

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG12/12

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Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related
Investment Measures

MEETING OF 14-15 SEPTEMBER 1989

Note by the Secretariat

1. The Group held its twelfth meeting on 14-15 September 1989 under the Chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2825 was adopted.

I Item A of the Agenda

2. The Chairman said that three new submissions had been received shortly before the meeting from India, Mexico and Japan (MTN.GNG/NG12/W/18, 19 and 20) and he invited representatives from these delegations to introduce them. He also invited further comments from participants on submissions which had been introduced at the last meeting by the United States, Switzerland and Singapore (MTN.GNG/NG12/W/15, 16 and 17), and initial comments on the three new submissions. Some participants made comments on the submissions by the United States, Switzerland and Japan collectively.

3. One participant said it was not appropriate to consider prohibition in the context of trade disciplines to be applied to investment measures. Trade restriction or distortion could be caused by many types of government policies, but trade effects should not take precedence over the policies themselves, and particularly not over investment policies in developing countries that were trying to industrialize and diversify their economies and to manage their balance of payments. Remedies to trade restriction and distortion should be sought where necessary, in the same way that dumping was dealt with in the GATT. The best approach to further work in the Group was not to try to classify investment measures as condemned or approved, but to consider what kind of disciplines might be appropriate for the adverse trade effects of TRIMs which occur in some, but not all situations.

4. Another participant agreed that GATT disciplines were needed for TRIMs that were directly trade restrictive and distorting, but said that prohibition was too radical. Quantitative restrictions and certain export subsidies were clearly prohibited in the GATT, but prohibition was not otherwise a familiar GATT discipline. Many trade measures with demonstrably restrictive and distorting effects, such as agricultural export subsidies, were not subject to GATT discipline at all, let alone prohibited. It was not being proposed universally in the Uruguay Round that such trade measures should be prohibited, so proposals to prohibit

TRIMs, especially widescale, raised questions about proportionality in the negotiations. Furthermore, pressing the issue of a TRIMs prohibition too far might force host countries to ban foreign investment in important sectors of their economies. The Group should try to reach a common understanding on the definition of the trade restrictive and distorting effects of TRIMs, consider how far existing GATT disciplines were adequate, and if necessary then work out new disciplines.

5. One participant said classifying investment measures into prohibited, permitted or other categories was contrary to the Group's mandate and could get it involved in trying to lay down an international investment régime. Investment policies were sovereign and too vital to allow a GATT committee to interfere with. Trying to prohibit TRIMs was also a defective approach. It was contrary to GATT philosophy, where even for trade measures prohibition was a severely circumscribed discipline which was confined to specific circumstances and from which developing countries were exempt. Performance requirements were not ipso facto trade restrictive and distorting and they could, and usually did, lead to trade creation and enhancement. Prohibition could prove counterproductive since performance requirements played a harmonizing rôle between the interests of foreign investors and host countries. Ways other than prohibition needed to be found, therefore, to discipline the trade restrictive and distorting effects of TRIMs in terms of existing or improved GATT rules.

6. Another participant declined to comment on the submissions because they did not deal with what the Group had been mandated to look at. It was supposed to examine the operation of GATT Articles that were related to the trade restrictive and distorting effects of investment measures. Among the fundamental objectives of investment measures for developing countries were to ensure development and the transfer of technology, to build up industrial capability, to avoid strain on the balance of payments, to address restrictive business practices, and to protect the environment. All participants needed to stand to gain from these negotiations.

7. One participant said that when the United States and Japanese submissions were analysed along the lines proposed in the submission by Singapore, it was not clear what GATT principles could be used as the basis for the prohibition of investment measures. The proposals were inflexible, and would not permit account to be taken of the positive side of investment measures. Clear criteria were needed to establish effective and balanced disciplines, and prohibition was not acceptable. Also, development considerations could not be treated only as exceptions. Developing countries needed a means of adjusting their investment measures in a way that would not frustrate their development objectives, would recognize their sovereignty over investment policy, and would take account of restrictive business practices which were just as trade restrictive and distorting as TRIMs.

Comments on the submission of the United States (MTN.GNG/NG12/W/15)

8. For one participant, many elements of the submission were good starting points for discussion and embodied some basic ideas that his

delegation could accept. Among them were: the focus on trade effects rather than on investment measures, and the identification of three categories of trade effects; the idea that several levels of disciplines should be possible, depending on the nature and incidence of trade effects; the proposition that the use of incentives in conjunction with TRIMs should not affect the assessment of trade effects; applying the concept of non-discrimination to permitted TRIMs; the need to consider development considerations, in conjunction with the idea that permanent and unconditional exceptions from general rules for developing countries were undesirable; the need for transparency; and the need to look at dispute settlement and transitional measures. His delegation would address these issues in a written submission to the Group before year-end.

