

**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 27-29 NOVEMBER 1989

Note by the Secretariat

1. The Group held its fourteenth meeting on 27-29 November 1989 under the chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2883 was adopted.

I Item A of the Agenda

2. The Chairman drew attention to new submissions from Bangladesh, the European Communities and the Nordic countries (MTN.GNG/NG12/W/21, 22 and 23). He invited those delegations to introduce their submissions and other participants to give their comments on them, noting that since the submissions had been received only recently he intended to make available a further opportunity for comments at the Group's next meeting. Many participants said that their comments were only preliminary at this stage.

Communication from Bangladesh: Proposals on behalf of the Least-Developed Countries (MTN.GNG/NG12/W/21)

3. The representative of Bangladesh said the submission was intended to respond to requests for an elaboration of earlier proposals made by Bangladesh on behalf of the least-developed countries (MTN.GNG/W/14/Rev.1). The general characteristics of the least-developed countries were their very low level of income and consumption, the limited size of their domestic markets, the primarily agrarian nature of their economies and their low levels of industrialization and technological development. All investment had necessarily to be made on the basis of efficient resource allocation and to take account of limited opportunities to reap economies of scale. The principal objective of all investment was growth and development, and consequent trade expansion. Investment measures should not, therefore, be regarded as trade distortive. Against this background, he read out the proposals contained in the submission, and said that any agreement arising out of the TRIMs negotiations should take account of the exceptional circumstances of the least-developed countries and the exceptional development path they had to follow.

4. The representative of Tanzania said that the submission sought to keep the least-developed countries' options for self-development open, taking into account their level of development, their natural endowments, and the choices open to them to industrialize during a period when environmental

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and technological considerations called for maximum flexibility. Import substitution was a valuable, time-tested option for industrial development. It would involve a period of capacity build-up but eventually it would allow industry to compete internationally. For many primary producing countries, diversification into processing domestic commodities and raw materials, thus adding value to the final product, was imperative. There would be trade-related consequences: certain imports would be reduced, although imports of inputs, equipment, plant and machinery would increase, and exports of primary products and raw materials would be reduced. Nevertheless, industrialization was a perfectly legitimate option.

5. It should be borne in mind that industrialized countries had, over time, developed synthetic and new products by applying their technological know-how. This had compelled many developing countries to contend with depressed demand for commodities and raw materials. Developing countries needed, for this reason alone, much greater flexibility to develop appropriate technological and/or socially acceptable responses. Their choice of investment and their adoption of the necessary investment policy measures would affect established trade patterns. The trade-related consequences of the restrictive business practices (RBPs) of transnational corporations needed to come under increased surveillance, especially their policies with regard to confinement to certain markets and their distribution of products manufactured by their strategically-located production units, which had no relevance to the economic interest of any given developing country. Transfer-pricing made the trade-related consequences of their investment even more onerous for many developing countries. The relevant GATT Articles needed, therefore, to be fully enforced, and where necessary to be modified and strengthened in order to provide protection against such practices.

Submission by the European Communities (MTN.GNG/NG12/W/22)

6. The representative of the European Communities introduced the submission and summarized its principal elements. He added that his delegation was aiming for a TRIMs agreement that could be adhered to by all contracting parties if possible, and not a restricted agreement.

7. The representative of the Nordic countries noted that in many important respects the submission was similar to that tabled by his own delegation, and he hoped that these areas of convergence would contribute to the further work of the Group. The most important differences between the two submissions were: regarding the more severe form of discipline proposed, his delegation emphasized the gradual nature of its application and considered it should be applied only to the most severe forms of TRIMs in terms of their trade effects and their widespread use; regarding the notification of TRIMs, his delegation considered that a general requirement would be burdensome and it therefore placed the emphasis on the provision of information upon request and counter-notification; and his delegation felt the implementation of a TRIMs agreement would be facilitated by the formation of a permanent committee to oversee the gradual elimination of certain TRIMs and to maintain a dialogue in this area.

8. The representative of the United States found the submission comprehensive and he agreed with it on many points: on the objectives of the negotiations; on the need to build on existing GATT Articles as far as possible; that investment régimes should not damage the trade interests of other contracting parties; on the need for two levels of discipline; on the need to prohibit the TRIMs listed in the submission, although he felt that some others should be prohibited as well; and that in focusing on the trade effects of TRIMs, it made no difference whether investors were domestic or foreign nor how a TRIM was imposed, whether in exchange for a subsidy or a right of establishment or in agreement with an investor.

9. He asked for clarification of a number of points. The submission seemed to suggest that new provisions would be necessary only for export performance requirements, yet there continued to be disagreement in the Group over the reach of existing GATT disciplines with respect to other TRIMs; in his view clear rules needed to be established so that discipline was not left up to dispute settlement on a case-by-case basis. He asked what would be the reach of the concept of effective equality of opportunity referred to in the context of local content requirements in paragraph 6; would it apply only to arms-length transactions and would a firm have to show that it had offered equal competitive opportunities in its purchasing if it were challenged by another firm or a contracting party? He asked why a TRIMs committee was not being proposed, since in his view it could serve a useful purpose. He asked also what criteria were being proposed to establish nullification or impairment or serious prejudice in paragraph 7.

10. The representative of Japan welcomed the submission and agreed with much of it. He agreed with the approach of establishing two categories of discipline for TRIMs according to their trade effects, although his delegation held a different view of the definition of trade effects which should give rise to prohibition, and therefore which TRIMs should be prohibited. He asked for confirmation that the TRIMs identified in Section B of the submission would be prohibited, and for clarification of the following points: which TRIMs would fall under other disciplines; would TRIMs enforced through incentives be prohibited or covered by other disciplines; would GATT exceptions apply generally or only to domestic sales requirements and exchange restrictions; what was meant by the reference in paragraph 5 to not reducing the scope of existing exceptions; and what was meant by the reference in paragraph 7 to nullification and impairment including the benefits of bound tariff concessions?. Regarding local content requirements, his delegation considered that in addition to being inconsistent with Article III:4 they were related to Article XI:1.

11. His delegation agreed that disciplines on TRIMs should apply regardless of the nationality of investors; that TRIMs should be applied on a non-discriminatory basis; that discipline was unconditional and not subject to the private operator's agreement; and that a TRIMs agreement should cover all public authorities. He asked to whom the notifications referred to in paragraph 14 would be addressed, and said there was merit in establishing a TRIMs committee in this regard. Finally, he expressed reservations if the consultations referred to in paragraph 15 would be narrower in scope than those provided for in Article XXII:1.

12. The representative of Canada welcomed the submission as a constructive contribution. He agreed with it on the objectives of the negotiations; that national investment policies should not be carried out at the expense of other countries' legitimate trade interests; that negotiations should be based firmly on the GATT and that all existing GATT provisions would apply; that incentives were not an appropriate subject for these negotiations; and that disciplines should be shaped to fit the importance and directness of the trade effects of individual measures, including whether they occurred only in particular circumstances.

13. He endorsed the last sentence of paragraph 6(i), since it was unreasonable to expect perfect knowledge on the part of any investor and effective equality of opportunity based on criteria of commercial competitiveness was a trade-neutral concept. He questioned the treatment of product mandating requirements, which appeared to interpret the right to export as an extra-territorial restriction on exports from other countries; the presumption of cause and effect did not seem to accord with reality, and the presumption that Article XI:1 applied was unclear.

14. He asked what distinction was being made in paragraph 7 between nullification and impairment and serious prejudice, and whether this reflected an attempt to establish two subsidiary categories of actionable TRIMs, each with its own criteria. In his view it would be better to establish obligations for a well-defined set of TRIMs which explicitly conditioned investors' trading patterns and had direct and substantive trade effects, so that prima facie nullification and impairment of benefits could be established. Other investment measures could be made actionable subject to adequate proof that nullification and impairment had occurred.

15. He asked why in paragraph 9 it was proposed to establish the discipline of non-discrimination for TRIMs which were to be prohibited. Paragraph 10 was a timely reminder that a breach of a GATT rule was presumed to have an adverse impact on the interests of other contracting parties regardless of whether an investor consented to an investment measure. He asked what addition to the requirements of Article X:1 was being proposed in paragraphs 13 and 14 in the context of a notification process for TRIMs, and endorsed the procedure suggested in the last sentence of paragraph 14 as being more effective than a comprehensive notification procedure. Information disclosed should be subject to appropriate provisions on confidentiality.

