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Negotiating Group on Trade-Related Investment Measures

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# STATEMENT BY SINGAPORE

The following statement was made at the Group's meeting held on 10 July 1989, with the request that it be circulated to members of the Group.

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1. The Singapore delegation would like to react to the United States and the Swiss proposals contained in documents MTN.GNG/NG12/W/15 and NG12/W/16. Since those two proposals have just been made available to the TRIMs Negotiating Group, my comments should not be regarded as exhaustive. We reserve our position to come back to them in a subsequent meeting.

## Applicability of the General Agreement

2. Some general observations. My remarks may be repetitive of those that have been said at previous meetings, but in view of the substantive nature of the United States and Swiss proposals, my general remarks about the underlying intent of the General Agreement and on some specific GATT Articles that have been cited in previous discussions are necessary so as to look at these proposals from a proper perspective.

3. First, trade distorting and restrictive effects per se are not sufficient grounds for prohibition of a trade measure. Tariffs can be regarded as having trade distorting and restrictive effects; and yet the General Agreement has not outlawed them. They are considered as legitimate, though perhaps undesirable, forms of protection of domestic industries. Their reduction or elimination is to be negotiated resulting in a balance of rights and obligations among contracting parties. Similarly, neither dumping nor subsidies (other than export subsidies, but they are not applicable to the less-developed contracting parties) are prohibited. However, to the extent that they cause serious material injury to another contracting party, the other contracting party is permitted to take remedial measures to counter their adverse effects. In other words, only when distorting and restrictive trade effects give rise to material injury to the other party can remedial counter-measures be taken to redress the imbalance caused.

4. Second, GATT articles are rules which govern trade measures taken by contracting parties, not production measures. TRIMs are legitimate

government policy instruments to restructure the economy, to diversify production, promote local employment or upgrade the technological level of the economy. They are fully compatible with the Preamble to GATT:

> "Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods..."

5. The General Agreement recognizes that when a conflict arises between the reduction of trade barriers and certain overriding social and economic objectives, a trade-off is to be made. For example, Article XXI allows that strict compliance with GATT obligations could be waived if it is a question of security or of one's international obligations such as under the UN Charter for the maintenance of international peace and security.

6. Surely, investment measures that are essential to the promotion of social and economic development of the contracting parties concerned should not be given a lesser trade-off?

7. One heard of Article 9 (relating to export subsidies) of the Subsidies Code being cited in the discussion of TRIMs; but one should not overlook that Article 11 proceeds to state:

> "Signatories recognise that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable..."

8. There is some deliberate mixing up of subsidies and incentives during the discussions on TRIMs; but this is a matter which I shall take up separately. I am citing the above to show that due recognition and therefore a trade-off is inherent in the General Agreement.

9. Third, even if one were to assume and even agree that some of the TRIMs have trade distorting and restrictive effects, what if the investment conditions imposed are so stringent and uneconomical that the investors will be turned away? In that event, where are the trade effects? We need therefore to be clear as to whether we are looking at TRIMs in an ex ante or ex post facto manner. In this connection, I recall that the Nordic Group representative once remarked that the investors have the choice of accepting the investment conditions imposed before making their investment decisions. If accepted, then the investor will have taken into account the added costs or constraints in deciding to invest.

10. It is said (in the United States paper MTN.GNG/NG12/W/14) that, for example:

- incentives can induce investors to change the location of operations, thereby distorting trade flows from what they would have been in the absence of the incentive; or

- while local equity requirements are not clearly inconsistent with existing GATT Articles, they can have significant trade effects through the influencing of management decisions regarding imports and exports.

11. It is to be emphasized that the General Agreement does not deal with production measures or management decisions. If individual investment and management decisions are to be taken into account in our discussions on TRIMs then one must, as a corollary, examine the trade effects of investment practices of private enterprises. Presumably this is not the intention underlying the United States or Swiss proposals before us.

12. Fourth, it has also been argued, perhaps more privately than openly, that if TRIMs (or more specifically investment incentives) are allowed, then it will only work against the economic interests of the smaller and not so financially endowed contracting parties simply because financially stronger contracting parties could always outbid the smaller contracting parties in attracting investment. It is a rather amusing, but not convincing argument, because investment decisions are not made purely because of the prevalence of investment incentives. Other factors often play a more decisive rôle, such as political stability, quality of the work force, etc. Moreover, investment incentives can be compared to advertising. No one has banned international advertising in GATT, even if it may be deemed to be trade distorting. On the contrary, it is trade creation. Even here, a common sense trade-off is made.