9. He added that the discipline of prohibition raised difficult questions, and requested clarification from the United States on certain points. If the legitimate use of investment measures was not to be impaired, prohibition would involve defining a TRIM so that only its serious negative trade effects were covered. Given that TRIMs were frequently applied ad hoc, and so far at least had been only loosely defined, prohibition could jeopardize the possibility of a reasonable degree of transparency around the fringes of this policy area, where new permutations of old measures were bound to arise. For other disciplines, proof of injury would be needed which raised conceptual and measurement problems. How should relief from injury be provided, and could not the concept of "equivalent trade effects" replace "equivalent commercial effects" in the proposal?

10. His delegation felt the form of the outcome of the negotiations would be important for the treatment of development considerations. A result closely linked to the GATT would have the advantage of building on existing provisions for development considerations, which would themselves hopefully be more clearly defined by the end of the Round. His delegation's thinking on transparency was tending towards counter-notifications and the establishment of enquiry points as a means of reaping the benefits of transparency while avoiding overloading national administrations with paperwork. Finally, the submission did not tackle clearly the issue of further negotiating procedure; it indicated that an illustrative list of TRIMs could be drawn up, but clarification was needed of how such a list would contribute to an operative outcome from the negotiations.

11. One participant found interesting the differentiated approach to TRIMs proposed. Regarding disciplines for non-prohibited TRIMs, he presumed the application of "counter-measures of equivalent commercial effect" would not take place unilaterally but only after dispute settlement proceedings. The proposal of time-limited derogations from certain disciplines for developing countries was interesting. Development considerations were a relevant element of the negotiations, but disciplines on TRIMs should, at least after a certain time, be identical for all participants and permanent and unlimited exemptions for developing countries were not desirable. Transparency provisions were very important, since TRIMs often were the subject of confidential negotiations and were not publicised. In this regard he asked whether the proposal in the submission for maintaining tribunals would require changes in national legal systems. The view of his

delegation on dispute settlement and enforcement was that general GATT dispute settlement procedures should apply, since it wanted TRIMs incorporated into the mainstream of the GATT. Transitional arrangements for all countries, and special ones for developing countries, were relevant considerations, and he asked for clarification in this context of the reference to important adjustments "for all parties affected by TRIMs".

12. The representative of the United States replied to some of the questions and comments made on the submission at this and the previous meeting. He said that inclusion of the word "comprehensive" in the title reflected interest in having an agreement that comprehensively addressed the adverse trade effects of TRIMs. The reference to maintaining tribunals to assist in ensuring transparency simply picked up language from Article X of the GATT, and nothing new was being proposed. For TRIMs that were not prohibited, non-discrimination was an important principle that would help to discipline them and reduce their trade effects to the least-restricted or distorted level experienced by any party. For these TRIMs, further discussion was necessary of how to measure adverse trade effects in terms of injury, what concept of injury to use, and who to regard as the injured parties; however, these questions did not arise in the context of prohibited TRIMs. The reference to "equivalent commercial effect" was a new term, and it was needed since it might prove necessary to develop a new concept of injury in the TRIMs area.

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

13. One participant said the submission was innovative and imaginative and provided useful input on how to structure future work. It reflected an accurate assessment of the situation in the Group. It was important to reach substantive results, but in the time left it would be difficult to cover all of the TRIMs mentioned so far. Defining three categories of investment measures provided scope for negotiating agreement on some measures and not discarding the rest but collecting them for future work in a form to be defined by the results of the negotiations.

14. The criterion suggested for determining the trade relevance of a TRIM was interesting, but would need further analysis. Other elements of the submission which merited continued, cautious interest were: the suggestion of using a composite description of measure plus background conditions to classify TRIMs, on which further clarification and illustration by Switzerland was needed; the request/offer procedure, although his delegation was not convinced this would not produce a zero-sum game in which trade-offs would be difficult to achieve because of the asymmetry of interests of different parties as regards foreign investment. Finally, he expressed concern that the submission did not distinguish sufficiently clearly between measures, which were under study, and their trade effects, which the Group was aiming to discipline.

15. One participant said major drawbacks in the negotiating mechanism proposed in the submission seemed to make it unworkable. The request/offer procedure did not appear practical, for reasons given by other participants. The process of qualifying measures by macroeconomic and

other circumstances was not defined, and he asked for it to be explained further. It appeared to turn on the openness of the economy imposing TRIMs; the more open the economy, the less distortive would be the TRIM. This did not seem likely to be an acceptable approach since it could lead to the conclusion that an open economy would be entitled to apply TRIMs but a closed economy would not.

16. One participant questioned the proposal to classify TRIMs according to whether they affected the investment decision or the business behaviour of an investor. The criterion of affecting business behaviour was vague and not clearly linked to the GATT. Nor was it obviously related to the trade restricting and distorting effects of TRIMs, since many government measures could affect business behaviour without affecting trade. Furthermore, even if such a criterion were to be accepted, the proposal to prohibit product mandating and manufacturing requirements was inconsistent with it; these were investment-related measures designed to influence investment decisions and it was hard to see how they would affect business behaviour. With regard to the proposal to consider measures in conjunction with the specific macroeconomic and other circumstances in which they were used, he asked how account could be taken of these circumstances if TRIMs were to be prohibited altogether.

