

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related
Investment Measures

MEETING OF 13-17 JUNE 1988

Note by the Secretariat

1. The Group held its seventh meeting on 13-17 June 1988 under the chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2597 was adopted.

2. Three new submissions were provided for this meeting, by the European Communities (MTN.GNG/NG12/W/10), the United States (MTN.GNG/NG12/W/11) and Japan (MTN.GNG/NG12/W/12).

General remarks under Item A of the Agenda

3. The representative of Malaysia made a statement on the development dimension of TRIMs and the relevance of the provisions of Part IV and Article XVIII of the GATT to the Group's work. This statement was subsequently issued in MTN.GNG/NG12/W/13. He added that one reason why many participants in the Group remained concerned about the subject of TRIMs in the Uruguay Round was that the position of developing countries had not been given adequate consideration. It remained unclear what benefits would accrue to them from the negotiations and an in-depth discussion of special and differential treatment was in order, particularly in view of the overall objectives of the Round.

4. Several participants welcomed this statement, and said that the development dimension of TRIMs had not been treated with sufficient depth or clarity in the submissions received for this meeting. Detailed examination of the provisions for special and differential treatment for developing countries should be taken up in parallel with the Group's examination of disciplines for TRIMs. One participant stated that transitional arrangements for developing countries or a preferential clause relating to timeframe should be considered in this regard. Another suggested that account should be taken of the repercussions of applying special and differential treatment in the case of TRIMs on the third country trade interests of other developing countries.

5. One participant reviewed several points which he said had been raised already in the Group's discussions but which had not been addressed in any

of the written submissions received for the meeting. It was necessary to clarify as a point of departure for the Group the relationship between trade and investment since trade, not investment, was the subject of work in GATT. It was well-established that the relationship was essentially competitive since direct foreign investment could and did displace trade and he invited other participants to comment on the relevance of this for the Group's work. In his view, it had implications for the clarification of the term 'trade restrictive and distorting'. This had to be considered exclusively in the context of the effects of the measures and not the measures themselves, because in the broadest sense one could see investment itself as distorting trade flows. The Group should not examine the effects of investment measures as if these were applied in a perfectly competitive world with no other forms of trade distortion. Rather, it should select and examine only those that could be shown to be directly and significantly trade restrictive and distorting and that were related to the operation of GATT Articles. The key criterion was the Articles themselves, since only these could provide a definitive interpretation of what was trade restrictive and distorting within the meaning of the GATT. He recalled an earlier suggestion that the Group adopt a panel-like approach and examine the adverse trade effects of TRIMs in the light of the GATT obligations of contracting parties, which meant examining their equivalence to the effects of trade measures which nullified or impaired benefits accruing under the GATT. There could be no generalized approach based on the efficient allocation of resources or efficient global macroeconomic management.

6. While some participants had spoken of the imperative need of developing countries to encourage inflows of direct foreign investment, the issue was whether they should have to attract them on multilaterally determined terms and conditions which are appropriately applied to trade. It should be recognized that there was no multilaterally-agreed framework for direct foreign investment as there was for trade and that investors had no automatic right to invest in a host country; they had to negotiate the terms of their participation. The Group was not mandated to discipline investment measures nor to negotiate the liberalization of investment régimes. These remained under the sovereign control of governments. The purpose in GATT was to try to negotiate down trade restrictions and that did not amount to the same thing as trying to negotiate away TRIMs. With regard to different approaches that had already been taken towards disciplines in GATT, he drew attention to the first paragraph of Article 11 of the Subsidies Code and stated that much the same could be said about TRIMs.

7. Several other participants made similar observations on the criteria for defining trade restriction and distortion and on the scope of the Group's mandate. One said the Group, in discussing the trade restrictive and distorting effects of investment measures, should examine the effects of protectionism, such as restrictions on agricultural trade and the MFA, in lowering investment in exporting countries. Another elaborated the point that foreign investors had no automatic right of investment in a host country. The sovereign right of all governments in this area should be

recognized and, as long as an investment measure was not contrary to GATT principles, it should not be called into question. Even those that could be called into question might be found to be acceptable on the grounds that they served industrialization purposes.

8. One participant stated it was becoming increasingly evident that wide differences of interpretation existed in the Group over the meaning of the direct trade effects of investment measures and the extent to which they were addressed by GATT Articles. The focus of discussion should be the direct, significant negative trade effects caused by investment measures in the light of a country's trade obligations under the GATT. This had been the approach used by the FIRA Panel, which had noted explicitly that the GATT did not prevent Canada from exercising its sovereign right to regulate direct foreign investment.

9. The presentation on the trade effects of investment measures made at the last meeting had used a broader approach, describing changes in existing trade patterns but failing to link the effects of any measure to trade obligations under the GATT. It was important to recall that any investment affected existing trade flows, but this could not be considered in itself a trade distortion even if it was caused by national investment policy. It would be necessary to examine whether the effect resulted from any action contrary to GATT obligations, such as dumping or subsidies.

10. All of the TRIMs cited by participants could, and in the view of her delegation did, have positive effects on trade and on the other economic variables stated to be the Agreement's objectives in the Preamble to the GATT. These should not constitute the matter for international regulation under the Group's negotiating mandate. New disciplines on the effects of TRIMs should be elaborated only after a common understanding had been reached on whether the concrete trade effects of each measure were positive or negative.

11. Another participant said the objectives of restricting TRIMs and eliminating their negative trade effects were consistent with changes introduced in his country's approach to direct foreign investment and to the economic system in general. The core of the problem in realising these objectives was how to avoid infringing on the positive aspects of investment measures and on the sovereignty of governments over national investment and development policies. In his view, the short-term, negative effects of certain TRIMs had been exaggerated in the Group while longer-term, favourable effects had been overlooked. With regard to the illustrations provided at the last meeting of the trade restricting and distorting effects of investment measures, these contributed little to a well-considered evaluation of investment policies or to the need for, and real possibilities of, restricting their negative trade effects. More generally, it was a dangerous oversimplification to suggest that what was good for trade was good for a whole economy; a better formulation was what was good for overall economic development was good for trade.

12. Responding to some of these points, one participant disagreed that there was any contradiction between the promotion of trade and investment or a competitive relationship between them. His delegation did not dispute that investment per se fell outside the scope of the mandate nor that investors had no automatic rights of investment, and he agreed fully that the intention of the Group should not be to interfere with national investment policies. It was the adverse trade effects of investment measures that the Group should focus on. In this regard, he questioned the relevance in the light of the mandate of comments that the Group should take account of the positive effects of investment measures on development and industrialisation; these should not be weighed in the balance with their adverse trade effects. Equally, the general objective of favouring investment flows was not relevant. Another participant also disagreed that there was a competitive relationship between trade and investment and stated that a more sophisticated level of economic analysis showed that investment increased trade and did not distort it. This proposition could not, therefore, be accepted as a yardstick for trade distortion. With regard to whether it was imperative to promote investment on multilaterally determined terms and conditions which were appropriately applied to trade, the answer was no. The Group had to examine the trade effects of investment measures and not their effects in promoting investment nor the sovereign rights of governments over investment régimes.

13. One participant stated that a thorough examination of the concepts of trade restriction and distortion was needed, particularly in the case of TRIMs such as manufacturing and technology transfer requirements, as well as incentives which were not aimed directly at trade flows but rather at investment activities and at establishing manufacturing capacity. Where such measures were accompanied by border import restrictions, trade restriction naturally was caused by the border measures, but it had been suggested that the investment measures could themselves cause trade restricting and distorting effects. If this implied an understanding that trade restriction occurred whenever any new production capacity was established, and that such restriction counteracted GATT rules, there was need for more discussion of what was understood by trade restriction.

