

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG12/W/23

22 November 1989

Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related
Investment Measures

Original: English

SUBMISSION BY THE NORDIC COUNTRIES

The attached communication, dated 21 November 1989, has been received from the Nordic Countries with the request that it be circulated to members of the Group.

I. INTRODUCTION

1. In response to the request of the Chairman of the TRIMs negotiating group for written submissions elaborating on the subject matter for negotiation, the Nordic Countries wish to present the following proposal. It builds upon the previous Nordic submission (MTN. GNG/NG12/W/6), and represents current Nordic positions on the main issues of discussion as they have evolved.

2. The proposal is comprehensive in the sense that it aims at covering those elements which are felt to be necessary for an agreement in the area of TRIMs. It can therefore be taken as a suggested framework for the negotiating phase that the group will enter into at the beginning of next year. The Nordic countries' basic aim is for a broad TRIMs agreement that can be accepted by all Contracting Parties.

II. GENERAL PRINCIPLES

3. In line with the TNC mandate of April this year and the underlying intentions of the Punta del Este Declaration, disciplines for TRIMs should as far as possible be based on existing GATT rules and principles. The objective of the negotiating group's work is to create rules that will assist Contracting Parties to avoid the distortive and restrictive effects of TRIMs on trade.

4. Avoiding this type of trade distortion or restriction inevitably entails paying a certain amount of attention to the measures causing such effects. As in the case of articles III or XIV of the General Agreement, these are not normally border measures.

It is however recognized that governments have a sovereign right to formulate investment policies against a background of nationally formulated goals on economic or social development. The Nordic Countries wish to underline that there is no intention to infringe upon this right, other than in the sense laid down by the mandate for these negotiations, of seeking to avoid that investment measures are taken at the expense of other countries' legitimate trading interests.

5. Avoiding trade distorting or restricting effects can be achieved in different ways.

- A case by case assessment of effects is one way of identifying what is to be avoided, but this has the disadvantage of enabling discipline only "after the fact" and entailing corrective measures which can pose problems for investor and host government alike.

- Disciplining entire categories of measures is another approach which has the advantage of simplicity. But it presupposes, in the Nordic Countries' view, that such categories of measures are considered to have a potential for negative effects upon trade under all or almost all circumstances. The GATT framework sets a precedent for generalized disciplines of this kind. Some flexibility is also provided in the GATT Agreement by the enumeration of exceptions from the general rules.

The Nordic Countries feel that both these approaches are valid and will in this submission suggest how they can be applied in the context of TRIMs.

6. As the focus of the Mid-Term Review mandate is on effects, any discipline should recognize the fact that the same negative trade effect arises irrespective of whether a given TRIM is applied to a domestic or to a foreign investor. Therefore, disciplines should apply equally to both categories of investment. Here again, it is important to underline that normal GATT exceptions should apply as far as possible in order to give governments the flexibility recognized by the GATT Agreement as legitimate and necessary.

7. A focus on effects further indicates that a discipline should cover not only such TRIMs that are stipulated by law or government regulation, but also those negotiated in an ad hoc manner with individual investors on the basis of broad discretionary powers.

8. Finally, the focus on effects indicates that if an investor agrees to- or suggests- or is compensated for a TRIM, this does not alter any negative effects on the trade of other countries either in quantitative or qualitative terms. Indeed, compensation probably aggravates these effects. Therefore, the Nordic Countries suggest that the mere fact of acquiescence (or active support) on the part of an investor cannot alter the applicability of the discipline. In line with general GATT principles, only the agreement of all Contracting Parties should make it possible to set aside a rule. The consent of private parties is not sufficient.

9. Practical experience indicates that TRIMs are applied not only at the national level, but that sub-national government bodies in some cases also formulate such measures. It is therefore deemed important by the Nordic Countries that disciplines for TRIMs are respected by all authorities, including those at sub-national levels.

10. During discussions in the Group, it has been suggested that incentives, or combinations of incentives and TRIMs, should be disciplined. Incentives in the broad sense are measures that governments use to stimulate economic activity. The aim may for instance be to promote development or counter regional imbalances. To the extent that incentives have trade restrictive or distortive effects, these are covered by the GATT discipline on subsidies (Art XVI of the General Agreement and the Subsidies Code). To the extent that such effects arise indirectly, as a result of linking the incentive to a TRIM, a discipline on the TRIM itself should be sufficient. In sum, the Nordic Countries see no reason to discipline incentives within the framework of a TRIMs agreement.

III. A MEASURED RESPONSE TO THE NEGATIVE TRADE EFFECTS OF TRIMs

11. Characteristic for the types of TRIMs discussed by the Negotiating Group is the fact that the trade effects cited vary from TRIM to TRIM and, for some TRIMs, from case to case. It would therefore not be appropriate to try to cover all TRIMs with same discipline. In line with what was stated in para 5 above, the Nordic Countries suggest that both comprehensive and case-by-case approaches are used.

