

**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 5-6 OCTOBER 1988

Note by the Secretariat

1. The Group held its eighth meeting on 5-6 October 1988 under the Chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2654 was adopted.

A. Continuation of the examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures

(i) Comments on written submissions

2. The Chairman invited participants to provide further comments on the four written submissions that had first been considered by the Group at its meeting in June.

3. Regarding the submission by the European Communities (MTN.GNG/NG12/W/10), one participant considered it contained much that he could agree with. However, he did not support its attempt to cut down the number of TRIMs under discussion and in his view it ignored the important aspect of bundling TRIMs together.

4. Another participant stated that the submission represented a stringent analysis of what might be considered TRIMs that were directly trade related. In his view, the measures it identified fell to a large extent within the Type A category that had been proposed in the Japanese submission.

5. One participant questioned the inclusion of exchange restrictions in the list of relevant TRIMs, since in his view these were not directly related to trade.

6. Two participants stated that, once agreement had been reached on which investment measures had trade restrictive and distorting effects, the Group should focus not only on the trade effects of these measures as was proposed in the submission, but also on their other effects and on the purpose of the measures in order to ensure a balanced approach. They disagreed with the submission that manufacturing requirements had direct,

adverse trade effects, and one of these participants stated that a manufacturing requirement could not be likened to an import quota since it was an investment measure and not a trade policy measure. A manufacturing requirement was always worked out in the context of an investment agreement in exchange for an investment opportunity. It could not be considered trade restrictive or distorting unless it was coupled with a border restriction, and in that case the proper response in GATT would be to address the border restriction itself.

7. Another participant welcomed the statement contained in the submission that there was a need to distinguish between investment measures in general and those that were relevant in the light of the negotiating objective. He agreed that it was not appropriate to consider all investment measures as being trade related on the grounds that, in principle, each of them could and probably would have an influence on trade. However, he could not agree that the measures cited were relevant because they were directed at the exports and imports of a company with the immediate objective of influencing its trading patterns. The only proper criterion was to determine which trade effects were restrictive and distorting within the context of the operation of GATT Articles.

8. To the latter comment, the representative of the European Communities asked whether, in the view of that participant, the measures cited in the submission as relevant to the Group's work could have trade effects that were not trade restrictive and distorting. With respect to exchange restrictions, these could be directly trade related either in the sense of a specific form of trade-balancing requirement or more generally when they limited a company's import possibilities, although in this connection he drew attention also to the points made in the submission with regard to not prejudicing a contracting party's possibility to adopt measures necessary to safeguard its external financial position. Finally, it should be recognized from the submission that his delegation was concerned only with investment measures that had direct and significant restrictive and distorting effects on trade, and that the measures cited were of immediate relevance to the Group's task. That would not imply anything about the conclusions to be drawn, but it would provide a sound basis for future negotiations acceptable to all participants.

9. With regard to the submission by the United States (MTN.GNG/NG12/W/11), the representative of the United States summarized its main points. It had examined a broad range of trade policy concepts that were quite familiar to the GATT and could be applied to TRIMs. It had concluded that these concepts were relevant to the Group's work, but that they were insufficient in some respects to avoid fully the trade restrictive and distorting effects of TRIMs. MFN treatment in the GATT was concerned with trade advantages and not the disadvantages that were associated with TRIMs, and national treatment focused only on imports while some TRIMs affected exports. The concept of prohibition without an effects test was implicit in Articles I and III, and explicit in Article XI, but it was qualified by exceptions and to the extent these undercut also disciplines on TRIMs, prohibition would not adequately avoid adverse trade effects.

10. In response to comments made at the previous meeting on this submission, he stated that the United States was not aiming to go beyond the scope of the mandate and establish a régime on investment. He acknowledged that the negotiation was about the adverse trade effects of investment measures, and said the United States was seeking to address only that aspect and not to abolish the overall investment policy of any contracting party. On the separate issue of whether disciplines might apply to TRIMs or only to their trade effects, it was in keeping with the mandate and with established GATT practice to deal with the adverse trade effects of TRIMs and the underlying cause of those effects, which was the measures. With regard to investment incentives, these were not neutral in their effects but rather contributed significantly to trade restriction and distortion when linked to performance requirements. They offset the cost of a performance requirement for an investor and in some cases even rewarded the investor for greater compliance with trade distorting TRIMs, so they were of practical concern.