14. This participant, supported by another, asked for clarification on whether the Group was examining only measures affecting direct foreign investment or also those affecting national investment, since this could have a major bearing on the negotiations. The trade effects of investment measures were not dependent on the nationality of an investor, which for GATT purposes was incidental. It had not been disputed that governments had a completely free hand with respect to the trade restrictive and distorting effects of domestic investments as long as these did not come under existing GATT disciplines. Export subsidies did, for example, but if an investment was aimed at production for the local market, whatever trade effect it might have was not addressed in any way by the GATT. In this regard, it was not sufficient to say that because a measure might have a major trade effect it could be addressed in the Group's discussions.

15. In addition, he called attention to different countries' investment régimes. Banning direct foreign investment altogether could produce large trade effects but it would fall under no GATT discipline. Countries that were liberalizing their régimes towards direct foreign investment, on the other hand would fall under GATT disciplines if, at the same time, they employed TRIMs. This would introduce an imbalance of rights and obligations under the GATT since a country liberalizing its foreign investment régime could be penalized relative to a country banning direct foreign investment. If an attempt was made to regulate TRIMs too rigidly, it could lead to a reversal of the process of liberalization of direct foreign investment.

16. In response to some of the points made in this statement, one participant stated that, logically, the Group should address the effects of investment measures applied to both foreign and national investors. Then, the problem of unbalanced rights and obligations for countries banning direct foreign investment would be solved since they would not be placed under less strict disciplines than countries permitting direct foreign investment. Another said he would have to reflect on the question of TRIMs that were applied to national investors as well as foreign investors since this could have an important bearing on the adequacy of national treatment provisions for disciplining the adverse trade effects of TRIMs.

17. One participant offered the following general observations. Investment, in and of itself, usually had trade effects. If an investment was undertaken simply to supply a local market, there was likely to be an effect on import levels. If it was an assembly operation for export, both the importation of components and the export of finished goods would be affected. At the extreme, prohibition of an investment would entail large trade effects. The existence of such natural trade effects complicated the task of isolating trade distortions caused by TRIMs which, in some instances, might be relatively small.

18. The work of the Group to date appeared to have focused on the possible trade distorting effects of investment measures applied to investment by non-nationals. Yet a local content rule applied to a national investor could have equally trade distorting effects.

19. As long as there was government involvement in investment decisions, negotiations would take place between the host country and the investor. All governments had objectives to pursue with investors in respect of such matters as economic development, national security, culture, technological development, competition policy or consumer protection. These objectives aimed to ensure that investors were good corporate citizens and contributed to economic and social growth. The Group's task should not compromise their attainment, but each government should consider ways in which they could be attained in the least trade-distorting fashion.

20. It was clearly difficult to label any particular investment measure as trade distorting or non-distorting. Rather than categorizing them as such,

a starting premise was that all investment measures had some potential, however limited, to distort trade in theory. It had, nevertheless, to be recognized that there were, generally speaking, important practical differences between them in terms of their potential to result in trade distortion. The following, non-exhaustive list could serve to illustrate this point: local content, export performance (including export levels and export processing zones) and trade balancing requirements, foreign exchange restrictions and import limitations had, in the view of his government, a generally high potential for direct trade distortion; manufacturing, domestic sales and product mandating requirements appeared to have a lower potential; and licensing, local equity, manufacturing and technology requirements (including technology transfer and R & D performance requirements) as well as manufacturing limitations and remittance restrictions probably had more indirect trade-distorting effects. A point to stress was that none of these measures could be stated categorically never to lead to trade distortion.

21. Two conclusions could be drawn. First, it would be difficult to reach agreement on whether any investment measure was trade distorting or not in all circumstances and the Group may be ill-advised to try to do so. Secondly, it might be equally difficult to examine further disciplines in a vacuum. The Group's trade task might be made easier, therefore, if it focused on a sample group of investment measures and first examined the relevance of GATT Articles to their trade restrictive and distorting effects and then elaborated, as appropriate, further provisions.

22. Several participants stated it could not be presumed that the mandate limited the Group's work only to the effects of government-mandated investment measures. One said he would try to present evidence on other measures in the future. Another stated the Group should examine the effect of any type of TRIM, whether imposed by governments, private enterprise or multinational corporations. Private foreign investors frequently attached conditions to their investments in his country which had trade restrictive and distorting effects. He proposed, in this regard, that the Group ask the Secretariat of UNCTAD or any other relevant organizations to provide it with information on TRIMs, as they had been defined in the Group, without regard to whether the information referred to TRIMs arising from government or non-government sources. He suggested that procedurally this could be accomplished through the drawing up of a questionnaire, as had been done in other negotiating groups. He stressed that this issue should be resolved quickly with the aim of making progress in the Group. Another participant opposed this proposal, noting that the subject of restrictive business practices had not been included in the Punta del Este Declaration.

23. The Chairman stated that the proposal would be formally registered and the Group would come back to it at its next meeting.

24. Commenting generally on the three submissions that had been received for this meeting, many participants qualified their detailed comments as

preliminary and one suggested the Group should return to the submissions at its next meeting.

25. One participant stated that all three submissions were based on a wide interpretation of which investment measures had trade effects and they tended to neglect the investment objectives of the measures. A balance had to be found between their trade and investment aspects.

Remarks on the submission by the European Communities (MTN.GNG/NG12/W/10)

26. The representative of the European Communities introduced the submission, noting it had been inspired by the objective of moving work forward in line with the negotiating plan, the subsequent stage of which required the Group to define areas in which negotiations might be required to elaborate, as appropriate, further provisions that might be necessary to avoid the adverse trade effects of investment measures. The submission reviewed all the investment measures that had been put forward by participants and made a suggestion on which of these should be considered relevant to the Group's work. Since all investment measures had the potential of affecting trade flows, and since not all measures relating to investment should be the subject of negotiation, a choice of measures had been made in the submission by adopting the criterion of direct trade relationship, where governments applied the measures with the object of influencing an investor's trade.

27. The measures chosen should be examined with a view to determining whether existing GATT provisions were sufficient to restrict their use in an appropriate way or whether new provisions should be elaborated. Further examination of the operation of GATT Articles would also be required in this context.

28. Commenting in general terms on the EC submission, one participant stated that she could not support the proposal to subject the list of investment measures to appropriate disciplines, since it did not appear to take account of the Group's negotiating mandate nor the guidance given by the Chairman at the end of last year on the way to proceed in a manner acceptable to all participants. The stress in the submission on investment measures themselves was unacceptable since the GATT covered trade and not investment per se or investment measures. Debate had to be focused on the effects of the investment measures in order to establish whether these were inconsistent with GATT obligations. Without this first step it would not be possible to discuss any elaboration of new disciplines.

29. Some participants stated that there were references in the submission to the effects of measures on the freedom of the investor. That was not a GATT matter and it was not of concern to the Group. One added that each country was free to determine how it should deal with investment flows. Developing countries could have greater needs for capital inflows than developed countries and might want to apply more flexible policies.

Another said that the statement in the submission that the EC was not calling into question the existence of national investment policies as such should not be neutralized in any way. Most developing countries were willing to accept direct foreign investment for financial and development purposes but certain limitations had to be established in the process.

30. One participant said her general concern with the submission was that it narrowed the list of TRIMs. While it might be necessary to make decisions on a definitive list of relevant TRIMs at some point in the negotiations, this should be done only after full analysis of the trade effects and the relevance of GATT provisions had enabled the Group to reach informed conclusions. For the time being all of the TRIMs should be left in the Group's work programme. Another participant endorsed this point of view.

31. One participant found the approach adopted in the submission to be realistic and constructive. It was directed at narrowing the scope of the negotiations and providing a balance between the trade and investment aspects of the subject. Too much emphasis had been placed too often in the discussions so far on the trade effects of investment measures. Furthermore, it was not acceptable to state, as some participants had, that all investment measures had trade restrictive and distorting effects and should be negotiated.