17. The representative of Switzerland replied to some of the questions and comments made on the submission at this and the previous meeting. He said that linking measures to the circumstances in which they were applied allowed the adverse trade effects of the measures to be disciplined rather than the measures themselves. Specific examples of this approach could be provided later. By way of general illustration, the five measures placed under the prohibited category in the submission would be trade distorting in a closed economy context, and an investor would need to be compensated for the cost of conforming to them by a subsidy or by being guaranteed a reserved market share. In an open economy these five measures would not be trade distorting and would not be prohibited. It was therefore not a question of the legitimacy of the TRIMs themselves, nor of allowing some countries to use the measures but others not. All depended upon the circumstances in which they were used.

18. Distinguishing measures which affect investment decisions from those affecting the business behaviour of an investor provided a neutral and economically-sound criterion for assigning measures to different categories. It captured the likelihood that ex ante measures affecting an investment decision would have a limited trade influence, while ex post measures which affected business behaviour after the investment had been made could have recurring adverse trade effects when they were accompanied by subsidies or a reserved market policy.

19. The discipline of prohibition should not be rejected on the grounds that it was too severe or that it was unfamiliar in the GATT. While his delegation was prepared to examine other solutions that might be proposed, there did not seem to be any adequate alternative to prohibition for measures that distorted trade. It would not be advantageous to try simply to reduce the trade distortion or to ensure that the distortion was the same for everyone, nor was it desirable to rely on retaliation since this would increase trade distortion further.

20. His delegation realised the Group would probably not have agreed on a classification of all TRIMs by the end of the Uruguay Round. The proposed system would allow TRIMs on which there was no agreement and new TRIMs to be dealt with after the Round through further negotiations on whether or not they cause trade distortion. This would be to the advantage of host as well as home countries, since they could seek to ensure that their measures could not be contested under the GATT on trade-distortion grounds and so create a secure policy environment to stimulate investment, which was one of the results his delegation was looking for from these negotiations.

Comments on the submission by India (MTN.GNG/NG12/W/18)

21. The representative of India, apart from introducing the submission, made a number of general comments in both his opening and closing remarks. He said that under its mandate, the Group was expected to identify the direct and significant adverse trade effects of TRIMs and consider means of avoiding them. This could not be equated with a mandate to prohibit investment measures themselves. Prohibition would encroach on countries' investment policies and would be tantamount to laying down an international investment régime in the GATT. The prohibition of investment measures was therefore unacceptable, whatever the GATT had to say in terms of the prohibition of trade measures. Prohibition was inappropriate also because local manufacturing and export performance requirements did not have adverse trade effects in each and every case they were used. Where they did have such effects, appropriate disciplines were called for, but these did not extend to prohibiting the measures themselves.

22. Other submissions had addressed development considerations only as a footnote to the negotiations, and this was unacceptable. Development considerations were an essential and inseparable part of the framework of negotiations and they should not be treated peripherally, to be added after disciplines had been established that applied uniformly to all participants. TRIMs in developing countries had to be approached differently, and development considerations had to be woven directly into the negotiations from the start. Not only for this Group, but for the whole Uruguay Round, the success of the negotiations would ultimately be measured by how they helped developing countries to integrate into the world economy. For this to happen, it was important that they should be broaden their industrial and technological base, and this would not take place through assembly plants and screwdriver operations. The relationship of TRIMs to development could not be ignored, since far from being contradictory to development TRIMs helped to make investments more productive and to ensure efficient investments took place and inefficient ones were weeded out.

23. TRIMs also played a rôle with respect to restrictive business practices. These could not be tackled effectively in developing countries through competition policy because of unequal bargaining power between multinational corporations and host governments. Disciplining TRIMs had therefore to be balanced by disciplines on restrictive business practices. To the extent the international community failed to address this issue, any useful dialogue on the subject of TRIMs would have to be postponed.

24. One participant welcomed the recognition that some measures could have adverse trade effects in certain circumstances, and believed the submission represented a serious offer to enter into substantive negotiations, at least on certain measures. The measures mentioned in this respect coincided to a large extent with those his delegation considered should be subject to adequate GATT discipline, but in his view exchange restrictions should be added since these amounted to a special form of trade-balancing requirement when they were applied to individual investors. The criteria of direct and significant adverse trade effects were evidently important for helping to identify which measures should be the subject of negotiations, but this language did not appear in the Group's mandate and the criteria should therefore be used to identify measures needing priority attention but not as a basis for excluding others.