11. In his view, the Group should focus on three basic elements in this analytical phase of the negotiations: TRIMs, their trade effects and the relation to GATT Articles. It should address three questions: what are the relationships between TRIMs, trade effects and GATT Articles; what does the GATT say about disciplining adverse trade effects as opposed to disciplining measures; and to what extent are GATT Articles adequate to avoid fully the adverse trade effects of TRIMs.

12. One participant agreed with many of the general considerations contained in the submission. The Group should proceed with a view to agreeing on steps to avoid and eliminate the adverse trade effects of investment measures, and not aim to call into question the existence of national investment régimes. It should adopt a flexible approach, and explore various ways of dealing with the trade restrictive and distorting effects of investment measures. Transitional arrangements would be an important element of any agreement reached. Provisions to ensure transparency would be essential for monitoring respect for any agreement reached, both to ensure that participants had brought their regulatory frameworks into conformity with the agreement and to indicate whether there were still measures falling outside it which had trade effects that it had been envisaged should be covered. Development considerations would have to be taken into account once agreement had been reached on what disciplines should be applied to avoid the adverse trade effects of TRIMs, although it should not be necessary to wait until those disciplines had actually been established.

13. With regard to the proposal in the submission (paragraph 18 of NG12/W/11) that the concept of national treatment should be extended, a more direct way of tackling the particular problem at issue there would be for the Group to deal with investment measures irrespective of whether they applied to foreign or domestic investors. Another participant disagreed with this suggestion as well as the proposal contained in the submission. In his view the task of avoiding the adverse trade effects of investment measures should not involve the restriction or prohibition of investment measures themselves; it was trade problems that were at issue, and the

Group should explore ways of solving them whether local or foreign investment was concerned.

14. One participant agreed with the general approach contained in the submission of applying trade concepts to TRIMs, including prohibition, and also that doing so demonstrated the insufficiency of existing disciplines contained in GATT Articles. Some arguments in the submission were pursued on the basis of the findings of the FIRA panel; in his view these findings reflected a narrow interpretation of GATT Articles and the Group should not feel itself restricted by them in its work. Transitional arrangements had not yet been considered and discussion of them should be reserved for a later stage of the negotiations. More submissions from participants were needed if the Group was to have a basis for discussing development considerations and exceptions.

15. Two participants agreed with the United States proposal on the three steps necessary to make progress in the Group. One added that the Group had not yet finished its initial diagnosis of the problems and had not begun to identify areas where new provisions might be necessary. The other questioned whether the remarks of the United States, that the use of incentives in conjunction with performance requirements would increase trade distortions, were meant to imply that this would be true only when trade restrictions were applied as well.

16. One participant stated that the submission proposed the negotiations should cover all possible TRIMs that might have a negative impact on trade. That approach might be justified in theory, but in reality it was not feasible. It could not be realized before the end of the Uruguay Round because the problem of TRIMs was new to GATT, so that participants lacked experience and awareness of the possible implications of their discussions, and it was questionable, on the basis of published empirical work, to what extent performance requirements were of a trade distorting character.

17. Another participant found certain considerations in the submission that he could agree with, such as the reference to addressing the trade restrictive and distorting effects of TRIMs, but he disagreed with many points it contained. In particular, he could not conceive of the Group progressing in any discussion on the prohibition of the use of investment measures. The Group was called on to address problems of trade distortion up to the point that these problems could be solved in their own right. It would be illogical, where investment policies and measures were designed to serve macroeconomic objectives for example, to subordinate those objectives to concerns about trade distortion. Furthermore, prohibition was not a concept that was closely related to trade. In any agreement there might have to be a few prohibitions and a few obligations to undertake certain things, but it was not appropriate to cite prohibition as a concept in itself that might be applied in the area of investment. With regard to the statements in the submission on the findings of the FIRA panel, in his view these findings concerned rights derived from GATT on questions of the importation of certain products and did not concern the investment issue as such.

18. One participant welcomed the introductory statement of the United States that it was the adverse trade effects of TRIMs and not investment measures or policies that were stressed in the mandate. This had not been clear from the wording of the submission itself, and as a result she had not been able to accept the submission as a basis for work in the Group.

