

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related
Investment Measures

NEGOTIATING GROUP ON TRADE-RELATED
INVESTMENT MEASURES

Meeting of 1-2 October 1987

Note by the Secretariat

1. The Group held its third meeting on 1-2 October 1987 under the chairmanship of Ambassador T. Kobayashi. The agenda set out in GATT/AIR/2455 was adopted. No new documents were available for the meeting.

Identification and examination of the operation of GATT Articles on the basis of national submissions

2. The Chairman recalled that the Group had begun a preliminary examination at its meeting in June of written submissions identifying GATT Articles related to the trade restrictive and distorting effects of investment measures. He expressed the hope that participants had since had time to reflect more fully on these submissions and to formulate their own proposals on which Articles warranted examination in the light of the negotiating objective accepted by Ministers. Sixteen Articles had been identified in written submissions, and these he listed along with a summary of the observations that had been made about their operation. Following a request from two participants, the Chairman circulated a note prepared for him by the Secretariat, on its own responsibility, containing a compilation of the content of written submissions and oral statements made to the Group so far. He stressed that it was not his intention to attach any status to this note which had been prepared for his own guidance, and that it was for participants to decide what formal documentation they wanted the Secretariat to prepare. He invited participants to make their contributions on this agenda item.

3. One participant proposed that Article XXIX be added to the list of Articles whose operation was to be examined by the Group.

4. Many participants expressed the view that the focus of the Group's work should lie, at least initially, on the operation of GATT Articles related to investment measures having direct and significant trade effects. Views differed to some extent on precisely which measures these were, but it was widely considered that local content and export performance

requirements could have direct and significant trade effects. Certain other measures were also mentioned in this context. Some participants considered that measures having direct trade effects were the only ones covered by the Ministerial mandate, and that to stray beyond these to investment measures having less direct and significant trade effects would not inspire widespread participation in the negotiations. Among the measures characterized as having indirect trade effects were local equity and licensing requirements, technology transfer requirements and remittance restrictions. Some participants considered that product mandating requirements were more frequently applied by private investors themselves than by governments.

5. A number of other participants shared the view that the focus should lie on measures having direct trade effects but did not object to including those having indirect trade effects in the discussions, which some felt should not be confined within narrow parameters at this stage of the Group's work. Another view was that it was unnecessary to make the distinction between direct and indirect trade effects which, in any case, it seemed doubtful could be accomplished entirely objectively.

6. The view was expressed that an additional criterion to be taken into account was that the trade effects of investment measures should be negative or unfair for them to warrant consideration, particularly in view of the use of the word "adverse" in the Ministerial mandate. Not all trade restrictive and distorting effects of investment measures could necessarily be qualified as negative. Measures designed to promote import-substituting industrialization or an improvement in a country's balance-of-payments situation were mentioned in this connection. These, it was stated, were recognized as promoting legitimate trade policy objectives by certain GATT Articles already. Also, measures designed to reduce or correct certain trade restrictive or distorting practices of multinational corporations could be considered to have a positive effect on trade flows.

7. Another view was that attempting at this stage to identify trade effects generically as negative or unfair or to classify investment measures accordingly would not prove a fruitful approach to the task before the Group. Too much depended upon the specific circumstances in which a measure was applied. Also, the trade effects of investment measures on third countries complicated any attempt at determining whether these effects were negative or not. Concerns in this area could be addressed as the Group carried out its examination of the operation of individual GATT Articles.

8. Some participants reiterated a view expressed at earlier meetings that the Group's mandate was clear in calling for a review of the operation of GATT Articles only, and that it did not extend to the general principles or objectives of the GATT, as reflected for example in the Preamble, nor to the Tokyo Round Codes. Another view was that the Tokyo Round Codes, at least, could not be ignored entirely since signatories were legally bound by them.

9. Several participants called attention to the relevance of the work underway in other Negotiating Groups to some of the issues that had been raised with respect to trade-related investment measures.

10. A number of comments were made about the tangible effects of investment measures. One participant felt it would be useful for the Group to have an indication of how widely these measures were applied so that it could gauge the magnitude of their trade effects.

