects**, but leave **policy space to develop**



Uruguay Round: Compromise emerged

- Interpretation and clarification of the application to trade-related investment measures of GATT provisions on **national treatment** for imported goods (Article III) and on **quantitative restrictions** on imports or exports (Article XI)
- TRIMs Agreement **does not cover** many of the measures that were discussed in the Uruguay Round negotiations, such as export performance and requirements for the transfer of technology



TRIMs Agreement: main features

- * Applies only to investment measures related to trade in goods (not trade in services)
- * Focuses on the discriminatory treatment of products (imported/exported), not producers
- * Does not regulate the entry of foreign investment or investors
- * Concerns measures applied to both foreign and local firms



TRIMs Agreement: Coverage (Art. 1)

* Goods v. Services

- “This Agreement applies to investment measures related to trade in goods only”
- Does the WTO have investment rules for services?

TRIMs Agreement: Coverage (Art. 1)

- * “Investment Measures”

- *Indonesia-Autos*: Measures were “aimed at encouraging the development of a local manufacturing capacity” for cars and components
- Need not be explicitly adopted as investment regulations
- See *Canada – Renewable Energy / Feed-in Tariff (FIT) Program*

- * “Trade-Related”

- *Indonesia-Autos*: Local content requirements “necessarily trade-related” because they favour domestic over imported products

Prohibitions

- * National Treatment and Quantitative Restrictions (Article 2)
 - Prohibition on the application of any TRIM that is inconsistent with the GATT 1994 provisions:
 - Article III (National treatment), or
 - Article XI (General elimination of quantitative restrictions)

Article III:4 of GATT 1994

- * Imported products
- * Shall be afforded treatment no less favourable than that accorded to
- * Like products of national origin...
- * In respect of all laws, regulations and requirements...
- * Affecting their internal sale, offering for sale, purchase , transportation, distribution and use



The Illustrative List

- * The Annex contains an Illustrative List of measures that are inconsistent with Articles III:4 and XI:1 of GATT 1994
- * Mandatory measures and measures compliance with which is necessary to obtain an “advantage”
- * The term “advantage” is not defined, but it is understood to encompass a wide range of benefits, including subsidies
- * Non-exhaustive list



Illustrative List: paras. 1(a) and 1(b)

- * TRIMs inconsistent with Article III.4 of GATT
 - 1(a): Measures that require the purchase or use of goods of domestic origin or from any domestic source
 - Local content requirements
 - 1(b): Measures that limit the purchase or use of imported products to an amount related to the volume or value of products exported by an enterprise
 - Trade-balancing requirements



Illustrative List: paras. 2(a) and 2(b)

- * TRIMs inconsistent with Article XI:1 of GATT
 - 2(a): Measures that restrict the importation of products used in or related to local production, generally or to an amount related to the volume or value of the local production exported by the enterprise
 - **Trade-balancing requirements**
 - 2(b): Measures that restrict the importation of products used in or related to local production, by restricting access to foreign exchange to an amount related to the foreign exchange inflows to the enterprise
 - **Exchange-balancing requirements**



Illustrative List para. 2(c)

- * TRIMs inconsistent with Article XI.1 of GATT
 - 2(c): Measures that restrict the exportation or sale for export of products, whether in terms of particular products, volume or value of products, or proportion of the volume or value of the local production of the enterprise

- **Export restrictions**

Note: export performance requirements are not affected, as they are not covered by Article XI.1 of the GATT



Relationship between GATT provisions and TRIMs Agreement

- * Interpretive note
- * *Canada – Renewable Energy / Feed-in Tariff (FIT) Program:*
 - * Cumulative obligations
 - * Clarify the application of Arts. III, XI
- * Value-added?
 - * Judicial economy / Order of analysis

Procurement – Article III:8(a) treatment

- * The provisions of this Article (**incl. III:4**) **shall not apply** to laws, regulations or requirements governing the **procurement by governmental agencies** of products purchased **for governmental purposes** and **not with a view to commercial resale** or with a view to use in the production of goods for commercial sale
 - * Query: Does this apply to TRIMs? See *Canada – Renewable Energy / Feed-in Tariff (FIT) Program*



Procurement – Article III:8(a) treatment

- * TRIMs that fall within the Illustrative List and are covered by Article III:8(a) of the GATT 1994 are not inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement
- * TRIMs that fall within the Illustrative List and are not covered by Article III:8(a) of the GATT 1994 are inconsistent with the national treatment obligation in Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

