

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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

MEETING OF 26 OCTOBER 1989

Note by the Secretariat

1. The Group held its thirteenth meeting on 26 October 1989 under the chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2854 was adopted.

2. The Group agreed that the names of delegations making statements should be given in the secretariat's note on this and future formal meetings.

I Item A of the Agenda

3. The Chairman invited participants to make additional comments on the submissions received before the last meeting from India, Mexico and Japan.

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

4. The representative of the United States stated that references in the submission to the increasing importance of the trade effects of investment measures as the volume of international investment expanded underlined the urgency of devising ways to avoid the adverse trade effects of TRIMs before they became ingrained in the system. The submission moved work forward by suggesting a framework of disciplines to avoid these effects. It left many issues open to further negotiation.

5. He asked for clarification on the following points. He understood that TRIMs falling under the proposed discipline of prohibition could not be introduced after such a discipline had been agreed to: how would TRIMs that were being phased-in at that time be treated? Would they be frozen at their existing level or could the phase-in be completed? Existing TRIMs in this category were to be phased-out in a specific time-period according to certain procedures; could further precision be given on the time-period and the procedures? Regarding the proposal that a TRIMs committee could express its views on prohibited TRIMs that were causing problems among contracting parties, what standard would the committee be trying to apply and on what would it base its views? Would it be in a position to say, for example, whether the TRIM was prohibited, whether it was causing harm to another party, and whether the time-frame for its elimination should be accelerated? The list of prohibited TRIMs seemed short, and the definitional difference between technology transfer and manufacturing

requirements was not clear. Regarding TRIMs which would not be prohibited but should observe other disciplines, he asked why stricter discipline was being proposed when compliance with export requirements was achieved through government mandate rather than through a related subsidy; in his view greater trade distortion would be caused when the measure was linked to a subsidy. On the proposed scope of disciplines, he felt there was a danger of creating a new grey area in GATT by failing to discipline TRIMs that were not legally enforceable.

6. The representative of the European Communities underlined the extent to which the adverse trade effects of TRIMs could increase with the expanding role of direct foreign investment. He supported the approach of establishing differentiated disciplines according to the intensity of the trade effects of TRIMs. Negotiations would need to focus on which TRIMs to put into which category of discipline. Three such categories appeared to have been identified in the submission; one (in Section 2(3)) concerned TRIMs which might, under certain circumstances, have adverse trade effects or be inconsistent with GATT provisions, and he asked why disciplines had not been elaborated for this category. TRIMs which should observe "other general disciplines" appeared to be characterised by being linked to incentives, and he asked why only two specific TRIMs had been included under this category. Also, what did Japan hope to achieve in relation to this category of TRIMs through non-discrimination and transparency, which were relatively formal disciplines that might not have any substantive impact on government behaviour? Regarding the proposed TRIMs committee, he asked on what criteria the committee would base its views with respect to TRIMs in each of the categories of disciplines.

7. The representative of the Nordic countries supported the approach of establishing differentiated disciplines for TRIMs. Among the TRIMs discussed so far, some had considerable trade distorting effects in almost all cases while the trade effect of others was less clear. It was natural, then, not to apply the same level of discipline to all TRIMs.

8. He welcomed the idea of gradually eliminating TRIMs which were considered wholly undesirable, although it remained to be seen which those were. Care should be taken to avoid the disruptions that were likely to be associated with implementing a new discipline, but at the same time the idea of gradual elimination posed problems that would need to be looked into. The proposed TRIMs committee could certainly play a role in this process, but it was necessary to consider carefully the mandate and functioning of such a body to ensure that a smooth fit was obtained with the general framework of GATT procedures, just as it was hoped that a forthcoming agreement on TRIMs would be connected firmly to the existing body of GATT rules. A TRIMs committee could also play an important role in achieving a degree of transparency in the area of TRIMs, and the instrument of counter-notification would probably be of great value to its work. It was also a necessary ingredient if the interests of third parties were to be covered effectively in the agreement.

9. The result of negotiations should ensure that dispute settlement did not become the principal form of multilateral dialogue in this area. It

would be wise to consider carefully whether a TRIMs committee should become involved in dispute settlement since this could detract from other roles it might fulfil; dispute settlement should perhaps be confined to established GATT mechanisms, which were being further developed in the Uruguay Round. Given the diversity of TRIMs, a second category of disciplines other than prohibition was important. The submission laid a good foundation in developing such a category, and it was hoped that further elaboration would be possible. It was hoped also that other elements of the submission could be elaborated further, such as those concerning the treatment of incentives and the establishment of disciplines on TRIMs applied by local government bodies.