11. At the invitation of the Chairman, participants began a preliminary detailed examination of the operation of GATT Articles which had been identified in written submissions and in oral statements as having an application to the trade restrictive and distorting effects of investment measures, starting with Articles III, VI and XVI. In this connection, one participant noted that the provisions for special and differential treatment of developing countries were relevant to the Group's work, but in his view probably at a later stage after the relevant GATT disciplines had been identified and discussions had moved on to the exceptions to these disciplines.

12. Many participants considered that the provisions of Article III, particularly paragraphs 4 and 5, did relate to the trade effects of local content requirements since these could result in purchases from local sources being given more favourable treatment than purchases of imported products. The findings of the FIRA panel had confirmed this.

13. Some participants considered that these provisions could relate also to the trade effects of other investment measures, and in particular to manufacturing requirements and to technology transfer requirements where these obliged an investor to produce or purchase certain intermediate inputs locally. In the view of these participants, the principle of non-discrimination between imported products and products of local origin contained in Article III lay at the heart of this relationship. Some other participants expressed doubts whether the provisions of Article III:4 covered the trade effects of manufacturing requirements since these required the local production rather than the local purchase of products. Several participants proposed that the operation of Article XI should be examined also in relation to the trade effects of manufacturing requirements and technology transfer requirements since these measures could restrict an investor's ability to import products, whether or not they were imposed in conjunction with a border measure.

14. Several participants doubted that either the provisions of Article III concerning non-discrimination against imported products or those of Article XI concerning border restrictions were relevant in the case of these measures. Article III:4 covered the sale and purchase of imported products but not their local production, and therefore did not appear to apply. Equally, the provisions of Article XI did not appear to apply if no border measure was being imposed.

15. The operation of Articles VI and XVI was discussed briefly, and primarily in relation to the trade effects of export performance requirements. One participant expressed the view that the operation of these Articles should be examined also in relation to the trade effects of remittance restrictions tied to export performance requirements, product mandating, trade balancing and manufacturing requirements, and investment incentives.

16. Three potential trade effects of investment measures that could be related to the operation of these Articles were identified by participants. These were: dumped exports, and the possibility of anti-dumping measures proliferating in the absence of any obligation on the government imposing investment measures to curtail unfair trade practices; the effects for third country suppliers to a market that was accepting dumped products from a country imposing investment measures on its exporters; and subsidized exports resulting from investment incentives.

17. Several participants questioned whether export performance requirements could automatically be associated with dumping, and suggested the need for specific evidence on this point. They recalled one finding of the FIRA panel that the General Agreement does not impose on contracting parties the obligation to prevent enterprises from dumping. In the event that dumping took place, they considered the provisions of Article VI adequate to deal with it. They also considered the problem of adverse trade effects for third country suppliers to be a generic problem in the General Agreement which could not be addressed adequately in this Negotiating Group.

18. Some other participants considered that the FIRA panel finding in question was not the same as saying that there was nothing in GATT that prevented contracting parties from encouraging dumping. Attention was drawn to the provision of Article VI:1 that dumping was to be condemned if it caused material injury. The view was expressed that to the extent that export performance requirements did lead to dumping or other investment measures caused export subsidization, it was preferable to curtail the practice at its source rather than to rely on the countermeasures available under Article VI.

19. The Group agreed to continue its examination of the operation of GATT Articles at its next meeting.

Consideration of the Group's work programme for the remainder of the initial phase, including documentation requirements

20. No specific views were expressed on how the Group might complete the initial phase of the negotiating process. However, one participant suggested the Group might aim for a neutral, summing-up of the discussions that had taken place rather than attempt to draw up a set of agreed conclusions on what form and content the subsequent phases would take. The

Chairman considered it might not be necessary to have an agreed text to complete the initial phase, but that it would be useful in his view to have the Secretariat prepare a document after the next meeting containing a balanced summary of the views expressed in the Group. The document could be reviewed by the Group at its fifth meeting.

21. The Group agreed to recommend to the GNG that it meet for a further period of four or five days during the initial phase.