32. One participant found no mention in the submission that certain types of trade regulation were permitted under the GATT and suggested that this fact needed to be taken into account in the Group's work.

33. With regard to the first two sections of the submission, one participant welcomed the emphasis placed on dealing with the trade distorting effects of investment measures and not the measures themselves, and the statement that the existence of national investment policies was not being called into question. Another considered the second section was internally contradictory since it confused the fact that it was the trade effects of investment measures and not the measures themselves that the Group was mandated to ensure fell under adequate GATT disciplines.

34. Several participants welcomed the descriptions of different investment measures in the third section as adding clarity to the Group's discussions. One agreed that these might benefit from still further refinement, particularly those of a somewhat nebulous character where GATT's relevance to the perceived trade effect was difficult to establish.

35. One participant questioned the usefulness of the definition given of manufacturing requirements. It would appear to cover any regulation dealing with the scope of an investment, whether foreign or local. In most countries, the authorities accepted or rejected investment proposals on the basis of detailed plans submitted by investors and with certain economic or investment objectives in mind, of which the level of local value-added was always important. If the authorities rejected a low local value-added

proposal, it would appear that this could be regarded as a manufacturing requirement. It was also difficult to see how manufacturing requirements could be related to exports and imports.

36. Many views were expressed on the fourth section which distinguished between investment measures in general and those that were considered relevant in the light of the negotiating mandate. Several participants welcomed the attempt to make such a distinction, seeing it as constructive and necessary to narrow the scope of the Group's discussions and focus on the trade restrictive and distorting effects of investment measures. However, several others considered this approach premature and resisted any attempt for the time being to reduce the number of TRIMs under consideration.

37. One participant subscribed to the view that, in principle, any investment measure could and probably would have an influence on trade even if taken for reasons entirely unrelated to trade. That was why it was necessary to be more precise about those perceived to have direct and significant trade effects. Otherwise, the Group would end up negotiating a framework in GATT of terms and conditions for direct foreign investment, which was not on its agenda. However, he could not subscribe to the attempt to define TRIMs as measures directed at the exports and imports of a company. Similar proposals had been made before but they did not provide an appropriate criterion for trade restriction and distortion because investors' decisions on purchases and sales could be influenced by a host of other factors.

38. Another agreed that all investment measures could affect trade to some degree and saw this as a principal cause of the Group's difficulty in defining the scope of its work. In his view, this should be determined by the criteria of direct and significant trade restrictive and distorting effects and he welcomed the connection drawn in the submission between a direct trade relationship and restrictive and distorting effects. However, he did not agree that a number of the specific measures listed in this section met those criteria. Exchange restrictions were not normally applied for trade purposes, but rather for fiscal purposes to safeguard the external financial position. In exceptional circumstances they might have trade restrictive effects, but that had not been established so far and in any case these could not be termed direct trade restrictive and distorting effects. With respect to manufacturing requirements, it was not clear how they could restrict trade in the absence of an accompanying quantitative restriction, in which case it was the quantitative restriction that should be addressed and not the requirements themselves.

39. Another participant also agreed that any investment measure affected trade to some degree. No common understanding had yet been reached on which investment measures had trade restrictive and distorting effects and more attention should be placed on how the imposition of conditions on an investment directly or indirectly affected the free flow of goods through its effects on the business decisions of foreign investors. In this

regard, the EC proposal for identifying TRIMs as measures directed at the exports and imports of a company and the immediate objective of which was to influence its trading patterns was constructive. From there it would be necessary to determine those TRIMs that had trade distorting effects, which would depend to some extent on the particular point of view taken on a measure. His delegation considered that local content and export performance requirements had direct trade-distorting effects, while remittance restrictions, technology transfer and licensing requirements affected trade only indirectly

40. Another participant, referring to the proposal for identifying TRIMs, stated this gave the impression that influencing trade was the only, or at least the main, objective of a TRIM, whereas in fact it was only one of several objectives and often not even the most important. Investment measures were aimed at accelerating structural adjustment and their trade effects were often only side-effects. Furthermore, many could have positive trade effects. For example, local content requirements could lead to the formation of a permanent, broadened market; accelerate the transfer and diffusion of technology; assist with labour training; create a new and more favourable structure of comparative advantage; assist in mastering the production of components which could lead to higher exports by removing the barrier of high import demand for spares and sub-assemblies; promote cooperation between the indigenous economy and multinational corporations; and encourage the development of a domestic industrial base with export potential. Fears that these measures would lead to lower imports were exaggerated and, indeed, imports of other products could very well rise. Whatever their trade effects, the objectives of local content requirements need not be concerned with trade.

41. One participant agreed that in principle the Group should discuss measures that were trade-related, but stated that the negotiating mandate referred also to concrete injurious trade effects and that if this criterion was taken into account the list of TRIMs presented in the submission should be reduced. The Group was in no position to set up a final list of TRIMs, at least not as precise as that proposed in the submission. No consensus existed yet on whether any TRIM had trade restrictive and distorting effects and it was too early to limit the discussion to specific measures.

42. One participant agreed it was too early to consider there was already agreement on the effects of investment measures that should constitute the subject matter of the Group's exercise. Local content and manufacturing requirements might or might not displace existing trade flows, but they could create a demand for totally new imported inputs. Even if there were concrete, negative trade effects in a specific case, these should be considered under Articles III and XI of the GATT and it might be unnecessary to elaborate further provisions to avoid them in view of the FIRA Panel findings. If export performance or trade balancing requirements led to dumping or involved subsidization, their effects should be considered under the appropriate GATT provisions. It was not yet clear how

product mandating and domestic sales requirements and manufacturing limitations could have effects inconsistent with GATT obligations. Exchange restrictions resulted from decisions on financial and monetary policy and although they would have marginal effects on investment and trade, discussion of them lay entirely outside the Group's mandate.

43. It was useful to recall that investment measures were adopted by developing countries in the context of industrial policy aimed at development and technological progress. Without such measures, the volume and pattern of foreign investment flows would be determined solely by investors, mostly multinational corporations, who arranged their economic interests globally without taking into account the development considerations of host countries and whose activities in any case had an impact on existing trade flows.

44. Another considered that local content requirements were not trade restrictive since it could be cheaper to purchase local products than imports.

45. One participant stated that local content, manufacturing and technology transfer requirements were very important for use in promoting industrialization and development in developing countries.

46. One participant agreed with the basic approach taken in the submission on the direct relevance of TRIMs to trade and with the conclusion that TRIMs were those measures which aimed at directly influencing the trading patterns of companies. Local content and export performance requirements were relevant in the light of the negotiating objective and product mandating and trade balancing requirements could have features in common with export performance requirements. He asked for an elaboration of the direct trade effects of exchange restrictions. His delegations held similar views to the EC on those measures which had been found in the submission not to be of direct relevance to the negotiating objective and he recalled his earlier statements to the Group on incentives and local equity requirements.

47. Another agreed with the analysis of TRIMs in terms of their direct trade effects. He agreed also with the selection of types of TRIMs made in the submission but stated the list of measures should not be considered exclusive. He disagreed that an export performance requirement could be equated with a subsidy and doubted, therefore, that Articles VI and XVI were relevant in this context. He welcomed the willingness reflected in the submission to examine exceptions to GATT disciplines. In his view, it would be necessary to develop a clear understanding of the possible ways in which TRIMs could be substituted for one another in order to establish effective disciplines.

48. Another participant felt the approach taken in the submission was helpful for distinguishing the trade effects of investment measures from their other effects. The trade effects would have to be considered in the

light of national objectives. It was possible to argue about whether the right choice of measures had been made in the submission, and the inclusion of exchange restrictions raised a number of important questions, but his delegation was prepared to consider the trade effects of all the measures.