10. The representative of Hungary asked whether the submission addressed investment measures applied only to foreign investors or also to domestic investors. The question was important in view of the wide-ranging approach taken and the large number of measures included in the prohibited category. Particular problems arose in addressing measures that did not have clear trade restrictive or distorting effects. Prohibition was not a common approach in the GATT and it applied only to the most distorting measures. His delegation had previously questioned proposals to prohibit technology transfer and manufacturing requirements. If it was being proposed that measures such as these should be prohibited also when applied to domestic investors, he asked how such a prohibition would be made applicable, what were perceived to be the adverse trade effects involved and who was being injured by them, and which party could bring the matter into GATT in the proposed TRIMs committee? As for the inclusion of local content requirements in the category of prohibited measures, he agreed that these could have more direct trade effects than a number of the other measures covered by the submission. He asked whether rules of origin with similar effects would fall under the heading of local content requirements if they were applied to foreign investors, especially if they involved a high level of local content and were coupled with trade restrictions.

11. The representative of Singapore noted that Japan was proposing, in the light of the FIRA panel findings, that TRIMs administered through incentives should not be prohibited because they were not legally enforceable; instead, incentives should be subject to existing GATT provisions and to negotiations in the Negotiating Group on Subsidies and Countervailing Measures. In that Group, Japan had proposed that subsidies which were used to achieve compliance with local content and export requirements should be prohibited. He asked, then, whether Japan equated incentives with subsidies, since if that was the case it would appear that Japan was effectively proposing that TRIMs administered through incentives should also be prohibited.

12. The representative of India welcomed the reference in Section 1(2) of the submission to the role of foreign investment in economic development and to the importance of the management of investment policies in developing countries. Foreign investment and technology inflows had a crucial role to play in economic development, and the importance of managing foreign investment policies in line with national development objectives should be fully recognized by any international framework.

However, in view of this he was perturbed that the outright prohibition of local manufacturing, export performance and technology transfer requirements should be proposed, since that would be the surest way of preventing direct foreign investment from being made compatible with national development objectives.

13. The stated rationale for proposing the prohibition of these measures was that they had trade restrictive and distorting effects in all circumstances. He asked how increased local manufacturing of components or increased exporting could be considered trade distorting if it was government-mandated but not if it was undertaken on the basis of the foreign investor's own discretion and judgement. He offered an example that occurred frequently in his own country, whereby the government said that it would like an investor to achieve 60 per cent local content over a period of time and the investor on his own commercial judgement actually achieved a higher percentage than that; would the conclusion be drawn then that there was no trade distortion involved? The proposal that government-mandated measures should be prohibited amounted to direct interference in national investment policy. India recognized that the trade effects of local manufacturing and export performance requirements had to be addressed in the context in which they arose, but to propose the outright prohibition of any investment measure was to propose throwing the baby out with the bathwater. And more importantly, it was out of line with the statement in the Japanese submission that direct investment and technology inflows were important pillars of national development policy.

14. In the same context, it was proposed in Section 3(1) that TRIMs should be prohibited even if they resulted from an undertaking between the government of a host country and a foreign investor. Obviously when such an agreement was reached, the investor chose to enter into the undertaking on his own commercial judgement; how was it, then, that a measure should be prohibited if the government entered into the picture but not if the government was not involved? That was a difficult philosophy to accept.

15. Regarding measures applied to domestic investors, there was no discrimination in India between domestic and foreign enterprises since India subscribed fully to the principle of national treatment. There were cases where national enterprises had technology-licensing agreements with foreign investors, and where national enterprises were required to integrate into the world economy and look to export markets to earn foreign exchange and to undertake similar obligations to foreign investors. To apply GATT rules and disciplines which addressed investment measures in the case of domestic investors would be to go far beyond the negotiating mandate, and he did not think that could be the intention in the Japanese submission since it stated that the management of investment policy was the prerogative of national governments. To prohibit such measures only in the case of foreign investors would be to depart from the principle of national treatment since it would confer more favourable treatment on foreign investors than on domestic enterprises.

16. The Group was mandated to recognize development considerations fully in the negotiations. He welcomed the fact that the submission recognized

that. However, prohibiting local manufacturing, export performance and technology transfer requirements would be incompatible with development considerations, and was therefore unacceptable. His delegation was totally opposed to the concept of prohibition, but it was in favour of addressing adverse trade effects arising in particular circumstances. The manner of addressing them needed to take account of development considerations, and greater flexibility was needed for developing countries in this respect.

17. The submission gave the impression in Section 2(2) that investment incentives per se were not to be regarded as trade distortive and were not to be prohibited as long as they were applied consistently with GATT provisions. It would not be consistent, then, to insist that local manufacturing, export performance and technology transfer requirements should be prohibited a priori. By way of example, one country applying no performance requirements and levying low corporate profit taxes on domestic and foreign sales non-discriminatorily might be able to increase its exports or import-substitution beyond the level attained by another country which applied performance requirements but which levied high corporate taxes. It appeared from the Japanese proposal that the first case would not be regarded as trade distortive while the second would. Also, he endorsed the questions of Singapore about the distinction between investment incentives and subsidies. Export subsidies were being addressed in another Group regardless of the circumstances in which they arose. Did the Japanese submission cover only incentives linked directly to performance requirements or also the general incentive structure of an economy including, for example, its corporate tax policy?

18. He asked whether Japan considered rules of origin should be treated any differently from local manufacturing requirements. Very often, the rationale for applying rules of origin was to avoid the establishment of screwdriver operations. India agreed that such operations were undesirable if technology was to be acquired by developing countries. There was in the underlying philosophy, therefore, a degree of commonality between rules of origin and local manufacturing requirements.