19. Responding to this last point, the representative of the United States repeated his statement, for the sake of clarity, that the United States accepted the mandate of the Group and acknowledged that this negotiation was about the adverse trade effects of investment measures. In other words, the United States was not seeking to abolish the overall investment régimes of contracting parties, but rather to find effective disciplines over just one aspect of those régimes, namely the application of measures which had the effect of restricting and distorting trade. In many cases that discipline was prohibition. Replying to other points raised, he stated that the submission was a discussion paper and it had not been intended that it should be considered a definitive legal interpretation of the FIRA panel findings, which in any case could not be made unilaterally. As regards investment incentives, it was the view of the United States that these distorted trade, particularly when applied in combination with other trade restrictive investment measures.

20. Regarding the submission by Japan (MTN.GNG/NG12/W/12), the representative of Japan explained its main purpose and went over several points contained in it. Its purpose was to provide an objective and comprehensive methodology for identifying the restrictive and distorting effects of TRIMs and examining the applicability of GATT Articles. Two categories of the adverse trade effects of TRIMs had been proposed: one for those considered to be inconsistent with existing GATT provisions, and another for those not obviously inconsistent but considered relevant to existing provisions. For the first category it would be necessary only to confirm the applicability of the relevant Articles, while for the other further provisions would need to be negotiated to cover them. It was hoped that other participants would use this methodology in making their own submissions and that the Group could ask the Secretariat in due course to assist in putting the methodology into practice.

21. On the basis of this methodology, the Group could work towards establishing rules to avoid the trade restrictive and distorting effects of TRIMs. In this regard, Japan did not intend that a country's own investment policies as such should be interfered with. However, it considered that the most effective way to avoid adverse trade effects would be to put investment measures themselves under rules and prohibit them in principle. One reason for this was that certain TRIMs were considered to cause import restrictions or other adverse trade effects inconsistent with Articles III:4 or XI:1 and many panels, including the FIRA panel, had recommended in the context of these provisions that measures should be brought into conformity with the GATT. These panel precedents suggested that the measures and their trade effects could not be separated, and in Japan's view such separation was indeed hypothetical and would not be practical when the Group came to address disciplines that were effective enough to avoid the trade restrictive and distorting effects of TRIMs.

22. The submission was not exhaustive in citing relevant GATT Articles. By way of example, Article I was of particular importance in relation to product mandate requirements. Also, in Japan's view it would be necessary to elaborate further provisions to avoid the adverse trade effects of export performance requirements if these were not clearly inconsistent with GATT Articles, since these measures artificially increased exports and could distort trade. Finally, other participants who considered that the matter of exceptions should be taken up in parallel with the establishment of disciplines should provide written submissions on this point.

23. Commenting on the Japanese submission, one participant agreed that to avoid the trade restrictive and distorting effects of investment measures it might be necessary to address the measures themselves. The concept of prohibition should not be shied away from when it proved to be the most effective means of discipline, since it was already well-established in GATT in the form of the prohibition of discrimination through internal measures in Article III and the prohibition of quantitative restrictions in Article XI, for example.

24. One participant found the methodology proposed in the submission to be balanced and very helpful, particularly since it allowed provision to be made for exceptions to disciplines over the adverse trade effects of investment measures. Another found the methodology useful for examining the extent to which GATT Articles already applied.

25. Another participant stated that the submission moved the discussions forward in that it attempted to structure the Group's approach to the large number of TRIMs which had been cited. The assessment it gave that the Group was now entering the first phase of the rule-making stage of its work, while not closing the door on further examination of trade effects, might be a little hasty since no consensus existed yet on which of the measures cited were truly trade related. A first examination of trade effects had been conducted, but it had not been conclusive and should therefore continue. With regard to the suggestion that the Group start looking now at what disciplines were needed to avoid the adverse trade effects of TRIMs, it would be more productive at this stage to focus on measures which fell clearly within the scope of the GATT while at the same time underlining that this would not imply the exclusion of any other measures from further consideration. In his view, those measures which fell clearly within the GATT, and were Type A measures in terms of the Japanese methodology, were local content, export performance, product mandating and trade-balancing requirements, the latter two being sub-categories of export performance requirements that could usefully be subsumed under that one broad heading. In reply to a comment from another participant that some of these measures had been placed in the Type B category in the Japanese submission, he added that it was not unlikely there would be different interpretations among participants at this stage of the GATT consistency of the trade effects of various measures.