49. One participant asked what was meant by the term "immediate" in the context of the objectives of an investment measure in this section of the submission.

50. Another stated that it was understandable in theory to make a distinction between direct and derived trade effects. Direct trade effects were of a much more immediate nature and it might be that direct and significant trade effects were most appropriate for consideration by the Group. They did fit within the objectives outlined by the negotiating mandate. However, the submission did not provide evidence that this approach would necessarily identify the most trade distorting measures. The Group should be concerned with all TRIMs causing major trade distortions, whether directly or indirectly.

51. With regard to the measures identified in the submission, investment incentives and remittance restrictions should be added to the list as relevant to the negotiating mandate. An example of an investment incentive with a direct effect on trade in inputs had been provided at the last meeting and remittance restrictions could also have direct trade effects. He asked why exchange restrictions had been included in the submission but remittance restrictions had not. His view was that at this early stage the Group should be cautious about discarding whole categories of investment measures without first examining them. In the end, however, it would be necessary to give less attention to those that represented only minor irritants

52. Another participant was of the view that the term "trade-related" in the context of investment measures could have a wider interpretation than that given in the submission, where it was limited to measures directed at imports and exports.

53. Another expressed interest in the distinction made between direct and indirect trade effects but he shared the view of some other participants that more analysis was needed before the Group made any decisions on which TRIMs had more relevance than others.

54. One participant, without prejudice to the list of TRIMs contained in the submission, welcomed the attempt made to clarify investment measures in terms of their trade effects. Further efforts in this direction would be an asset in the work of the Group. The definition of TRIMs as measures directed at the imports and exports of a company with the immediate objective of influencing its trading patterns was a good starting-point for examining the term "trade-distorting" and coming to a common understanding on its meaning.

55. One participant did not support the approach taken in the submission of grouping TRIMs according to whether they directly or indirectly affected trade. Such an attempt at analysis was not to be rejected out of hand, but the distinction between direct and indirect trade effects was not always discernible and in any event it should not serve as the basis for deciding on which TRIMs should be disciplined and which should not. The task of the Group was to ensure that adequate GATT disciplines existed for the trade effects of all TRIMs.

56. He suggested taking a different approach to the issue of direct and indirect trade restriction and distortion. Accepting that the Group was not mandated to discuss investment per se, trade distortion in the context of the GATT had to mean trade effects that were similar to those that could be produced by, or somehow could be brought under the rubric of, the policy tools and measures that were the natural purview of the GATT. His government believed all TRIMs had trade effects that were analogous, if not identical, to the effects of trade policies which GATT rules tried to control. It was possible to distinguish those that themselves distorted trade and those that reinforced existing distortions, some of which might be created by other TRIMs, such as local equity requirements in combination with other performance requirements. However, he could not accept the direct/indirect paradigm proposed in the submission because it was not complete and he could not accept that any measures should be taken out of discussion. Furthermore, the Group would need to decide how to handle combinations of TRIMs where the total trade effect might be greater than the sum of the parts.

57. With regard to the statement that measures taken, for example, for fiscal, environmental or consumer protection purposes should not be the subject of these negotiations, one participant viewed this reference to exceptions as a reflection of flexibility which could help accommodate the interests of many participants. Another agreed on the need to delineate the national legal framework governing investments in general and those TRIMs that were relevant to the negotiating objectives. In this respect, safety standards and other examples could be added to the list. One participant noted that the EC was referring to the fact that investment measures were used in some cases, and in his view in all cases, to achieve several objectives. Trade was not directly one of them. To the list of objectives in the submission could be added others relating to economic policies in general and to macroeconomic considerations. Although these could be trade-related, they should not be viewed as having a direct and significant trade effect since they were not used directly to achieve trade objectives. Another participant stated that the topical issues for his government of environmental matters and toxic waste should certainly find a place on the list. He enquired why local content requirements and remittance restrictions were included in the list of relevant TRIMs if the EC accepted the exclusion of measures taken for such purposes, and asked for further elaboration of this point.

58. One participant agreed that in principle there was likely to be provision made for exceptions and that those listed by the EC might be relevant in some circumstances, but she added that exceptions should be limited and very carefully defined. Another agreed that it would be an inefficient use of negotiating resources to examine, for example, measures primarily related to the protection of the environment that were applicable equally to domestic and foreign companies, but considered the EC statement might go too far since it had the potential of excluding many measures. In response to a request from another participant for an explanation of why it was necessary not to exclude any measures that might have an impact on trade before knowing whether the effect was adverse or not when provisions already existed in the GATT for exceptions, for example, for national security purposes, this participant emphasized his position was that the Group should not be careless in establishing exceptions to GATT disciplines.

59. A number of views were expressed on the statement in the fifth section of the submission that where trade is restricted, trade is distorted. Two participants agreed and one added that government mandated measures which had the effect of restricting trade by forcing it into certain channels would distort trade by preventing investment, production or trade decisions from being taken on the basis of purely commercial considerations and so affect the trade flows of other contracting parties. Two other participants disagreed with the statement. One stated that several GATT provisions permitted trade restriction, including those dealing with development considerations, so that the validity of the statement would depend upon the particular Article on which a judgement was being based. The other stated that his country was a victim of both trade restriction and distortion. A distinction did exist between them and it was not possible to adopt a common sense approach to this issue because investment per se was not within the scope of the Group's work. The statement in the submission that Article XVI was concerned with increases of exports due to government intervention was an inadequate approach to establishing criteria for trade restriction and distortion since it was possible to see in almost every government measure to stimulate the economy some element that would lead to trade restriction or distortion. The GATT recognized and accepted certain kinds of trade restriction and the trade restrictive effects of investment measures should be viewed in this context, bearing in mind also that serious trade restricting effects which were contrary to GATT existed already in world trade. Trade distortion was the more serious form of perceived trade effect and he was not aware of any GATT provision that tolerated it. Trade distortion could be construed, for example, to mean the external impact of an action such as subsidization or dumping. The Group could consider adverse trade distorting effects of investment measures but in doing so it should not adopt simply a textbook approach. Another participant considered the distinction between trade restriction and distortion to be semantic since the mandate required that both be dealt with.

60. Several participants rejected the statement that TRIMs were basically nothing else than trade policy measures linked to the authorization of an investment. One added, however, that the link cited was not accidental. It was a determining factor of whether a measure fell within the province of trade or investment. The terms and conditions of an investment had to be negotiated with the host government concerned and the Group had already agreed that national investment régimes were not a subject for negotiation. Another said that investment policies generally did not take into account trade effects. They might indirectly affect trade, but that was not their major inspiration when an investment was authorized. Rather, they were dedicated to other, broader objectives such as economic development and these should not be jeopardized by concerns over their trade effects. Another participant stated that TRIMs first and foremost were investment policy measures and that they had long-term positive trade effects which probably offset their short-term negative effects.

61. One participant supported the statement that the Group should not limit its attention to measures taken at the border. Internal measures should also be covered.

62. One participant agreed with the statement rejecting the view that because an investor agreed in negotiations to certain TRIMs, no problem could be said to exist with the measures. The existence of barriers and restrictions to trade in other sectors had led to pragmatic solutions and to the development of grey area measures to ensure trade continued. Such solutions did not lessen the need to bring restrictions that existed in the first place under multilateral disciplines. She was not questioning the right of countries to establish their own investment policies, and she would agree with other participants that there was no such thing as an automatic right to invest, but the negotiation of the terms of an investment should not be such as to result in adverse effects on the trading interests of other countries.