25. This participant disagreed that prohibition was an exceptional GATT concept and that it was not significant outside the area of quantitative restrictions and export subsidies. Article XI went well beyond quantitative restrictions. Also, prohibition could be qualified in the GATT, and there were quite a number of Articles which permitted a measure to be applied even if it was contrary in principle to Articles III or XI. Introducing prohibition in these negotiations was not equivalent to establishing an investment régime in the GATT; it was rather a conclusion drawn from the fact that some TRIMs practically always produced adverse trade effects, and then a qualified prohibition would be the most operationally effective discipline.

26. The submission reopened the issue of the freedom of the investor to accept a TRIM and invest or not. If it was agreed in the Group that the negotiations were not about investment régimes, then the behaviour of investors was not relevant. What was important was the trade effects of the measures, including their effects on third parties. Regarding comments in the submission on "rules of origin", it was often necessary to know the origin of products for the implementation of trade measures; domestic value-added or local content might be relevant criteria for determining the place of "last substantial transformation" of a product. However, this related to the production process in the exporting country, not the importing country, and the concept of rules of origin was out of place in the context of the TRIMs negotiations.

27. This participant did not believe restrictive business practices were an important parameter when TRIMs were introduced into legislation or used in screening processes for foreign investors. Not only multinational corporations, but also small and medium-sized investors who did not engage in restrictive business practices were subject to TRIMs. In any case, TRIMs were not an appropriate response since they would create additional restrictions and they were not suited to fine-tuning for this purpose. Concerning the comments in the submission on the operation of GATT Articles, Article I did not apply only to border measures but also to measures covered by Article III.2 and III.4. Also, it was probably not a correct appreciation to state that Article III did not apply to manufacturing requirements as long as the products that had to be manufactured locally were otherwise available in the country, through local production or imports.

28. Development considerations had to be taken into account in the negotiations. However, it was difficult to accept the argument that TRIMs had trade creating effects and other development benefits which outweighed their adverse trade effects. Foreign direct investment was having an increasingly important effect on world trade flows, and allowing the trade of foreign investors to be regulated through investment measures could have serious effects for the GATT system; those effects could be even more serious when the measures affected domestic investors as well. The use of TRIMs seemed to be related to the openness of economies. Investors who wanted access to a closed economy would be likely to accept the imposition of TRIMs more easily. In open economies, TRIMs might still be applied but they would need to be balanced with incentives which would make them a more costly policy instrument. As economies became more open, therefore, TRIMs might be imposed less frequently and the difficulties for developing countries to negotiate on them might become less important.

29. One participant said the submission clearly recognized that some TRIMs were directly trade-related and could have trade restrictive and distorting effects. His delegation agreed with the emphasis placed in the submission on the trade effects of investment measures, and with much of the analysis of individual TRIMs that it contained. He wondered whether full account had been taken of the findings of the FIRA panel on local content requirements, which made the issue one of compliance with GATT obligations and the elimination of such measures. However, he noted the comments in the submission that there was a perception that hostility towards TRIMs on the part of some countries could upset the equilibrium that governments and companies were beginning to achieve, and said that for his delegation this underscored the fact that the overnight prohibition of TRIMs was not feasible or desirable; the progressive elimination of TRIMs with direct and significant trade restrictive and distorting effects was called for. His delegation found the analysis of development considerations useful, but he questioned the statement that development considerations could outweigh the adverse trade effects of the measures; calibrated disciplines were needed to meet the concerns of individual developing countries, but they could not be open-ended. There appeared to be two options for dealing with restrictive business practices: extra-territorial application of domestic law or the introduction by each government of its own competition policy. Useful work had been done on this subject in other fora and his delegation supported it continuing there.

30. One participant regretted that India had set the discussion in its submission in the context of general investment policy issues, citing negotiations going on elsewhere on certain elements of foreign investment, while reproaching other delegations for advocating an overall framework for investment. Speaking for his own delegation, it had been careful to avoid going beyond the mandate and had concentrated on the adverse trade effects of investment measures. He did not believe the arguments contained in the submission were based entirely on development considerations. They seemed, rather, to be the traditional arguments of countries with large domestic markets which preferred to resort to unilateral or bilateral measures to restrict market access. The general approach to development considerations was surprising, since it seemed to create a dichotomy between trade and development. His delegation believed contracting parties had chosen to

join the GATT because they realised that development and growth were fostered by multilateral trade, and that any contradiction between trade and development was an exception rather than the rule.

31. He supported the reference in the submission to the importance of the macroeconomic environment in establishing the adverse trade effects of TRIMs. However, the statement that TRIMs were justified to harmonize the interests of investors and host countries ignored the trade interests of third countries; harmony might be achieved only at a cost to these countries. The reference to the use of TRIMs for balance-of-payments purposes reflected too narrow an analysis. A balance of payments deficit could not be corrected through product-specific measures since it reflected macroeconomic problems. Finally, restrictive business practices did not fall within the purview of the Group. If a host country feared that a foreign investor would resort to such practices and wished to impose TRIMs, it should ensure these did not have adverse trade effects.