26. His delegation had already elaborated extensively on how it saw GATT Articles operate in respect of local content and export performance requirements. It would not seem unreasonable for the Group to confirm in

its future work the operation of GATT Articles in respect of Type A measures. The definition given of Type A measures represented truly trade-related measures that were therefore an appropriate subject for negotiation. Type B measures were of a more nebulous character. Their GATT inconsistency was more difficult to establish, and hence their negotiability was subject to much more scrutiny in the Group. While not ruling out that further provisions might prove necessary for Type B measures, it was difficult to have more than a conceptual discussion of them until the set of measures to which existing provisions were applicable was fairly well locked in. It was hard to embark on rule-making without some form of common understanding on the concrete measures involved, and for the time being the relation to trade of some of the TRIMs cited was unclear. The submission provided a useful framework for discussions to try to categorize them according to GATT inconsistency.

27. Another participant agreed on the need to identifying those TRIMs that contravened existing Articles and that therefore corresponded to Type A measures in the submission. In his view, however, technology transfer requirements did not meet that criterion, and to suggest they did seem to imply that setting up any new production capacity contravened GATT Articles.

28. Some other participants considered that the methodology proposed in the submission ignored the guidelines for the Group's work, and in particular the sequence that was provided for in the negotiating mandate and plan. They could agree with the submission that discussions should be oriented to the examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures. However, as the submission also stated, the Group had completed only a first examination of these issues. It would be wrong to suggest that this examination had been conclusive, and it was therefore premature to propose a methodology which presupposed there was a need to elaborate further provisions to avoid the adverse trade effects of investment measures. Before going on to elaborate new disciplines, if any, it would be necessary to arrive at a common assessment of whether investment measures had trade restrictive or distorting effects and whether existing Articles offered a satisfactory solution to these effects. More detailed discussion was therefore needed on the substance of these issues before the Group would be in a position to consider whether there was any need to resort to the kind of methodology proposed by Japan. Several of these participants elaborated on their comments in this regard.

29. One stated that more work was needed to reach a common understanding on the definition of TRIMs and to identify their trade restrictive and distorting effects. It might not be necessary to reach a final agreement on what was or what was not a TRIM, but a working agreement was needed on investment conditions that could be considered TRIMs. The Group could not yet engage constructively in examining the adequacy of GATT Articles or the need for new provisions. This was illustrated in that some of the TRIMs cited in the submission as having trade restrictive and distorting effects did not necessarily produce these effects in all circumstances. There was a danger, in looking at TRIMs across the board in this way, that the most

transparent and visible among them would become associated automatically with trade restrictive and distorting effects while more subtle combinations of TRIMs, which in practice had more adverse trade effects, would be overlooked. Care should be taken to examine fully the trade effects of each TRIM and the circumstances in which they were employed before beginning to categorize them. Only then could appropriate remedies be formulated, as necessary.

30. Another stated that no common understanding existed yet on which TRIMs had trade restrictive and distorting effects or on their relation to GATT Articles, so that participants could not begin to categorize measures according to the methodology proposed. In its submission, for example, Japan had classified technology transfer requirements as Type A measures, but his delegation did not agree that these measures had adverse trade effects and it clearly, therefore, could not agree with the classification that was proposed. In his view it was premature to discuss Japan's ideas further.

31. Another stated that the Group's first step should be to see in which cases TRIMs did have adverse trade effects and over which measures GATT disciplines applied. Only then could the Group discuss whether there was any need for further disciplines. It could not be said now that there were TRIMs that had Type A or other effects. Also, it was not acceptable to suggest that rules on non-discrimination, transparency, dispute settlement, and so on should be applied to all TRIMs that had trade restrictive and distorting effects. GATT rules applied only to trade in goods, and not to investment or investment measures.

32. Another stated that the submission reflected an approach that was too hasty and would therefore be unbalanced in comparison to work in other negotiating groups.

33. Another stated that he could not agree with the submission that the Group should look at all TRIMs. The criterion for their inclusion in the discussions must be that they had direct and significant trade restrictive and distorting effects within a GATT concept of trade restriction and distortion. It was misleading, for example, to describe an artificial increase in exports as a trade restrictive or distorting effect. It was the view of his delegation that investment measures should not be used to introduce or maintain measures that were equivalent to trade policy measures such as quantitative restrictions which were not otherwise justified under GATT Articles. In its work so far, the Group had been able to identify the potential adverse effects in certain cases of certain investment measures, but it had to be sure that any unequivocal judgement it arrived at in this respect was justified by the circumstances and it was not yet at the stage of making such a judgement.

