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Group of Negotiations on Goods (GATT)
Negotiating Group on Trade-Related
Investment Measures

MEETING OF 10-11 JULY 1989

Note by the Secretariat

1. The Group held its eleventh meeting on 10-11 July 1989 under the Chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2801 was adopted.

2. Before the Group took up Item A of the Agenda, the representative of India stated his Government's deep concern regarding the action of the United States, on 25 May 1989, in identifying India and some other countries under the so-called "Super 301" of its Omnibus Trade and Competiveness Act of 1988. India had expressed its views on these developments in the GATT Council and elsewhere. However, the developments also had a direct bearing on the working of the present Group, and had the potential to undermine it. The United States had identified India for what it termed "unfair trading practices" in the area of Investment Measures. Specifically, it had stated: "Government approval is required for all new or expanded foreign investment in India. Approval is conditioned upon a number of criteria, including requirements for foreign equity participation. Where approval is granted, the Indian Government often requires investors to use locally produced goods in the items they produce in India, rather than allowing them to import the best quality and most cost-effective products. Some investors are also required to meet export targets. Such "performance requirements" burden foreign investors and result in significant trade distortions."

3. This action was totally arbitrary and unwarranted. It had vitiated the negotiating environment and raised serious doubts about the relevance and utility of the multilateral negotiating process. The pernicious part of this action lay in the fact that there was no certainty that the outcome of the multilateral process would be respected as the United States had reserved for itself the right to act bilaterally if the outcome did not satisfy it. India had doubts about the benefits and success of multilateral negotiations if such bilateral threats continued. Unless the multilateral negotiations were freed from bilateral threat and coercion they would lose their relevance and purpose.

4. A number of participants shared the concerns expressed by the representative of India. One said that the arbitrary and unilateral action taken by the United States limited his Government's ability to continue negotiations in the Uruguay Round and put the whole Round in jeopardy. He hoped that such action would be halted, as a minimum guarantee for

continuing negotiations in good faith. Two others considered the action to be a violation of the standstill commitment agreed on at Punta del Este.

5. The representative of the United States said his Government's general position with respect to Section 301 and its consistency with GATT obligations had been stated in recent GATT meetings. He reiterated his Government's intentions and expectations with respect to the request for negotiations on the trade-related investment policies of India. Domestic law required the Administration to identify negotiating priorities, and TRIMs was one of them. The Government's objective was to reach a satisfactory understanding, within the GATT context if possible, that would lead to trade liberalization on TRIMs. It intended to place a good deal of faith in multilateral procedures. Where the GATT provided a mechanism to address its concerns, it would consider using that approach. Where the GATT did not currently address those concerns but the matter was being negotiated in the Uruguay Round, the Round was the appropriate forum to pursue a negotiated solution. His Government might pursue separate bilateral consultations on the same subject, but its position in such consultations would be entirely consistent with, and in furtherance of, its objectives in the Uruguay Round. It was not, therefore, pursuing its objectives totally outside the framework of multilateralism. The intention was to pursue vigorously a Uruguay Round agreement on TRIMs, and his Government had every hope and reason to expect that agreements reached in the Round would fully address United States concerns on a broad range of trade matters, including TRIMs.

6. One participant hoped that, notwithstanding the developments being referred to, the TRIMs negotiations could be brought to a positive conclusion since only agreements entered into freely and with the full conviction of each participant in the negotiations would be valid and respected in the future.

I Item A of the Agenda

7. The Chairman noted that two new written submissions had been received shortly before the meeting, one from the United States and the other from Switzerland (contained in MTN.GNG/NG12/W/15 and 16, respectively). He invited participants to address any one or more of the five elements that the Trade Negotiations Committee had agreed should be integrated into the negotiating process, and to give their preliminary comments on the two new written submissions.

8. The representative of Singapore made a statement on the applicability of the General Agreement to TRIMs and provided also some preliminary comments on the United States and Swiss submissions. His statement has been reproduced in full in document MTN.GNG/NG12/W/17.

9. Two participants said that the statement of the representative of Singapore was fully in line with their own thinking. One added that he shared in particular the concerns expressed about the inclusion of the concept of prohibition in both the United States and the Swiss submissions. Prohibition in the context of investment measures was a serious matter with far-reaching implications that could go well beyond the GATT.

10. One participant welcomed the recognition in the statement by Singapore of the need for remedial disciplines for the trade restrictive and distorting effects of TRIMs in certain circumstances. However, the circumstances described were primarily related to injury which he believed were too narrow. He made the following comments on the five points raised in the first part of the statement on the Applicability of the General Agreement.

11. Regarding the point that the existence of trade restrictive and distorting effects was not sufficient grounds for prohibition, as was shown by the treatment of tariffs in the GATT, he said that the GATT prohibited some measures such as quantitative restrictions because of their inherent adverse trade effects. Quantitative restrictions were prohibited in his view because they tended to have discriminatory effects, because the amount of protection they conferred was not easily measured, and because once they were filled lower-cost producers could not easily surmount them. These criteria applied equally to TRIMs, and he believed therefore that certain TRIMs also should be prohibited. With regard to gauging adverse trade effects through material injury and applying a suitable remedy, he presumed such a remedy would be a countervailing duty of some kind and he was concerned about that approach. Countervailing duties violated GATT disciplines on non-discrimination and for that reason contracting parties tried to limit their application. Where a measure was inherently trade distorting, addressing the cause of distortion was a preferable approach to imposing an offsetting measure.

12. On the second point that GATT Articles governed trade measures, not production measures, that was true in general but not when clear trade distortion existed. For example, a GATT working party had concluded that a domestic production subsidy could impair a tariff binding, and Article III:5 prohibited the use of mixing requirements. Both of these were production measures that were addressed by the GATT because of their trade effects. It was correct to say that the GATT recognized in the Preamble the objectives of development and full employment, but it also recognized that certain trade measures should be disciplined and that some were preferable to others. TRIMs could have the same objectives as trade measures disciplined by the GATT, such as quantitative restrictions, and the GATT had a role in pronouncing some measures preferable to others because of their effects on the trade interests of other contracting parties and on the overall operation of the system.

13. On the third point that investors had the choice of accepting the investment conditions imposed before deciding to invest, the problem was that they would not take into account the trade interests of other countries when accepting a TRIM. Where, in particular, an investor accepted a TRIM along with an investment incentive it in no way indicated that the trade interests of other countries were being taken into account. Protecting those trade interests was the function of the GATT and of its rule-making process. On the fourth point concerning investment incentives, his delegation was reflecting on the argument that incentives should not be considered to be a TRIM per se. However, the difference between large and small countries lay not so much in the size of the incentive they could afford to offer as in the size of the domestic market. The larger the market an investor had guaranteed access to, the higher the cost he could

accept in the form of a TRIM. On the final point regarding the improper selection of individual panel cases, or parts of those cases, to buttress a point of view in the negotiations, he completely agreed. The Group's objective should not be to examine specific panel cases but to make rules to avoid the adverse trade effects of TRIMs; that was a political exercise and not a panel exercise.

14. One participant stated that his delegation was preparing a written submission and he outlined its major elements. The basic approach was that some investment measures had trade restrictive and distorting effects and the aim of disciplines for TRIMs should be to avoid those effects. Disciplines should be established on the basis of GATT principles. He recalled an earlier submission by his delegation in which a number of TRIMs had been identified as having adverse trade effects and classified into two categories: one category was inconsistent with GATT provisions and the other was related to GATT provisions. Other TRIMs should be examined further and classified accordingly, and measures applied both by central and local governments should be subject to discipline. TRIMs should be prohibited if they had trade restrictive and distorting effects and procedures should be agreed on to reduce or abolish them. The discipline of prohibition should not be undermined by "undertakings" between a host country government and foreign investors. Certain familiar disciplines should be applied to all TRIMs, such as non-discrimination, transparency, and notification. The same disciplines should apply to all countries, but transitional arrangements might be appropriate for developing countries. To avoid adverse trade effects, an effective mechanism for consultation and dispute settlement was needed, taking account of the provisions of Articles XXII and XXIII. It might also prove desirable to set up a surveillance body on TRIMs.

15. One participant stated that any agreement on TRIMs had to contain well-defined parameters that would bring about stability for the investment policies of contracting parties. Stability was important for policy-makers and for investors, since investment did not take place in an unstable environment. Proposals should therefore be examined from that point of view.