19. The representative of Yugoslavia stated that incentives which were of a general character and were applied non-discriminatorily to all investors could not be equated with subsidies. The Group had made substantial progress, but the concept of prohibition remained a major problem for many participants. Other ways and means of reducing the trade restrictive and distorting effects of investment measures should be sought. Certain measures, such as manufacturing, local content and technology transfer requirements contained very strong developmental elements and the trade effects of these measures were side-effects that were much less important than their effects in promoting economic development. Insistence on prohibition for these measures was not justified, therefore. Nor could the development considerations of TRIMs be addressed adequately through special and differential treatment provisions; they needed to be integrated directly into the negotiations. The Japanese submission represented a step forward compared with other submissions in this respect.

20. The representative of Nigeria stated that inherent contradictions remained in the Japanese submission between the proposal to prohibit certain TRIMs and the positive role which it attributed to foreign and domestic investment in promoting economic development. Most of the measures which Japan was proposing should be prohibited were precisely those that could assist economic development in developing countries.

21. The representative of Egypt asked for clarification on the general disciplines proposed for TRIMs cited in Section 2(2) of the submission.

22. The representative of Japan acknowledged there were a number of areas in the submission where further work was required, both by Japan and in the Group on a collective basis. He gave the following preliminary responses to the questions asked and the comments made.

23. The precise criterion on which the TRIMs committee would formulate its views needed further reflection. Regarding prohibited TRIMs that were being phased-in at the time a TRIMs agreement became effective, these would fall into the category of existing TRIMs and he drew attention to the statement in Section 1(1) of the submission that further discussion was needed on such matters as the time-span for the elimination of these TRIMs. Japan's basic idea was that they should be eliminated immediately but that in certain cases gradual elimination, over a relatively short period, might be in order. TRIMs covered in Section 1(2) that should observe other general disciplines could easily have trade effects just as pronounced as prohibited TRIMs, but it was proposed that remedies for them should be different since they were not legally enforceable. Japan was aware of the possibility that TRIMs which were not legally enforceable could become a grey area, and it was in view of this, and the findings of the FIRA panel, that the second category of disciplines had been proposed.

24. It had not been Japan's intention to suggest a third category of disciplines for TRIMs covered in Section 2(3) of the submission; the intention had been rather to say that Japan was concerned specifically about the two measures identified in Section 2(2), but that other delegations might have come across measures that should be added under this second category of disciplines. For this category, Japan acknowledged that non-discrimination and transparency were not novel disciplines but it believed they could play a helpful role; transparency in particular was perhaps more important in connection with TRIMs than with other trade measures covered by the GATT. What was certain was that adequate disciplines were needed to avoid the adverse trade effects of performance requirements coupled with investment incentives.

25. The concept of investment incentives had a wider coverage than that of subsidies, which were being addressed quite properly in another negotiating group. In Japan's view, the example of different tax systems cited by India did not amount to a subsidy practice. The intention in the submission had been to suggest that the TRIMs Group needed to give further thought to the definition of incentives.

26. Regarding the scope of disciplines, Japan considered they should apply equally to foreign and domestic investors since the adverse trade effects of TRIMs arose irrespective of the nationality of the investor involved. The question of who would be entitled to bring a complaint to the GATT in these circumstances required further consideration, but Japan believed the answer lay in the notion of interested parties who felt their trade had been affected adversely by the measures. Japan agreed there was an element of commonality between rules of origin and local manufacturing or content requirements; the policy objectives could be similar, and the measures equally problematic and trade distorting. However, rules of origin were under discussion elsewhere in the Uruguay Round and the matter should be left at that for the time being.

27. The question of why a distinction should be made between a situation when a government required a company to act in a certain way and one when the company acted that way of its own volition reflected a basic difference of view over the meaning of trade distortion. Japan began from the premise that under the GATT free competition, free initiative and free trade were good things and there should be as little government intervention in the process as possible. It would have no difficulty, therefore, if a company acted in a certain way on its own commercial judgement; the difficulty arose when a government intervened in the process. The question of whether or not an investor agreed to certain government-mandated undertakings was not really relevant, as the FIRA panel had stated.

28. Regarding the integration of development considerations into the negotiations, Japan acknowledged this to be a very important matter and would continue to reflect on it. As to whether or not prohibition would contradict the concept of development, Japan recognized the important role of investment in development but it did not consider that by invoking development considerations countries should be allowed to disregard other considerations that were of legitimate concern to its trading partners. A balance needed to be struck between development considerations and the trading interests and GATT rights of other parties.

29. The representative of the European Communities noted that Japan was not proposing disciplines over TRIMs which could cause adverse trade effects or be inconsistent with GATT provisions only under certain circumstances, but suggested further reflection was needed since the problems they could cause were real ones. Regarding the discipline of transparency for TRIMs that would not be prohibited, he agreed transparency was important but felt that it could not be an ultimate goal in itself.