34. Furthermore, the Group had to examine thoroughly the operation of existing Articles before it began to consider whether there was any need to supplement them with new provisions. Adverse trade effects had to be considered in terms of the nullification or impairment of GATT benefits and if discriminatory trade effects of investment measures were identified

these would appear to be contrary to the operation of GATT Articles. However, GATT rules and disciplines could not be applied to investment or investment régimes as was suggested in Section 4(3) of the submission. The principle of non-discrimination, for example, could not be applied to investment measures.

35. The submission asserted that certain TRIMs fell into Type A of the methodological framework and were inconsistent with existing GATT Articles. Since no supporting arguments had been provided for this, it had to be presumed that this was based done in the case of local content requirements on the FIRA panel findings, but a systematic examination of these findings was necessary before such a determination could be made. In his view, the FIRA panel had not made a categorical statement on local content requirements but had related them to the operation of the trade régime. It had said, for example, that there might be situations where its findings would not be applicable, for example to countries invoking the provisions of Article XVIII, Section C in particular. It would be necessary for the Group to examine these findings and decide on their relevance for its purposes, particularly with regard to the applicability of GATT disciplines to specific measures.

36. With regard to the inclusion of Type B in the submission, all this demonstrated was that there were investment measures which Japan considered were not inconsistent with GATT Articles. It was insufficient to simply assert that these measures had trade restrictive and distorting effects. A comprehensive analysis and classification of their trade effects was necessary, and it could not be said that the Group had exhausted its examination of the relationship of GATT Articles to the trade restrictive and distorting effects of investment measures nor that there was any need to elaborate new provisions to cover such effects.

37. It had been pointed out that investment measures could have trade creating effects and bring benefits to the country maintaining them. They might have adverse trade effects for other countries. The Group should not seek to proscribe or prohibit investment measures because of some adverse trade effects that might arise in certain circumstances, but rather to identify and check those effects. It could not be said, for example, that in every circumstance a particular investment measure led to dumping. It had already been stated in the Group that no government consciously compelled or encouraged companies to dump goods on external markets.

38. Several other participants also expressed concern over the suggestion that the Group should consider the prohibition of investment measures in principle.

39. One stated the submission proposed that the Group should confirm the applicability of existing Articles to Type A measures and agree to prohibit them in principle. It was unnecessary to consider prohibition at all, since recourse to Articles XXII and XXIII was available in the event that a GATT obligation was not being respected. Consideration of the principle of prohibition would lead the Group to focus on investment per se, which was not covered by the mandate, and take it beyond the kind of disciplines

contained in the GATT. Investment measures were most often applied for purposes other than trade and if they had negative trade effects then GATT remedies could be applied. However, in the case, for example, of dumping there was no need for prohibition.

40. Another stated that the proposal seemed to aim at applying the principle of prohibition to investment measures per se, which represented a deep-cutting approach that was not acceptable.

41. One participant considered the concept of prohibition was extremely ambitious and it would be better to start by examining the proposal in the submission to lay down concrete procedures to reduce the adverse trade effects of investment measures. This would square better with the language in the mandate. He enquired whether Japan had any particular procedures in mind in this respect.

42. Several participants questioned how it would be possible to prohibit investment measures in principle without interfering with or calling into question the existence of national investment policies, as the submission suggested.

43. One noted that in the extreme case of the prohibition of all investment measures, investment policy would be eliminated. All depended on which investment measures were to be considered in the Group. In his delegations' view, the effects of those measures having a direct adverse impact on trade in all circumstances could not be avoided unless governments refrained from using the measures. However, where measures might in some circumstances, but not necessarily or always have adverse trade effects, it was premature to suggest they should be prohibited. A modulated approach was required to avoid interfering as far as possible with national investment policies that had important domestic objectives while at the same time trying to avoid adverse trade effects. Prohibition should be only a last resort, and if there were other, less drastic solutions they should be considered seriously.

44. Another stated that it was going too far to consider disciplines that would prevent governments from deciding on their investment policies or from achieving domestic objectives.