16. One participant stated that the main question for the Group was how to find a definition for TRIMs, given it was agreed that investment measures were not the subject of negotiation. Then it would be necessary to find a definition for trade distortion in order to differentiate TRIMs that should be subject to discipline from those that should not. The Group had not been successful in its search for these definitions so far, and a new approach was needed. The United States and Swiss submissions offered an opportunity to find a new approach. The Group should discuss the substance of what was wanted by way of disciplines and what sort of basic framework would be feasible. Definitions for the terms trade-related and trade-distorting could then emerge.

17. One participant considered it useful at this stage of the Uruguay Round to go beyond an examination of the trade effects of TRIMs and their coverage by existing GATT Articles, and to suggest frameworks for the structure of a possible agreement on TRIMs. In this regard he welcomed the submissions from the United States and Switzerland. The Group was tending

increasingly towards the kind of modulated approach that his delegation had suggested in the past, involving the elaboration of disciplines according to the intent and the adverse trade effects of different TRIMs. This required making a determination of which investment measures were TRIMs and categorizing TRIMs according to their trade effects. The Swiss submission stated that it was not possible operationally to make such determinations without taking account of the circumstances in which TRIMs were used, but the proposed approach of linking TRIMs with specific circumstances was not itself any more operational. He doubted that any two cases of TRIMs used in specific circumstances would ever be considered the same. His delegation had not yet spelled out the details of a modulated approach or the distinction that would have to be made between TRIMs in respect of the disciplines that should be applied, but it had put forward the criterion of "directly trade-related". This referred to investment measures that were intended to influence the trade behaviour of an investor, for which it should not be necessary to examine in detail whether the measures would have trade effects in specific circumstances. An example was export performance requirements that had no trade effect because the investor would have exported his product in any case, but the intention that they should have trade effects was what mattered. Where intent was not so clear-cut, the effects of investment measures became relevant.

18. One participant stated that progress in the Group had been difficult to achieve and it was clear that there were still wide differences between participants. With little over a year left in which to achieve the mandate for negotiations, it was time to look very carefully at what the CONTRACTING PARTIES wanted to achieve out of this Group and how it would be possible to do it in the time available.

19. The Group seemed to have been engaged in a lengthy circular argument which kept returning to a key area of disagreement: what were the trade-related aspects of investment measures and which TRIMs of those identified should be negotiated. It was time to look at the mandate from another angle. Its objective was clearly to avoid distortions and restrictions to trade that might be created by investment measures. Interests being harmed by TRIMs were, amongst others, the interests of other exporters to the market concerned; the freedom of investors operating in that market; the interests of consumers within the market (both through the price and variety of what was available and through what might <u>not</u> be available to them) and the interests of other traders in a third market. There was a large degree of coincidence between these interests and those which had guided the drafters of the GATT, but not in all cases. For example, there might be difficulty in dealing with circumstances where the interests of other traders in a third market were concerned. These similarities and differences should provide some guidelines for the Group's consideration of how TRIMs might be dealt with under existing GATT Articles.

20. Another key point in the negotiations had been the claim that it was each country's sovereign right to determine its own investment policy. There had been an implicit assumption that regardless of the trade effects of such policies they could not be viewed in the same way as trade policies that were addressed by GATT provisions. The objectives behind most governments' decisions to implement an investment policy tended to be a

desire to: attract investment in order to improve the health of the economy; protect existing domestic industry; encourage the development of a sound, diversified industrial base; increase exports in order to improve balance-of-payments figures; and introduce improved technology. These objectives were very similar to those cited for the introduction of trade policy measures: restrictions on imports might be introduced with the aim of the protection of a domestic industry and also with the aim of encouraging development of the industry behind trade barriers. Export incentives, in their various forms, were also designed to encourage the growth of the domestic industry and to improve the balance of payments. Where trade policy was concerned these objectives were not questioned by GATT, and nor should they be for investment policies. Nevertheless, the GATT did question the means by which the objectives were achieved, and contained provisions to ensure that policies caused minimum harm to the interests of trading partners. The provisions of the GATT either prohibited or circumscribed certain measures, or provided remedies to trading partners when there were clear cases of harm to the interests of others or distortions to trade patterns. Similar considerations should apply to the issues being negotiating in this Group.

21. It had become clear that investment measures could have significant adverse trade effects. They could act in a similar manner to quantitative restrictions on imports or to export subsidies, amongst other things. If such measures were government-mandated and had similar effects to the measures dealt with already under the GATT, it followed that the Group should assess whether similar methods of redress could be available to deal with the adverse effects of investment measures.

22. Rather than reaching agreement now on what TRIMs should be in or out, or whether a particular TRIM had a trade distorting effect in all cases, agreement should be sought on what effects were to be avoided and how they should be avoided. Later, once a negotiating framework was in place and criteria for establishing the application of disciplines were agreed, the Group should discuss which TRIMs should be dealt with in what way. Without knowing what sort of possible disciplines could be negotiated, nor what type of amendments, if any, might be required to GATT Articles, it was impossible for even two countries to agree on what TRIMs were relevant.

23. The same participant noted that several participants had touched on possible methods for dealing with the adverse effects of TRIMs. Two useful proposals had been made but there was much to be done in elaborating what was being suggested. The first step should be to establish criteria of both intent and effect for determining which investment measures should be subject to discussion. A number of options should then be explored simultaneously in deciding on possible disciplines to deal with the adverse trade effects of investment measures. These had to include: (a) the option of prohibition, to eliminate the adverse effects of TRIMs which were inherently trade distorting; (b) provisions for countermeasures to be taken if adverse effects did not occur in all cases where a TRIM was applied; (c) general principles of non-discrimination and transparency for all TRIMs; and (d) dispute settlement procedures to allow for a case-by-case assessment if the interests of a particular contracting party were threatened. The Group had not even begun to analyse what considerations needed to be taken into account in deciding on disciplines.

For example, there might be difficulty in determining injury in the case of certain types of TRIMs, and in deciding who had been injured. The fact that it was often the interests of traders in third country markets or other exporters to the host market tended to reinforce the arguments for prohibition in certain cases rather than dealing case-by-case where injury needed to be established. It had not yet been determined whether these problems could be dealt with through existing GATT Articles and it was clearly necessary to examine the question in some detail.

24. The corollary to looking at adverse trade effects and how to deal with them was to look at what investment measures were non-distorting. The Group should address the positive aspect as well as assessing what measures distorted and restricted trade. Nobody was disputing the right of governments to implement and maintain their own investment policies; nevertheless studies had shown that policies involving government-mandated TRIMs, which had direct or indirect negative effects on trade, might succeed in achieving their short-term objectives but in the long term often led to economic inefficiencies in terms of resource allocation, cost structures and so on. The Group could usefully consider what sort of investment policies would achieve the objectives commonly sought (i.e. encouraging investment, technology transfer, industrial development, and diversification of exports), but at the same time would remain substantially trade-neutral and ensure that investors could make business decisions purely on the basis of commercial considerations. The criteria of intent and effect of investment measures were again relevant. This could be one way of dealing with the special concerns of developing countries.

25. Other crucially important issues remained, such as transparency, the institutional mechanisms, dispute settlement procedures, and dealing with a transition period. Rather than continuing its circular arguments, therefore, and debating the scope of the mandate, the Group should start discussing how to proceed with a negotiating framework where there was at least the possibility of agreement. In this context, the submissions tabled at this meeting were particularly welcome.

26. One participant found it surprising that two-and-a-half years into the debate some participants still professed to harbour doubts as to what the Group was doing. In the view of his delegation, the effects on trade of certain investment measures were broadly comparable to and often similar to those of traditional trade policy measures. Where those effects restricted or distorted trade they fell within the kind of trade policy considerations that were at the core of the GATT system. In instances where such adverse effects were evident, it was appropriate to eliminate or minimize them through multilateral disciplines. This was recognized practice within GATT and it was based on the application of general rules, not on a case-by-case confirmation of trade effects.