30. The representative of Uruguay agreed with Japan that government intervention in trade should be minimised. This was one of the objectives of all participants in the Uruguay Round. But this led him to believe that the central purpose of the Japanese submission concerned the problems encountered by companies in dealing with TRIMs rather than the trade distortion that they caused. His delegation had asked before what would happen if a TRIM was replaced by a general trade measure. There were many instances where a TRIM, which influenced a company's undertakings, was not directly linked to an investment but rather to trade measures used within

the general trade policy framework. When a trade measure created a distortion which directly influenced a company's trade or production decisions and created a negative trade effect, it became difficult to determine where the limit lay between trade policy and TRIMs. The Group needed to keep in mind the question of whether such trade measures would be treated according to whatever disciplines were established on TRIMs or on their equivalent trade effects.

31. He expressed concern about the development of indicative lists of TRIMs. Many measures had similar effects on trade. The United States had identified three categories of adverse trade effects in MTN.GNG/NG12/W/14. These effects were not only the result of TRIMs applied in investment contracts or directly by governments, but also of such things as defence contracts, measures applied to develop technology or in financial sectors, and so on. There were many sectors that were directly or indirectly concerned, as well as trade operations and trade and investment policies.

32. He also expressed concern over the proposal to prohibit TRIMs when the host government had accepted a particular investment only on certain conditions. If these conditions could no longer be legally-enforced, the government might decide that the investment was no longer of any interest or that the investment contract should be modified. This could raise complex legal problems, involving such matters as compensation. If this type of discipline was to be considered, therefore, the Group needed to reflect on other aspects that would have to be dealt with.

33. The representative of India endorsed the concerns of Uruguay that an agreement between a host government and a foreign investor over, for example, the provision of access to the domestic market in return for technology transfer would be prohibited if it were legally-binding but unactionable if it was not. Would developing countries which wanted to encourage foreign investment be prohibited, then, from aligning it with their development programmes?

34. The representative of Hungary considered that it might be necessary to return to the question of rules of origin and their relationship to local content requirements in the Group's discussions.

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

35. The representative of the European Communities reiterated his remarks at the last meeting that the submission was welcome because it constituted a significant opening towards serious negotiations on TRIMs. He added the following comments on points he found significant in the submission.

36. On the question of whether it was justified to introduce the concept of prohibition of TRIMs into the negotiations, since the Group was mandated only to look at the adverse trade effects of investment measures, he did not find a large difference in viewpoints between India on the one hand and Japan, Switzerland and the United States on the other. The Indian submission clearly addressed the question of which investment measures had

direct and significant adverse trade effects, and in several places it focused on the measures themselves (e.g., paragraphs 6 and 7). The Communities had considered all along that any agreement on disciplines for the adverse trade effects of TRIMs would need to focus on the measures, and the approach taken by India was not substantially different in this respect. The step that India had not yet taken was to recognize that certain measures regularly had adverse trade effects.

37. Linked to this, a point which figured prominently in Part I of the submission was that it was not logical to assume that a performance requirement was trade restrictive or distorting just because it was government-mandated, since an investor might achieve a similar or even higher level of local manufacturing or exports guided only by his own commercial judgement. This again showed that India's position was not far from that of certain other participants in respect of measuring trade restriction and distortion against the benchmark of commercial judgement. Logically, India should then conclude that if a government-mandated performance requirement led an investor to go beyond what he otherwise might have done, there would be some trade restriction or distortion. By tracing this kind of circular argument, he was not implying that ipso facto all performance requirements would be trade restrictive or distorting, but he was calling into question some participants' general opposition to the view that certain performance requirements normally had adverse trade effects and to any concept of prohibition.

38. Another prominent point in the submission was the claim that TRIMs harmonised the interests of host countries and investors and that they could not, therefore, be considered prejudicial. It was misleading to consider only the bilateral relationship between host countries and investors, since this neglected the interests of third parties who might be injured or suffer prejudice. As the Japanese submission had pointed out, through reference inter alia to the FIRA panel findings, whether or not an investor agreed to accept a TRIM was irrelevant.

39. Regarding the notion in the Indian submission that countries should be able to apply TRIMs freely where the development effects of the measures outweighed their adverse trade effects, he asked for further clarification. If taken literally, this would appear to provide a wholesale justification for using TRIMs, which seemed contradictory to the constructive spirit reflected elsewhere in the submission. He had considerable sympathy with the argument that some countries could face special problems, but to argue that whatever was considered by a country to be in its own interests should outweigh the negative trade effects of TRIMs was not acceptable; it could lead to no discipline whatsoever in this area.

40. The representative of Singapore took up the comments made by the European Communities on the use of commercial judgement as a benchmark against which to measure trade restriction or distortion. They would lead to the conclusion that if a TRIM was not legally-enforceable and compliance was achieved through a linked incentive, then the investor's commercial judgement would not be compromised and the TRIM should not be actionable. This was different from the traditional GATT approach of viewing trade

distortion in terms of nullification or impairment of GATT benefits, through, for example, the inconsistency of a measure with GATT provisions; it was not clear how it would apply to trade measures covered by the GATT.