45. In response to these comments, the representative of Japan disagreed that it was premature to consider the methodology contained in the submission. It was not Japan's intention to address investment policy as such, but in order to deal with the adverse trade effects of investment measures it was Japan's view that it would be necessary to address the measures themselves. It would be necessary in the future to consider whether the prohibition of measures should be only a last resort or not, but for the time being the Group should proceed in that direction. Finally, it remained Japan's view that proper account had been taken of the FIRA panel findings in the submission.

46. With regard to the submission by Malaysia (MTN.GNG/NG12/W/13), one participant stated that it appeared, superficially, to be a statement of

the need to take account of the special situation of developing countries, which had been expressed traditionally in GATT in terms of differential and more favourable treatment. However, in his view, after closer reading, that was not its thrust at all. Rather, it went into many issues that his delegation had already raised in detail in the Group. One was the reference to the FIRA panel finding that full account should be taken of the special provisions in GATT relating to developing countries. It was indeed appropriate to examine this finding and elaborate it in terms of the perceived trade effects of investment measures. He could agree with the submission that measures such as local content and export performance requirements were expected to have immediate effects on developing countries' economies. In the light of Part IV, and the development objectives of developing countries, TRIMs should be considered to fall within the meaning of special measures allowed to these countries. Then, although they certainly would affect trade, the trade effect could not be defined as restrictive or distorting. There was no intention to distort trade, nor to force dumping or any other kind of unfair trade practice; there was merely the existence of a performance requirement which was a legitimate condition for accepting an investment since foreign investors had no automatic rights to invest.

47. Another participant supported the proposal contained in the submission that the Group should examine the provisions of Article XVIII and Part IV. The trade effects of measures were taken to safeguard balance-of-payments positions or to develop a national capacity to produce certain inputs were perfectly consistent with the provisions of Article XVIII. Investment measures were imposed by governments within the broad context of investment policies that aimed at developing their economies, and the development dimension of the measures should be stressed. Some investment measures might have trade effects, but the Group should examine first the consistency of those effects with GATT Articles, including those Articles dealing with the economic development of developing countries.

48. Another participant stated that the submission was welcome for bringing balance and proportion to the different proposals that had been put forward. Article XVIII and Part IV called on contracting parties to take into consideration that developing countries should reduce their dependence on primary products and increase their participation in the benefits accruing from international trade. Access to those benefits would not come spontaneously, and public action was often required to channel and promote industrialization and trade.

49. Another participant stated that the submission contained helpful elements that could lead to positive dialogue. His delegation was prepared to consider the concerns of developing countries that used investment measures for development purposes, and it agreed that the Group's objective could not be to eliminate all investment measures nor to call into question the existence of national investment policies. The task was to ensure that investment measures did not cause trade restrictive or distorting effects and were not used in an untransparent manner to achieve what was contrary to GATT Articles or to undermine the open, multilateral trading system.

50. Another participant welcomed the submission. It raised legitimate issues that needed to be considered. However, logically these should be dealt with only after rules and disciplines had been agreed on.

(ii) Other comments

51. One participant recalled the approach that his delegation had suggested the Group should take to its work, based on the negotiating mandate. The Group should deal only with the operation of GATT Articles, and not with general principles or concepts. The transposition of certain concepts to the area of investment had not been envisaged for these negotiations. The negotiations should address merchandise trade problems and a GATT approach should be applied, dealing mainly with the effects of measures rather than the measures themselves. A clear distinction had to be made between trade problems and investment problems. Criteria were needed for selecting those measures which could have trade restrictive and distorting effects that could be related to the operation of GATT Articles. It was evident that the Group should select those TRIMs which had direct and significant trade restrictive and distorting effects and consequently examine the operation of those Articles related to such effects. Investment usually would have trade effects, since any production operation would eventually affect trade flows and result in trade opportunities. The only yardstick for assessing whether those trade effects were restrictive and distorting was the GATT. The approach should not be to examine any investment measure on the grounds that it was trade related or had a trade effect, but rather that its trade restrictive and distorting effects represented a form of unfair trade.

52. Another participant stated that to accelerate the Group's work, two objectives had to be reached urgently. One was that, for pragmatic reasons, only a limited number of TRIMs should be selected for further negotiation. The Group should concentrate on those TRIMs with trade effects that were easy to identify. Extending the negotiations to measures applied to domestic investors would delay progress. Selecting a limited number of investment measures for negotiation now would not exclude the possibility of including other TRIMs in future rounds of negotiation. The second objective should be to elaborate an exhaustive typology of all possible trade effects of investment measures that would allow a common understanding to be reached on which of them had direct and significant adverse trade effects. Achieving these two objectives would open the way for an examination of the relationship of GATT Articles and for further negotiations.