27. One participant welcomed the approach to the negotiations taken in the Swiss submission and the fact that it covered all of the elements included in the Group's work programme agreed on in Montreal. He stated that he could support some of the ideas it contained. The way that the Group approached the problem of TRIMs was very important and it should look deeper into two of the points made in the Introduction to the Swiss

submission, namely that each country had a sovereign right to determine its own investment policies and that investment measures could have varied effects in different economic and regulatory situations. The Group needed to examine the relationship of TRIMs to international trade in general and to the global monetary and financial situation, as well as to the situation in each individual contracting party so that account could be taken of differences in import and export capacities. In that way the need for certain measures, such as TRIMs, could be properly brought out. If those participants favouring strict disciplines on TRIMs would take account of other countries' economic situations and the fact that some investors were looking for investment opportunities in those countries, they would realize that it would be difficult for them to find a consensus in the negotiations with countries in difficult economic situations whose position with respect to the international division of labour was fundamentally different.

28. The Group should look at the problem, therefore, in the light of the economic interests of all countries, not just a few. It should adopt an approach that took account of the differences in interest and not one that entrenched them further, and one that might lead to positive solutions and not concentrate attention only on solutions stipulating what countries could not do in their economic development policies. TRIMs could have varied effects on trade, depending on the different economic situation in each country. Some TRIMs might limit trade when applied in countries with a high export capacity, a convertible currency and a surplus in capital, but in a country in opposite circumstances they could increase trade. The negotiations would succeed only if their results helped growth and economic development for all contracting parties, because only then would trade develop.

29. One participant stated that the subject under negotiation was not investment, investment policies or investor behaviour. It was, to begin with, an identification of TRIMs, focusing on those measures with direct and significant trade effects. A number of TRIMs had so far been identified and comments had been made on the way they operated and the impact they might have on trade. The work programme called for a step-by-step approach, and the logic of that approach must be followed if further progress was to be made. Once the identification of TRIMs relevant to the work of the Group had been made, the next stage would be to identify which TRIMs produced trade restrictive and distorting effects and under what circumstances they produced them. Some ideas had been put forward on the possibility of using an injury test to determine which trade effects were restrictive and distorting, and that approach could possibly be explored during this stage of the Group's work. The next stage would be to examine how existing Articles might be relevant and might apply to any adverse trade effects of TRIMs identified; his delegation had stated earlier which Articles it believed might be relevant. Once that stage had been completed, and if the Group considered that some specific adverse trade effects were not adequately addressed by existing Articles, the Group could look, as appropriate, at the possibility of formulating new rules.

30. Attempting a quantum jump in the negotiations, which sidestepped some of these issues in order to get to the rule-making stage, could have serious and dangerous implications. It was unacceptable to attempt to evolve a code or multilateral agreement on TRIMs without any reference to

how the GATT was able to deal with their trade restrictive and distorting effects. The Group had to begin with the direct and significant adverse trade effects of TRIMs and the extent to which these were addressed by existing GATT Articles, rather than with the broad relationship between investment, production and trade. Some progress had been made, but the fact this did not measure up to the expectations of some participants did not entitle them to skip over essential elements of the work programme, ignore the mandate, and attempt to evolve a GATT agreement on TRIMs. Investment measures, particularly those applied by developing countries, were economic policy instruments directed at national social, industrial and technological objectives. Those objectives addressed concerns about achieving technology transfer, avoiding excessive balance-of-payments pressures, correcting distortions arising from the restrictive business practices of foreign investors, dispersing economic power to achieve a more equitable distribution of economic wealth, and so on. The foreign investment policies of developing countries were directed at development objectives that emphasized modernization, upgrading of technology and international competitiveness. In developing countries, inflows of foreign capital often played only a small role in upgrading production and technology unless the government actively channelled the capital and imposed certain conditions to ensure that desired results were forthcoming. This was especially true in view of the weak and sometimes ineffective bargaining position of licensees and industrial partners in developing countries and in view of the restrictive business practices of private foreign investors. It was to combat practices such as transfer pricing, export prohibition, and tied selling that host governments had to introduce restrictions such as local content, manufacturing and export performance requirements.

31. One participant expressed doubts about the direction that negotiations were taking. His delegation had pointed out repeatedly that the primary task of the Group was not to establish a comprehensive agreement on TRIMs. In fact, the nature of that task was not primarily normative. The first task was to identify trade restrictive and distorting effects of investment measures covered by existing GATT Articles. Other elements would require consideration, but only later. His Government remained convinced that existing disciplines were adequate, and it would not like Article XVIII or Part IV of the GATT to be undermined by any normative exercise undertaken in this Group. It would not be willing to accept further obligations that would imply any limitation whatsoever on its ability to pursue public policy objectives, especially in promoting social, economic and technological development. The Group had not yet undertaken adequately its identification exercise, and completing it was a prerequisite for negotiating other elements of the mandate.

32. One participant made a proposal on the procedure for work in the Group. She stated that attempts by participants to identify the trade restrictive and distorting effects of investment measures so far had been theoretical and general in nature, based on assumptions rather than on what occurred in practice. While the Group might recognize that some measures might have adverse trade effects, it had not reached a definitive decision on the existence of those effects, their size or their scope, or the circumstances in which they occurred. It had not carried out a collective, systematic exercise to identify the trade effects nor to determine the

relationship to GATT Articles. It was premature to begin drawing up categories of TRIMs or of possible disciplines until exactly which adverse trade effects were of concern to all had been identified.

33. In view of all the measures that had been cited, it did not seem practical to carry out an exhaustive examination of each TRIM. To expedite work, therefore, and to avoid lengthy discussions on the scope of investment measures that were considered relevant, her delegation proposed that the Group undertake a testing procedure, similar to that being carried out in the services negotiations, on two pilot TRIMs. This experimental exercise would not prejudge the outcome of the negotiations, but would allow the Group to systematically identify trade restrictive and distorting effects in the light of the elements agreed on in Montreal, and help to deal in a practical way with the implementation of any improvements in this field and to advance work to the operational phase.

34. The first step would be to choose, by consensus, two pilot TRIMs. These should be representative of those cited so far, and might include one which some delegations considered to have clearly detectable adverse trade effects and another where the trade effects were much less clear. Export performance requirements and local equity requirements might, for example, be selected, but whatever selection was made would not prejudge the position of any participant with respect to the measures nor affect the importance given to other measures. The Group would then identify the effects of those measures, whether they were restrictive and distorting, whether there was a clear relationship of cause and effect, and whether the effects occurred automatically or only in certain circumstances such as particular macroeconomic conditions. The analysis would be carried out using factual data and, as far as possible, criteria would be used to quantify the effects of the measures. The technical assistance of the Secretariat could be sought. Then, the Group would examine what legal measures were necessary to avoid the adverse trade effects of the TRIMs and whether existing GATT Articles were sufficient or not. If existing GATT Articles were found insufficient, the Group could examine proposals for modifications to them or for any pertinent additions. The Group would examine the trade effects in the light of development aspects of the measures. It would examine the importance of the measures for developing countries to achieve their economic development objectives, especially to transfer technology, to avoid balance-of-payments problems, to assist priority sectors, or to combat restrictive business practices. Account would be taken of all the principles contained in Article XVIII and Part IV. The modalities of implementation would be determined at a later stage.

35. The Chairman asked participants to reflect on this proposal and said the Group would come back to it at its next meeting.

Detailed comments on the submission by the United States (MTN.GNG/NG12/W/15)

36. The representative of the United States introduced and summarized the submission. He said that the submission was a proposal for discussion. It built on past work in by the Group on the trade effects of TRIMs and their relationship to the GATT. It presented a conceptual outline of how an

agreement on TRIMs could be structured. He hoped that the Group might endorse and build on the elements it included in drafting a comprehensive agreement.

37. Section II-A of the submission identified three categories of adverse trade effects produced by TRIMs. He did not assume that these were their only possible adverse trade effects. The previous United States submission had tried to analyse adverse trade effects as completely as possible, but other participants might have carried the analysis further.

38. In Section II-B, two categories of discipline were proposed. The basic criterion chosen for organizing TRIMs by category of discipline was "inherent trade distortion" because this notion reflected established GATT practice better than other qualifiers such as "significant" and "direct". The common feature of prohibited practices under GATT was that they inherently had trade distorting effects. The GATT prohibition on quantitative restrictions, for example, applied regardless of whether a particular quota produced demonstrably significant trade effects. Regulations that had the effect of favouring domestic products over like imports were also prohibited, even though their effect on imports was arguably more indirect than direct.