16. He asked what types of additional consultation procedures were being proposed in paragraph 15, and questioned the inference that disputes involving TRIMs should be treated with greater urgency than other types of disputes. He endorsed the proposal in paragraph 16 for reasonably defined special transitional provisions for those developing countries whose level of international competitiveness might require such provisions to cope with potential structural adjustment problems; permanent and unconditional exceptions from general rules and disciplines would be unacceptable.

17. The representative of India recognized the quality of the submission even though he could not agree with all of its contents. He agreed with

the statement in paragraph 2 on the objective of disciplines, but not that prohibiting TRIMs was really a solution. It was clear from the mandate that the Group had to draw on existing GATT Articles, but differences of view existed on the extent to which certain Articles were applicable and the wholesale application of all Articles to TRIMs had not been endorsed. He welcomed the statement in paragraph 3 that negotiations should not call into question the existence of national investment policies, and that those policies were an integral part of the sovereign right of governments to order their own economic, industrial, social, cultural and development policies. However, he did not consider the prohibition of investment measures was consistent with that statement.

18. Referring to paragraph 4, he disagreed that directly trade-related investment measures were necessarily trade restrictive and distorting in all circumstances, and he recalled his delegation's position in MTN.GNG/NG12/W/18. Such measures could be trade-creating and enhancing, and only two TRIMs, local content (including manufacturing) requirements and export performance requirements, had a direct and significant trade impact. Account had to be taken of the RBPs of private operators since they had the same trade effects as government measures. Also, while some TRIMs might have a trade impact, developing countries' needs were such that they had to retain a measure of freedom in using them. The notion of prohibition was not warranted, therefore, in the circumstances.

19. He asked why Article XVIII:B had not been listed along with other exceptions in paragraph 5. Referring to paragraph 6, he stated that Article III:4 applied only after a product had been imported into a market and he disagreed, therefore, with the statement that it was relevant in the context of manufacturing requirements. He disagreed that exchange restrictions had a direct trade impact.

20. The representative of Switzerland welcomed the submission and agreed with many points, including the need for a TRIMs agreement to be linked to the GATT, to have broad coverage and fullest participation, and to be based on the premise that national policies should not damage the trade interests of other countries. He asked for clarification on the following points: the operationality of the agreement, including how the agreement would be implemented, the way in which dispute settlement would function, and whether a TRIMs committee would be necessary; the meaning of the term "equivalent disciplines" which appeared in several places in Section B; and exactly which measures would fall under other disciplines in Section C.

21. The representative of Egypt agreed in great measure with the contents of paragraphs 2 and 3, and said recognition that investment measures were an integral part of investment policies called for a realistic approach to developing disciplines to avoid their adverse trade effects. However, the proposed disciplines did not seem to reflect that kind of approach. They ignored the fact that the negotiations were dealing with investment measures, not trade measures, which were designed to serve far-reaching purposes; these could not be subordinated to trade considerations and prohibiting the measures because of their trade effects was unacceptable.

22. Regarding paragraph 5, a direct trade relationship could not be equated with an adverse trade effect. For example, establishing an export-oriented industry in a developing country could not be considered trade distortive, even though it would certainly have an impact on trade flows. He asked why Article XVIII:B was not listed along with other exceptions in this paragraph.

23. Local content requirements had been treated objectively in the light of existing GATT provisions; he agreed with the approach and considered it could be adopted with regard to other measures. Manufacturing requirements were closely related to economic and technological development and to the development of new industries; he did not agree, therefore, with the approach of treating them as import restrictive and prohibiting them. He asked, nevertheless, whether the Communities felt that approach should be applied also to rules of origin which could produce many of the same trade effects as manufacturing requirements, although he acknowledged that they did not fall squarely into the Group's work. He doubted that domestic sales requirements were used intentionally to restrict exports. The use of trade-balancing requirements reflected legitimate concerns over chronic external deficits, and he disagreed that they were trade restrictive since they did not set any quantitative limit on imports. Exchange restrictions fell within the wider context of macroeconomic policies, and he rejected an approach to them based on their trade effects; they were subject already to disciplines under the Articles of the International Monetary Fund, where in many cases they were permitted. Product mandating requirements were related more to RBPs than to government measures, and he doubted they represented an export restriction; in his view they could not achieve the effect suggested in the submission unless they were coupled with a trade restriction. Manufacturing limitations also seemed incapable of having the trade effect suggested unless linked to an import restriction, and he asked why they were considered to be directly trade-related.

24. Account needed to be taken of whether export performance requirements were imposed before or after an investment took place. Many developing countries encouraged export-oriented industries through treatment more favourable than national treatment in order to improve the export performance of the economy; whether or not they caused export-displacement of other countries should not call into question the legitimacy of such industries. He recalled the treatment of export performance requirements in MTN.GNG/NG12/W/18, which showed how development considerations should be taken into account. He agreed that export performance requirements which caused or threatened material injury were contrary to GATT obligations, but not that general disciplines such as prohibition should be elaborated.

25. Regarding "Other Disciplines" in Section C, he agreed that nullification and impairment could be a basis for action under the GATT, but he was not aware of any GATT provision which cited serious prejudice as a basis for legal action and in his view the concept was too ambiguous for this purpose; a causal link to changes in trade flows would be difficult to establish, since it could be argued then that economic development or investment itself could cause serious prejudice. Regarding "General Considerations" in Section D, he agreed that in principle any discipline on

the effects of investment measures should apply regardless of the nationality of the investor. Regarding paragraph 10, he raised again the question of how export industries should be treated. Transparency was important for any discipline in the multilateral trading system, and within reasonable limits some transparency requirements would have to be applied along the lines of what was included already in the GATT, but he needed to reflect on whether all investment measures should be notified.

26. The representative of Australia said that the submission added to her delegation's concern over the general approach and specific elements of recent submissions, particularly the prohibition of measures themselves rather than their trade effects. Negotiations should focus on disciplines to address the adverse effects of TRIMs rather than concentrating on the measures themselves or identifying those measures which should be prohibited. Every investment measure of an establishment or operational nature was likely to have some influence on trade, but it could not be assumed that some measures were "inherently" more trade distorting than others since the degree of trade distortion would vary with the macroeconomic and industry circumstances in which they were applied. Categorization of investment measures was therefore unwise, since it could not be assumed that specific investment-related measures would result automatically in significant adverse trade effects.

27. Her delegation was concerned that the visibility of investment measures should not be equated with their trade impact. Less visible TRIMs might be more detrimental to the trading system, and prohibition of the more visible measures was likely to result in a proliferation of less visible ones. Negotiations should aim to elaborate rules to define and redress injury, in terms of demonstrating nullification or impairment of GATT benefits on a case-by-case basis ex post rather than ex ante, so that GATT disciplines would be made fully applicable to all potentially trade-distorting investment measures.

28. While her delegation could certainly endorse features of the approach adopted in this submission, there remained areas of concern and areas requiring clarification. The premises put forward in paragraph 2 were reasonable, but their subsequent elaboration was not always consistent. It was doubtful that it was conceptually sound or practically feasible to categorize TRIMs according to whether their trade effects were direct and intentional. By way of example, if Country "A" introduced a package of investment incentives and performance requirements to attract new investment, while Country "B" introduced a similar package but in the context of a phased deregulation and liberalization of an existing industry, total assistance would be increasing in Country "A" but falling in Country "B". Moreover, the net trade effects of policies in Country "B" would be less distortionary, and possibly even positive over the medium- to long-term. The same measures could have diametrically opposite results under different circumstances.

29. She asked how the statement in paragraph 3, that incentives were not the subject of the negotiations, could be reconciled with the statement in paragraph 10 that incentives should be brought within the scope of a TRIMs

agreement. She noted that the submission allowed for a transitional period for developing countries and said that some form of transitional period would seem necessary also for developed countries.

30. The representative of Hong Kong had no difficulty with the broad thrust of the submission, and agreed with the premises stated in paragraph 2 and with the objective to eliminate the adverse trade effects of TRIMs. The submission focused unduly on the classification and disciplining of investment measures per se rather than on identifying their adverse trade effects; this imbalance should be corrected, and more neutral concepts of injury should be examined along with the causal link between an investment measure and the injury caused. He questioned whether the criterion of "intent" was sufficiently operational to use as a basis for proposing prohibition, and whether all the TRIMs for which prohibition was proposed were intended primarily to restrict trade; exchange restrictions, for example, were imposed not to restrict trade per se but to remedy balance-of-payments problems, which was not outlawed by the GATT. In Section H he noted the concept of "developing countries which had reached a high level of competitiveness"; in GATT terms, this seemed to be creating a new category of developing countries and he asked for clarification of the approach in general and the criteria that would be used.