12. For the comprehensive approach described in paras 14-19 below, only two main types of TRIMs are considered sufficiently clear-cut in their trade distorting effects to be subject to such a discipline :

- Local content requirements, defined as an obligation for the investor to use inputs of local origin or from a local source up to a specified percentage of the final value of the product.
Such requirements are considered contrary to Article III:4 and III:5 of the General Agreement, and with respect to the former this conclusion is supported by the findings of the so-called FIRA Panel (L/5504).
- Export performance requirements, defined as an obligation for the investor to export a specified quantity, proportion or minimum value of the product; or a proportion of the investment's import requirements (i.e. a trade balancing requirement).
Such requirements imply that exports take place not as a result of commercial considerations but under the influence of other factors unrelated to the market conditions for the product. Trade displacement would result for third parties, who will find that parts of the market are artificially absorbed by producers who under normal conditions would not be competing at all. (The argument that trade might have taken place in any case is not considered strong. It implies a superfluous performance requirement, which must be considered a rare and by most governments undesired phenomenon).
Note that trade balancing requirements are considered, for the purposes of this submission, to fall under export performance requirements as the effects are seen to be very similar.

13. Other TRIMs that have been discussed by the Negotiating Group are considered by the Nordic Countries to have negative effects on the trade of third countries in degrees varying from case to case. It is proposed that Contracting Parties as a result of these negotiations shall designate TRIMs from this group to be covered by those general commitments and case-by-case disciplines described below in paras 20-28

IV. A FIRST LEVEL OF DISCIPLINE

14. Elimination should be the goal for such categories of TRIMs whose trade distorting and restricting effects appear to occur under all or almost all circumstances (as explained above: local content requirements and export performance requirements, in the Nordic Countries' opinion).

15. A gradual approach is however needed so as to allow governments and investors presently relying on a TRIM the necessary time to adjust. This approach would have to cover both the gradual elimination of existing measures as well as the implementation of new measures in the category of TRIMs to be eliminated.

16. The phase-out of existing measures for a category of TRIMs could be based on the following three tenets.

a) Notification

The existing TRIMs in a category to be eliminated would need to be notified. As indicated in para 7 above, this requirement would apply also to ad hoc measures.

Notifications would have to be disaggregated if, taking the case of local content requirements as an example, different percentages apply to different investments or sectors.

b) Binding

Based on these notifications, the present state of affairs would be bound and increases not permitted. Thus, for an existing 50% local content requirement no increase above that level would thereafter be permitted. Similarly, if no local content requirements exist, 0% would once and for all be the binding level. Since only existing local content requirements would be notified, the absence of a notification would indicate a level of 0%. An appropriate cut-off date for new measures would need to be defined in an agreement along these lines.

c) Adjustment period

The Nordic Countries propose that developed Contracting Parties should undertake to eliminate notified TRIMs over a period not exceeding 3 years from the time of adoption of an agreement.

As a general rule developing Contracting Parties should phase out their notified TRIMs over 5 years.

The time frame normally allowed for the least developed countries should be 10 years.

Since categories of TRIMs proposed for elimination should be those most directly in violation of GATT principles, the suggested solution is sub-optimal in the sense that it makes possible the temporary continuation of GATT-inconsistent measures. But this could be considered comparable with the practice of allowing a transition period for compliance with the findings of a GATT panel.

17. In addition to the gradual phase-out of existing measures, the first level of discipline would also have to cover the implementation of new measures or degrees of a measure. This could be accomplished by requiring that governments refrain from

- the implementation, in the context of particular investment projects, of new stages in an already required or accepted TRIM.
- applying the TRIM to be eliminated to cases of new (or expanded) investment. (see also para 32 below, however)
- adopting new laws, regulations or practices containing the TRIM to be eliminated;

18. Enforcement of this discipline should be based upon normal GATT dispute settlement procedures (as embodied in Art XXII and XXIII with improvements agreed upon in the context of the Uruguay Round), using the notifications made at the outset as a base line. A consultation procedure preceding actual dispute settlement would need to embody the right of counter-notification by parties perceiving an infringement of the discipline.

19. The orderly phase-out of measures would be facilitated by the institution of a surveillance mechanism, perhaps in the form of annual reviews of the status of notified TRIMs.

V. A SECOND LEVEL OF DISCIPLINE

20. TRIMs not covered by the first level of discipline could be described as measures which embody a risk of adverse trade effects under certain -but not all- circumstances. In order to minimize that risk Contracting Parties should undertake a general commitment to avoid causing such effects in the implementation of measures related to investment. Such a commitment would have the added benefit of eliminating many possibilities for circumvention of the provisions under the first level of discipline.

21. Other general GATT principles that could usefully be linked directly to TRIMs in a second level of discipline are the concepts of national treatment and non-discrimination.

22. The enforcement of a second level discipline could be facilitated by adopting a provision stating explicitly that negative trade effects emanating from TRIMs are actionable under GATT, on a case-by-case basis. The provision should specify that complaints could legitimately focus not only on laws and regulations, but also on systematic practice and on individual instances of TRIMs use.

