

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG12/W/24

24 January 1990

Special Distribution

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

Original: English

COMMUNICATION FROM THE UNITED STATES

The following communication dated 23 January 1990 has been received by the Secretariat with the request that it be circulated to the Group.

The attached submission seeks to clarify the United States' position and encourage focused, constructive discussions of the kind that have prevailed at recent meetings. In drafting the attached text, we were particularly motivated by comments and questions about our most recent submission, "A Structure for Negotiating a Comprehensive Agreement on TRIMs" (MTN.GNG/NG12/W/15, 7 July 1989). Many delegations remarked that, while it was useful to look at GATT concepts such as non-discrimination and transparency, and to consider their relevance to trade-related investment measures (TRIMs), it was difficult to say much about them in abstract. Our submission, therefore, attempts to take the Group's work a step further, to move from the general to the specific, from the conceptual to the concrete. In light of the limited time remaining in the Round, we believe such an exercise is timely and will support the future work of this Group and our Chairman.

Form and Application

Our intent was to prepare a draft TRIMs Agreement, applicable to all contracting parties, that was based on existing GATT Articles and principles. The attached text is not intended to be a separate, free-standing instrument.

Disciplines

As have several other delegations, we propose a two-tiered approach to disciplines: prohibition for certain investment measures, and less rigorous disciplines for others.

Article 1: Prohibition would apply to investment measures that inherently restrict or distort trade. By "inherently" we mean one can reasonably presume that there will be trade restriction or distortion because the adverse trade effects are inseparable from the underlying measure.

While prohibition is the most demanding of disciplines, it is the only means of ensuring that the Group's mandate is fulfilled with respect to certain investment measures. Given that our mandate is to avoid adverse trade effects rather than merely compensate for them after the fact, and since certain investment measures inherently restrict or distort trade, the only way to ensure the avoidance of adverse trade effects is to prohibit inherently trade distorting investment measures. (As will be seen in the discussion of Article III, however, there would be exceptions to prohibition.) In addition, prohibition is a traditional GATT discipline that forms the core of several fundamental Articles in the General Agreement which are relevant to TRIMs.

Paragraph 4 of Article I is intended to prevent the circumvention of Article I by applying investment measures that inherently restrict or distort trade but do not meet the descriptions of TRIMs in paragraphs 2 and 3. We have provided two examples of such investment measures.

We agree with the point made by several delegations that an investment measure has the same trade effect whether it is imposed on a foreign or domestic firm. Therefore, we do not make a distinction between foreign and domestic entities which might be subject to trade distorting investment measures.

Article II addresses investment measures which do not inherently restrict or distort trade but may have adverse trade effects in some circumstances. Accordingly, we have not proposed to prohibit such measures but to establish two obligations and to provide for remedies in the event that a contracting party is adversely affected by the application of a non-prohibited investment measure.

Paragraph 3 contains the first obligation: non-discrimination, one of the most basic principles in international trade. With respect to the application of non-prohibited investment measures, non-discrimination requires a contracting party to treat a particular foreign company at least as well as it treats the most favoured foreign or domestic firm, whichever receives the better treatment. By promoting equitable treatment among partners it contributes directly to liberalization and fosters an atmosphere of fairness essential to international co-operation. Where a practice is not so systematically harmful as to be prohibited but has the potential to harm other parties, it is reasonable to require that such a practice be applied in an even-handed manner. In addition, the non-discriminatory application of TRIMs will, overall, tend to decrease trade distortion; it ensures that any reduction in TRIMs will redound to the benefit of all, thus promoting more open trade.

There is, of course, the possibility that a contracting party will be adversely affected by a non-prohibited investment measure even if it is applied on a non-discriminatory basis. Accordingly, paragraph 4 of Article II enjoins contracting parties from applying such measures in a manner which adversely affects the trade of another party. Paragraph 5 gives guidelines for determining whether a party has been adversely affected, and paragraph 6 provides for consultations between affected parties.

### Transition Measures and Development

Compliance with a TRIMs Agreement would involve significant adjustments on the part of countries applying TRIMs and firms subject to such measures. With that in mind, the provisions in Article III of the draft suggest a scheme for adjusting to an Agreement progressively, but which would not indefinitely postpone disciplines.

Article III does not propose specific time periods for transition, although in our view there are strong arguments in favour of brief transition periods. If transition periods are long, important economic adjustments may be delayed and established companies could be disadvantaged vis-à-vis new entrants - an outcome which should be avoided.

### Transparency

For disciplines to be effective, information about TRIMs maintained or applied by contracting parties should be made available. Accordingly, Part A of Article IV obliges contracting parties to make public TRIMs that are applied generally.

In addition to information about TRIMs of general application, contracting parties may need to know about the application of a specific TRIM to a specific company. This would be especially useful in determining whether TRIMs covered by Article II are being applied in a non-discriminatory manner. Accordingly, Part B of Article IV obliges contracting parties to provide upon request information regarding the terms or conditions of a specific TRIM applied to a specific company.