53. One participant stated that the thrust of most of the written submissions appeared to be that any measures which sought to influence an investor tended to have negative trade effects and contravened the principles of GATT, and that correcting for this would remove trade distortions. This was unacceptable. Investment measures might have an impact on trade, and many were designed to do so, but as the FIRA panel findings had shown export performance requirements, for example, did not violate any GATT obligations. Trade creation could not be equated with

trade distortion, and measures designed to generate exports could not be considered trade restrictive or distorting.

54. One participant stated that in his view export performance requirements were directly related to Article XVI since they resulted in an export level in excess of that which would otherwise have been sustainable. An administrative arrangement or measure which forced investors to export a certain amount of production, for example in order to finance necessary imports, could have a subsidizing effect. That might be the case in particular where border protection was high and profits on the domestic market were used to cover losses on export markets. Regulations which artificially increased production would, in the absence of offsetting measures, either increase exports or reduce imports. Subsidies could cover not only the disbursement of financing by governments to producers but also measures which had an equivalent effect. That had been recognized some time ago by a Working Party report on anti-dumping and countervailing duties. In the view of his delegation, therefore, export performance requirements could be equated with such measures and they fell clearly into the category of Type A measures that had been proposed in the Japanese submission. Another participant responded that the Tokyo Round Subsidies Code was a more authoritative source than the Working Party report in question. The criterion of a subsidy had always been direct financial disbursements by governments and there could be no question of considering administrative measures as having equivalent effects. One other participant stated that it was unacceptably broad to say that regulations which artificially increased production would increase exports or reduce imports, since that could cover any government measure.

55. Another participant stated that the adverse nature of the trade effects of TRIMs cited so far had not been clearly established, at least as far as GATT obligations were concerned. Nor was there evidence that existing GATT provisions would be inadequate to deal with their trade restrictive and distorting effects. A clear sequence had been laid out in the mandate. The Group should concentrate on existing GATT Articles before considering whether further provisions might be necessary.

56. One participant stated that in his view, the Group was moving towards agreement on certain general points, that it should address the effects of the measures and not the measures themselves and that it should address those TRIMs which had direct and significant trade effects. If agreement could be reached on those points it would be possible to have a more productive attitude towards the discussions.

57. Several participants stated that investment measures other than those imposed by governments were relevant to the work of the Group. A number of these participants elaborated their comments on this issue.

58. One stated that the policies used by developing countries to regulate direct foreign investment were an integral part of development policy to try to stop restrictive and discriminatory practices against national resources, and especially against the establishment of monopolies. There was a lack of balance at present in the Negotiating Group's discussions

because no account was being taken of the economic development of developing countries. The active side of investment policy for attracting and regulating foreign investment should not be overlooked. It could be said that it was not only government-mandated investment measures which were trade restrictive and distorting, and that these measures were simply a response to the context in which direct foreign investors operated. To correct the problem of the adverse trade effects of investment measures, it was not sufficient to consider only their effects on the trade practices of private enterprises. It was necessary to analyze the measures themselves and to understand that they served several objectives, which most often were not concerned with trade. They offered possibilities for promoting trade through changing national production possibilities of goods that were of particular interest to developing countries. This dimension of investment measures should be examined in the Group from the perspective of Part IV of the GATT.

59. Another stated that the Group was called on to examine the adverse trade effects of investment measures and it could not be presumed that such measures were the result only of government actions or policies. The investment measures of private enterprises also had trade restrictive and in many cases distorting effects. He was not suggesting the Group look into restrictive business practices per se, but it should be comprehensive in its examination of investment measures and how they affected trade. Often, certain performance requirements were imposed by governments to offset the practices of private enterprises.

60. One stated there was no reason for the Group to restrict its focus to the investment measures and practices of governments. His delegation had identified some other investment measures and practices that tended to restrict and distort world trade. These were price-fixing, restricting parallel imports, tied-purchasing, tied-selling and transfer-pricing. Tied-purchasing, for example, was directly analogous to a local content requirement in the sense that it was the investor who obliged its subsidiary to procure part of its requirements for goods and materials from a specific source. This list of measures was illustrative, not exhaustive, and he was willing to examine other such measures and practices which were related to investment. However, he was proposing now that these measures be added to the list of investment measures under examination in the Group.