32. One participant welcomed the submission since it would allow the Group to engage in a constructive and candid dialogue. However, he could not agree with much contained in it. He welcomed the acceptance that some TRIMs could have adverse trade effects, that these could conflict with Article III and that there were benefits to host countries from foreign investment. He agreed that development considerations should be taken into account and welcomed their elaboration in the submission, but said that other considerations such as reducing trade barriers and trade distortion should not be overlooked. He disagreed that the Group's mandate did not cover prohibition and that it did not cover a rule-making exercise. The main problem with the submission was that it did not seem to recognize that TRIMs were costly for all concerned and incompatible with an open trading system. Investors would try to cover or pass on the higher costs of TRIMs by seeking protection and incentives, and the result would be a vicious circle of trade restriction and distortion and the creation of new barriers to trade liberalization. The GATT should ensure that this circle did not occur, but by trying to provide an apology for TRIMs the submission was putting forward an approach that would drive the GATT in the wrong direction. Also, he did not accept that disciplining TRIMs would be anti-development; this argument seemed to be based on the same concepts as the discredited theory of import substitution.

33. One participant disagreed with the statements in the submission on the scope of the Group's mandate and the limitations this placed on its ability to undertake rule-making. The comments of another participant that TRIMs could be replaced by trade measures was the heart of the problem and the reason why TRIMs had to be tackled in GATT. It was irrelevant whether investors agreed to the imposition of TRIMs, since this took no account of third country trade effects. It was also irrelevant that the investor was free to choose whether to invest or not, since TRIMs were often applied after an investment had been made. There was a development aspect to the negotiations, but this aspect could not override the adverse trade effects of TRIMs. In the current climate of increasing foreign investment, it was in the interests of all concerned to discipline TRIMs effectively.

34. One participant welcomed the submission as an indication of India's commitment to the work of the Group. He welcomed the recognition that some TRIMs could have adverse trade effects, which seemed to imply an acknowledgement that disciplines were needed for some TRIMs. GATT instruments such as anti-dumping and countervailing duties were recognized by India as applicable to trade distortions caused by investment measures which prejudiced the trading interests of contracting parties. He presumed that if a factual link could be established between an investment measure and its adverse trade effects, and those effects fell within the kind proscribed by the GATT, then India would acknowledge the applicability of prohibition to a TRIM as a legitimate trade policy action, subject to certain conditions including the specific situation of developing countries. Developing countries were not alone in pursuing investment objectives, but many instruments were available for this purpose and he did not share India's perceptions on the need for TRIMs. In the case of increasing export earnings, for example, he did not consider TRIMs a useful tool, and he was convinced they were not an appropriate response to restrictive business practices. He expressed concern about statements that development considerations should override the trade restrictive and distorting effects of TRIMs. He also expressed concern with the doctrine that the intent of a measure should be the predominant factor in evaluating it; that the intention may not have been to affect trade was irrelevant, and adverse trade effects could not be reduced to an incidental status through this kind of reasoning.

35. For one participant, the ideas contained in the submission went a long way towards meeting the concerns of his own delegation. He agreed with its logic and with the approach proposed, and with the need for investment policies to meet development objectives in developing countries. It contained useful references to authentic studies on the issue of restrictive business practices, and a good analysis of investment policy which he could agree with to a large extent.

36. Responding to other comments, he said that the issue of prohibition was not whether it was a familiar GATT concept but that it was an inappropriate means for dealing with TRIMs. GATT only covered trade measures, and investment measures had extensive and varied effects other than on trade, so parallels could not be drawn to what was or was not contained in the GATT. Also, the issue of restrictive business practices could not be dismissed on the grounds that these were corporate measures while the Group was to deal only with government measures; restrictive business practices could have similar trade effects to TRIMs, and in some cases they could only be dealt with by applying TRIMs.

37. One participant welcomed the emphasis placed on development considerations in this submission; these needed to be integrated directly into the negotiations.

38. One participant welcomed the submission as a substantial contribution to further work in the Group. He agreed with many elements of it, including the unacceptability of prohibition, the need to emphasize development considerations, and the need to discipline the restrictive business practices of multinational corporations in order to ensure a

balanced approach in the Group's work. He insisted that the Group should remain within its mandate, and referred to comments made by his delegation at the previous meeting (reflected in paragraph 31 of MTN.GNG/NG12/11).

Comments on the submission by Mexico (MTN.GNG/NG12/W/19)

39. Participants recognized the constructive nature of the proposal. Some participants found it interesting and said they would reflect further on it. One participant understood the need that was felt to test and illustrate more precisely the trade effects of TRIMs and their relation to GATT Articles. While not considering this a priority, his delegation was prepared to join in the kind of exercise being proposed as long as it could be undertaken in parallel with the work of the Negotiating Group, for example in a separate working group. Another participant said that to arrive at consensus on proposals being tabled by other participants, the Group would need to focus on TRIMs with direct and significant trade restrictive and distorting effects, and he felt the proposed exercise would provide a systematic approach in this respect. However, he could not accept the establishment of a separate working group; small delegations would find it difficult to attend which could make its proceedings untransparent, and it was unclear what the status of its findings would be.