39. The United States considered some TRIMs to be already prohibited under GATT, such as local content, trade balancing and manufacturing requirements and certain combinations of TRIMs such as local equity requirements combined with local content requirements. In addition, the United States believed that certain TRIMs which were not clearly covered by GATT Articles, such as export requirements, should also be prohibited because of their inherent trade effects. The submission did not set out which specific TRIMs should be prohibited, but rather proposed that the Group elaborate an illustrative list of TRIMs as a means of clarifying the scope of the prohibited category. This was because the United States believed the Group should first try to reach a basic understanding about the structure of appropriate disciplines, and then undertake the task of clarifying the scope of such disciplines.

40. It was also proposed that the prohibited category of disciplines apply to domestic as well as foreign investors and regardless of whether TRIMs were used in conjunction with incentives. In the United States view, an export requirement had the same distorting effect on trade flows whether it was imposed on domestic or foreign investors. Regarding the use of performance requirements in combination with incentives, such combinations were particularly trade distorting because the investor was rewarded for complying with trade distorting practices.

41. The United States had been persuaded by the arguments of some other participants that disciplines other than prohibition were appropriate for TRIMs. Included in the proposal, therefore, were two kinds of disciplines for TRIMs which were not inherently trade distorting.

42. The representative of the United States posed two questions for the Group: (1) What are the basic obligations that should be included in a TRIMs agreement? (2) How should an agreement allow for development considerations and ensure that developing countries participate fully in

its application? The submission did not completely answer these questions, but he hoped it brought answers a step closer.

43. One participant stated that the thrust of the Unites States submission was that where there were clearly demonstrable direct, significant and distorting trade effects arising from performance requirements imposed on an investor, they should be subject to appropriate GATT disciplines. His delegation concurred with this objective, even if it did not endorse every specific evaluation of the trade restrictive and distorting effects of TRIMs. The submission therefore pointed the way towards the next and substantive step in the negotiations. His delegation would need to reflect on the arguments and conclusions presented in it, and on the structure for a set of disciplines on TRIMs which it suggested. On first reading, the proposal seemed to outline all the key elements which needed to be addressed in achieving a substantive result from the Group's work. Resisting the temptation to elaborate illustrative lists, it opened the door on a discussion of these elements and on the attendant criteria, without first polarizing participants as to what would be disciplined and how. His delegation was attracted to the approach to developmental considerations contained in the submission because it would ensure maximum participation by all contracting parties in the negotiations and in their outcome, both of which were major objectives of the Round. Transparency provisions were essential to ensure respect for any agreement reached, as were mechanisms to enforce the rules agreed on and to resolve disputes which might arise. All occupied important places in the mainstream of the GATT. His delegation presumed that the countermeasures mentioned in the paper were intended to be an integral part of the dispute settlement mechanism and not separate from it. In sum, the submission was a constructive and appropriate guide to future work.

44. On the Title of the submission, one participant stated that the Group's task was not to negotiate a comprehensive agreement on TRIMs; it was primarily one of clarification of the adverse trade effects of investment measures and the application of GATT Articles, and consideration of what further clarification or elaboration could be provided if it was found that the effects were not dealt with appropriately. Another asked whether the reference to a comprehensive agreement on TRIMs reflected an expectation that a Code would result from the negotiations. One participant stated that her delegation had no problem with the concept of negotiating a comprehensive agreement on TRIMs. The representative of the United States replied that to question the title of the submission was to look too narrowly at the mandate of the Group; it was clearly within the mandate to work on an agreement to discipline and prevent the adverse trade effects of TRIMs. As to the best legal form for an agreement on TRIMs, he had no precise idea yet what that might be.

45. On Sectior I, Introduction, one participant said there was general agreement that investment measures could have trade effects, but so far there was no agreement on what criteria should be used for determining adverse trade effects nor which specific measures might have such effects. It was therefore important to continue work on the identification of the trade effects of specific TRIMs and of the ways in which they might be disciplined in the GATT. Two participants disagreed with the claim in the submission that the Group had satisfactorily addressed the first two of the

five elements of the work programme endorsed by Ministers at Montreal, and stated that the process of identification called for in those two elements needed to continue. One added that he agreed no priority had been established for any of the five elements, but said it was premature to move on to consider the means of avoiding adverse trade effects since none had yet been identified definitively by the Group and the examination of the coverage of existing GATT Articles had not been completed. The statement that TRIMs were often used in an ad hoc, non-transparent and discriminatory manner was not helpful in moving work forward since investment measures and policies were basic instruments used to assist the development process and for that purpose they had to be applied in a particular manner. One participant said the statement in question provided an indication of the nature of the problem and a basis for considering appropriate disciplines. Another participant considered that disciplines to ensure TRIMs were applied in a transparent and non-discriminatory manner would be important but not sufficient to deal with the problems that had been identified; additional disciplines would be necessary. The representative of the United States said that it should be possible to take up some of the issues relating to the further identification of the trade restricting and distorting effects of investment measures in the context of the proposal to elaborate illustrative lists that was contained in the submission.

46. On Section II-A, General considerations, one participant stated that the existence of the three categories of adverse trade effects had not yet been clearly demonstrated. One participant said that all investment measures could have the kind of trade effects described and further criteria were needed to identify those with trade restrictive and distorting effects. He asked whether the United States still considered an investment incentive to be a TRIM. One participant considered the third category of adverse trade effects (reduction of exports) not to be central to the exercise. Another participant said the Group should not focus exclusively on government-mandated investment measures; investment measures and practices of market operators should be covered and a fourth category of adverse trade effects, "increase of imports", should be added. The representative of the United States said that in his view private business behaviour was not covered by the Group's mandate but he would be interested in any presentations made on this point.

47. One participant stated that with regard to the proposal that "a GATT agreement on TRIMs should include disciplines adequate to eliminate or minimize the adverse trade effects of TRIMs", the Group's task was to clarify GATT Articles and not to negotiate a GATT agreement on TRIMs. Any trade effects of TRIMs were purely incidental since investment measures were not intended to ensure the promotion or the smooth flow of trade. Any new rules should be targeted at their adverse trade effects and not at the investment measures themselves.

48. One participant aid that the problem was how to establish when adverse trade effects occurred. One approach was to refer to market shares, but he cautioned against using the traditional market share concept used in GATT when looking at TRIMs. It was rather third country market shares that were at issue. This might be thought of as one country's rightful share, and any measures taken to increase or decrease it might be equated with trade distortion. The questions then were whether this concept would work and

whether or not it would conflict with the traditional GATT concept of injury which related to domestic industry, since measures to encourage local production would not cause injury to domestic industry but rather to industries in third countries. Related to this was the problem of establishing the causal link between a reduction in imports or increase in exports and injury. One participant disagreed that market shares or the concept of injury could be the appropriate criteria for judging whether investment measures had adverse trade effects; in his view, the criterion should be nullification or impairment of GATT rights and benefits, and the causal link between investment measures and nullification or impairment was crucial. He also asked for clarification of the term "provide relief" in relation to disciplines on TRIMs. One participant agreed with the submission that disciplines should be adequate to ensure that TRIMs did not nullify or impair GATT benefits, and felt it should be spelled out further that they should ensure TRIMs did not have the effect of denying most-favoured-nation or national treatment, of undercutting tariff concessions or of otherwise causing nullification or impairment. The representative of the United States said that changes in market share or trade patterns were not a satisfactory test for trade distortion caused by TRIMs. TRIMs were usually imposed on an ad hoc and firm-specific basis, so they could have a distorting effect on a firm's business which might be hard to track through market share analysis. Using a test of nullification or impairment for identifying trade distortion was too vague an approach. The GATT concept of nullification or impairment was extremely broad and it would be necessary to specify more precisely what contracting parties' obligations were with respect to TRIMs.

49. On Section II-B, Proposed disciplines, one participant agreed with the two possible approaches put forward. They were not mutually exclusive options, and both could usefully be employed. One participant considered the two approaches merited further examination. Another enquired whether the disciplines being proposed in the submission would be rule- or principle-based.