31. The representative of Brazil noted that the submission focused on investment measures per se rather than on their adverse trade effects, and he asked for clarification of this approach in the light of the Group's mandate. There was no reference to the trade restrictive and distorting effects of RBPs, and he asked what the Communities' reaction to that subject was. The only idea related to "development considerations" was the provision of special transitional arrangements; he asked what length of transitional period was being proposed and whether it would be similar to the period it had taken developed countries to arrive at their current levels of development. He asked for clarification of the term "developing countries which had reached a high level of competitiveness", and whether the Communities were considering making a further submission which addressed more concretely the concerns of developing countries in these negotiations. As long as the Group failed to address some of the points on the agenda, it would be hard for it to make progress.

32. The representative of New Zealand agreed with the approach suggested in paragraphs 2 and 3, but said that investment incentives should be considered simultaneously in this Group and the Group on Subsidies since as was noted in paragraph 10 they could be applied in a discriminatory manner. She agreed on the need to distinguish directly trade-related TRIMs from other TRIMs and to establish two levels of discipline, and that where adverse trade effects could be directly attributable to an investment measure and were similar to the restrictive and distorting effects of a trade measure, they could not be separated from the investment measure and the remedy should relate directly to the measure concerned. In response to comments by the representative of Australia pointing to a different conclusion on this latter point, she recalled earlier comments made on the approach suggested by Switzerland (MTN.GNG/NG12/W/16) that trying to take

macroeconomic and other factors into account could create difficulties in establishing clear disciplines on TRIMs, since the criteria would be vague. Regarding the specific example cited by Australia, the same arguments might be used by a country in transition from a more to a less restrictive trade régime, and while its trade restrictions might be tolerated as transitional measures they would have no justification in the long-term; the same considerations should apply to trade restrictive TRIMs.

33. Referring to paragraph 8, she could not see how local content requirements would infringe necessarily on the national treatment principle if imposed on both domestic and foreign investors, but she did consider that the measure could be trade restrictive or distortive in such circumstances and felt for this reason that Article XI:1 needed to be examined. Regarding export performance requirements, she disagreed with the comments by the representative of Egypt since there would be no need for such a requirement where an investor was naturally exploiting competitive export opportunities. These requirements raised problems not only of dumping, but also infringement of the legitimate trading interests of other contracting parties, and she asked for elaboration of what disciplines the Communities had in mind in this regard.

34. Useful ideas were put forward in Section C on the second level of disciplines, but further elaboration was needed particularly with respect to the concept of serious prejudice. She agreed with the statement in paragraph 7 that injury might be caused to third countries by TRIMs, and said that clear criteria needed to be established to ensure that disciplines were effective. She agreed with much contained in Section D, particularly the ideas on non-discrimination in its broadest form and the fact that the agreement of private investors was not a factor to be taken into account. Regarding Section E, she asked for confirmation that the notification requirements suggested in paragraph 14 would apply to TRIMs covered by both levels of disciplines, and asked what the Communities' views were on the establishment of a TRIMs committee. On Section F, she considered it worthwhile elaborating further on the issue of burden of proof and where this would fall in the case of consultation and dispute settlement. She presumed remedial action following consultation procedures would have to be based on a mutually satisfactory solution. On Section H, she agreed that permanent and unconditional exceptions from the rules for developing countries would be unacceptable, but considered that transitional arrangements were warranted for both developed and developing countries for phasing out prohibited TRIMs.

35. The representative of Hungary detected no real change in the Communities' basic approach since its last submission, although he felt the arguments were set out more clearly. He agreed with many of the ideas in Section A, and particularly in paragraphs 2 and 3. However, the proposal to prohibit certain TRIMs was severe and the proposed scope of prohibition very broad; in his view, the number of investment measures which actually had direct trade effects was much smaller than that suggested.

36. In certain circumstances, rules of origin could fall under the definition of local content requirements in paragraph 6(i). Cases existed

where strict quantitative border restrictions led foreign suppliers to establish local production facilities, and where rules of origin requiring a high level of local content were then applied to determine whether output manufactured locally qualified as a domestic product. He asked for the views of the Communities in this regard. Manufacturing requirements, as defined in paragraph 6(ii), could cover practically any government investment measure which caused an increase in domestic production and import-substitution, and he asked how a precise differentiation could be established on the basis of intent. He saw no need to deal with exchange restrictions since they were covered already by existing GATT Articles. To the extent it was considered necessary to discipline product mandating requirements, it would also be necessary to discipline government restrictions on exports of high technology goods.

37. He asked whether Section C was addressed to all the remaining TRIMs that had been cited in the Group. He asked how the concept of non-discrimination, including national treatment, proposed in Section D could be applied to measures such as local equity and remittance restrictions which he presumed would fall under the category of "Other Disciplines", and specifically how the concepts of nullification and impairment or serious prejudice would be applied in these cases. He asked also how the elimination of prohibited TRIMs should be achieved in the case of developed countries.

38. The representative of Singapore asked how the Communities would define "requirements"; was it limited to legally-enforceable measures, or could it cover measures whose effective implementation was achieved in other ways, such as through incentives? Regarding incentives, he considered it necessary to differentiate production from investment incentives; production incentives covered measures such as guaranteed price supports, but investment incentives were quite different since they were time-bound, applied on a non-discriminatory basis, and justifiable because an investor voluntarily promoted certain national development objectives. By way of example, a tax holiday was an investment incentive and did not provoke trade distortion, since it was offered when an investor engaged in export production voluntarily and it was effective only if the investment was commercially viable and profitable. Regarding the inclusion of export performance requirements in the list of prohibited TRIMs, he recalled the FIRA panel findings and said that the Communities' arguments for establishing disciplines over their use because of market-displacement seemed to be based on the notion of fixed market shares. He did not believe that an exporter could continue to sell at prices below cost and survive. Furthermore, in the absence of specific injury to the trade interests of another country, he did not see the harm of such requirements.

39. The representative of Yugoslavia welcomed the submission and found much in it that was acceptable, particularly with regard to the contents of Section A. He emphasized that incentives did not add in any way to the adverse trade effects of other TRIMs in terms of restriction or discrimination, and they should not, therefore, be the subject of negotiations in this Group. Paragraph 10 suggested that the Communities wished to broaden the scope of the negotiations, and he asked whether the

intention was to prohibit not only government-mandated TRIMs but also RBPs; if so, the negotiations could be made more complicated and his delegation would need to reconsider its position. Although his country did not apply TRIMs, it had reservations about the concept of prohibition with respect to TRIMs which were closely linked to development policies, and he considered it would be preferable to aim to reduce the adverse trade effects of the measures rather than prohibit their use entirely. Section H seemed to have more of a procedural than of a developmental character, and implied only delays in implementation of an agreement.

40. The representative of the European Communities said that clear-cut prohibition should apply to the TRIMs listed in Section B, and case-by-case disciplines to other TRIMs. Prohibition should apply whether measures were legally enforceable or achieved through some other means such as offering incentives. He agreed that it would be necessary to define clearly what was understood by the term "requirement" in this respect; however, limiting prohibition to legally enforceable measures only could create a large, undesirable grey area of TRIMs which would be applied de facto but could not be classified as requirements and which would be subject to no effective discipline. The term "equivalent disciplines" in paragraph 6 reflected the fact that the Communities considered many of the measures listed in Section B to be contrary to Article XI:1, given the wide scope of that Article, and it meant therefore that if agreement could not be reached that a measure was covered by Article XI:1 a new provision should be elaborated which would have the same effect as Article XI:1. The list of GATT exceptions in paragraph 5 was only illustrative, and all GATT exceptions would be available for any TRIM for which existing Articles provided disciplines; where new equivalent disciplines needed to be elaborated, equivalent exceptions would also need to be elaborated.

41. Regarding the measures that would be subject to prohibition, the Communities had pointed out in its previous submission that that all the measures listed in Section B could be traced back to local content and export performance requirements; limiting prohibition to just those two core measures was not, therefore, justified. Proposals for a standstill and rollback of prohibited measures could be considered at the appropriate time. Regarding the comment that many of these measures would not be effective in the absence of a complementary border trade restriction, he acknowledged that could be the case with manufacturing limitations but not with product mandating requirements.