41. The representative of the European Communities stated that he had not meant to identify the Communities with that concept, but that he had taken it from the Indian submission and he did not wish to disagree with it at this stage. It was an interesting concept and showed that a general rejection of the discipline of prohibition could not be maintained.

42. The representative of the United States welcomed the Indian submission for articulating a point of view and enlivening the discussions. He endorsed the questions raised by the European Communities. In his view, it was somewhat sterile to continue arguing about the Group's mandate. The mandate was broad and it was up to the Group to interpret it, but he did not agree that it was inconsistent with the mandate to discuss frameworks of disciplines to avoid the adverse trade effects of TRIMs.

43. The part of the submission which disturbed him most was its failure to address the impact of TRIMs on third countries and on the trading system. In his view, local content and export performance requirements were basically incompatible with the GATT system. Local content was a barrier that could not be overcome no matter how much better an imported product might be, and it even had a perverse effect in the sense that the costlier was the domestically produced substitute, the easier it would be to meet a local content requirement. The submission partly recognized this point in paragraph 39 where it referred to the benefits of trade in inputs taking place through subcontracting; that could not happen if high local content was required. The failure to address the adverse trade effects of TRIMs on third countries was brought out most clearly in Section III of the submission: in paragraph 44 it was stated that Article III did not apply if there were no imports; in paragraph 50 it was stated that Article XI did not apply if a restriction was imposed internally. Taking these two statements together, it would seem that India considered it would be consistent with the GATT for a country to prohibit all domestic purchases of imports or to require the domestic manufacture of all goods it consumed. In his view, that would not be compatible with the GATT system.

44. Another point of concern was the relationship of TRIMs to protection. A TRIM was often imposed in exchange for giving access to a protected market; the higher the level of protection, the greater the benefit of market access and the more TRIMs could be imposed. But this relationship worked both ways. If a company had accepted a TRIM, it would argue to maintain the protection it enjoyed on the domestic market in order to help offset the costs of the TRIM. An unfortunate correlation therefore tended to exist between TRIMs and highly protected markets, while TRIMs were found less often in more open market environments.

45. In his view, rules of origin were inherently different from local content requirements, since they were an attempt to prevent circumvention of trade rules, but he agreed with India that rules of origin needed to be

disciplined and the United States had made a proposal to this effect in another Group.

46. He welcomed paragraph 48 of the submission, which he read as a willingness to discuss the trade effects of TRIMs and remedies for them. Regarding objections in the submission to the concept of prohibition, in his view prohibition was a very effective discipline. Other participants had indicated that there should be other disciplines in addition to prohibition, and he encouraged them to specify what they had in mind.

47. The representative of Japan welcomed the Indian submission and recalled his comments at the last meeting. TRIMs had, of course, a development dimension as did every other subject in the Uruguay Round, but they also had global implications which was why multilateral discussions were called for. By way of further explanation, he drew attention to paragraph 25 of the submission where reference was made to the fact that imports could not be increased over the long-run by developing countries unless they enjoyed also an increase in their export earnings. That was a fair statement, but it raised the question of how exports were to be increased. India suggested in paragraph 29 that because of considerations such as these, export performance requirements applied on a long-term basis would have trade-enhancing and trade-stabilising effects, but this presupposed that other countries did not have export performance requirements; if they did, what would happen to world trade? These global implications of TRIMs were not fully addressed in the submission.

48. The representative of the Nordic countries welcomed the recognition by India that some of the TRIMs mentioned in the Group were trade-related and could have trade restrictive and distorting effects. He agreed that the focus of negotiations should be on trade effects, but felt that the negative effects of some TRIMs were so common that it was possible to generalise from trade effects to the measures themselves. For TRIMs where that was not the case, other means of curbing their negative trade effects when they occurred had to be found. He understood the reluctance of India and some other participants to accept a discipline of prohibition, but recalled that local content requirements had been deemed inconsistent with the GATT by the FIRA panel; in that case at least, the Group should consider how to achieve compliance with the GATT and the elimination of the measures. In doing so it would be of central importance to take developing countries' concerns into account in such a way that individual countries' development efforts were not substantially hampered. He agreed on the need to strike a balance between trade and development interests. One purpose of a multilateral discipline was to reconcile different objectives that were in themselves considered legitimate by developed and developing countries. The comprehensive scope of the Indian submission and its coverage of development considerations provided a very useful basis for such an exercise. He hoped that India and others would continue refining the arguments and suggesting operative ways in which the appropriate balance could be struck.

49. The representative of New Zealand felt that excessive concern was being voiced over the concept of prohibition. As the Nordic countries had

pointed out, the Group already had a precedent of a TRIM that had been found by the FIRA panel to be inconsistent with the GATT. Since GATT Articles broadly defined the scope of the Group's mandate, it had to be recognized that prohibition fell within the terms of the mandate at the very least in the sense of eliminating GATT-inconsistent measures.

