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Negotiating Group on Trade-Related Investment Measures

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Trade Related Investment Measures

I. Introduction

1. The elaboration of provisions within GATT to discipline the trade distorting effects of present and future investment measures is an important element in the strengthening of GATT rules and disciplines and part of the effort to increase the responsiveness of the GATT to the evolving international economic environment.

2. One of the main difficulties in the negotiation of a discipline for trade-related investment measures is the definition of the scope of application of such a discipline. The problem of distinguishing investment measures (IMs) from trade-related investment measures (TRIMs) stems from the following considerations:

- each country has the sovereign right to determine its own investment policies, within the limits of international law;

- present GATT obligations are limited to the trade aspect of investment measures. There are no GATT obligations concerning the investment aspect of such policies;

- any investment policy has by definition an impact on trade (unless the policy is ineffective). The issue is to distinguish between government mandated investment measures which affect trade and those which not only affect, but distort and/or restrict trade;

- the effects of investment measures on trade are varied and difficult to predict. Surveys on the trade effects of investment measures seem to indicate that the same measure may have very different effects depending on the macroeconomic situation of the country and the specific circumstances under which these measures are taken.

3. The discussion on which investment measures have trade distorting effects and therefore have to be disciplined by GATT and which ones are not trade distorting and therefore fall outside the GATT framework cannot lead to operational solutions. It is relatively easy to provide examples showing that any particular measure can or cannot have trade distorting effects.

However, agreement should be possible on the presumption that a combination of specific investment measures and trade or macroeconomic conditions are likely to have trade distorting effects. In the same way it should be possible to agree that a given measure is unlikely to have such effects depending on the conditions.

II. A GATT discipline for trade-related investment measures

1. The proposed system of GATT disciplines for investment measures, depending on their likeliness to have or not to have a trade restrictive and/or distorting effect, is based on a classification of investment measures into three categories with specific legal effects attached to each category.

The following three categories are proposed:

- Category A: Prohibited investment measures. Measures under this category are prohibited *per se*. Violations of such prohibitions would be subject to actions within the GATT system (prior consultations, dispute settlement).

- Category B: Permitted investment measures. Measures under this category are not actionable.

- Category C: Actionable investment measures. These measures are not prohibited at the outset. They would, however, be actionable subject to complaint and to countermeasures by parties affected, based upon GATT rules and disciplines.

III. A negotiating framework for trade-related investment measures

1. The negotiations would attempt to determine typical measures and conditions falling into categories A and B. All measures and conditions which cannot be allocated to A or B would fall into category C.

2. As investment measures have different economic effects depending on the macroeconomic and trade conditions under which they are taken, the classification would specify the measures as well as the typical regulatory environment under which they are presumed to fall under the given category. The same measure thus may fall into different categories depending on the conditions under which they are taken.

3. It would probably not be possible to define category A and category B in an exhaustive way. Each category would contain a list of measures which are presumed to belong to it and which could be expanded in the future.

4. The criterion "Does the investment measure affect the investment decision only or also the business behaviour of the investor during the production process" should allow for the distribution of some of the measures into one of the two categories A and B.

Category A: Prohibited investment measures: would cover all measures which influence the business behaviour of the investor during the production process and thus are inherently trade distorting. Clearly, all cases to which existing GATT prohibitions can be applied would fall into this category (e.g. local content, trade balancing, manufacturing, product mandating, and export requirements).

Category B: Permitted investment measures: would cover all investment decisions per se, i.e. government measures which control, limit and/or guide investment decisions as well as investment incentives which influence the decisions to invest. Measures under this category may include limitations to foreign investment; investment incentives for regional development; etc.;

Category C: Actionable measures: while it should be possible to allocate some of the measures to the two categories defined above, there will exist measures and conditions for which no agreement on a classification can be reached. All these measures would fall into this category C. The contracting parties may agree on ways and means to reduce the number of measures falling into this category.

5. The following negotiating approach may be used:

(i) Each country may propose a classification of investment measures under given macroeconomic and trade conditions in categories A and B;

(ii) Multilateral negotiations would attempt to get agreement on specific measures which fall under categories A and B;

(iii) The measures not allocated to A and B could become the subject of a request/offer exchange of concessions with a view to minimize the size of the category C.

IV. Standing Committee and dispute settlement

1. As the classification is based on a non-exhaustive list of sample measures and conditions, some uncertainty may exist about the allocation of a specific measure under specific conditions to one of the three categories. A country which wishes to introduce an investment measure and which wants to ensure that the measure is non-actionable would have to have the possibility to confirm the status of the measure, thereby protecting itself from possible action. Any contracting party should be in a position to call upon a Committee at GATT to either confirm the classification of an investment measure envisaged or to challenge a given investment measure of another contracting party. The Committee will make an immediate determination of the category to which the measure belongs. Such an approach would:

(i) provide international recognition of lawful investment measures;

(ii) allow the treatment of new investment measures and/or new conditions under which they are taken and to classify them according to the proposed categories;

(iii) further the understanding of investment measures through the analysis of specific cases.

2. Dispute settlement would follow normal GATT procedures.

V. The advantages of such an approach to the negotiations

1. Such a framework would have the following advantages:

- it would allow a clear definition of the scope of the application of any discipline to be installed;

- it would focus the discussion on the effects of investment measures rather than on specific measures with the following advantages:

  (i) at the outset no measure would be, *a priori*, forbidden or allowed, but all measures would be submitted to some discipline, if they have trade distorting effects;

  (ii) the system would be open: any new measure would be submitted to the same discipline. The present discussion about an enumeration of TRIMs would be avoided;

  (iii) the system would be dynamic: any measure or category of measures could be submitted to negotiations at any time;

- the system would respect the sovereign right of a country to determine its own investment policy. The discipline to be installed would, however, prescribe how such a policy has to be implemented, so as to avoid, as far as possible, trade distorting effects;

- the system would allow the introduction of general GATT exceptions. Any special treatment based on the reformed general rules contained in GATT would apply equally to investment measures.