42. He had no comment on the suggestion that Article XI:1 might also apply to local content requirements, although he noted the findings of the FIRA panel that having found such measures to be contrary to Article III:4 it had not felt it necessary to go further. However, he noted that both foreign and domestic investors would be subject to discipline under Article III:4 since national treatment applied to products and not to investors. The concept of effective equality of opportunity in paragraph 6(i) was trade neutral and implied that competitiveness would be enhanced and resources would be allocated optimally; the FIRA panel had concluded along similar lines. Rules of origin were fundamentally different from local content requirements and had nothing to do with

investment measures. Origin was sometimes defined in local content or value-added terms, but rules of origin were not linked to the establishment or operation of an investment within a country; they were used to identify the origin of products coming from exporting countries.

43. Product mandating requirements were a restriction on exports from other countries and contrary, therefore, to Article XI:1. The ultimate intention of domestic sales requirements, exchange restrictions and perhaps other measures might not be to influence trade, but he said that reference to the "intent" of a measure drew attention to the fact that a government would recognize that a measure would have a direct effect on imports or exports; it could be distinguished, then, from measures having only "incidental" or "accidental" trade effects. Discipline over export performance requirements should be based on the provisions of Article VI, since there was a difference between not preventing dumping on the one hand and encouraging dumping on the other; the measures should be prohibited.

44. Measures to be covered by "Other Disciplines" would be left open-ended, which would help to avoid circumvention of the disciplines over TRIMs that were to be prohibited. Other TRIMs such as technology transfer and local equity requirements and remittance restrictions had been mentioned in the Group; he did not wish to speculate on how often such measures might have adverse trade effects and fall under the disciplines suggested in Section C, but they should be dealt with case-by-case.

45. Serious prejudice was a recognized concept in Article XVI and in the Subsidies Code. He saw no particular difficulty with maintaining two criteria (nullification or impairment and serious prejudice) for adverse trade effects on which to base disciplines in Section C, although he accepted that further refinement of those criteria might allow them to be unified. He agreed that the notion of adverse trade effects needed to be defined in operational terms; criteria had been suggested in paragraph 7, and he noted that there was some GATT jurisprudence available in relation to both nullification or impairment and serious prejudice.

46. The reference to investment incentives in paragraph 10 was not in contradiction to the reference in paragraph 3, since the intention was not to suggest that incentives should be the subject of negotiations but to argue that TRIMs could not be justified by the fact that a government was compensating an investor for the additional costs caused by performance requirements. It was TRIMs, and not incentives, that were the subject of paragraph 10. Also, it was not the intention of the Communities to suggest in this paragraph that rules and disciplines to cover the practices of private operators should be brought into the negotiations.

47. He accepted that a TRIMs committee could be useful and he was willing to examine its rôle and its functioning in a TRIMs agreement. In this regard, he was open to suggestions on who the notifications proposed in paragraph 14 should be addressed to. Notifications would apply to both prohibited measures during a transition period and to measures subject to other disciplines. Information should be notified preferably only upon request, but if this did not prove successful it might be necessary to move

over to a system of counter-notification. It had not been the intention to suggest in paragraph 15 that the scope of consultations should be reduced below that called for in Article XXII, and he recalled the basic approach of the submission that a TRIMs agreement should be based to the fullest extent possible on existing GATT provisions.

48. He agreed that there should not be permanent or unconditional exceptions from the disciplines for developing countries. The Communities agreed on the need for a short transition period for developed countries to eliminate prohibited TRIMs, and he pointed out that the reference in paragraph 17 was to "special" transition periods for developing countries. He had no clear ideas on exactly what length of transitional period might be in order; he hoped for suggestions from those who might be interested in such periods. Regarding the meaning of "developing countries which have reached a high level of international competitiveness", he said he did not want to go into detail but that he presumed all participants were aware of the general discussions underway on integration, and he considered it reasonable to take those considerations into account in these negotiations from the beginning and not wait to make adjustments at the end.

Submission by the Nordic countries (MTN.GNG/NG12/W/23)

49. The representative of the Nordic countries introduced the submission and underlined its principal elements.

50. The representative of Brazil welcomed the submission as a contribution towards more balanced discussions in the Group, but he could not endorse its proposals without substantial qualification.

51. He welcomed the recognition in paragraph 4 of the sovereign right of governments to formulate investment policy. The focus of discussions should be the adverse trade effects of investment measures and their relation to GATT Articles. The approach of a case-by-case assessment of effects was the proper approach for the Group to adopt, and he welcomed the thorough attention given to this approach in the submission. However, his delegation could not accept that the second approach identified of disciplining entire categories of measures was consistent with the mandate.

52. On paragraph 6, he had doubts about including measures applied to domestic investors in the negotiations. The emphasis on the applicability of established GATT exceptions in the same paragraph was welcome, but in his view exceptions for the use of investment measures that were found to be inconsistent with GATT Articles should not be confined to those already existing. He welcomed the statement in paragraph 10 that investment incentives should not be taken up directly and agreed that a case-by-case discipline on the related investment measure should be sufficient. He agreed with the statement in paragraph 11 that the trade effects of investment measures varied from case to case, and concluded that they could not, therefore, be subjected to general disciplines.

53. He acknowledged that the two measures cited in paragraph 12 could have adverse trade effects in some cases, but disagreed that they should be subject to a comprehensive approach; the measures could equally have positive trade effects. The Group should not overlook the need to address the adverse trade effects of RBPs if it was to progress in a balanced way.

54. He welcomed the reference in paragraph 15 to the need for a gradual approach to applying disciplines in this area, although in his view the Group had not yet reached the stage where specific approaches could be discussed substantively; further work was needed first on identifying the adverse trade effects of investment measures and relating them to GATT Articles. He considered the specific adjustment period for developing countries suggested in paragraph 16 was far too short.

55. He supported the comment in paragraph 24 with regard to ensuring full respect for the m.f.n. principle. He expressed doubts on paragraph 26 about developing countries agreeing to the proposal to furnish information on request on their investment measures, and on the applicability of enquiry points proposed in paragraph 27. He welcomed the references to the need for exceptions to the rules in paragraphs 29 and 30, but repeated that these should go beyond those already existing in the GATT; this seemed to be recognized in paragraph 31 where individual timetables for phasing out measures were proposed. What he had in mind was the Group considering the foreign debt of highly-indebted developing countries as being grounds for a major exception to the eventual understandings that might emerge.

56. In summary, he said that his comments should be interpreted as a willingness to act in a constructive manner and try to derive from the submission ideas that might be useful to discussions; it should not be used as grounds for trying to derive a consensus view in the Group at this stage. Positions were still far apart on various important issues. According to the mandate, the Group needed to further identify trade restrictive and distorting effects of investment measures that were or might be covered by existing GATT Articles, specifying those Articles, before other points, especially the means of avoiding the adverse trade effects of TRIMs, could be taken up. He recalled paragraph 2 of the Ministerial Declaration of 1982, which gave a clear indication of the difficulties faced by developing countries in world trade and the perspective in which the Group should be working. It was important to keep in mind Item B(iii) of the Punta del Este mandate and to respect the needs of the developing countries.

57. The representative of Japan said that many of the comments he had made on the submission by the European Communities applied equally to the Nordic countries' submission, because the two were similar in many respects. He asked for clarification on a number of specific points in the Nordic countries' submission. With regard to the second level of disciplines for TRIMs that might in some cases, but not always, have adverse trade effects, the submission seemed to imply that these would be examined measure by measure but not individual case by individual case; he asked whether this interpretation was correct, and whether it was proposed that TRIMs which were not legally enforceable should be covered also by this second level of

discipline. He endorsed the need for disciplines over TRIMs negotiated in an ad hoc manner, but asked whether this was covered adequately by the reference in paragraph 22 to complaints focusing on systematic practice and on individual instances of TRIMs used.

58. He considered that the definition of local content requirements in paragraph 12 was too narrow, since it would not appear to cover requirements to purchase specific components or to manufacture components locally under the first level of discipline. Also, in his view local content requirements were inconsistent with Article XI. He asked whether a definitive list of TRIMs should be elaborated for coverage by the second level of discipline, and what those TRIMs would be. References in paragraphs 24-26 to establishing strict transparency provisions for TRIMs and elaborating a mechanism for request/offer negotiations needed further reflection. He asked whether the reference in paragraph 32 to allowing the imposition of new TRIMs during the phase-out period conflicted with the comment in paragraph 17 that TRIMs to be eliminated should not be applied to new investments. He agreed with the need to set up a TRIMs committee, but felt that its functions were defined too narrowly in the submission.