50. Regarding the objections raised in paragraph 11 of the submission to proposals by other participants which India considered aimed to prohibit government intervention in the economy through TRIMs rather than to prohibit the adverse trade effects of TRIMs, in her view the proper subject for discussion was prohibiting adverse trade effects which resulted directly from government intervention. Article XI of the GATT, for example, was based on the concept of nullification and impairment of benefits, which was considered to occur when government-mandated trade policy measures were used in a way that injured the interests of other contracting parties. She emphasised that since the GATT had been signed by governments, it clearly referred to government-mandated measures. Her first reaction to the point raised in the same paragraph, that investors might act in any case in a similar manner to that mandated by a TRIM, had been to ask why the TRIM was then necessary. For her, it was the fact that it was a government-mandated measure which created the adverse trade effects. Analogy could be made again to Article XI; importers might choose to import a product or not, but the important point was that they had the choice and could operate freely in line with market forces and their business needs. The GATT accepted this concept of freedom of choice, both for importers and suppliers, and recognized it could not work in the face of a government-mandated quantitative restriction which established arbitrarily the quantity of goods available and was understood prima facie to injure the interests of other trading partners.

51. She was not advocating a widespread resort to the prohibition of TRIMs, but she did consider the concept of prohibition appropriate in cases where a TRIM had a similar or identical effect to a quantitative restriction. The same argument of nullification or impairment of benefits applied. And in such cases, it was impossible to separate the measure from its trade effects. She agreed with India and others that it was necessary to start by focusing on trade effects when framing any disciplines, but in her view that did not preclude the possibility of the prohibition of measures having those effects. Like many others, she felt that in cases where GATT relevance was less clear-cut and the trade effects of a measure were not direct or significant in all cases, more work needed to be done on what disciplines might appropriately apply. In conclusion, rather than reject any concept of prohibition, it was incumbent upon the Group to look at what was inherent in the GATT and to recognize that it did establish parameters for considering prohibition. The Group should examine how far the concept of prohibition was applicable to TRIMs and then consider procedures for bringing those measures into conformity with the GATT.

52. The representative of Brazil was concerned that negotiations were not heading in the direction that had been mandated, and that the impression being given was that the Group was there to establish overall rules on investment or to classify selected measures as prohibited. The Indian

submission brought to the attention of the Group very relevant issues, to which an adequate response had not so far been given.

53. Paragraph 6 of the submission posed four basic questions that the Group needed to address if it was to proceed in a disciplined and constructive manner, abiding by the terms of its mandate. It was risky to aim for something more ambitious than the mandate, and it would not be conducive to finding answers to those four questions. To the extent any proposal introduced ideas that fell outside the mandate, the Group might find itself in a position that it could not use them.

54. Regarding the first question posed in the submission, India had tried to answer it in a logical and intelligent way and had found very few situations in which TRIMs would have significant and adverse trade effects. It had been inevitable in this context to comment on the measures themselves, since the Group's discussions to date had concentrated on the measures rather than their trade effects and it was natural in replying to focus on the measures to see whether those discussions were justifiable or not. India had tried to show that it was only in certain circumstances that some measures could produce some direct and adverse trade effects. That was enough to reject the approach of classifying measures which in all circumstances would be prohibited, and it was regrettable that some participants were insisting on this approach since it left little room for consensus on the matter. India, in contrast, was inviting the Group to tackle the issue of adverse trade effects very openly.

55. He agreed with India on the need to address the adverse trade effects not only of government measures but also of private business practices. He understood India to be saying that what needed to be addressed was not necessarily the practices themselves but their adverse trade effects. So far, other participants had not indicated whether they considered these trade effects relevant or how they might deal with them, and he asked for their views on this issue which had been well-developed by India.

56. A reaction from other participants was also needed on the views, which he shared, on export performance, local content and local manufacturing requirements on pages 11 to 17 of the submission. It would help to show to what extent participants were negotiating with the same perspective. He asked in particular for comments from others on whether rules of origin and the trade effects they produce should be assimilated with local content requirements or treated separately.

57. The Group had exchanged views in the past on the issue of adverse trade effects, and he recalled the submission by the United States (MTN.GNG/NG12/W/14) where three categories of trade effects had been mentioned as being "artificial". He noted that the term had not been used in subsequent submissions to the Group by the United States, and asked whether it still reflected the United States position accurately. A good aspect of the United States proposal was its attempt to address the question of adverse trade effects, but it was necessary to be more specific on what those effects were and he repeated a question that he had asked in

the past about whether the United States had some specific criteria to establish what an "artificial" trade effect was.

58. Finally, he reiterated that the Group should proceed in a logical manner by discussing first the question of adverse trade effects and then other points on its agenda. He had no objection to all the points being discussed, but the Group had to be consistent in tackling its mandate if it was to get positive results. The Indian submission provided a good basis for further discussion.

59. The representative of Hungary found the submission important and substantive, and had no problem in agreeing with some of its ideas and conclusions. He noted that India had approached the matter from the point of view of developing countries, but he stated that investment policies were important for all countries as a means of promoting economic development and growth.