### Institutions: TRIMs Committee

Article V of the draft provides for the establishment of a TRIMs Committee to oversee the implementation of the Agreement, to serve as a forum for consulting on TRIMs and to carry out other responsibilities that may be assigned to it by the CONTRACTING PARTIES.

### Consultation and Dispute Settlement

Article VI affirms that the consultation and dispute settlement provisions in the General Agreement would also apply with respect to a TRIMs Agreement.

### Future Work

To help ensure that a TRIMs Agreement is effective in meeting its objectives and remains in step with evolving conditions in international trade, Article VII provides for a review of the Agreement no later than \_\_\_ years after its entry into force.

### Definitions

The annex defines some key terms in the text.

TRADE-RELATED INVESTMENT MEASURES

The CONTRACTING PARTIES,

Noting that the Ministerial Declaration on the Uruguay Round directed that negotiators examine the operation of the Articles of the General Agreement on Tariffs and Trade (hereinafter referred to as the "General Agreement") related to the trade restrictive and distorting effects of investment measures, and elaborate further provisions that may be necessary to avoid such adverse effects on trade;

Desiring to promote the expansion and progressive liberalization of world trade to increase the economic growth of all trading partners;

Recognizing the right of contracting parties to regulate foreign investment in a manner that is consistent with the General Agreement and other international obligations;

Recognizing the importance of foreign direct investment in the promotion of economic development;

Taking into account the particular economic circumstances of developing and least-developed countries;

Desiring to clarify relevant provisions of the General Agreement and to elaborate appropriate new provisions necessary to avoid the trade restrictive and distorting effects of trade-related investment measures (hereinafter referred to as "TRIMs");

Agree as follows:

Article I      Obligations Regarding Investment Measures which Inherently Restrict or Distort Trade

1. The CONTRACTING PARTIES recognize that certain investment measures inherently restrict or distort trade by, for example, restricting or displacing imports, or restricting, displacing or requiring exports.
2. Therefore, and having regard to the objectives of Articles III and XI of the General Agreement, no contracting party shall maintain or apply investment measures which accord a preference to domestic goods over imports, or act as quantitative restrictions on imports or exports. Accordingly, no contracting party shall maintain or apply measures which:
  - (a) require a given level or percentage of domestic content, the purchase or supply of goods from domestic sources in preference to imports, or the substitution of domestic goods for imported goods;
  - (b) require the mixture, processing or use of products in ways which require, directly or indirectly, that a specified amount or proportion of any product be supplied by domestic sources;

- (c) require the manufacture of particular goods in the territory of that party;
- (d) restrict the production of particular goods or the use of particular technology;
- (e) require the transfer, use or licensing of a particular technology or process for local production;
- (f) require the sale of a given level or percentage of production in the territory of that party; or
- (g) require exports or foreign exchange earnings as a condition for importing.

3. Having regard to the objectives of the General Agreement, no contracting party shall maintain or apply investment measures which require the export of goods, either generally or to a particular country or area of the world market.

4. No contracting party shall maintain or apply any other investment measures which inherently restrict or distort trade, for example, measures which:

- (a) condition a company's access to foreign exchange or ability to make remittances on export performance or foreign exchange earnings;
- (b) require local equity participation in a company in circumstances such that the local equity participant or related party will be a preferred supplier of domestically produced goods to that company or must be in the same line of business as that company.

#### Article II Obligations Regarding other Investment Measures

1. The CONTRACTING PARTIES further recognize that certain investment measures other than those set out in Article I may restrict or distort trade in some circumstances, particularly when applied in a discriminatory manner.

2. Examples of such measures include:

- (a) the requirement that some equity be held by nationals of the host country;
- (b) restrictions on remittances or access to foreign exchange, other than those prohibited by Article I:2(g) and 4(a), which, having regard to Article XV:4 of the General Agreement, frustrate the intent of the provisions of this Agreement or the General Agreement.

3. Accordingly, no contracting party shall apply such a measure to the company of another contracting party in a manner which, in like situations,

accords treatment less favourable than the better of treatment accorded to its companies or to companies of any other contracting parties.

4. Furthermore, no contracting party shall apply an investment measure coming under this Article II in a manner which adversely affects the trade of another contracting party.

5. In determining whether such a measure adversely affects the trade of another contracting party, parties shall consider whether it:

- (a) restricts or displaces imports;
- (b) restricts, displaces or requires exports; or
- (c) nullifies or impairs any benefits accruing directly or indirectly to a contracting party under the General Agreement or this Agreement, taking into account imports or exports which would have occurred had the measure not been imposed.

6. If a contracting party believes that such a measure has adverse effects on its trade, it shall advise the contracting party applying the measure and describe its effects. The contracting party applying the measure shall promptly consult with the complaining party with a view to reaching a mutually satisfactory solution to eliminate adverse trade effects.