63. The statement in the seventh section of the submission, that the adverse trade effects of TRIMs should be subject to general rules in the same way that import quotas were prohibited in the GATT irrespective of whether the trade effects arose in every case, drew a number of comments. One participant stated that no such analogy could be made since import quotas were trade measures. Trade and investment should not be mixed up in this way. Another said it was necessary to have specific evidence of the adverse trade effects of investment measures on a case-by-case basis. One participant agreed on the need for generally applicable rules and disciplines but was concerned that the EC was narrowing the scope to address only those TRIMs which had direct trade-restrictive effects in all cases. In her view, such TRIMs should probably be dealt with through prohibition with certain limited exceptions. However, others that did not result in negative trade effects in every case should not be left out of consideration. They should be subject to disciplines to minimize those effects but without necessarily prohibiting the measures. The only time

that a case-by-case approach should be adopted was under dispute settlement within a general framework of rules and disciplines.

64. One participant rejected the apparent conclusion drawn in this section that the list of TRIMs identified in the submission as having direct trade effects reflected a collective appreciation in the Group that those TRIMs should form the basis of future work. He also rejected the argument that it was irrelevant whether TRIMs had adverse trade effects or not in individual cases.

65. The same participant welcomed the statement in the eighth section of the submission that there was so far no agreement on the extent to which existing GATT Articles were sufficient for the purpose of avoiding the adverse trade effects of TRIMs. This provided a useful reminder that there was a considerable conceptual base that had not yet been established in defining the scope of the Group's work. Another stated the Group was not yet at the point where it could begin work on interpreting existing GATT Articles and elaborating further provisions. For the time being it was not even known whether further provisions would be required.

56. In response to some of the many comments, the representative of the European Communities made the following remarks. With respect to narrowing down the list of investment measures, it was stated in the submission that the Communities were open to arguments favouring the addition of other measures, but the Group should focus for the time being on the eight measures identified as having direct trade effects. It had not been intended to imply that there was any common understanding in the Group on the relevance of these eight, but rather to say they were of concern to the Communities and should be of concern to the Group. The reference to them being trade policy measures had not been intended to imply they might not serve also other purposes such as employment creation or industrialization; however, those aims could also be pursued through classical trade policy measures and where investment measures had direct trade effects, their only significant distinguishing feature was that they were attached to the authorization of an investment. Measures such as manufacturing requirements were broadly interchangeable with trade policy measures in terms of their trade effects.

67. He agreed to a very large extent with statements that the Group should focus on the trade effects of the measures and not the measures themselves. References in the submission to the need to define appropriate disciplines did not imply that the TRIMs identified as having direct trade effects should be prohibited in each case. Nor were the eight measures identified the only ones available to governments for implementing national investment policies. The Communities favoured a modulated approach of defining disciplines which were sufficient to eliminate the adverse trade effects of the measures while doing as little damage as possible to national investment policies and interfering as little as possible with the positive effects of the measures. Whether this was done by prohibition, which might be necessary in certain cases, or by other disciplines was a question that

needed further discussion. It might be possible to discipline the trade effects of some central measures without prohibiting the measures themselves.

68. It was very difficult to conceive of putting measures aimed at fiscal, environmental, consumer protection and certain other objectives under GATT disciplines. They probably would have an impact on trade but they were rather far off the Group's mandate. With regard to the use of the term "immediate objective" for defining TRIMs in the submission, reference to the trade activities of investors could probably be found in government orders imposing those eight measures identified in the submission. Finally, care should be taken when designing disciplines for TRIMs that other measures having the same trade effects could not simply be substituted for the TRIMs and escape GATT rules.

Remarks on the submission by the United States (MTN.GNG/NG12/W/11)

69. The representative of the United States said that the submission had been designed to solicit views on issues that were central to the Group's future work. A wide range of trade policy concepts that could be applied to TRIMs had been covered. It was preferable for the Group to adopt a broad approach in dealing with all TRIMs that had been identified rather than arbitrarily or hastily limiting the number of measures under consideration, and in this regard the submission was intended to contribute to changing the focus of the Group's work towards principles that lay at the heart of the GATT. A recurring theme of the submission was that the objective of avoiding trade restriction and distortion would be met only if account was taken of the full range of complex trade effects of TRIMs, applied individually or in groups, in home, host and third countries.

70. The submission examined three forms of GATT discipline and concluded that, while each could contribute usefully, each had shortcomings as a means of avoiding the trade restrictive and distorting effects of TRIMs. The application of MFN treatment to TRIMs would not succeed comprehensively because it was concerned with according advantages, not disadvantages, to trading partners and because TRIMs did not generally discriminate among countries of origin or destination. The shortcoming of national treatment was that it focused on imports and not on exports. It was demonstrated in the submission that trade distortion would persist, even if MFN and national treatment were applied in the context of TRIMs to producers rather than their products. The concept of prohibition existed in several GATT Articles and in principle it did not allow a targeted measure to be maintained at all, but it was qualified by a number of broad or specific exceptions and these constituted its shortcoming.

71. A preliminary observation was therefore that MFN and national treatment and prohibition were all applicable in varying degrees to TRIMs but individually they were not sufficient to fully avoid the adverse trade effects of TRIMs. Applying these concepts in combination would minimize

their separate shortcomings but where it appeared that existing GATT provisions were inadequate, even when applied in combination, the Group should elaborate further provisions.

72. Several associated issues were discussed in the submission and these could contribute to ensuring the effectiveness and feasibility of whatever disciplines were decided upon.

73. One participant stated that the suggestions in the submission on what rules and disciplines might be applicable to the trade effects of TRIMs seemed to cover all possible considerations. The proposal that TRIMs should be disciplined in such a way as to take account of their effects on home, host and third countries was constructive in the context of establishing a balanced approach that could attract the support of as many participants as possible. Also, the proposal to establish speedier dispute settlement procedures was particularly worthy of endorsement. However, the concepts put forward needed careful examination so as to establish a common understanding on their meaning and applicability; for example, the definition and interpretation of the concept of national treatment in the submission might not coincide with the views of all participants.

74. Another found the submission ingenious and inventive. It adopted a global approach based on wide GATT concepts and it contained interesting points worth pursuing, such as its subtle examination of the relationship of the MFN principle to product mandating requirements. It also contained helpful reminders of the notions of transparency, transitional arrangements, and so on. It should be taken up at the appropriate moment but this could be after further examining what appropriate disciplines might be in this area. However, he said that it was difficult to see how the Group could begin to define disciplines for the trade effects of TRIMs without knowing to which particular measures the effects related.

75. One participant welcomed the focus in the submission on procedures for moving forward in the Group and on the need, in compliance with the mandate, to agree on specific steps to avoid and eliminate the trade restrictive and distorting effects of TRIMs. Parts II and III of the submission gave the impression that the US envisaged a separate agreement dealing with TRIMs only; such an outcome could flow only from the examination of TRIMs within the Group.

76. It was important to arrive at a working definition of TRIMs or for the contracting parties to reach an agreement in descriptive terms of what that might be, but the submission was not particularly helpful in that regard. It analyzed some of the rules and disciplines contained in the GATT and pointed to a number of gaps that would be difficult to bridge using the Articles as they stood. More discussion on the nature of TRIMs was required in the Group to ascertain the substance of this claim and this implied a commitment to address seriously a number of difficult substantial issues.

77. It was probably not sufficient to discuss so-called TRIMs without consideration of the underlying objectives of industry and investment policies, not in an extensively detailed fashion but in a way that would shed light on the trade-related aims of measures that might, because of their trade distortive effects, fall within the ambit of the Group. The maintenance of restrictive trade measures was untenable. However, it was doubtful that local content and export performance requirements, which a number of participants had stated constituted major measures that should be negotiated away, were in all cases trade-distorting TRIMs. The motivation behind the measures was an important factor and TRIMs that might be considered restrictive measures by some participants could in fact be intended through their effects to be self-eliminating.