60. He agreed with India's conclusion that export performance and local content measures were the two types of investment measures which could be shown to have direct trade effects. India considered local manufacturing requirements to be a particular type of local content measure, but in his view they could be different and should be treated separately. With respect to the other TRIMs mentioned in the Group, he agreed to a large extent with the conclusion in paragraph 20 of the submission that these could not be shown to have direct or significant adverse trade effects.

61. A number of these other measures raised difficult problems in the light of the statement by Japan that TRIMs should be brought under effective discipline whether they applied to foreign or domestic investors. In the case of remittance and exchange restrictions, this would imply that any country that did not allow free capital movements or did not maintain a liberal foreign exchange policy would be in contravention of any understanding reached to discipline the use of these measures. Such an approach would go well beyond the Group's mandate. A similar conclusion would be drawn if it was to be understood that manufacturing requirements applied to domestic investors were to be covered by disciplines on TRIMs, since any government investment policy could be demonstrated to be a manufacturing requirement. In any case, he did not accept that manufacturing requirements applied to domestic investors would have trade effects that were related to the trade interests of other countries.

62. A problem which he had referred to previously concerned the treatment of technology transfer requirements, which frequently were imposed in response to government-mandated technology transfer restrictions. Such restrictions were wide-ranging and affected a large number of sectors, and he doubted anyone would deny that they had direct trade restricting and distorting effects. Applying technology transfer requirements in such circumstances was nothing more than a defensive measure, and if these were to be considered TRIMs they could only be examined in parallel with the restrictions which provided the basis for their application.

63. The representative of Colombia felt that the Group still had an identity problem. Some participants continued to establish categories of TRIMs without defining clearly their influence on trade, and this had led to an impasse where the Group ended up discussing the legitimacy of the measures rather than how to control their possible trade impact. A balance of positions could not be achieved while some participants concentrated on certain elements but ignored others, such as the restrictive business practices of private enterprises.

64. He could accept the philosophy and the substantive content on development considerations that was included in the Indian submission. Some participants, such as Japan, had said that they recognized the need to include development considerations in the negotiations, but in their proposals they had referred only to time-limited exceptions to the general procedures that they wanted to apply to reduce and eliminate TRIMs. The impression that the Japanese proposal gave of aiming to submit TRIMs to the discipline of prohibition was also of concern. Japan's explanation of the relationship between investment incentives and subsidies had been unsatisfactory, and it contrasted with the clear statement on this matter in paragraph 52 of the Indian submission. He believed that the treatment to be given to foreign investors should be structured on the basis of parameters to be determined by competent national bodies which could take into account political, economic and technical conditions. These bodies had first to undertake an enquiry before giving their approval for an investment. He also believed that foreign investment policies gave rights to the investors but only on condition that they fulfilled certain specific obligations.

65. The representative of Mexico said that some elements of the Indian submission warranted full attention, particularly those dealing with development considerations. She considered it natural that participants should insist that the Group strictly respect its mandate and concentrate on identifying the adverse trade effects of investment measures and the means of avoiding them. She agreed that the Group should focus on the trade effects of the measures and not the investment measures themselves, which were a matter for sovereign policy-making. India also made a pertinent observation in saying that it was not appropriate to describe measures as having a restricting influence on trade simply because they were applied by governments and to propose, therefore, that they should be prohibited. Such an argument would lead to the extreme case of prohibiting all government-mandated TRIMs without taking into consideration their actual trade effects. She believed it absolutely necessary to insist on the verification of the direct and significant trade effects of TRIMs. It was only by identifying such trade effects that appropriate provisions to avoid them could be determined.

66. She recognized that there might be certain investment measures that could have distorting effects on trade. Her delegation was ready to explore various disciplines which could avoid such effects, but it had serious reservations about the concept of prohibition. Since it could not be established that a particular investment measure would have trade distorting effects in all circumstances, prohibition did not seem to be the

appropriate solution. Recalling a point made on earlier occasions, she said that she shared the view that investment incentives should not be dealt with in the TRIMs Group.

67. She drew attention to the presentation in the Indian submission on the importance of foreign investment for assisting economic development. In line with the Montreal mandate, development considerations should be integrated fully and negotiations should aim to help developing countries attract foreign investment according to their economic needs. In this context, measures such as technology transfer requirements played an important role.

68. The representative of Chile said that the Indian submission raised some valid and important points. One was concern about attempts to place TRIMs in categories such as prohibited, permitted or actionable; this was a very limiting approach to adopt. Another was that lists of TRIMs could be drawn up ad infinitum, depending on how trade distorting different delegations considered the effects of investment measures to be. The submission could be used as a starting point for analysing adverse trade effects, which he had always understood must be direct and significant to warrant consideration. He agreed with Mexico that investment incentives did not fall within the scope of the mandate of this Group.

69. Responding to the questions raised and the comments made, the representative of India stated that first and foremost the Indian submission had been confined strictly within the Group's mandate, which required that development considerations be taken fully into consideration. The submission tried to examine these in detail in relation to the TRIMs which had been claimed by other participants to be trade-distorting.