13. Fifth, identification of the trade distorting and restrictive effects of TRIMs has so far often been conducted on the assumption that certain trade effects will follow given such and such a scenario. No doubt some proponents, the United States participant in particular, have put forward empirical evidence to justify their assumptions. However, this is very different from a panel proceeding such as in the FIRA panel report in deriving certain conclusions with regard to the consistency or inconsistency of certain trade measures. A panel is required to come to a unanimous conclusion based on exhaustive searching of evidence and legal analysis of the applicability of the GATT Articles concerned. I mention this because there is an expectation, as demonstrated by unilateral assumptions and interpretations of GATT Articles, that the TRIMs Negotiating Group should make a political decision or judgement on the nature of the TRIMs themselves. This is rather unacceptable from the law-making point of view in GATT. There is also a tendency to take a case-law approach in determining the inconsistency of some TRIMs such as by citing the FIRA panel report on local content requirements as being inconsistent with GATT rules. However, the same FIRA panel also concluded that export performance was not inconsistent with GATT. Yet, export performance requirements have been cited in practically all the proposals regarding TRIMs. I am pointing this out because firstly, I am not sure whether GATT has the practice of rule-making through a case-law approach such as by citing precedents set by past panel reports; and secondly, one cannot simply pick and choose only some aspects of a panel report to augment one's argument, while at the same time ignoring the other findings of the same panel report.

Some specific arguments

14. I have been somewhat lengthy in my general remarks, because it is important to lay out the premises and assumptions of the TRIMs Negotiating Group discussion in a proper perspective, given the intent of the General Agreement. It is important because we have a substantive proposal before us, i.e. the advocation of prohibition of TRIMs, or at least some of them. It is tantamount to law-making within GATT. To do so we need exhaustive discussion and clear understanding of what the implications of our actions are on the General Agreement and on the rights and obligations of the contracting parties, especially if we are to prohibit measures that fall outside the jurisdiction of GATT.

15. To illustrate, I may cite some specific GATT Articles.

(a) Article I will be violated if a specific trade measure discriminates between goods of different origin. However, just because some TRIMs have discriminatory trade effects would not be contrary to Article I. Article I deals with discriminatory trade measures, not discriminatory effects. Also, as Article I deals with border measures, it does not apply to TRIMs which are not border measures such as product mandate requirements.

(b) Article II is concerned with whether a government imposes additional charges on imports. The fact that a TRIM may increase the cost of importing is not a violation of Article II.

(c) Though it has often been cited that the FIRA panel report has found that a local content requirement is inconsistent with Article III, it has to be stressed that Article III deals with discrimination between imported and domestic goods. As such it does not apply to a manufacturing requirement which is a production measure, which falls outside the scope of the General Agreement.

(d) Article XI deals with restrictions on importation or exportation of products. It does not deal with the act of importing. Hence a manufacturing requirement which may constrain a company from importing is not against Article XI. Such a measure does not prevent the importation by the said company.

16. I am citing only a few Articles to demonstrate that there has been divergence on how participants here perceive the operation and the applicability of GATT Articles.

The Swiss Proposal (MTN.GNG/NG12/W/16)

17. One outstanding feature of the Swiss proposal is that it simply treats TRIMs as if they are subsidies, as demonstrated in the Swiss approach in classifying TRIMs into Prohibited TRIMs, Permitted TRIMs and Actionable TRIMs.

18. Second, it describes Prohibited Investment Measures as those that would cover "all measures which influence the business behaviour of the

investor during the production process and thus are inherently trade distorting". If the business behaviour of the investor is a primary consideration, would this imply that investment or production decisions should be looked into in examining trade effects on the other contracting parties?

19. Third, the Swiss proposal suggests that whether a TRIM be allocated as Prohibited or Permitted could become the subject of "a request/offer exchange of concessions" with a view to minimize the size of category C (i.e. those TRIMs which are actionable). It is not clear as to what this exchange of concessions means. Does this mean that the categorization of TRIMs is subject to negotiations and may shift from one category to another category and therefore a matter for political decision by the contracting parties, as opposed to a process which derives conclusions from legal analysis of the GATT Articles and their applicability? Or does this mean that the conditions contained in certain TRIMs are negotiable like Tariffs? For example, could one conceive negotiating reduction of a local content requirement from 70 per cent to 40 per cent over a time-bound period?

20. Fourth, and this seems to carry the most serious implications, the Swiss proposals suggest that "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."

21. There are two misgivings regarding such a suggestion:

(a) it would impinge on the national right to legislate laws; and

(b) what if the Committee is not in a position to make an immediate determination?

This proposal may have the Standards Code in mind; but it is a totally different matter if a contracting party is required to consult or seek approval from an external body before it can decide on its own investment or economic policy!

22. I would appreciate clarifications from the Swiss delegation on my comments.

Conclusion

23. In conclusion, I may say that during the discussions in this TRIMs Negotiating Group so far, there has been a singular absence of any reference by the proponents to the need of addressing the issue of material or serious injury that may form a justifiable basis for remedial measures to redress trade distorting and restrictive effects of TRIMs. As I said earlier, the concept of prohibition is applied to only those measures (such as quantitative restrictions) which run counter to the basic tenets and objectives of GATT. These are encapsulated in its Preamble: "... substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."

24. Prohibition is a serious matter; and prohibition of TRIMs would have far-reaching implications that go beyond GATT. In fact, the Punta del Este mandate for TRIMs does not speak of prohibition but elaborating, as appropriate, further provisions that may be necessary "to avoid such adverse effects on trade."

25. We agree that the trade distorting and restrictive effects of some TRIMs need to be identified. To the extent that the application of certain TRIMs has resulted in material and serious injury to another contracting party, we need to find remedial measures through perhaps a consultative mechanism. If unresolved, then resort to the GATT dispute settlement process may take place.

26. But this is far from prohibition.