* Canada – Renewable Energy / Feed-in Tariff (FIT) Program



Procurement – Article III:8(a) treatment

- * Under Article III:8(a) of the GATT 1994, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement

* India – Solar Cells



Subsidies to Domestic Producers

Article III:8(b)

- * The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products



Relationship with ASCM

- * Any “**advantage**” provided on **the condition of satisfying LCRs** is inconsistent with Art. III:4 GATT
(para. 1(a) Illustrative List)
- * “**subsidies contingent**, whether solely or as one of several conditions, **upon the use of domestic over imported goods**” shall not be maintained
(Art. 3.1(b) ASCM)
- * Order of analysis of simultaneous claims?
 - * LCR nexus with “**advantage**” vs nexus with “**subsidy**”
 - * Different remedies



Article XI:2 of GATT 1994

- * Do the provisions in Article XI:2 of the GATT 1994 apply to the TRIMs Agreement?
- * Not conclusive. But probably...
 - * It would appear that the reasoning set out in relation to Articles 2.1 and 2.2 of the TRIMs Agreement and Article III:4 of the GATT 1994 would apply *mutatis mutandis* to the relationship between Articles XI:1 and XI:2 of the GATT 1994
 - * Canada – Renewable Energy / Feed-in Tariff (FIT) Program



Exceptions

- * Exceptions (Article 3)

- Exceptions under GATT 1994 apply to the TRIMs Agreement



Special & Differential Treatment

- * Developing Country Members (Article 4)
 - Temporary exceptions may be allowed for developing countries pursuant to Article XVIII of the GATT 1994 and other WTO balance-of-payments safeguards

Notification and transitional arrangements (Article 5)

- * Notification of inconsistent TRIMs within 90 days of the entry into force of the WTO
- * Transition period for elimination of notified TRIMs
 - 2 years (developed countries)
 - 5 years (developing countries)
 - 7 years (least-developed countries)
- * 27 Members notified TRIMs under Article 5.1
 - All but one measure included local content aspects

Notification and transitional arrangements (Article 5)

- * Possible extension of the transition period for developing countries demonstrating particular difficulties in implementing the Agreement
 - Extensions until end-2003 were granted to 7 Members:
 - Argentina, Colombia, Malaysia, Mexico, Pakistan, Philippines, Romania

2005 Hong Kong Ministerial Declaration: Annex F (WT/MIN(05)/DEC)

- * S&D Decision on TRIMs Agreement
- * LDCs allowed to maintain existing TRIMs until the end of a new transition period lasting 7 years:
 - * Notify the CTG within 2 years, starting on 17 January 2006
 - * Transition period may be extended by CTG, taking into account the individual financial, trade and development needs of Member in question

Hong Kong Ministerial Declaration

- * LDCs also allowed to introduce new TRIMs:
 - * Notify to the CTG such measures within 6 months of their adoption
 - * CTG to give positive consideration to such notifications
 - * Duration of new measures not to exceed 5 years, renewable subject to review and decision by CTG
 - * All measures adopted under this decision shall be phased out by 2020
- No measures notified



Other provisions

- * **Transparency (Article 6)**
 - Notification of the publications in which TRIMs may be found
- * **TRIMs Committee**
 - Monitors the implementation and operation of the Agreement and provides a forum for consultation
- * **Consultation and Dispute Settlement (Article 8)**
 - The provisions of the GATT and the WTO Dispute Settlement Understanding are applicable



TRIMs in Practice

- Of the TRIMs discussed in the Committee:
 - Overwhelming majority principally involved local content issues (33/34)
 - * Measures related principally to developing and emerging economies:
 - * Indonesia (7); Russia (6); India (4); Brazil and China (3); Argentina, Nigeria, Turkey and United States (2); Korea, Ukraine and Uruguay (1)



G90 Proposals

- * Frequent developing Member proposals for more TRIMs S&D
- * Some G90 proposals:
 - * Allow LDCs and SVEs to introduce new TRIMs, with renewable 15 year exemption, when provided for specified policy objectives; or
 - * Exempt LLDCs from TRIMs Agreement until they cease to be LDCs
 - * Not adopted at Nairobi



Summary

- * TRIMs Agreement applies to trade in goods
- * Prohibits measures that are inconsistent with Articles III and XI of GATT 1994: local content; trade balancing, export restrictions
- * Extensions of transition periods expired at the end of 2003
- * 2005 HK Declaration: Decision in favour of LDCs