59. The representative of Nigeria considered the submission to be capable of moving negotiations forward, although he was not able to agree to all the points raised in it. He welcomed the recognition that governments had sovereign rights to formulate investment policies and that the Group should not interfere with that. He agreed that investment incentives were not a subject for discussion in this Group. The view of his delegation was that the prohibition of TRIMs was not a viable option for the Group to pursue; established GATT mechanisms should be able to deal with the adverse trade effects of TRIMs, but if they could not disciplines other than prohibition should be elaborated. Providing differentiated phase-out periods for developed and developing countries did not constitute an adequate response to the need to integrate development considerations into the negotiations, and he asked how the specific time periods for phase-out proposed in the submission had been arrived at.

60. The representative of Singapore said that two particularly significant elements of the submission were the proposal to treat TRIMs like non-tariff barriers and negotiate them down, and the fact that it limited discussion to the two TRIMs which had clear adverse trade effects, local content and export performance requirements. He did not agree that it was a disadvantage of the case-by-case approach that it enabled disciplines to be applied only ex post; this was the approach already taken in the GATT towards export subsidies and dumping. The alternative approach of disciplining entire categories of measures was acceptable as long as it was limited to TRIMs that had adverse trade effects in all circumstances. References in paragraph 7 to disciplining TRIMs that were negotiated on an ad hoc basis suggested the need for a clear definition of what was meant by the term "requirement". He agreed that investment incentives should not be addressed by the Group; in his view, incentives could be distinguished from subsidies and there was no such thing as a TRIM induced by an incentive. He disagreed with paragraph 12 that the criteria of commercial

considerations or trade displacement could be used to define the trade distorting effects of export performance requirements.

61. He asked for clarification on the following points: did the reference in paragraph 16 to "different percentages applying to different investments" imply that a certain percentage would be tolerated; would countries that maintained no TRIMs be expected to accept 0 per cent bindings on the measures in question; what would happen if countries were not able to fully phase-out their TRIMs during the specified adjustment periods; were there specific criteria, such as causing injury or trade displacement for third countries, that would be used in assessing whether a government had met the general commitment suggested in paragraph 20 and in examining the negative trade effects of TRIMs on a case-by-case basis that was referred to in paragraph 22; what sort of concessions would be exchanged in the request/offer negotiations proposed in paragraph 24; did the reference to the need for confidentiality of notified information in paragraph 26 concern information provided by private corporations; what would be the purpose of the common understanding on the trade aspects of TRIMs referred to in paragraph 28; did the reference in paragraph 31 to individual timetables imply flexibility on the phase-out periods allowed to developing countries to eliminate certain TRIMs; and did paragraph 32 imply that disciplines would be applied retroactively to existing TRIMs?

62. Finally, he noted that the number of TRIMs cited as having clear adverse trade effects varied considerably from one submission to the next, and he suggested the Group establish definitively which ones were the focus of the negotiations.

63. The representative of the United States agreed with practically all of the first two Sections of the submission, but noted that his delegation had proposed that investment incentives should be disciplined; he would reflect on the statement in paragraph 10 that disciplining TRIMs which were linked to incentives would be sufficient without disciplining incentives themselves. More TRIMs than those listed in Section III were directly trade-related and could cause serious trade restriction and distortion, and he asked specifically why manufacturing requirements had not been included.

64. He agreed with the aim of eliminating TRIMs on the proposed first level of discipline, and considered the modalities suggested for phasing out these TRIMs could be helpful. On the second level of discipline, he agreed on the need for a commitment that TRIMs should be applied non-discriminatorily, and that the remedy to adverse trade effects should be recourse to dispute settlement procedures. He asked what the basis for exchanging concessions would be under the request/offer procedure suggested in paragraph 24, and added that there might be a danger that countries would act quickly to impose TRIMs in order to increase their bargaining power. He asked what criteria would be used to determine whether a TRIM was actionable; clear standards would be needed on which to judge individual measures, and thought would have to be given to what adverse trade effects a complainant would need to show in order to make a case for taking action. He agreed that exceptions needed to be examined but on the basis of whether they made sense in the particular case of TRIMs. He

agreed on the need to set up a TRIMs committee, and felt that its work programme and habits could be left up to the committee to decide.

65. The representative of Yugoslavia welcomed the submission, and in particular the emphasis placed on the trade effects of TRIMs rather than on the measures themselves, on the applicability of a case-by-case approach to disciplines, and on development aspects. He agreed with most of the contents of Sections I and II, but hoped that the reference in paragraph 7 to TRIMs negotiated in an ad hoc manner did not imply that disciplines would apply to measures agreed on between investors and host governments. Although he had always considered local content and export performance requirements to be important instruments for development, he could accept that they should be examined on a case-by-case basis without prejudging the final outcome. A gradual approach to elimination was welcome, and he had no difficulties with the requirement that TRIMs to be eliminated should be notified, but he considered further discussion of the proposals for binding and adjustment periods in paragraph 16 were needed. He understood that the second level of discipline embraced all the other TRIMs which had been discussed until now in the Group, and he agreed that these measures should be subject to general commitments. The proposed request/offer procedure was interesting but he could not see how it could be made operative. It was important for governments to have the possibility of invoking exceptions, and he was open to the idea of establishing a TRIMs committee.

66. The representative of Korea welcomed the proposal as a meaningful basis for further discussions. The proposal of case-by-case disciplines based on general commitments was particularly worth exploring. The Group should agree on precisely which measures were TRIMs, so that negotiations could focus on determining how TRIMs, including local content and export performance requirements, should be disciplined on a case-by-case basis. He agreed that incentives should not be the subject of negotiations in this Group, and with the aim of a broad TRIMs agreement that could be accepted by all contracting parties. This would require that more consideration be given to development considerations; some flexibility in the form, for example, of exceptions, would be essential. He expressed doubts about applying disciplines to TRIMs imposed on domestic investors.

67. The representative of India said the submission was a sincere attempt to understand the development dimension of the subject, but that it did not go far enough. He noted the statement in paragraph 3 that the proposal was based on GATT rules and principles, but expressed serious reservations about their applicability to investment measures per se; they were related only to trade policy measures. He welcomed the statement in paragraph 4 that the intention was not to infringe on the sovereign rights of governments to formulate investment policies, but he felt the approach proposed would not succeed in this respect. He welcomed the emphasis placed on the effects of the measures and not the measures themselves, and the proposal not to deal with investment incentives in this Group. He expressed doubts about the coverage of measures imposed on domestic as well as foreign investors, since some of the conditions placed on domestic investors were important policy instruments in developing countries for diversifying the industrial base and acquiring technology.

68. He recalled that India had identified local content and export performance requirements as the only two measures capable of having significant adverse trade effects, with trade-balancing requirements subsumed under these two and manufacturing requirements defined as a form of local content requirement. However, they did not have adverse trade effects in all circumstances; most of the time they had trade creating and enhancing effects, especially in developing countries. He disagreed fundamentally with the submission that the Group's mandate extended to applying disciplines to the measures themselves, and considered the proposal internally contradictory in referring on the one hand to the freedom of countries to order their investment policies and proposing on the other the prohibition of certain measures; if measures were prohibited, developing countries would be bereft of all possibility of regulating foreign and domestic investment and this would amount to imposing on all countries a philosophy of economic development that involved free market operation. A case-by-case assessment of significant adverse trade effects was the only valid approach to explore, and it could be applied only to the few measures he had mentioned. In this regard, therefore, he disagreed with the approach taken under the second level of disciplines as well as the first. He noted the approach under the first level of disciplines of binding the measures and handling them like non-tariff barriers, but felt it was irrelevant in the circumstances.

69. It was clear that in many cases private operators used these measures themselves, so it could not be assumed that they were trade restrictive and distorting in all circumstances. In as much as private investors placed trade conditions on the activities of their enterprises, these had to be addressed in the same way as government mandated performance requirements.

70. He disagreed that developing countries' concerns had been taken care of through basing the proposal on existing GATT instruments which struck a balance between GATT interests and development interests. Development aspects were implicitly ignored by the argument that some TRIMs had adverse trade effects in all circumstances and should be prohibited. Even if in certain circumstances they did cause adverse trade effects, development aspects outweighed those effects. Nor was a time derogation a solution.

71. The representative of Switzerland agreed with most of Sections I and II, but added that in his view the Group should ensure that TRIMs had no adverse effects on exchange rates. He agreed with the basic approach of eliminating certain TRIMs and the criteria suggested for identifying which ones should be eliminated, but he did not agree that a definitive list of such TRIMs should be drawn up for the time being. He expressed interest in the proposals for notifying and binding TRIMs to be eliminated and providing an adjustment period for phasing them out, but asked for further clarification of these proposals and of the meaning of the term "refrain from" in paragraph 17.