50. One participant stated that the discipline of "prohibition" was controversial and sensitive in the area of TRIMs, but it should be examined in great detail as a possible approach. As a first step the Group should not go beyond applying to TRIMs the GATT prohibitions that existed already on certain behaviour. It might prove difficult then to apply the concept to the "reduction of exports" category of trade effects since it had been apparent from earlier discussions that it was more difficult to relate this trade effect to existing GATT Articles. One participant asked whether the discipline of prohibition would be established by form, by p[illegible] by effect. The GATT seldom established an absolute prohibition [illegible]y prohibition was balanced with exceptions, as in the case of [illegible]II and XI. He asked, therefore, whether measures taken in accordance with specific Articles of the GATT such as Article XVIII:B, and which were per se consistent with the GATT, would be prohibited under the proposal.

51. One participant stated that the discipline of prohibition was a very ambitious goal. His delegation had indicated in an earlier submission which TRIMs it believed qualified as those with inherent trade effects, and with the exception of export performance requirements it considered that they were all covered already by existing GATT Articles. For those

measures, the Group should concentrate on ensuring that general GATT principles and disciplines applied effectively. Those included principles such as national treatment, and also normal GATT exceptions which modified somewhat the concept of outright prohibition which the United States seemed to be seeking for a broad range of measures. One participant said that it was difficult to enter into detailed negotiations using an approach based on the prohibition of TRIMs on the grounds that they were inherently trade restricting and distorting. Every investment measure of an establishment or operational nature had trade effects of some kind. One participant expressed serious concern about the proposal for prohibition. The Group could not take an a priori position that the existence of trade restrictive and distorting effects of TRIMs was sufficient to warrant the prohibition of investment measures, and it was worrying to see prohibition proposed for precisely those measures that had strong development and investment effects. Negotiations should focus on ways of reducing the adverse trade effects of TRIMs and not on the prohibition of the measures themselves. One participant said that there were certain cases of prohibition contained in the GATT, although in all of those cases exceptions to the prohibition existed. The GATT dealt only with trade flows, and the prohibition of investment measures would be outside the scope of the mandate and beyond the competence of the GATT. Another participant also accepted that the concept of prohibition was not alien to GATT, but stated that it only applied to trade measures or to measures taken to intervene in merchandise trade flows. The scope of application of the concept could not be expanded to cover investment measures. The Group should avoid the route of prohibition since his delegation could not accept the elaboration of rules to prohibit investment measures.

52. Replying to the comments on the proposed discipline of prohibition, the representative of the United States said that the approach taken in the submission had been to sidestep the philosophical issue of whether it should be based on form, purpose or effect and to propose instead that if a TRIM was designed to change trade patterns and the way a firm behaved it should be considered inherently trade-distorting in both purpose and effect and therefore prohibited. It should not be necessary to see whether there was a measurable trade effect before prohibiting a TRIM. For example, Article III prohibited discrimination without the need for evidence of trade effect. The same concept of prohibition, which was a blend of purpose and effect, should be applied to TRIMs. Also, Article III went well beyond trade measures and prohibited other measures which per se would have an effect on trade if they were used discriminatorily. He accepted that prohibition was balanced by exceptions in the GATT, but could see no clear basis for exceptions in the case of TRIMs. Article XVIII concerned restrictions on the quantity or value of imports, which did not correspond to the description of TRIMs. TRIMs such as local content and export requirements caused discrimination and in his view that was not covered by the provisions of, for example, Article XVIII:B. One participant responded that the comments of the representative of the United States on Article III illustrated a conceptual problem. Article III established an obligation to extend to foreign products treatment that was no less favourable, but not necessarily identical to national treatment. The way to establish what was no less favourable was to examine trade effects, and that had been the practice of GATT dispute panels. Trade effects were more or less what was meant by nullification and impairment under Article XXIII. As a result, it

could not be said that the obligations of Article III disregarded the trade effects of a measure.

53. With regard to the category "other disciplines", one participant stated that negotiations should concentrate on this category since it had not been established that any investment measure had trade restrictive or distorting effects in every case. Discussions so far pointed to the conclusion that the elaboration of useful disciplines on TRIMs had to be based on a case-by-case approach to avoiding certain adverse trade effects. The proposal of a commitment to use TRIMs only in ways that did not produce adverse trade effects provided a reasonably useful approach, particularly if related to the concept of nullification or impairment; once nullification or impairment had been proved, there was some room for the elaboration of general disciplines. However, he rejected the proposal of a commitment to use TRIMs only on a non-discriminatory basis, since investment measures that had in practice no trade effects became entirely an investment issue, outside the coverage of the negotiations. One participant stated that a major difficulty with TRIMs was that their trade effects could vary greatly with the circumstances and it seemed that the majority of them could fall into the category defined by the United States as needing to subject to "other disciplines", requiring a case-by-case approach. Of these disciplines, non-discrimination was key; so too was transparency, since it was fairly common for TRIMs to be applied ad hoc on the basis of broad enabling legislation. Taken together with the requirement of discipline on a case-by-case basis, the need for transparency was underlined. He agreed that the application of incentives could in no way justify the use of TRIMs; measures labelled as "voluntary" could be just as damaging to third party interests as more direct legislation. At the same time, his delegation believed that the issue of investment incentives as such did not belong in the work of this Group; work should concentrate on the associated TRIM. One participant stated that the proposal that disciplines should ensure TRIMs did not produce adverse trade effects was useful but needed elaboration. Another participant also considered that this was a useful section of the submission, and agreed on the need to ensure that TRIMs were applied non-discriminatorily and in ways that did not produce adverse trade effects. The representative of the United States said that his preferred discipline for TRIMs was straightforward prohibition and he would put the burden of proof that other effective disciplines were possible on those who claimed that a TRIM could be designed in such a way that it would have no adverse trade effects.

54. One participant noted that the proposal referred to "countermeasures of equivalent commercial effect" being permitted where adverse trade effects persisted. He asked who it was envisaged would suffer adverse trade effects, the domestic industry of a third country or an individual firm or investor, and what kind of countermeasures were envisaged, TRIMs for TRIMs or something different. Another participant agreed that some counter- or remedial measures should be available to contracting parties whose interests were harmed, but considered more clarification was needed on this issue. In particular, how might affected parties take countermeasures of equivalent commercial effect, how should equivalent commercial effect be determined, who would make the determination (the country affected or a panel of some sort), what might the measures be, and

could countermeasures be applied only after dispute settlement or in advance of that on a unilateral basis? One participant said that it seemed countermeasures would be of a quite different nature to those currently available under the GATT or the MTN Codes, and asked for clarification on all the questions asked by the previous participant as well as when, in terms of the investment process, could countermeasures be taken, how would they be justified, and how would they be subject to scrutiny under the GATT. One participant also asked for clarification of the concept of countermeasures. Another participant said it was conceivable to view countermeasures in the light of GATT rules releasing a contracting party from certain obligations, but not as involving retaliatory measures that were not sanctioned by the CONTRACTING PARTIES. The representative of the United States said the question of countermeasures raised difficult issues. Countering a TRIM with another TRIM was clearly not the answer, since countries which did not use them would not want to distort their own economies by introducing them. Also, countries applying TRIMs might not have their own direct foreign investment to which such a countermeasure could be applied.

55. One participant asked for clarification on the nature of and the role that would be assigned to "illustrative lists"; were they only concepts within the framework of the negotiations, would they remain illustrative rather than definitive in any final agreement, and would they be open-ended so that they could be added to at a later stage? Another participant also asked what final status they would have. While there were possible dangers in to illustrative lists, they might be hard to avoid. However, they should not substitute for basic criteria on which to establish general disciplines, and those criteria should be determined by looking at a combination of the purpose and effect of the investment measures that were under discussion. One participant stated that a negotiating approach based on an illustrative list of prohibited measures to discipline TRIMs was unlikely to capture all of the various trade distorting permutations of the measures, so it would be be difficult to reach agreement in the Group on the inclusion of specific measures in the list and on the status and scope of application of the list. One participant considered that the elaboration of illustrative lists was the wrong approach and would create confusion. The work programme called for the identification of the adverse trade effects of specific investment measures and the Group had not yet satisfactorily addressed that issue. The representative of the United States said that the lists should be purely illustrative. Disciplines should be based on general criteria, such as the inherently trade distorting nature of TRIMs, and illustrative lists could then be drawn up with specific examples of TRIMs that were subject to specific disciplines. In that way any new measure that was devised could still be caught by the discipline even if it did not appear on an illustrative list.