23. For this second level of discipline as well, it is foreseen that GATT's normal dispute settlement mechanism (contained in articles XXII and XXIII with modifications) could be used. The burden of proof would rest with the complainant.

24. In many cases, a TRIM falling under the second level of discipline could be likened to a non-tariff measure. From this point of departure, one could envisage an alternative or complement to case-by-case dispute settlement as described above. As with NTMs, request offer negotiations could be conducted with a view to eliminating measures. Such negotiations could take place within the framework of a Round, or outside of it. In line with normal GATT practice, concessions would be established on a Most Favoured Nation basis.

25. A meaningful case-by-case discipline presupposes a high degree of transparency. This is not an easy requirement to fulfill. A system of notification would need to cover a very broad range of investment measures and would give rise to a large volume of information the handling of which would pose practical problems and entail considerable expense. There would also be a certain degree of uncertainty associated with such an arrangement, as to whether it would be efficient in identifying instances of adverse trade effects.

26. An alternative that the Nordic Countries consider more realistic would be to base transparency on a detailed and comprehensive obligation to furnish information upon request through GATT channels. Special care would have to be taken to incorporate reasonable guarantees to protect the confidentiality of information given.

27. A national enquiry point system similar to that incorporated into the TBT-agreement would be an asset in this context. This would provide Contracting Parties with a precisely defined focus for enquires, eliminating any uncertainty concerning responsibility for obligations in this area.

28. Regular multilateral reviews of Contracting Parties' TRIMs regulations and practices would also be appropriate. By discussing notified instances of adverse trade effects (in a context separate from dispute settlement) and otherwise providing a forum for exchanges of view on any topic related to the discipline, such consultations could contribute to the development of a common understanding on the trade aspects of TRIMs use. To the extent that such an understanding evolves, recourse to the dispute settlement mechanism might be avoided.

VI. EXCEPTIONS TO RULES

29. The issue of exceptions is an important one, especially against the background of the Mid-Term Review mandate's injunction to consider developmental aspects of TRIMs within the framework of the negotiations. The Nordic Countries fully recognize the importance of these considerations and emphasize that a balance must be found between well defined trade- and development aspects in the TRIMs context.

30. As indicated already in para 5, the exceptions incorporated into the GATT Agreement would provide a certain degree of relief from the suggested first level of discipline, which calls for the gradual elimination of certain types of TRIMs. To what extent these exceptions would apply depends in part on the form of a TRIMs agreement.

The Nordic Countries strongly favour a close link to the GATT Agreement. This would imply scope for the invocation of many of the normal exceptions. The exceptions detailed in articles XI:2 (quantitative restrictions), XII (balance of payments safeguards), XVIII:B & C (economic development), XX (public morals, health, etc) and XXI (security) should therefore be examined for their relevance when negotiating a discipline.

31. Another important form of exception already discussed is the acceptance of phasing-out periods of varying length for TRIMs under the first level of discipline. This approach could be further refined to provide for individual timetables for the phase-out operation, country by country. Special circumstances could then be considered more fully.

Modalities would, however, have to be discussed. It would be necessary to agree how and when such discussions could take place, as well as the criteria that could be applied in order to arrive at a balance between GATT rules and special needs. The Nordic Countries would appreciate other countries' views on this subject.

32. A problem which requires careful consideration is that of how to treat existing investments subjected to TRIMs, if these measures are phased out under the first level of discipline. The effect of a phase-out might run counter to the general principle of non-discrimination by subjecting existing investments and new investments to different requirements and thereby giving rise to new distortions. The Nordic Countries could consider a solution which allowed for the imposition of TRIMs on new investments during the phase-out period, but only to the same extent and level as such TRIMs remain in force for comparable investments. This measure is suggested as a means of avoiding unwanted distortions, and not in order to compensate investors for changing conditions. Such changes lie at the heart of all trade liberalization and the associated risks must be borne by all. Investors already established on a market could in general be regarded as having a competitive edge over newcomers by the mere fact of earlier establishment.

33. For the second level of disciplines proposed above, the Nordic Countries believe that the approach to exceptions detailed in para 30 is equally valid: an examination of normal GATT exceptions to ascertain their validity in the TRIMs context, coupled with explicit reference to these exceptions in an agreement. It would be suitable for a TRIMs agreement to spell out exactly which of these (and/or other) exceptions that are considered as being applicable to TRIMs.

34. In addition to the above, the Nordic Countries remain open to discuss further types of exceptions that may be considered necessary by other Contracting Parties.

VII. A TRIMS COMMITTEE

35. In order to carry out the suggestions put forward in para 19 on monitoring (for the first level of discipline) and in para 28 on multilateral reviews (for the second level of discipline), the Nordic Countries propose that a TRIMS Committee is constituted as a part of a Uruguay Round agreement on TRIMs.

36. The Committee's mandate should be confined to these tasks. No link is proposed to dispute settlement, which should be conducted according to normal GATT procedures as defined in art XXII - XXIII.

A separate but equally important reason for avoiding any such link is that, in the Nordic Countries' opinion, it would adversely affect the Committee's ability to fulfil its primary functions.