72. The second level of discipline depended on the first. He was not in favour of dealing with TRIMs through dispute settlement procedures; that should be a subsidiary or secondary approach. The mandate called for agreement on limiting measures that were directly trade restrictive and

distorting. There would naturally be some measures that could not be dealt with in the Uruguay Round, and these would remain subject to the dispute settlement approach, but agreement should be reached on eliminating the most flagrant measures.

73. He found the proposals on transparency and the establishment of enquiry points interesting. The Section dealing with exceptions covered a matter that had not been fully developed; the extent to which existing exceptions might apply in the area of TRIMs should be examined. He supported the proposed approach to development aspects, and felt that more precise timetables for phasing out measures that were to be eliminated could be discussed in due course. Exceedingly long periods would not be in order, especially for developing countries that increasingly were becoming major exporters on world markets and, in some cases, also foreign investors. He disagreed that such an approach amounted to imposing a market-based philosophy of development, and he added that in joining the GATT system developing countries had chosen to increase trade and avoid trade distortion and unfair trade practices.

74. The representative of Poland welcomed the submission. His delegation had suggested in the past limiting TRIMs to a minimum to allow for a detailed examination of their impact on trade and economic development and for reaching a reasonable agreement on how to discipline them under existing or new GATT provisions. The TRIMs under negotiation could be open so that any time they could be added to with new TRIMs. The advantages of such an approach were: there would be time to gain experience; the time remaining for reaching an agreement to satisfy all contracting parties could be more productively used; and the Group could avoid mistakenly regulating too many TRIMs, whose trade and general economic effects were far from being fully documented and recognized. The submission displayed a realistic goal, left room for detailed and continued examination of all aspects of TRIMs, and guarded against hastily-taken wrong decisions.

75. He agreed to the proposed categorization of TRIMs, not necessarily because the two TRIMs placed under the first level of discipline had paramount trade distorting and restricting effects and therefore deserved special treatment, but because this approach seems to be reasonable. TRIMs did not induce uneconomic behaviour automatically. It occurred only if a TRIM was introduced once an enterprise was already operating, and then a discipline limiting the extension of new TRIMs to existing firms would be necessary. However, if the TRIM was already in place, an investor had to take it into account before making the decision to invest. Only if the investor's production profile and competitiveness allowed him to meet the TRIM requirement and achieve an expected rate of profit would he invest. Then, TRIMs were only a form of information for the investor and a criterion that helped the host country to select the most appropriate investors. The situation would be more complicated if the host country linked incentives to TRIMs, but then it was not the TRIM that was the problem but the incentive, and that was a kind of subsidy which was disciplined by Article XVI and the Subsidies Code.

76. Transparency was important, and all elements suggested in the submission required careful consideration. He asked for clarification of the difference between the contents of paragraphs 25 and 26, expressed doubts about the duration of the adjustment periods, and asked whether they were based on certain economic criteria or determined arbitrarily.

77. The representative of Mexico agreed that the aim of the negotiations was to avoid the trade restrictive and distorting effects of TRIMS, as far as possible through existing GATT provisions. Negotiations should not question national policies which were aimed at economic and social development, and incentives should not be dealt with in this Group. The submission put the Group's work in a more practical dimension because it flagged the three TRIMS which her delegation believed the Group could start working on in a more systematic and pragmatic way. She recalled a proposal made previously by Mexico in this regard. She noted the disciplines suggested for these three TRIMS, but felt that in carrying out a systematic examination other, equally effective disciplines might be identified. With regard to proposals for a TRIMS committee and its rôle and function, she believed that it was preferable to use existing GATT mechanisms.

78. The representative of New Zealand agreed with many points in Sections I and II, but saw no reason to relegate negotiations on investment incentives to another Group. Two approaches to disciplines were needed. The criteria for determining which TRIMS would fall under the first level of disciplines led her to believe that it would be warranted to include more than just those TRIMS identified in the proposal; the position of her delegation in that respect was closer to that of the European Communities.

79. She asked whether it was being suggested that the Group should agree on a finite list of TRIMS to be covered at the first and second levels of discipline; if so, there would be a non-specified third category of non-actionable TRIMS which raised concerns about the possibility of circumvention or the establishment of a grey area. The suggestions in Section IV for phasing-out TRIMS were useful, and the approach of notification, binding and adjustment periods was a good one. She asked with respect to binding what was meant by an appropriate cut-off date for new measures. She expressed concern about the possibilities for the circumvention of other disciplines proposed in Section V; the proposal for a general commitment to avoid causing adverse trade effects did not seem sufficient and she preferred the approach of the European Communities based on damage to the interests of other trading partners as a better starting point. She asked whether the link to national treatment and non-discrimination proposed in paragraph 21 would be made in terms of a general principle or specific rules. Dispute settlement would definitely have a rôle to play, but she noted that the mandate called for adverse trade effects to be avoided and not just remedied after the fact.

80. The proposal for request/offer negotiations was an interesting concept as long as it was strictly parallel to and not in place of the other approaches suggested in the submission, but she asked for clarification of how it would work. A high degree of transparency would be needed for the second level of disciplines to work effectively; she agreed with the

proposal to establish enquiry points but doubted that an obligation to furnish information upon request would be sufficient. Exceptions did need to be addressed, but account should be taken of the fact that several of GATT exceptions were already under negotiation in other Groups.

81. If TRIMs falling under the first level of disciplines could be replaced easily by other TRIMs, similar disciplines should apply to them all to avoid circumvention of disciplines; this seemed particularly relevant in the case of manufacturing requirements. The criteria for the second level of disciplines needed to be spelled out as a basis for dispute settlement, for establishing injury to trade interests or nullification or impairment, and for clarifying the general commitments to be undertaken.

82. The representative of Hungary agreed with most of the points made in Sections I and II. He agreed that local content and export performance requirements were the measures which might be considered seriously trade-related. Concentrating on them and trying to see what were their actual trade effects and the relevance of those effects to GATT Articles would help to focus work constructively. He agreed with the general thrust of the approach outlined in Section IV, and would reflect further on it, but he found the ideas expressed in paragraphs 17 and 32 contradictory. He saw value in the proposal for differentiated adjustment periods, taking account of the specific situations of different countries, and asked for clarification of the proposal contained in paragraph 31 in this respect.

83. He found it difficult to comment substantively on the proposed second level of disciplines without knowing exactly which TRIMs the disciplines would apply to; would all the remaining TRIMs cited in the Group be covered? Clarification was needed in this respect for evaluating the proposal in paragraph 21 for linkages to the principles of national treatment and non-discrimination; how could such principles be applied to measures such as local equity requirements or remittance restrictions?

84. The representative of Australia remained concerned about the almost exclusive focus on prohibition, as in the case of other submissions, but welcomed the fact that this submission entered in more detail into the area of other disciplines that might be considered. Nevertheless, she could not agree that the adverse trade effects of local content and export performance requirements were always clear-cut; a broader view of the impact of the measures was necessary. Also, the Group was not mandated to focus on the measures themselves when formulating disciplines. If elimination was considered justifiable, a gradual approach would be essential since the measures might be associated with substantial capital investments and be part of a comprehensive industrial policy which it would be difficult to dismantle. Three years seemed too short for adjustment to take place in this respect, and she noted that the proposal itself addressed some of the undesirable effects that could result from too rapid adjustment; this could be counterproductive and lead to the measures being replaced by less transparent but equally trade-distorting ones.

85. She could see the means through which request/offer negotiations could take place and concessions be made, but she asked what exactly would be the

TRIMs under negotiation. It appeared that TRIMs subject to the second level of discipline could be dealt with case-by-case through dispute settlement, so would it be TRIMs that did not have adverse trade effects that would be subject to the request/offer negotiations or TRIMs which had already been subject to dispute settlement proceedings? She asked what criteria would be used for disciplining TRIMs under the second level and for applying remedial measures.

86. The representative of Canada agreed with most of the points made in Sections I and II. He welcomed the gradual approach proposed for eliminating TRIMs under the first level of discipline; this was realistic and necessary for effective implementation of the disciplines. He asked for clarification on whether bound levels of TRIMs would be reduced gradually. He asked also what enforcement provisions would apply to these disciplines; would it be those of Article XXIII or was something additional intended? He asked for confirmation that dispute settlement proceedings would take account of improvements made during the Uruguay Round negotiations. He questioned the effectiveness of the request/offer mechanism, since an exchange of concessions was not evident if looked at strictly in a TRIMs context. A high degree of transparency would be needed for the second level of disciplines, and he agreed that an obligation to provide information according to established criteria would be the most effective way of ensuring transparency. However, he questioned whether the system of enquiry points would allow for transparency only on a bilateral basis, and asked what the effect of the system would be on general transparency provisions. He asked whether the regular multilateral reviews proposed for TRIMs could not be carried out under the TPRM process. Regarding notifications to the proposed TRIMs committee, he asked what it was being proposed should be notified and to whom; he doubted that notifying adverse trade effects would be sufficient for public scrutiny of a complaint, and felt it could lead to capricious notifications.