56. On Section III, Development Considerations, one participant supported the proposal to have the same set of disciplines for all countries with transitional arrangements for developing countries. One considered transitional arrangements to be very important. Another participant agreed that the same set of disciplines should apply to all countries, that the special circumstances of developing countries and especially during a transitional period, were very important, and added that development considerations could not be decided upon in advance of knowing what

disciplines were to apply. One participant attached importance to development considerations and considered transitional arrangements had a role, especially for individual developing countries when it came to the implementation of a TRIMs agreement. He looked forward to more ideas and suggestions with respect to developing countries' concerns.

57. One participant rejected the basic approach taken in the submission with regard to development considerations. It took the position that TRIMs had a predominantly trade aspect and that their development and investment aspects had still to be proven; in fact it was their trade aspect that was still unproven. One participant expressed concern over the proposal that disciplines on TRIMs should apply to all contracting parties regardless of their level of economic development. All GATT rules were applied according to basic GATT principles, among which was the principle of special and differential treatment. His delegation would like to be clear on the kind of rules that would be agreed on first, and then consider what kind of qualifications would be needed for developing countries. In this regard he was not suggesting that development considerations should be left until the end of the negotiations, but that their nature depended upon the kind of issues addressed. Developing countries did not expect to achieve their development objectives through negotiations in this Group, but there was concern that any rules or disciplines proposed might impinge on or prejudice the sovereignty of governments in pursuing their development policies through the administration of their investment regimes. He rejected the notion of the Group agreeing first on general rules and disciplines and then addressing development considerations in the form of exceptions. Exceptions, such as for safeguard or balance-of-payments purposes, applied to any contracting party in exceptional circumstances, but development considerations were not a matter of exceptions. One participant emphasized that investment measures were used in developing countries for socio-economic and development purposes. TRIMs should be looked at, therefore, from this perspective and their development aspect should be taken into account in the negotiations from the outset and not addressed solely through possible exceptions to disciplines or through transitional arrangements. Transitional arrangements in particular did not provide an adequate approach because such arrangements would apply equally to developed countries. Another participant stated that development aspects of the subject had to be integrated into the negotiations and providing for transitional arrangements was not an appropriate approach.

58. On Section IV-A, Transparency, one participant considered the analogy to Article X requirements useful, except for the reference to the administration of measures in an "impartial and reasonable manner"; that had been designed for, and was acceptable in, the case of trade measures but not investment measures since it would not achieve clarity and it would interfere with the administration of investment policies. In general, rules and disciplines that were designed for trade measures could not be extended automatically to investment measures since these were applied typically on a case-by-case basis. Who would judge, for example, whether a technology transfer requirement had been applied in an impartial and reasonable manner? One participant considered the provisions of Article X to be a bare minimum for dealing with the problems raised by TRIMs and agreed with the submission on the need for full notification requirements.

She expressed concern at the statement of the previous participant on the inapplicability of the reference to impartial administration to investment measures. One participant idered the elements mentioned in the submission were generally useful, and agreed that high standards of transparency in the case of TRIMs were needed, since they were often employed in an untransparent manner. One participant stated the idea of maintaining tribunals was a good one and asked whether a special tribunal was envisaged, separate from the judicial or administrative system, or an on-going domestic body. He added that effective notification requirements for TRIMs required a clear-cut definition of the term trade-related; otherwise, they might result in all investment measures having to be notified and then becoming subject to challenge. The representative of the United States said that the proposed tribunals were nothing other than those envisaged in Article X. A higher level of transparency for TRIMs was very important because many TRIMs were applied on a case-by-case basis. A conflict might arise between GATT transparency requirements and the provision of what private companies might consider to be confidential information, and the Group should examine how to reconcile that potential conflict.

59. On Sections IV-B and C, Enforcement, dispute settlement and transitional arrangements, one participant stated these matters would probably have to be addressed only after a clear idea had been gained on the scope, framework and disciplines of an agreement on TRIMs. Two participants endorsed the importance of these issues and the need to elaborate on them. One participant considered that existing rules for consultation and dispute settlement should apply, after taking account of their strengthening during the Uruguay Round.

Detailed comments on the submission by Switzerland (MTN.GNG/NG12/W/16)

60. The representative of Switzerland introduced the submission. In addition to providing a summary of its contents, he made the following remarks.

61. As a leading foreign investing country, as well as a significant host country for foreign investments under a liberal policy, Switzerland was convinced of the merits of foreign direct private investments for a worldwide efficient allocation of resources and for growth and development.

62. The importance of TRIMs as a trade-distorting element might be underestimated and many of their trade-distorting effects might not be accounted for, since TRIMs were related to voluntary arrangements and were therefore perceived, rightly or wrongly, as less constraining than some other trade restrictions being addressed in the Uruguay Round. There existed, moreover, a dynamic element in TRIMs which made it very important that they were submitted to clear GATT discipline. In the first place, strengthened disciplines and surveillance which it was hoped would result from the closing of major loopholes in the present contractual arrangements during the Round might incite governments to increasingly use TRIMs as a protectionist measure in the absence of enforceable disciplines over them. Secondly, new trading forms, such as buy-operate-transfer contracts, management and risk sharing contracts, made trade and investment more

difficult to distinguish. It was probable that such new trading forms were becoming more and more frequently used, and that they would lead to new forms of TRIMs, the nature and effects of which could not yet be grasped fully. Thirdly, the increasing interdependence between different aspects of international economic relations was leading to new cooperative economic agreements which combined finance, trade and investment. Such combinations of incentives and preferential treatment in various fields might create new and unforeseen distortions in trade. Thus TRIMs might, in the absence of an operational legal framework, become more and more distorting factors in trade.

63. One of the main difficulties was defining the scope of application of disciplines for TRIMs. The problem of distinguishing TRIMs from general investment measures was difficult given that any investment policy had an effect on trade. The issue was to distinguish government-mandated investment measures that affected trade from those that not only affected trade but also distorted and/or restricted trade. The effects of investment measures on trade were also varied and difficult to predict. The discussion on which investment measures had trade distorting effects and therefore had to be disciplined by GATT and which ones were not trade distorting and therefore fell outside the GATT framework could not lead to operational solutions. However, Switzerland believed that agreement should be possible on which investment measures were likely and which were unlikely to have trade restrictive and distorting effects, and under which trade and macroeconomic conditions a specific TRIM was likely or unlikely to have such effects. Proposals on GATT disciplines and a negotiating framework for TRIMs, and for a Standing Committee and for dispute settlement, were contained in the submission.

64. Participants said that their comments on the Swiss proposal were of only a preliminary nature. One said the Group had not yet finished its task of identifying measures for negotiation and there was therefore no concrete basis for proceeding further to categorize measures or elaborate disciplines. One participant stated that the proposal reflected a flexible and pragmatic approach which should be examined from the point of view of the degree of stability it would bring to investment policy-making in contracting parties since the issue of investment went well beyond the matter under discussion in the Group. One participant said that it provided a logical and attractive framework for negotiations. He was basically favourable to a framework as comprehensive as this, but further work was necessary to improve it, make it workable and make sure it conformed to the GATT. One stated that the proposal was welcome for placing much needed emphasis on the negotiating framework. One said that the proposal was a good basis for discussions since it moved the work of the Group in the right direction by providing a bridge between those participants favouring a maximalist approach to TRIMs and those favouring a case-by-case approach. Implementing the proposal would be complicated and involve a lot of work, but it would establish a process that could continue after the Uruguay Round, particularly with regard to the identification and appreciation of changing circumstances in which TRIMs were used. One liked the objectives of the proposal and agreed with the advantages that it was claimed it would have, particularly its focus on an open and dynamic system that would respect sovereignty over investment policies. One participant welcomed the flexible approach proposed in the submission and said that he

could envisage how substantive negotiations could develop on the basis of it.