40. Several participants considered the Group had made considerable progress already towards achieving the objectives of the proposed testing exercise, and disagreed with the comment in the submission that progress in the Negotiating Group had been minimal. They shared the aim of streamlining the Group's work and narrowing the basic divergence of views that existed, but questioned the contribution that a testing exercise could make. One felt that reconciling differences of view in the Group was more a matter for negotiation. Others doubted the practicality of the proposal in view of the limited time available for completing negotiations and of potential difficulties they foresaw in collecting sufficiently specific data on the trade effects of individual TRIMs to make the results of the exercise convincing. They also questioned the purpose of such an exercise if its results would not be binding, since the Group already had general parameters for its negotiations in the form of the adverse trade effects of TRIMs and the adequacy of the coverage of existing GATT Articles. One of these participants suggested that, as his own delegation had done, individual participants undertake their own testing exercises and incorporate the results in their comments on the proposals being put forward on a framework of disciplines for TRIMs. In this regard he noted Mexico's recent liberalization of TRIMs and hoped the Mexican delegation would share its experience with the Group.

41. One participant disagreed that time-pressure was relevant to considering the merits of the proposal; more important were its feasibility and the contribution it could make to the negotiations. He suggested participants bear the proposal in mind when preparing national submissions and that the Group reconsider it when differences of view had been narrowed down.

42. The representative of Mexico said that it was certainly not the aim of the proposal to slow work in the Group down. In his view, participants needed concrete evidence of the incidence of TRIMs and their trade effects in order to consider the various proposals being tabled. He could accept that the proposed testing exercise should take place in parallel or on a time-sharing basis with the Group's negotiations, but he felt that if testing exercises were undertaken only nationally they would lack focus.

43. The Chairman said that since there was no consensus to agree to the proposal, the Group would reflect further and return to it if necessary.

Comments on the submission by Japan (MTN.GNG/NG12/W/20)

44. One participant said he would reflect further on the proposal for a differentiated approach, with stricter disciplines for some TRIMs than for others. He agreed with several elements of the proposal: that investment incentives per se should be excluded from these negotiations; that the fact a performance requirement was a condition for obtaining an investment incentive was relevant; that disciplines should apply equally to central and local governments; and that it should not make any difference to the scope and application of disciplines whether there was an undertaking between an investor and the government or not.

45. He said that counter-notification rather than notification procedures would seem more effective to increase transparency as a first step towards eliminating prohibited TRIMs, since countries were hardly likely to notify their own prohibited TRIMs. He asked for elaboration of the subsequent procedures through which prohibited TRIMs would be eliminated, and what the rôle of the proposed committee would be in the case of a TRIM which fell into the prohibited category; if it was intended it should examine the TRIM for adverse trade effects, the concept of prohibition would appear to be case-by-case rather than a general concept.

46. For non-prohibited TRIMs, he asked whether it might be necessary to have disciplines beyond non-discrimination and transparency that would reduce or eliminate the TRIM if it had adverse trade effects, and to treat differently TRIMs imposed as a condition for receipt of an investment incentive from those imposed as an investment condition; the latter would amount to an unconditional obligation to comply with performance requirements. He asked why only two TRIMs had been included in the non-prohibited category, when in principle all TRIMs could be conditions for the receipt of an investment incentive.

47. One participant supported the notion of prohibiting TRIMs with trade restrictive and distorting effects and establishing other disciplines for TRIMs which had significant adverse trade effects in certain circumstances. She expressed interest in the proposal to progressively reduce and eliminate certain TRIMs, and asked for further elaboration. She asked for clarification of the concept of prohibition that was being proposed, and of the term "legally-enforceable". She supported the need for transparency and non-discrimination as basic disciplines on TRIMs, but questioned in the case of non-prohibited TRIMs whether these two disciplines would be

sufficient and whether the proposed committee could also recommend elimination of the TRIMs and compensation for their adverse trade effects. In her view, incentives should not be excluded and left up to negotiations in other Groups.

48. One participant said the proposal set out the major elements of a framework of disciplines for TRIMs. It rested on the proposition that contracting parties should avoid the trade restrictive and distorting effects of investment measures, and that disciplines should be proportional to these effects and should be linked to the nullification and impairment of GATT rights. Prohibition should not be the only discipline involved. He agreed with the focus in the proposal on local content and export performance requirements, but not on the inclusion of some of the other TRIMs mentioned. He asked for elaboration of the notion of standstill and rollback, what specific "Agreement" was being referred to in connection with investment incentives in the proposal, and what disciplines were being proposed for sub-national entities.