87. The representative of Hong Kong agreed with much in the proposal. A key element was the suggestion to prohibit only two categories of TRIMs on the grounds that they had adverse trade effects under virtually all circumstances and to subject others to a lesser discipline; this appeared to strike a reasonable balance between the legitimate right of a country to decide its own investment policies and the right of others to ensure that such measures were not taken at the expense of their trading interests. The argument that the effects of certain TRIMs could not be separated from the measures themselves seemed to be workable because it kept in mind the relationship between measure and effect; without this it was difficult to argue a priori for prohibition. It seemed clear that eliminating the two TRIMs proposed would make a country more attractive for inward investment.

88. He asked for clarification on a number of specific points: what status would the principle of non-discrimination have, and in particular would a discriminatory TRIM applied on an ad hoc or company-by-company basis be disallowed and to what extent was non-discrimination an essential part of the second level of disciplines; the request/offer procedure, and confirmation that it would be only complementary to other disciplines proposed; the regular review mechanism could make a useful contribution to

transparency, but what would be the outcome of reviews carried out and what would be done with review material generated? He agreed with the need to consider exceptions to disciplines, and that appropriate adjustment periods would be desirable for countries which felt they needed them.

89. The representative of Malaysia welcomed the submission as a sincere attempt to advance negotiations, but expressed concern about the inclusion of proposals to prohibit certain TRIMs, in particular export performance requirements; trade displacement would take place naturally as export-oriented industries in developing countries became more competitive on world markets and it would not seem then to matter whether they were encouraged by such requirements or not. A case-by-case approach to disciplines was necessary if the focus was to be placed on adverse trade effects and not the measures themselves, on recognition of and respect for the sovereign right of governments to formulate appropriate policies for development, and on development aspects of TRIMs.

90. The representative of the European Communities asked what the justification was for limiting to two the number of TRIMs covered by the first level of discipline; other participants had mentioned other TRIMs which they considered could have trade restrictive effects in all, or almost all circumstances, and this level of discipline should be expanded to cover more measures. He appreciated the suggestions made with respect to the gradual phase-out of TRIMs that were to be eliminated.

91. He considered the second level of disciplines lacked sufficiently strong operational criteria for dispute settlement purposes, and recalled the suggestions made by his delegation on the need for commitments to avoid nullification or impairment and serious prejudice to the trade interests of other parties. There might be some misunderstanding in the Group of the concept of a second level of discipline and a case-by-case approach. Discipline was not imposed through dispute settlement but through the commitment not to use TRIMs if they caused adverse trade effects to other trading partners; dispute settlement might then be the final consequence, but it was not a discipline in and of itself.

92. He considered the proposed request/offer mechanism to be an excessive venture and questioned the relevance and realism of negotiations on measures that were not prohibited but permitted subject to discipline to avoid their adverse trade effects. He asked how exceptions would be made operational with respect to measures covered by the second level of disciplines. He was not convinced that the concept of discrimination against established investors referred to in paragraph 32 was a necessary element in an agreement. It would create difficulties of implementation if prohibited TRIMs could be introduced and then phased out in parallel with those of already established investors. The situation of established investors in the context of TRIMs did not appear to be different from the situation of producers who found their protection against imports was reduced as a result of tariff cuts.

93. The representative of Argentina said that prohibition of investment measures was an unacceptable approach. TRIMs were usually applied to

correct or redress certain restrictive practices or imbalances which the market itself could not correct, and governments could not be left without instruments to use in such situations. Dispute settlement procedures were in any case available and made the prohibition of measures unnecessary. The logic of using a case-by-case approach to disciplines was that the trade effects of TRIMs could vary from case to case. It would allow legitimate investment to be balanced with the commercial interests of other countries whose interests might be affected by the application of certain TRIMs. In view of the support that existed for a case-by-case approach to disciplines, the Group should focus on establishing criteria such as nullification or impairment and injury for determining the existence of adverse trade effects. Regarding the application of GATT principles of non-discrimination to TRIMs, he had difficulty in seeing how they could be relevant to the type of problems the Group was trying to solve. If a country applied a TRIM in a given sector to a given enterprise, whatever adverse trade effects occurred would be less than if the TRIM was applied to every enterprise in that sector.

94. The representative of Tanzania welcomed the consideration given to the need for transitional periods for developing countries, and in particular the least-developed, in order not to compromise their development objectives. However, he questioned the criteria on which the specific time-frames suggested had been chosen; such criteria needed to include a given proportion of domestic factory output to GDP as a measure of the level of industrialization. International trade was a factor that determined the pace of industrialization, but it could not be the end sought by industrialization policy in developing countries. It had the broader objective of creating the necessary capacity for developing the full potential of endowed resources and putting them to the use of the entire population to enhance their welfare.

95. The representative of Egypt welcomed the attention given to the second level of disciplines. The proposal to prohibit certain TRIMs was limited to a small number of measures, but the problem with this approach remained one of principle. It implied that certain measures were trade distortive in all circumstances, which was an area of complete disagreement in the Group, and it disregarded entirely the development dimension of investment measures.

96. Development considerations had been addressed by all of the proposals put forward so far only in terms of exceptions to disciplines. According to the Montreal mandate the Group should go beyond that and examine what were the development purposes or development-related functions of investment measures and see whether and how the same functions could be performed in other ways. Export performance requirements, for example, were imposed not only for balance-of-payments purposes but also to correct a chronic deficit in the merchandise trade balance; this was a legitimate concern for developing countries but it was not envisaged in the GATT as a problem that needed to be addressed. The measures were also imposed to deal with the practice of export prohibition by private investors. Did the Group intend to deal directly with such prohibitions, and if so how? It would be unfair tell governments not to use export performance requirements

while at the same time allowing market operators to impose export prohibition on their subsidiaries in developing countries. Another development-related purpose of the measures was to ensure that industry became internationally competitive; this often had to be factored in at the investment stage through industrial and investment policies.

97. Measures such as export performance and local content requirements should then be considered from the perspective of development considerations, and not prohibited on the grounds that they might have adverse trade effects. Even where their trade effects might be perceived to occur in all circumstances, the issue could not be treated so simply. The question was what should be done about the development-related functions of the measures. Prohibition was therefore completely unacceptable. The stringency of the disciplines proposed for TRIMs would inevitably affect the number of participants willing to accept the outcome of the negotiations. The concerns of all contracting parties had to be taken into account to ensure comprehensive participation.

98. Referring to specific points in the submission, he stated that the concept of trade displacement was inadequate to define adverse trade effects in a way that could be used as a basis for some form of legal action or determination. The reasons behind trade displacement needed to be examined, since it could occur also as a result of fair competition. Since he could not subscribe to the discipline of prohibition, he could not see any merit in the mechanisms suggested for phasing TRIMs out gradually or in exceptions related to prohibition. Regarding binding certain TRIMs at specific levels, one possible conclusion could be that there was a particular level at which no further trade restriction or distortion would occur. The question was then: what precisely was that level? He questioned the basis on which the proposal for different adjustment periods had been made, and asked for clarification of the term "new stages" in paragraph 17.

99. Regarding the second level of disciplines, he asked whether it was considered that trade considerations should supersede wider considerations relating to macroeconomic policies, industrial strategies or development objectives. He asked, with regard to paragraph 22, whether the intention was to apply GATT principles such as national treatment to investors or to goods. On the proposed request/offer mechanism, he asked whether the negotiations would be on non-tariff measures which might relate to performance requirements or on the TRIMs themselves. He agreed that transparency was a very important consideration and found the proposals in paragraphs 26 and 27 constructive in this regard; consideration should be given equally to improving the transparency of the policy directives given by private investors to their subsidiaries in cases where they related to export prohibitions and similar measures. The proposal for multilateral reviews was an institutional question that should be addressed at the end of the Round.

100. The representative of the Nordic countries felt that there appeared to be a consensus emerging in the Group on some points addressed in the submission. These were that: it was desirable that all contracting

parties took part in any agreement reached; that investment policy itself was a matter of national sovereignty; that disciplines should be based on existing GATT Articles and provisions; and that incentives lay outside the ambit of this Group and remedies to their adverse trade effects could be found in GATT disciplines on subsidies.