65. One participant said the Swiss submission was an innovative and technically elegant contribution to the work of the Group. It would require an expert consideration of its intricacies. As a preliminary observation, its suggestion for a categorization of TRIMs was not dissimilar in intent to that set out in the United States submission and his delegation wondered at the introduction of a "non-actionable" category given the presumption that what was not expressly prohibited or actionable obviously must be permitted. The core concept of classification of investment measures according to the interface between investment policy measures, macroeconomic conditions and trade conditions was a technically challenging and theoretically attractive approach to the problem of categorization. A question remained, however, about the ease with which workable and practical categorizations would be possible given the myriad of combinations suggested by the model. The model also seemed to suggest that the same investment measures could move among categories pursuant to changes in either regulatory or macroeconomic environments. His delegation would be interested in an elaboration of how this would work in practice since it seemed to imply a continuing review of past categorizations, which held obvious implications for policy-makers and market operators.

66. On Section I, Introduction, two participants agreed with the problem identified of distinguishing TRIMs from investment measures. Three participants welcomed the acknowledgement that "each country has the sovereign right to determine its own investment policy". One participant found the second indent in paragraph 2 confusing, since it seemed to suggest that negotiations were leading to GATT obligations on investment aspects of investment measures, and another said that it was clear the GATT could not impose any obligation outside the trade aspects of an investment measure. One participant agreed with the need to distinguish measures that affected trade from those that restricted or distorted trade. Several participants agreed with the statement that "the effects of investment measures on trade are varied and difficult to predict". One said this pointed to an important part of the negotiations since it could not be assumed that some TRIMs regularly had trade restrictive and distorting effects. Their effects were not predictable outside the circumstances in which they were used and they should not, therefore, be prohibited. One participant disagreed with the statements in paragraph 3 which presumed that investment measures were likely to have trade restrictive and distorting effects and implied that the measures had to be disciplined.

67. Two participants generally concurred with the proposed approach of examining the trade effects of investment measures in the context of the specific macroeconomic and trade conditions in which they were applied, but expressed doubts about the feasibility of the proposals later in the submission to classify investment measures into categories on a preselection basis and arrive at definitive lists of TRIMs that would be prohibited or permitted. One added that a strict specification of measures and conditions that would fall under the prohibited Category A, for example, might encourage countries to make modifications that would ensure their measures were not prohibited, and this seemed likely to result overall in most measures falling under the actionable Category C. Two

participants said that the proposal to consider TRIMs in conjunction with the background conditions under which they were applied warranted further elaboration. However, one questioned whether such an approach might not lead into a very large-scale exercise. One participant asked what sort of conditions Switzerland had in mind and how they might be put forward by a contracting party using a TRIM and assessed by other contracting parties. Who would decide whether particular conditions justified using a TRIM and on what grounds? Another participant also asked for clarification about the feasibility of reaching the agreement indicated in paragraph 3. One participant considered very dangerous the suggestion that the trade effects of an investment measure were modified by the circumstances in which it was used.

68. On Section II, A GATT discipline for TRIMs, one participant objected to the title of the Section since the Group was not mandated to negotiate a GATT discipline for TRIMs. Two participants had particular problems with the use of the concept of prohibition in the context of TRIMs. One added that investment measures were a centrally important part of public policy-making for some countries. He agreed that the concept was not alien to the GATT, in some cases even without the need to establish trade effects, but it could not be assumed that the GATT would deal with investment measures in the same way it dealt with trade measures. The Group's mandate spoke of the effects of investment measures, and the measures could not be discussed without knowing what their effect was. One participant expressed reservations about the inclusion of the concept of prohibition, but said that the combination of intent and effect was very important in considering whether any measures might fall under the prohibited Category A. One participant considered the three categories to be useful, but stated that the actionable Category C was described slightly differently later in the submission as containing TRIMs that were not yet classified; she preferred the reference to TRIMs in this category being actionable, but not prohibited at the outset. In her view, however, clear criteria would be needed for classifying measures into the three categories, and this suggested the use of illustrative, rather than exhaustive, lists of measures in each. Another participant asked what sort of prohibition was envisaged for measures that fell into the prohibited Category A; was it absolute prohibition or was it suggesting only a reversion of the onus of proof so that any countermeasures would be justified without showing reason and it would be up to the affected party to demonstrate how the measure in question fell outside Category A. Also, what kind of countermeasures were envisaged for measures falling into the actionable Category C; would it involve the application of a measure to offset the effect of a TRIM or would it involve consultations designed to have the TRIM removed or amended? One participant asked why it was necessary to include a permitted list of measures under Category B at all.

69. On Section III, A negotiating framework for TRIMs, one participant objected to the title of the Section which did not lie within the Group's negotiating mandate. One participant considered the approach outlined in paragraph 2 would be difficult to realize since it would require agreement on the treatment of different conditions in which TRIMs were imposed. One participant said it would be curious if the same measure could be subject to different disciplines in different countries because of differences in circumstances, but that the criterion suggested in paragraph 4 was

interesting and warranted further examination. Another participant considered the approach was confusing since it was not clear how the notion of the unpredictability of the trade effects of individual TRIMs could be combined with a proposal to classify them according to their effects. Also, the criterion suggested in paragraph 4 was not helpful since it did not seem it would produce accurate results; investment incentives, for example, could influence operating behaviour as well as investment decisions, while a requirement on an investor to employ a certain proportion of local labour could not be considered trade-distorting. One participant asked how in practice the criterion described in paragraph 4 would work in distinguishing measures that affected the investment behaviour of an investor from those that affected the investor's business behaviour during the production process. Three participants considered the criterion to be helpful for identifying the degree of trade distortion caused, and which TRIMs should or should not be subject to discipline, by distinguishing between the intent and effect of different measures. One added that it might not provide an exhaustive criterion for categorizing TRIMs. She asked for an explanation of the meaning of the phrase "typical regulatory environment" in paragraph 2, and expressed doubts that "limitations to foreign investment" should be included in the permitted Category B and considered completely non-actionable as was suggested in the submission. One participant said that under the criterion suggested in paragraph 4, manufacturing requirements should not fall into the prohibited Category A since they affected the investment decision and not the operating behaviour of an investor. He agreed that a number of TRIMs should be expressly permitted, including local equity requirements and investment incentives, but said that in his view the permitted Category B should be wider than was indicated in the submission.

70. One participant said that the most fruitful line of enquiry would be to consider what elements would apply to investment measures in the actionable Category C. In this respect she was interested in a discussion of the rules necessary to define and redress injury that could result from TRIMs on a case-by-case basis through the GATT consultation and dispute settlement mechanism. One participant asked what the mechanism for action would be under Category C. If it was an Article XXIII dispute or an investigation by an affected country, the injury test would be relevant. It was important to reduce the number of measures falling into the actionable Category C as far as possible because otherwise the stability of conditions for investment in a particular country would be placed in doubt. With regard to the suggestion of reducing the number of measures in Category C, one participant asked whether it was envisaged that they would be reclassified into Categories A and B and, if so, on what basis that would take place; would it depend on case histories or on newly developed criteria?

71. Regarding the negotiating approach proposed in paragraph 5(i), one participant asked whether countries would propose classification criteria or measures for classification; if it was the latter, he doubted that countries would propose their own measures for classification into the prohibited Category A. Another participant agreed with the comments of the previous participant; the approach could lead contracting parties into a long process of attempting to categorize each other's measures, with doubtful end results. One participant found merit in the proposal

contained in paragraph 5(i) on self-classification of investment measures by each country, but questioned the proposal in paragraph 5(ii) for multilateral negotiations to classify measures into Categories A and B and said that the proper path for this exercise would be dispute settlement.

72. Several participants asked for clarification of the request/offer exchange of concessions mechanism that was proposed in paragraph 5(iii) for reclassifying TRIMs out of Category C. One stated that such a process usually took place once rules had already been laid down and not as part of a rule-making exercise. Rules were needed in order to know what was to be paid for. Another enquired how such a system could be made effective given the asymmetry of interests among capital-exporting and capital-importing countries in the area of TRIMs. Another expressed serious concern with this system. In his view, the Swiss proposal would result in the bulk of TRIMs falling under the actionable Category C and becoming subject to ongoing, and probably bilateral negotiations. Where a TRIM had an effect on several contracting parties, some of whom had bilateral agreements with the country imposing the TRIM and some not, how would the system operate in a way that would respect basic GATT principles? Another participant stated that her main reservations with the proposal concerned the feasibility of the proposed request/offer mechanism.