78. One example was his own government's passenger motor vehicle plan. This was run transparently and made provisions for export performance and contained a local content scheme, although the provisions of the plan were not a condition for investment approval. The plan aimed to make the local vehicle industry more efficient and able to operate with lower levels of assistance in the longer term, so that the specific requirements for local content and export performance would ultimately have a considerable trade liberalizing effect. Indeed, the government had recently announced a marked acceleration of the plan. Moreover, the main effect of the so-called local content scheme in the plan was to determine the level of the tariff applying to imported motor vehicles and components. Domestic producers who decided to import above the duty-free threshold had to pay the normal tariff but were not subject to penalties. The only incentive to use locally produced goods rather than imports was therefore the tariff, as with any industry using inputs benefiting from tariff assistance. This demonstrated the point that examination of some measures which appeared prima facie to be TRIMs would show that their effect was not that of a TRIM at all. The overriding consideration when defining TRIMs should be whether they had a significant trade restrictive or distorting effect or were motivated by trade policy considerations.

79. This participant fully supported the statement in the submission that any agreement on TRIMs should recognize the sovereign right of every country, subject to its international obligations, to establish its own investment policy. One of the fundamental tasks of the Group was to reconcile sovereign rights with GATT obligations.

80. With regard to the various TRIMs that had been cited up to now in the Group, not all of them were equally transparent but care should be taken not to equate transparency with the actual impact of a measure. It was desirable that the Group should examine the TRIMs one by one from the point of view of their trade restrictive effects and the operation of GATT Articles. Such an examination could show that some measures were indeed trade restrictive but that it was difficult to find a GATT Article that would deal with them effectively. It was in full accordance with the mandate for the Group to then go further and look at TRIMs from a broader trade policy perspective than that of existing GATT Articles.

81. Finally, it was not clear that industry, investment and trade policies were always malleable enough to reconcile the competing demands of home, host and third countries, even though it was certainly desirable as the submission proposed to discipline TRIMs in a manner that took account of their adverse trade effects on all countries. Trade policy was partly based on enlightened self-interest tempered, inter alia, by the operation of GATT Articles. With regard to the fourth point under paragraph 6 of the submission, therefore, existing GATT disciplines should be fully applicable to TRIMs and supplemented by further measures which could contribute to a less distorted and more efficient multilateral trading system.

82. One participant welcomed the submission as a step forward, following the identification of TRIMs and the listing of GATT Articles, that would allow progress to be made in the Group. It provided an initial analysis, but it also showed how much more participants each had still to think through. She appreciated its intention of keeping the scope of the examination of TRIMs broad, supported its main thrust and agreed with the general considerations it contained and particularly the second and third points under paragraph 6, and noted its linkages with the other submissions under discussion. She agreed that none of the basic GATT principles addressed would be sufficient on its own to deal with TRIMs effectively, although in her view the same comment could be made about the GATT itself since its fundamental principles each formed part of an integral whole and dealt with different aspects of the trading process.

83. With regard to the principle of MFN treatment as incorporated in Article I, she agreed this could have limitations for TRIMs, although not so different from those for other traded products in that the least onerous measure was applied to all suppliers to a market. However, the interpretation given in the submission on the applicability of Article I might be too limited and a wider interpretation of, for example, the word "immunity" would extend its applicability to other TRIMs besides incentives.

84. She agreed that national treatment was currently limited to non-discriminatory treatment with regard to imported products and that the possibility should be explored of extending it to cover exports resulting from an investment. Article III was not geared to take account of trade conditions resulting from investment in a host country.

85. In her view, the main approach to TRIMs with clear trade restrictive and distorting effects should be to explore the possibilities for their prohibition in principle, backed up by the effective operation of other GATT principles and with some carefully defined exceptions that took account of certain policy objectives. In this regard she wondered why the submission suggested there were real inadequacies in current GATT provisions such that prohibition would need to be achieved through the elaboration of new rules. Would it not, for example, be relatively straightforward to agree on a prohibition under Article XI on import restrictions made effective through TRIMs such as local content

requirements and, by extension, a prohibition on local content requirements that operated as restrictions on trade.

86. Her authorities had not yet come to a firm position on the best approach to take over which TRIMs should be subject to what rules and disciplines. However, with regard to the comments of another participant, she could not agree that the concept of prohibition stood in complete contradiction to the sovereign rights of contracting parties to develop their own policies. Signature of any international agreement entailed the acceptance of some limitations on policy implementation in order to ensure the trade interests of other countries were not affected adversely. Some practices, such as quantitative restrictions, were already prohibited for this reason in the GATT. The restrictive trade effects of investment policies posed the same fundamental problems as the effects of trade policies that were already subject to GATT rules and disciplines, and investment measures and trade policies could be used to achieve the same results. It was only logical that their similar trade effects should be subject to similar multilateral rules and disciplines. Where investment measures were virtually certain to lead to trade restriction and distortion, it would be difficult to deal with the trade effects in a way that allowed the continued use of the measures causing them.

87. She welcomed the ideas in the submission on transitional arrangements, which would be important for the orderly, progressive and equitable phasing out of those measures with adverse trade effects that were found to be contrary to the GATT in its current or amended form, and on transparency, since this had been one of the main problems with TRIMs established on an ad hoc basis through case-by-case negotiations. She agreed with the comments in the submission on dispute settlement and noted current procedures were already under review in another negotiating group.

88. Finally, she endorsed the need for generally applicable rules and disciplines in the area of TRIMs. These should be developed first by the Group before issues such as special and differential treatment for developing countries were resolved, although she was not questioning the need to resolve these issues eventually in accordance with the mandate.

89. One participant stated the submission was important and complementary to other submissions. Despite the shortcomings identified in the three basic disciplines it reviewed, he believed these would provide the main elements of discipline for TRIMs although more may be needed. Transparency was important for effective discipline and he emphasized the benefits it could bring in the form of predictability for traders and investors. He queried what was meant in the submission by a systematic approach.

90. Another found the submission logical in trying to apply trade policy concepts to TRIMs since their effects could be the same as those produced by other trade policy measures. Whether more should be done required further thought, since the GATT was not complete even for trade measures.

The discussion of disciplines should also include discussion of exceptions, but transparency and dispute settlement should be dealt with later.

91. Another participant agreed with the thrust of many of the general considerations in the submission against the background of the Group's mandate. These included the possibility of elaborating further disciplines, respect for the sovereignty of national investment policy, the aim of avoiding adverse trade effects (although their elimination seemed ambitious), and ensuring transparency in the case of TRIMs since this could serve to enhance predictability, although it was not clear yet that a higher than normal degree of transparency was needed for TRIMs.

92. An underlying assumption of the paper appeared to be that all TRIMs mentioned so far should be subjected to discipline, but this seemed to be casting the net very wide. His delegation had voiced concerns in previous meetings about whether local equity requirements had trade effects and whether these should be dealt with in the GATT. Incentives were a component of general industrial policies. Industrial promotion, for example for start-up industries, was used throughout the world and few countries would be likely to agree to give it up. Excessive and undue incentives might upset markets and negatively affect trading partners, but this seemed to be a problem belonging more to the subsidies complex in general. The Group should not address the incentive attached to a particular TRIM but should focus on the trade distorting effects of TRIMs.

93. No consensus had yet been reached in the Group on a definitive list of TRIMs and the list would probably have to remain open until the end of the Group's work. In the meantime, his delegation would not be averse to setting aside for the time being the five TRIMs identified in the EC submission as not being directly trade-related, without prejudice to their final treatment within the framework of these negotiations. They represented at least a more difficult negotiating task. Without commitment to any in particular of the other eight TRIMs, he suggested that concentrating on those with more straightforward trade effects would be a way of facilitating work and speeding up the negotiating process.