61. Some participants supported the proposal to add these measures to the list of measures under discussion in the Group. One proposed that the group request the Secretariat to distribute UNCTAD studies on these measures. Another added that her delegation had indicated at earlier meetings of the Group the relevance of inter-affiliate transactions, market-sharing contracts and price practices based on non-economic considerations. Investment measures were adopted by developing countries in the context of industrial policies aimed at development and technological progress. In the absence of such measures, the pattern and volume of foreign investment flows would be determined solely by investors, and mainly multinational corporations, which planned on a global basis without taking account of the development considerations of host countries. That kind of planning had an impact on existing trade patterns. It could

be that no GATT Articles dealt with the trade effects of the measures cited, but if that proved to be the case her delegation would insist that they be considered in terms of the elaboration of further provisions.

62. Some other participants opposed the inclusion of these measures in the Group's work. One stated that the practices of individual companies were not within the mandate of the Group, and that the Chairman of the Ministerial Session at Punta de Este had stated that no consensus had been reached to negotiate on restrictive business practices in the Uruguay Round. The practices being cited now were restrictive business practices. The GATT could control government measures but not the practices of private enterprise. He also could not agree to the circulation of UNCTAD documents in the Group.

63. Another endorsed this statement. He added that the practices cited were not investment measures. They were not covered by the Group's mandate, and it was not possible to examine the practices of private companies against GATT Articles because the GATT concerned only government measures. Article VI, for example, concerned only government measures. Many countries applied anti-trust laws to deal with the activities of private enterprises. There was no reason to include these practices in the Group's work.

64. In response to these statements, several participants insisted that the Group's mandate did not exclude the examination of the investment measures and practices of private investors. While some of these measures and practices might commonly be referred to as restrictive business practices, it was not their intention to deal with the broad subject of restrictive business practices as such. These measures and practices in the area of investment had significant trade restrictive and distorting effects, and the only difference between them and the measures cited by other participants was that they were not mandated by governments. Nothing in the mandate said that the Group should restrict its work to government-mandated investment measures.

65. One of these participants added that if the Uruguay Round was intended to move towards greater efficiency in new areas for the GATT, it was unacceptable to seek to create artificial boundaries between the measures and practices of governments and private companies. The only criterion for the inclusion or exclusion of these measures and practices should be whether they had direct and significant trade restrictive and distorting effects. He could not agree at this stage that those that did have such effects should be excluded from the Group's work. It might be found, subsequently, that they were not specifically linked to GATT Articles in which case they would fall into the category of Type B measures within the Japanese methodology. He had no preconceived notions about how to deal with them then; it would be necessary to consider what might be appropriate remedies. However, if it was considered appropriate by some other participants for the Group to discuss the principle of prohibition in respect of other investment measures, he could not see how it was possible to split government and non-government measures and practices. This participant, and some others, stated that with regard to the practice of

dumping, it was engaged in solely by private enterprises but its adverse trade effects were clearly disciplined in the GATT. This was an example of the kind of discipline that might be envisaged to avoid the adverse trade effects of the investment measures and practices of private companies.

66. One participant stated that the Group could negotiate measures that governments might take to control their multinational corporations.

67. Another participant stated that all countries had objectives to pursue with investors with respect to such issues as economic development, national security, cultural factors, technological development, competition policy and consumer protection. One general aim was to ensure that multinational corporations were good corporate citizens. The Group should not compromise the attainment of these objectives in its search for ways to avoid the adverse trade effects of investment measures. The Group had not yet reached the stage of identifying certain investment measures as TRIMs, and it should proceed on a case-by-case basis to establish whether any particular investment measure necessarily had an adverse trade effect. In his view, there would always exist uncertainty over whether a measure would have an adverse trade effect in all circumstances, and it was unreasonable to pursue the approach of prohibiting or restricting the use of an investment measure on the grounds that it might be trade restrictive or distorting.

68. Two participants stated that they had not, so far, accepted any of the TRIMs cited as being relevant to the Group's work. One added that she had not been given satisfactory evidence of the trade restrictive and distorting effects of any investment measure.

B. Discussion of further work required in terms of the negotiating mandate

69. The Chairman announced that a draft of the report he was to make to the GNG in November would be circulated shortly.