70. The assumption by the European Communities that India recognized investment measures had to be addressed, and the argument that India should recognize also that the measures could be prohibited, appeared to be based on a selective reading of the submission from which some statements had been taken out of context. In paragraph 5 it was stated clearly that the Group should confine itself to the avoidance of the adverse trade effects of investment measures, if any, and should not focus on investment measures per se nor on their prohibition. This was in keeping with the Montreal decision on TRIMs, and India had tried to suggest how the task could be addressed purposefully. When taken in the proper context, the argument of the Communities lost much of its force. The same was true for the comment by the Communities on paragraph 11 of the submission. What was stated there was that the advocacy of the prohibition of performance requirements in submissions by the industrialised countries was based on the argument that all performance requirements ipso facto had trade-distorting effects; if the same performance requirement was undertaken voluntarily by an investor, why would it not be considered equally trade-distorting? What these other participants were proposing, then, was not prohibition of the adverse trade effects of an investment measure but prohibition of government intervention. Japan had stated clearly that government intervention was not conducive to free competition, initiative or trade and was therefore not compatible with the GATT. This was a philosophy that

India did not agree with; it could be discussed, but the TRIMs Group was not the place to do so.

71. Japan had commented that if all countries were to adopt export performance requirements there would be no trade-enhancing or stabilising effects of TRIMs, and the European Communities and the United States had made a similar point when referring to the need to take into account the injury caused by TRIMs to third countries. The Indian approach was not a zero-sum game, where one country's exports would be increased only at the expense of those of another country. The submission put forward the underlying development philosophy that for developing countries to increase their imports they needed to increase their exports on world markets. In that context, raising developing countries' exports would be good for world trade and would not be at the expense of other countries. If exporting involved subsidisation or dumping, the submission clearly acknowledged that GATT provisions would apply, but there was no need to prohibit investment measures related to an increase in exports.

72. In that context, he referred to the quotations from a recent United Nations document that were contained in the submission. The kind of thinking that was in the mind of the international community on the subject of development considerations should not be overlooked. By maximising the benefits of foreign investment and technology inflows, developing countries would be able to integrate into the international economy and to import and export more, thereby increasing international trade. Taking a long-term perspective, the reasons for export performance requirements could be appreciated. It should not be assumed, therefore, that local manufacturing and export performance requirements were ipso facto trade restricting or distorting; they were trade enhancing in the long-run.

73. If government-mandated local manufacturing or export performance requirements were considered trade distorting and were therefore to be prohibited, what should be done about the restrictions imposed by international companies on exporting or component-sourcing by their subsidiaries in developing countries? It was not satisfactory to answer that the Group should address only government-mandated measures and not those applied by private companies. The Group's mandate was to address adverse trade effects, and it was not stipulated whether investment measures were government or corporate measures. This was an important matter of balance for the results of the Group's work. Developing countries would suffer if they were subject to disciplines on TRIMs on the one hand but could do nothing about private company practices which produced the same adverse trade effects on the other. He attached extreme importance to the Group addressing the restrictive business practices of multinational corporations, particularly since investment measures were being addressed for the first time in the GATT in these negotiations.

74. The ways in which local manufacturing requirements enhanced industrial and economic growth in host countries was spelled out in paragraph 39 of the submission. How they created and enhanced trade was also set out in detail. This should be taken into account by the Group in its discussions on the development considerations of investment measures.

75. He welcomed the comments of the Nordic countries that they did not subscribe to the concept of prohibition except in extreme circumstances, that the Group should focus on adverse trade effects and not on investment measures themselves, and that the central issue was how to take into account the concerns of developing countries and to strike a balance between these concerns and the adverse trade effects of investment measures. In his view, if the Group was willing to look at the matter of development considerations, it would find that an appropriate balance had been struck in the Indian submission, but as long as the approach remained at the simplistic level of extended transition or phase-out periods, the concerns of developing countries would not be addressed properly. If any disciplines were found to be needed in this area, they should be built on development considerations.

76. The European Communities had asked who was to decide whether development aspects of investment measures outweighed their adverse trade effects; India submitted that it was obvious they did so in the case of local manufacturing and export performance requirements. If in any particular circumstance these measures led to dumped exports, ample redress was available through the GATT. If export performance requirements did not lead to dumping or local manufacturing requirements led to technology transfer and economic diversification for the host country, the measures were not trade distorting but rather contributed to trade and development. No meeting of minds would ever be reached by arguing that development aspects did not outweigh adverse trade effects and that the remedy lay in prohibiting the measures in question.

77. Finally, he welcomed the support of Brazil, Chile, Colombia, Hungary and Mexico for the Indian submission and their focus on three key elements of the negotiations; the need for the Group to address development considerations and restrictive business practices and to abandon the concept of the prohibition of investment measures. As had been pointed out by Chile, India was against attempts to categorise investment measures as prohibited, permissible or actionable, but it was willing to address the adverse trade effects of investment measures and to consider remedies for those effects.

II Item B of the Agenda

78. The Chairman recalled that the Group's next meeting was scheduled for 27-29 November. He proposed that the Group hold two meetings in the first quarter of 1990, and asked participants to reflect on the dates of 29-30 January and 29-30 March so that a decision could be taken at the Group's meeting in November.