94. One participant stated that the submission tried to enlarge the scope of work in the Group when it replaced the term "the operation of GATT Articles" in the negotiating mandate by "trade policy concepts reflected in the GATT system", implying the General Agreement and related Tokyo Round Agreements. If the Group had been given a broad mandate to establish an agreement that would subject all countries' investment policies to disciplines, it would be conceivable that the negotiations could conclude by prohibiting certain TRIMs, but this was not the case. Whatever the ambitions of certain delegations in this area prior to Punta del Este, the mandate negotiated there did not foresee the establishment of an investment régime in the GATT. Furthermore, the terms of the mandate did not foresee the examination of the effects on home, host or third countries; it required the Group to consider the eventual, adverse effects of investment measures on merchandise trade in the light of existing disciplines.

95. With regard to the concepts of MFN and national treatment, these were applied in the GATT to products and not to producers or investors as the submission implied. The eventual adverse effects of TRIMs should be considered solely in terms of trade in goods as there were not and could not be any disciplines in the GATT on the rights of enterprises or investors. The US thesis that such rights should be regulated internationally would necessarily have to be complemented by the establishment of disciplines on the obligations of these enterprises and investors.

96. The GATT disciplines and rules were formulated in positive or conditional ways (e.g. Articles I and III) and they should not be interpreted so as to establish a new concept of prohibition. There was no concept of prohibition in the GATT. What was remarkable about the submission was its finding that in any case such a concept would be insufficient to deal with the adverse trade effects of TRIMs.

97. The considerations in the submission on transparency, enforcement and dispute settlement presumed the establishment by the Group of disciplines on TRIMs. Disciplines such as the prohibition of TRIMs were not covered by the mandate, and in any case the Group should not attempt to establish mechanisms or procedures in the GATT to avoid the eventual adverse trade effects of TRIMs before there was consensus on what these effects were. It was surprising to see a proposal for greater transparency on TRIMs at the same time that confidentiality between investors and governments was considered legitimate. With regard to development considerations, which the submission proposed should be left for discussion later on, she asked why the Group should not examine now how far such provisions as Article XVIII and Part IV could be relevant.

98. In sum, the submission contained a maximalist proposal that went much further than the Group's mandate and aimed at establishing an international investment régime. There was no examination of the operation of GATT Articles, nor any proposal that this should be done by the Group, but only the mention of some Articles as a basis for suggesting a much broader approach.

99. One participant found the submission to be unjust in its attempt to see to what extent the GATT Articles covered all the TRIMs that had been mentioned. Its conclusion that they were insufficient was hardly surprising. The GATT, unlike the Havana Charter, had no provisions covering investment and it could not be expected that its Articles would cover more than those TRIMs that gave rise to specific discrimination in trade, such as local content requirements. A more effective approach would have been to examine which TRIMs had trade restrictive and distorting effects and which could therefore be covered by the GATT. Some such TRIMs, for example, were covered by Article III.

100. One participant considered the submission to be too sweeping in implying that all investment measures distorted trade. What rôle was left

then for national investment policies and how could governments influence investment flows? He also stated that, in the submission, MFN and national treatment were applied to investors, not products, and this was of major importance and required further thought.

101. Another was convinced that only the criteria of direct, negative trade effects provided well-based grounds for qualifying TRIMs for inclusion in the negotiations, and he was not able to accept the proposal in the submission to examine the applicability of the trade concepts to all TRIMs that had been mentioned in the Group's discussions.

102. One participant considered it necessary to know what specific investment measures were envisaged in the submission to be subject to the trade policy concepts of MFN and national treatment; the list should be limited to only those that were directly trade-related. There was no need for this Group to elaborate special provisions for dispute settlement since that whole issue was under examination in another negotiating group. With regard to provisions for special and differential treatment for developing countries, these should be taken up in parallel with the elaboration of disciplines.

103. One participant stated that the language on transitional arrangements in the submission appeared adequate but that further elaboration of development considerations was needed.

104. In response to some of the comments that had been made on the submission, the representative of the United States made the following remarks. He acknowledged that it might not be necessary in every case to elaborate new disciplines to eliminate the trade restrictive and distorting effects of TRIMs and that existing GATT disciplines might need only some interpretation. He emphasized that the United States accepted that the mandate covered only the adverse trade effects of TRIMs and not the measures themselves, but expressed doubts that the effects of, for example, export performance requirements could be avoided without eliminating the measures.

105. With respect to comments made on the positive trade effects of TRIMs, he stated that what appeared positive from a national point of view could be negative in a broader, multilateral context. Worries expressed about how any new disciplines established over TRIMs would affect the sort of joint ventures found in Eastern European countries might already be taken care of in the state trading provisions of the GATT. Also, he did not necessarily view company to company negotiations as something to be embraced by what was decided upon by the Group.

106. He acknowledged that special and differential treatment for developing countries had to be addressed in the negotiations, but for the time being not enough input on this issue had been forthcoming. Concrete suggestions on how the Group could incorporate it into its work were needed, preferably in written submissions to the Group.

107. Finally, commenting on the reference to a systematic approach in the submission, he said this would involve elaborating systematically on the definitions of investment measures and the descriptions of their adverse trade effects, and then seeking common analysis of the extent to which there was complete GATT coverage of these trade effects, less complete coverage, and inadequate or no coverage at all, with a subsequent attempt to reach common views on the need for new disciplines and to negotiate them. Along the way, participants interested in transitional arrangements, exceptions, and so on would be able to make their demands.

108. One participant welcomed this statement on the coverage of the mandate but disagreed that export performance requirements had to be eliminated if their adverse trade effects were to be avoided. The distortion they caused was not the act of exporting itself as long as this was the result of producing in a competitive environment; distortion arose only when there was subsidization or dumping that was inconsistent with the GATT.

Remarks on the submission of Japan (MTN.GNG/NG12/W/12)

109. The representative of Japan noted that the submission had been made available only recently and he read extracts from it for the benefit of participants. Summarizing the annex to the submission, he stated that Articles III(4), III(5), VI, XI(1) and XVI were relevant to the analysis of the trade effects of investment measures that were considered to be inconsistent with existing GATT provisions, while further elaboration of Articles VI, XI and XVI was needed to cover adequately other trade effects of investment measures. He emphasized that the annex was illustrative and was not intended to limit the scope of the Group's discussions to the seven measures listed there. Other participants were invited to consider using the same methodology to expound their own points of views on the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures.

110. It was generally noted that comments on this submission were of only a very preliminary nature.

111. One participant stated that the Group's mandate had been carefully negotiated. It called for the clarification of GATT provisions related to the trade restrictive and distorting effects of investment measures, not the measures themselves. There was need for precision if the Group was to deal with adverse trade effects without infringing on investment per se. However, the methodology proposed in this submission appeared to be geared towards eliminating measures that were significantly trade-related.

112. Another noted the submission proposed that the Group should take up now the question of what disciplines should be established to avoid the adverse trade effects of investment measures. He queried whether a common understanding existed yet on this point. With regard to the further proposition in the submission that certain types of TRIMs should be prohibited, he considered this approach to be too advanced for the time

being to attract the participation of developing countries. In his view, the basis of negotiation should be to discipline those investment measures causing trade distortion in such a way as to avoid their adverse trade effects.