73. On Section IV, Standing Committee and dispute settlement, one participant considered that if such a Committee process were to work it could be a very good system, but he questioned whether it would work in practice. To expect a Committee to make an immediate determination on the classification of a particular measure was asking a lot if it operated on the basis of consensus. He asked whether it was an option or a requirement for a country to have its measures examined in the Committee. Another participant doubted that contracting parties wishing to introduce TRIMs would submit them for review to the Committee; they would be more likely to introduce measures on the presumption that they were non-actionable and leave it up to others to make a challenge. In that context, and for transparency, she favoured some form of notification scheme to provide prior warning of changes in investment policies. If the Committee did not make an immediate determination on a measure, that could pose problems for contracting parties wishing to change their investment policies. Also, she asked whether the proposed Committee would include all contracting parties or only a small group of them. One participant expressed concern about the proposed Committee and said that the agreement in the Group that it was the sovereign right of contracting parties to determine their own investment policies should be borne in mind when considering it. Another said that it did not seem practical for contracting parties to have to seek permission before imposing an investment measure. Two participants asked what kind of determination the Committee would make and what the consequences of its determination would be. One asked whether the Committee would be responsible for the process of expanding or deleting the list of measures that was referred to in paragraph 3 of Section III of the submission. One asked whether the proposed Committee would be open-ended. He added that if investment measures had to be submitted to it in advance, the sovereignty of countries over their investment policies could be infringed.

74. On Section V, The advantages of such an approach to the negotiations, one participant agreed on the need to respect the sovereign right of a

country to determine its own investment policy, but considered the proposals heavily circumscribed countries' freedom in that respect. The only freedom envisaged was in permitted Category B measures.

75. In response to the comments made and the questions posed on the submission, the representative of Switzerland stated that it was important to see the proposal as a negotiating framework. Some specifics had been included to make it understandable and more concrete, but it had left many questions unanswered either because it was thought that they should be elaborated by the Negotiating Group or because Switzerland did not want to burden the proposal with national preferences. In due course Switzerland would submit it's own views on some of the specifics. The questions asked could be categorized into four sub-headings: some fundamental issues concerning the nature of the discipline of GATT in trade matters and its relationship to investment policies and/or to other higher national goals; questions relating to the classification system proposed; questions relating to the request/offer procedure; and questions relating to the standing committee and its relation to the dispute settlement procedures.

76. With regard to the fundamental issues, some participants had questioned the applicability of the General Agreement to investment measures and had addressed the issue of higher national goals. Trade distorting effects per se might not be sufficient to prohibit a specific measure and that GATT addressed trade measures rather than production measures, the purpose of which were often quite different. It had been hoped that these difficulties could be overcome, partly at least, by concentrating on the trade effects of production measures; by concentrating the approach and the proposed disciplines not on specific measures, but on measures taken under specific conditions which should permit the necessary trade-offs between higher national goals and the trade effects of investment measures; and by proposing to apply general GATT exceptions and any special treatment based on the reformed general rules contained in GATT equally to TRIMs. It had been hoped thereby to ensure that the proposed system of disciplines would be part of the "normal" GATT.

77. The purpose of the classification system proposed was not to define certain prohibited investment measures, as some comments seemed to imply, but to establish a framework of disciplines for investment measures that would provide guidelines to governments on how to implement their investment policies through means which minimized their trade distorting effects. In that spirit, it seemed logical for GATT to provide them with a framework based on a traffic-light approach, so as to assist them in defining an investment policy that respected the interests of their trading partners by indicating conditions and measures which were likely to have trade distorting effects and therefore should be avoided (prohibited category), conditions and measures which were unlikely to be trade distorting and therefore should be used, if possible (permitted category), and conditions and measures which might or might not have trade distorting effects and therefore had to be used with caution (yellow-light or actionable category). The proposed system did not amount to international scrutiny of national policies, but would provide a framework of rules and disciplines which would allow governments to introduce policies in pursuit of their national objectives and in conformity with GATT.

78. Several participants had emphasized the apparent contradiction between the unpredictability of effects of investment measures and the attempt to classify them into categories with legal effects. The proposal attempted to solve this problem by associating measures with typical conditions under which there was a strong presumption that they would have trade distorting effects, by providing in each category non-exhaustive examples, and by adopting an iterative approach. There would be a large middle ground of measures and conditions for which it would be impossible to determine - or to have an agreement ex ante - that they had trade distorting effects. Those measures will fall into the actionable category, where action would be based ex post on the basis of injury. Several participants had questioned the feasibility of the approach, but there might be some misunderstanding of the proposal. When it spoke about specific measures under specific conditions, what was meant was not individual investment measures or country specific conditions, but typical measures under typical conditions. An illustrative example was export requirements coupled with a reserved market would clearly have a strong presumption of having trade restrictive and distorting effects and probably would fall into Category A; export requirements in a liberal trade régime might be legitimate and fall into Category B; while export requirements in a market with tariff or non-tariff protection might fall into Category C. Clearly, at the beginning there might be only relatively few measures in the forbidden and permitted categories. That was the reason for proposing a dynamic system that might go on beyond the Uruguay Round through the proposed Committee. With regard to who would decide on the categorization, clearly only the contracting parties could impose on themselves a commonly agreed discipline. A criterion to guide that process had been proposed. Experience in the negotiation, as well as panel decisions, would help to further refine understanding of the trade effects of investment measures, but as had been pointed out panel decisions applied or interpreted GATT rules; they did not create GATT law. With regard to the precise form that prohibition should take and the kind of countermeasures to be used, these would require further reflection.

79. With respect to the proposal for a request/offer approach to the categorization, it had initially been hoped that an economic criterion could be found that would allow the objective categorization of different measures under typical conditions into the two categories, permitted and prohibited. However, it had been concluded that such a system would not be practical in view of the diversity of circumstances that could occur. The economic criterion was being proposed, therefore, only as a guide, leaving the categorization to the more realistic system of a negotiating process. Under that process, which had been termed request and offer each country would propose typical measures under typical conditions which it would want either prohibited or allowed under a GATT discipline. Obviously a country would propose in the permitted category measures which corresponded to those it used, or intended to use in the future, in its investment policy. In the same way it would propose, under the prohibited category, measures and conditions typical of other countries where it felt its investors were restricted in an unacceptable way. A first multilateral discussion might lead to some agreement by contracting parties about the two categories. All measures on which there was no agreement would fall into Category C (actionable measures). The danger of this method was that all measures would end up in Category C, and some incentives would need to be given to

avoid that happening. In terms of stability, and based on the hypothesis that contracting parties had an interest in accepting a discipline which gave them some security in defining their investment measures, it had been thought that there might be some give and take; a country which had different means available to achieve the objectives of its investment policy might agree to prohibit some of them in return for the assurance that the other measures necessary to achieve its investment objectives were put into the permitted category.

80. There was no intention to replace normal GATT dispute settlement procedures by the proposed Standing Committee. However, it was believed that something additional was required because dispute settlement procedures could interpret GATT rules but not create them. Rules could only be created or refined by the CONTRACTING PARTIES; as the proposed system was an open and dynamic one, based on a non-exhaustive list of measures under typical conditions, a mechanism was needed that could allow the system to be refined over time through negotiations based on improved understanding of the mechanisms at work; and dispute settlement proceedings basically involved only the parties concerned in the dispute until the last stage of adoption of the report. Procedures in a committee were more transparent and multilateral. As TRIMs often affected third parties, committee proceedings seemed more appropriate than dispute settlement, particularly for tasks such as the classification of TRIMs.

81. Clearly the exact functioning of the Committee would need to be determined by negotiations. It had not been foreseen that there would be an obligation for a country to seek a decision by the Committee. However, countries looking into different investment measures to achieve their investment policies might have an interest in testing their possible instruments with other contracting parties so as to acquire some legal security for them. If a country did not submit a measure to the Committee, it would automatically fall into category C and could thus be actionable on the basis of injury. It would not fall into the permitted category as that would give no incentive to consult on proposed measures. In case the contracting parties could not agree on the classification of the measure, it would also fall into the category of actionable measures. Switzerland had no specific proposals on the composition of the Committee at this stage, but should its composition be restricted it could only make recommendations for approval to the CONTRACTING PARTIES.

Other Business

82. The Group agreed to hold its next meeting on 14-15 September, and to schedule further meetings for 26-27 October and 27-29 November.