### Article III Transition Measures and Development

1. With regard to a measure coming under Articles I or II, contracting parties may continue to apply such measure to a company after the entry into force of this Agreement for \_\_\_ year(s) in the case of developed countries, \_\_\_ years in the case of developing countries and \_\_\_ years in the case of least-developed countries provided that:

- (a) such measure was actually applied to that company prior to the date of the initiation of the Uruguay Round;
- (b) the terms of such measure are not made more onerous;
- (c) the contracting party notifies such measure to the GATT Secretariat and the Committee on Trade-Related Investment Measures (see Article V); and
- (d) the contracting party submits to the GATT Secretariat and the TRIMs Committee a transition plan for eliminating such measure within the time accorded to it under this Article.

2. Each contracting party shall determine its own transition plan.

3. The GATT Secretariat shall, upon request, provide technical assistance to least-developed and developing countries.

4. This Article shall not be construed to impair any rights or derogate from any obligations set forth in the General Agreement.

Article IV Transparency in the Application of TRIMs

A. Measures of General Application

1. Contracting parties shall make public all measures of general application (including laws, regulations, judicial decisions, administrative rulings and policy statements) which are TRIMs or authorize the use of TRIMs. Contracting parties shall notify the GATT Secretariat of the publications in which such measures may be found.

2. Any contracting party may request from another contracting party information regarding such measures of general application. Responses to such requests shall be prompt and comprehensive.

B. Measures of Specific Application

3. A contracting party applying a TRIM to a specific company shall, at the request of another contracting party, provide to the party making the request certain information about the terms or conditions of the TRIM. Such information would include, for example, the percentage of equity that must be owned by domestic investors pursuant to a local equity requirement, or the level of exports or domestic content that must be reached pursuant to export or local content requirements. Such information would not include business-sensitive information not directly related to the TRIM such as information about profits or plans regarding expansion or reduction of business activities.

4. A contracting party receiving such a request shall provide information promptly and in a comprehensive manner.

5. A contracting party which, pursuant to a formal request, has received information about measures of specific application shall not disclose such information without formal authorization from the contracting party providing the information unless the information is in the public domain on or after the date on which the information is provided. Such information may be used only in connection with GATT dispute settlement proceedings or other purposes related to the implementation of this Agreement.

Article V Committee on Trade-Related Investment Measures

1. There shall be established under this Agreement a Committee on Trade-Related Investment Measures (hereinafter "the Committee") composed of representatives of each of the contracting parties. The Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary, but not less than once a year. It may establish its own rules of procedure.

2. The Committee shall oversee the implementation of this Agreement and make periodic reports to the CONTRACTING PARTIES on the degree to which the Agreement is accomplishing its objectives. The Committee shall afford

contracting parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives. The Committee shall carry out such other responsibilities as may be assigned to it by the CONTRACTING PARTIES.

Article VI      Consultation and Settlement of Disputes

1. Contracting parties may have recourse at any time to Articles XXII and XXIII of the General Agreement for the purpose of addressing any matter related to this Agreement.

Article VII      Future Work

1. Not later than \_\_\_\_ years after the entry into force of this Agreement the contracting parties shall review its effectiveness and, as appropriate, clarify and improve its obligations.



ANNEX

1. An "investment measure" is any measure maintained (i.e., provided for by laws, regulations, judicial decisions, administrative rulings or policy statements) or applied by a contracting party

(a) as a term or condition of permitting an investment in its territory;

(b) in connection with the establishment of a company, or the making or expanding of any investment;

(c) as a condition for the receipt of an incentive (\*) or services necessary for the conduct of business;

(d) as a condition for the continued operation of a company.

2. A "trade-related investment measure" or "TRIM", is any investment measures which restricts or distorts trade by, for example, restricting or displacing imports; restricting, displacing or requirement exports; or otherwise nullifying or impairing any benefits accruing directly or indirectly to a contracting party under the General Agreement or this Agreement, taking into account imports or exports which would have occurred had the measure not been imposed.

3. A measure is "required" when

(a) it must be complied with under law, regulation, administrative practice or policy;

(b) it is a condition for the receipt of an incentive or a factor in determining eligibility for an incentive;

(c) it is sought or accepted by a contracting party in connection with issuing an investment authorization or granting an incentive; or

(d) it is enforceable or enforced against a company under law, regulation, administrative practice or policy, or by withdrawal of an incentive.

4. An "incentive" is any benefit or the lessening of any burden.

5. A "company" means any kind of corporation, company, association, sole proprietorship, branch or other organization legally constituted under the laws and regulations of a contracting party or a political subdivision thereof, whether or not organized for pecuniary gain, or privately or governmentally owned.

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\*It is understood that this Agreement does not establish disciplines on investment incentives per se.