113. One participant stated that this submission went in the wrong direction. In particular, it was rigid and orthodox in introducing the concept of prohibition and applying it to all the TRIMs that were mentioned. One principal difficulty with the submission was that it assumed these TRIMs had trade restrictive and distorting effects. No conclusions had been reached on that point yet and for some TRIMs this remained open to serious doubt. On the contrary, some had trade-creating effects; for example, certain export performance requirements did not distort but rather increased competitiveness in trade as long as they did not involve subsidization or dumping. The submission proposed a general framework of rules for TRIMs, yet it was not the purpose of the Group to establish an international agreement on TRIMs, so either the submission was very ambitious or it reflected a different interpretation of the objectives of the Group to that held by other participants.

114. Another disagreed with the statement in the submission that the Group had reached the stage now to take up the question of what disciplines were to be established. There had been wide disagreement in the Group over whether the negotiating objective entailed the establishment of any discipline to deal with the adverse trade effects of TRIMs and this point would need to be considered in the light of the points made in MTN.GNG/NG12/W/13 with regard to the position of less developed contracting parties. Any discipline on the adverse trade effects of TRIMs would have to be seen to bring about trade liberalization and trade expansion of special benefit to these countries. For the time being, the Group was still examining such issues as what was a trade-related investment measure, what exactly were its adverse effects on trade, what was meant by trade restrictive and distorting, and how did GATT Articles that might be related operate.

115. The submission appeared clinical in its approach and raised a number of questions. With regard to the classification of the trade effects of TRIMs in the annex, was it conclusive from the Group's discussions that such effects did result from the use of investment measures by developed and less-developed contracting parties? Was there any GATT experience to support the conclusions drawn on the GATT consistency of these effects and on what basis had the classification of TRIMs according to their trade effects been made? Had the Group the capacity or the faculty to know which trade effects of TRIMs were obviously consistent or inconsistent with existing GATT provisions, even with the benefit of the findings of the FIRA Panel report to draw on? Also, if TRIMs which had Type B effects were considered to be consistent with GATT provisions, was there any need to elaborate further provisions to take care of them?

116. Another participant found some merit in the methodology proposed but did not believe the Group was yet at the stage of deciding whether the trade effects of TRIMs were or were not consistent with GATT provisions. Some of the specific details of the submission were not acceptable, particularly on several measures and their effects. It was not clear, for example, how manufacturing requirements could be applied inconsistently with GATT in the absence of an accompanying border measure.

117. Another welcomed statements in the submission that discussions should focus on ways of avoiding the adverse trade effects of TRIMs, but found it hard to reconcile the rest of the submission with them. Stress was placed on investment measures themselves, there was no clear identification of their trade effects, and the conclusion appeared to be that the best way to avoid adverse trade effects was to suppress the measures. The Group had to focus on the trade effects of the measures if national investment policies were to be fully respected, yet how could they be respected if it was argued that the trade effects could not be avoided without prohibiting the measures?

118. This participant suggested that, since the list of TRIMs in the submission was not exclusive, it would be useful to have Japan's views on what other TRIMs would or would not be consistent with existing GATT provisions. The classification in the annex did not appear to be relevant in view of the proposal in the submission that both Type A and B measures should in principle be prohibited. Also with regard to the annex, were export performance requirements the only measures that it was felt would require additional disciplines? In the case of product mandating requirements, their effects in terms of dumping and their use in conjunction with incentives were already covered by GATT provisions and it was not the case that new provisions would be required to take care of their trade effects. Finally, the proposal in the submission for phasing out exceptions was flawed in the case of special and differential treatment for developing countries since the concept of progressive development was not a sufficient base for it.

119. One participant found the methodology used in the submission interesting, but wondered whether all fourteen TRIMs under consideration would fit into it. A third classification of TRIMs having positive trade effects might be needed. He also considered that other possible exceptions, such as infant industry, balance of payments and national security exceptions, should be taken into account.

120. Another was attracted by the transparency and simplicity of the methodology proposed in the submission for classifying the trade effects of investment measures and he considered it to be a promising tool for the future.

121. Another participant considered that the proposed methodology offered a possible means of bringing together all elements of the negotiating mandate and the approaches adopted in the US and the EC submissions, as well as a

practical way of coming to grips with the somewhat abstract concepts of scope and disciplines that these submissions contained. He noted, however, that his delegation did not necessarily share the emphasis placed on individual TRIMs in the Japanese submission.

122. One participant stated that this submission made a major contribution in providing analysis of many of the specific problems that sooner or later would have to be dealt with in the Group. He agreed that investment measures causing trade restrictive and distorting effects should be prohibited in principle, although some TRIMs might be handled by rules that fell short of prohibition. Concrete procedures had to be developed to reduce or abolish the use of TRIMs and further provisions would be needed in GATT to eliminate the adverse trade effects of all TRIMs. Exceptions should not be considered until general rules had been established or at least thoroughly discussed in the Group. That applied also to the issue of special and differential treatment for developing countries. The submission contained a thoughtful analysis of where existing GATT provisions might be found to be lacking. Also, there were attractive aspects of the format proposed in the annex to bring together the elements of the discussions on all of the TRIMs under consideration and some variant of it might prove useful in the future.

123. Another participant agreed on the usefulness of the format for analysis provided in the annex to the submission, particularly for when the Group came to decide on whether existing disciplines were adequate and whether new ones were needed. Analyzing together the relevance of investment measures and their trade effects to GATT Articles was helpful. Further consideration would have to be given to the details of the submission, in particular the claim that six of the seven TRIMs listed there were already prohibited by the GATT. A problem could also arise over those measures classified in both categories in the annex. Finally, technology transfer requirements seemed to be defined very narrowly in this submission and in a way that made them akin to manufacturing requirements. They could have much broader GATT relevance than this.

124. One participant welcomed the useful ideas on methodology in the submission and the fact that the list of TRIMs had been left open. The methodology provided a good starting point for analysis and underscored the importance of not making any a priori exclusions. She felt it was timely for the Group to begin addressing disciplines and take the first steps to integrate TRIMs into the GATT, and that answers to many issues would emerge as this discussion was carried forward. The division proposed in the annex for the classification of trade effects was helpful, although obviously opinions in the Group would differ over which effects should go into which column. In this regard, she asked for clarification that Type B would include the measures that would be difficult to incorporate into existing provisions but which nevertheless had trade restrictive and distorting effects. She considered useful the proposal of another participant for a third classification that would cover investment measures that sometimes, but not always, had trade restrictive and distorting effects depending on

how they were used. She noted that only a small number of GATT Articles had been included in the annex to the submission and enquired whether Japan would consider including others.

125. Another found the methodology in the submission useful and was tempted to suggest the Group try it out once it had completed its discussions. At the least, future discussions could be structured along its lines.

126. Replying to some of the points made on his delegation's submission, the representative of Japan said that in his view the submission was timely since the Group had held extensive discussions on the trade effects of investment measures, although he did not consider the need for such discussions had been exhausted yet. With regard to the methodology proposed in the submission, he believed the inclusion of Type B effects was necessary and consistent with the Group's mandate and agreed that it could be defined more broadly to include the effects of measures that were not apparently covered at all by the GATT Articles. Export performance requirements should be addressed from the standpoint both of subsidization and dumping and of their general effects in raising the level of exports.

127. While accepting the points made on the sovereignty of investment policy, he considered the Group should agree in principle to aim to prohibit the use of TRIMs with trade restrictive and distorting effects. This did not reflect an attempt on the part of his delegation to overlook the requirement in the mandate that the Group concentrate on the trade effects of TRIMs, but the belief that in many cases it would be difficult to avoid these effects without prohibiting the measures themselves. The Group should of course consider alternatives to prohibition whenever it was convinced such alternatives would be comprehensively effective. With respect to special and differential treatment for developing countries, in his view this should be discussed after a common understanding had been reached on what disciplines were needed in the area of TRIMs.

Dates of the next meeting

128. The Chairman suggested, on the basis of informal consultations, that the Group aim to have two meetings in the second part of the year, with specific dates to be confirmed by the GNG.