49. One participant found interesting the approach to prohibition, which seemed to involve a commitment to eliminate gradually a measure in combination with a requirement to examine it. The rôle of the proposed TRIMs committee would depend on the precise outcome of the negotiations; if the discipline of prohibition was closely linked to existing GATT provisions, it might prove possible to use strengthened GATT dispute settlement procedures rather than a committee. He agreed that investment incentives per se were subsidies and should not be included in these negotiations, that a counter-notification procedure would be useful, and that local government measures should be included in a TRIMs agreement. He welcomed the elaboration of development considerations in the submission.

50. One participant noted the convergence of approach between this and other proposals, and welcomed the statement that Japan was willing to examine TRIMs other than those cited in the submission. He expressed concern that under the proposal if a TRIM was not legally enforceable it would not really be covered by effective disciplines; this could create a grey area and GATT experience with grey areas had been unsatisfactory. The proposed mechanism for eliminating TRIMs appeared to involve a rollback along with the prohibition of new measures, and he asked whether that was a correct understanding. He asked how non-discrimination could be applied to TRIMs, since they were so often negotiated on a case-by-case basis, and what relationship the proposed committee would have to the rest of GATT, and specifically to dispute settlement procedures; would it have authority to make recommendations to panels?

51. One participant asked what the impact of the decisions of the proposed committee would be. Although TRIMs in the non-prohibited category appeared to be non-mandatory measures, he noted they were used in conjunction with investment incentives and said that in his view incentives should fall into the prohibited category. He shared the concerns expressed by the previous participant over non-mandatory TRIMs turning into grey area measures if they escaped effective discipline, and said this pointed to a useful element of the Swiss approach where it was the trade effect that mattered, and not the enforceability of the TRIM.

52. One participant asked whether it was proposed that all of the TRIMs cited for prohibition would be dealt with on the same basis regardless of their adverse trade effects. The criterion suggested for prohibition was whether or not a TRIM was inconsistent with GATT provisions, and he asked whether there were other criteria that could turn the exercise into a policy-related rather than a judicial one. He asked whether any difference was proposed with regard to the length of the transitional period for developed and developing countries. Finally, he asked for clarification of technology transfer and local manufacturing requirements, since as defined in the submission they appeared to be only varieties of local content requirements; several other participants made the same point.

53. One participant asked for clarification of the criteria for prohibiting TRIMs; it appeared that two criteria would have to be satisfied, one of which included the relevance of the measure to existing GATT provisions which seemed a doubtful basis for proposing prohibition. The non-prohibited category appeared to cover only TRIMs used in conjunction with investment incentives, so for TRIMs per se the proposed discipline seemed to be only prohibition with some flexibility in terms of time given for elimination; this was a severe approach, and the scope of the proposal would need careful consideration. The emphasis on development considerations was welcome, but he said it appeared the same disciplines would apply to all countries and the only flexibility given to developing countries would be the length of the permitted transitional period. He, and several other participants, sought clarification on the mandate, the composition and the authority of the proposed committee.

54. One participant doubted her authorities would be prepared to accept the approach of comprehensive prohibition of TRIMs. She agreed appropriate disciplines were needed, but considered prohibition not to be appropriate given the nature of the trade problems created by TRIMs that had been discussed so far. She asked for empirical evidence to support the statement in the submission that the adverse trade effects of TRIMs was an increasing phenomenon. Regarding the measures cited in the submission, she stated that there was no agreement yet in the Group on what measures were TRIMs. She agreed with another participant that counter-notification would be more effective than self-notification to identify TRIMs that might be prohibited as a result of negotiations. She sought clarification on: whether a standstill on TRIMs was being proposed; what criteria were being suggested for classifying TRIMs into the prohibited category; what kind of notification procedure would be used, and whether registration of TRIMs was intended to cover only those prohibited; what precisely was meant by the term "legally enforceable"; why TRIMs used in conjunction with incentives should not be prohibited; and what disciplines would apply to non-prohibited TRIMs that were found to have adverse trade effects? Finally, she stressed the importance of direct foreign investment for capital-importing developed countries as well as developing countries; another participant made the same point.

55. One participant said the concept of prohibition was too blunt and out of proportion to the adverse trade effects of investment measures. Foreign investment had a fast-growing rôle in his country, and investment policy was an important part of overall economic policy. He disagreed with some

other participants that technology transfer and manufacturing requirements were only specific forms of local content requirements, but disagreed also with the proposal for their prohibition since they were selective investment measures and he doubted they produced adverse trade effects. It would be problematic to consider prohibiting technology transfer requirements while some countries continued to prohibit certain kinds of technology exports. He agreed that local and central government measures should be subject to equal disciplines, and with the approach to development considerations, especially that the same disciplines should apply to all countries.

56. One participant found the notion of prohibition difficult to accept, and said that it should not be discussed until concrete adverse trade effects of TRIMs had been examined. It appeared that the proposal assumed all investment measures were trade restrictive and distorting, and he could not accept this. He asked what precisely was meant by the term "limited period" in the context of development considerations and what criteria would be used for granting exceptions to developing countries.

57. One participant expressed serious misgivings about prohibiting TRIMs. An evaluation of the trade effects of TRIMs, both positive and negative, should be made before considering prohibition, and the notion of whether a TRIM artificially affected trade was not a suitable basis for such analysis. The approach of prohibition could lead some countries to ban foreign investment in certain sectors. He sought clarification on the distinction between prohibited and non-prohibited categories of TRIMs and on the meaning of the phrase "legally-enforceable". He questioned why disciplines should be applied when investors voluntarily agreed to meet performance requirements, and suggested that these might be treated in the same way as voluntary export restraints and other grey area measures which were not covered by the GATT.

58. One participant said that technology transfer and domestic sales requirements were not trade-related and did not have adverse trade effects, and further evidence of the prevalence and the trade distorting effects of product mandating and manufacturing requirements was needed before he could accept they should be included in the negotiations. Investment incentives were part of a much broader and complex policy issue, which included such things as corporate tax policy, and they could not be considered to be TRIMs. To ensure a balanced approach, disciplining government-mandated investment measures could not be considered in isolation from disciplining the restrictive business practices of private operators, since these were two sides of the same coin. Development considerations could not be treated through time-limited exceptions, but had to be woven in as an integral part of the negotiations.

59. One participant could not accept that the Group should negotiate a framework of disciplines for TRIMs, nor the prohibition of certain TRIMs. She said that incentives should not be part of the TRIMs negotiations but should be dealt with elsewhere. She asked what was covered by the second category of disciplines proposed in the submission since it seemed to refer to government objectives rather than to mandatory measures, and these could not be considered to be TRIMs.

60. One participant doubted that prohibition was a suitable discipline for TRIMs, and suggested that if a prohibited TRIM was replaced by a border trade measure the trade effects could be even more restrictive and distorting. Also, prohibiting TRIMs would require that individual investment agreements be renegotiated, and this could create instability for investors. He asked what, in the context of the proposal, would happen if a non-prohibited TRIM was found to have adverse trade effects. Another participant replied to the first of these comments that it showed TRIMs and trade measures were often interchangeable and it underscored the need for general disciplines alongside prohibition to catch all new measures.

61. The representative of Japan replied to some of the questions and comments made. He said that the proposal did not attempt to create an international agreement on investment per se. Certain investment measures related to the trade interests and GATT rights of contracting parties and they should be dealt with accordingly. References in the submission to the growing incidence and trade effects of TRIMs could be substantiated with empirical data, and his delegation had referred to concrete examples in the past. There was no rationale in the GATT to make a distinction between capital-importing and exporting countries.

62. The grounds for prohibition were the trade restrictive and distorting effects of the measures and their inconsistency with GATT provisions. These criteria held for the seven TRIMs mentioned in the submission. Technology transfer and manufacturing requirements were indeed similar to local content requirements, but they were not the same and Japan believed all three were inconsistent with GATT provisions. The reference to "relevance to the existing GATT provisions" was aimed at export performance requirements which Japan believed should be prohibited by negotiating new provisions. The concept of prohibition went further than a standstill, since it involved clear legal obligations not to introduce new prohibited TRIMs and to eliminate existing ones.

63. The distinction between the prohibited and non-prohibited categories of disciplines rested on whether TRIMs were legally-enforceable or not. Those in the non-prohibited category should still be considered measures, and not simply government objectives. Drawing parallels with voluntary export restraints was not valid since TRIMs were not government to government agreements, and it was not relevant in the case of TRIMs whether an investor agreed to respect a performance requirement or not. The disciplines being sought for non-prohibited TRIMs were transparency and non-discrimination; since these TRIMs were not legally-enforceable they were not in immediate violation of GATT, but it would be possible to go to dispute settlement proceedings where they impaired or nullified GATT rights. Only two TRIMs had been included in the non-prohibited category because empirical evidence suggested these two were important, but it would be possible to consider including others. Investment incentives could not be dismissed from the TRIMs negotiations and left for consideration elsewhere since in many cases it was difficult to equate them only with export subsidies, for example when they were used in conjunction with product mandating requirements.

64. Japan did not foresee the proposed committee having a dispute settlement function nor presenting formal recommendations. It would simply express its views, and it was hoped these would be taken into account by countries applying the TRIMs in question. The TRIMs that should be registered with the committee would be those that it was agreed would fall into the two categories of disciplines. If a prohibited TRIM was imposed, there would be a violation of GATT disciplines and grounds for dispute settlement, but the committee might usefully look at the issue first. The composition of the committee would need to be looked at further.

65. Questions of which countries would be covered by development considerations and what precisely was meant by "limited period" should be looked at further. The basic idea was that prohibited TRIMs should be eliminated by developed countries in the immediate future, while developing countries would benefit from an extended transitional period.

II Other Business

66. The Chairman recalled that the Group had scheduled its next two meetings for 26-27 October and 27-29 November.