101. With regard to specific points and questions raised, he made the following remarks. The adjustment periods proposed in paragraph 16(c) were there to stimulate debate; in his view, the specific periods given were a reasonable starting point for discussion. The request/offer mechanism was based upon the proposition that if a particular TRIM could be determined to have a trade effect similar to a non-tariff barrier, but no GATT violation was involved, the reduction of these measures could serve GATT objectives of reducing barriers to trade. The kind of negotiation that could be envisaged was the removal of the TRIM in exchange for reduced tariffs or the removal of an NTM of interest to a country maintaining such a TRIM. This would have to follow GATT principles and therefore be extended on an m.f.n. basis. Which TRIMs should be covered in this way was an open question since the coverage of the second level of disciplines was not defined. A related question was what should be the criteria for distinguishing a TRIM which contravened rules from those which were simply NTMs. The desirability of entering into negotiations would be up to individual contracting parties; if the TRIM in question was perceived as being one that a contracting party was willing to "pay" for having removed, it seemed reasonable that this option should be available. The GATT system as a whole would benefit from any reduction of barriers to trade.

102. The criteria for second level disciplines or dispute settlement would need to be elaborated. He agreed that dispute settlement should not be the primary instrument for enforcing the second level of discipline. Regular GATT procedures would apply to notifications on TRIMs that were to be eliminated; these would be submitted to the Secretariat for circulation and the process would in turn be monitored by the Committee. Regular procedures would apply equally to counter-notifications. Paragraph 4 did not imply that governments should have complete freedom to formulate investment policies; there were instances where investment measures impinged on the legitimate trade interests of other countries, and both trade interests and investment policies would have to compromise to a certain degree. He did not agree that the application of a TRIMs discipline to domestic investment would amount to the imposition of a market-based philosophy of economic development. However, countries which adhered to the GATT had to be assumed to have accepted the market-oriented approach taken by it, at least to the extent that trade issues were involved. If a domestic investment measure had trade restrictive or distorting effects, the mandate suggested that these should be considered in the context of general GATT principles, and these were market oriented.

103. The idea of covering ad hoc TRIMs in paragraph 7 was compatible with the mention of systematic practices in paragraph 22; both should be covered by a TRIMs discipline. Paragraphs 7 and 8 did imply that measures agreed to by an investor would be covered by the agreement if the measure could be said to have been required by government authority, whether by law

or regulation, directly or indirectly, with or without compensation in the form of an incentive. Local content rules that were not legally enforceable, but only induced by an incentive, should be eliminated since their trade effects were the same.

104. Local manufacturing requirements were not covered under the first level of discipline because the submission aimed to strike a balance between trade interests and development interests. This measure was more closely related to development objectives than local content in general, and placing it on the second level would give developing countries a degree of flexibility not provided by the first level. He emphasized, however, that he did not consider the second level to be a loophole; parties would have to accept a general commitment to avoid causing negative trade effects when implementing TRIMs, and a manufacturing requirement that did cause negative trade effects would be actionable. With regard to the other four TRIMs which the European Communities had proposed should be prohibited, they were not covered by the first level of discipline because their adverse trade effects were less clear-cut. The difference was one of degree and not of kind, and it might well be said that an arbitrary line between the two levels of discipline had been drawn.

105. The second level of discipline was a general commitment enforceable on a case-by-case basis, where the effects of investment measures could be scrutinized according to suitable criteria. This was not easy to equate with the idea that certain categories of measures per se should be covered or exempted, and the suggestion in paragraph 13 was to see if the Group could identify any non-actionable TRIMs as was originally suggested by the Swiss submission. That suggestion needed to be reconsidered, but the important point was that the second level of disciplines should be based solely on the actual trade effects of investment measures. With regard to the phase-out of bound TRIMs on the first level of discipline, it might be most appropriate to leave individual countries the freedom to decide for themselves how to reach the goal of elimination. The intention was to eliminate the measures and not only specific investment agreements containing those measures, but the gradual approach gave governments flexibility in going about elimination. The reference to a "cut-off date" in paragraph 16(b) was designed to prevent countries from imposing TRIMs that should be eliminated or that could be used in a request/offer context.

106. Two alternative suggestions for phasing-out TRIMs that were to be eliminated had been made in paragraphs 16(c) and 31. His delegation preferred general time limits because this was simpler. He did not see the possibility of having a general time limit for some countries and special timetables for others. He had no particular idea yet on the appropriate criteria for individual country timetables, but he had noted with interest the suggestion by Tanzania that the level of industrialization might be relevant. The suggestions for applying phase-outs to new investments in paragraphs 17 and 32 were also alternatives. Paragraph 32 was based on the idea that new distortions could arise if newcomers could plan their investment without reference to a TRIM, whereas existing investments remained shaped by their TRIMs for a long time after the TRIM itself has

been removed. This might justify subjecting newcomers to the same TRIMs as existing competitors, but phasing them out at the same rate.

107. The principles of national treatment and non-discrimination were relevant to TRIMs. Even if a measure covered by the second level of discipline did not cause trade distortion or restriction per se, it could still give rise to adverse effects if applied differentially to investors in the same sector. As to the nature of the link between these principles and the second level of disciplines, it would seem appropriate to use the same form as for the general commitment covering these TRIMs. He agreed that the principles would be meaningless for certain types of TRIMs, but considered this self-evident. References to modifications to dispute settlement procedures in paragraph 23 implied nothing more than Articles XXII and XXIII as improved during the Uruguay Round.

108. It would not be desirable for a system of national enquiry points to result in the whole process of information exchange becoming less transparent and underlying disputes bilateralized, which was why paragraph 26 specified that requests for information be channelled through the GATT. Exactly how this would be organized could be discussed; the suggested TRIMs Committee could act as a clearing house for the requests, if not for the information itself, which would be subject to requirements of confidentiality yet to be defined. Two kinds of notifications were envisaged: those furnished for the binding of TRIMs to be eliminated, and those directed at the GATT consultation and dispute settlement mechanism. It was the second of these that was referred to in paragraph 28.

109. The purpose of the common understanding to be reached by a TRIMs Committee was stated in paragraph 28; to have the opportunity to discuss TRIMs issues on a regular basis. It would be possible over time to gain a greater understanding of the factors involved in using TRIMs and a clearer picture of what the different possible interpretations were of specific elements in a TRIMs agreement. The results of actual dispute settlement cases would also be fed into these discussions and, over time, a gradual convergence of opinion should take place.

110. Paragraph 32 addressed TRIMs that were to be eliminated retroactively. The mention of a competitive edge was not central to the argument that existing firms should need no special treatment as their TRIMs were phased out. Regarding the reference to exceptions in paragraph 33, since the basis for the second level of discipline was a general undertaking, it would be up to each contracting party to decide in which cases an exception would apply. If negative trade effects then arose and were contested under GATT consultation and dispute settlement provisions, a key issue would be whether the exception was justifiable in that particular case. It would be a disadvantage to use an after-the-fact approach to discipline TRIMs because the mandate of the Group called for avoiding trade distortive and restrictive effects, not offsetting damage that had already been done.

111. Notifications of TRIMs under the first level of discipline needed to be disaggregated in order to ensure transparency during the orderly phase-out of the measures. Otherwise adherence to an agreed discipline

would be difficult to determine. The notion of a cut-off level was not what lay at the heart of the concept of binding; if a country did not apply local content requirements, for example, then this TRIM would have to be bound at 0 per cent once and for all. Cases of non-compliance with the phase-out should be brought to dispute settlement. The meaning and implication of the phase-out was parallelism; there would be the possibility of imposing the same level of a measure to new investments, but these would be subject to identical phase-out requirements.

112. Regarding investment incentives, the Nordic countries had proposed that improvements be made to GATT disciplines on subsidies in the Group on Subsidies. The issue of exceptions had necessarily also to take account of the negotiations in other Groups that related to Articles cited as being relevant in the context of TRIMs.

113. The representative of Egypt stated that the comments made by the representative of the Nordic countries on the relevance of applying the principles of national treatment and non-discrimination to some TRIMs implied rule-making with regard to investment, not with regard to merchandise trade. Previous references to national treatment and non-discrimination had been made in the context of how they applied to merchandise trade. For example, the determination of the FIRA Panel was that the case was not in conformity with Article III:4 of the GATT because it did not extend national treatment to foreign merchandise trade; the Panel did not consider whether the investment measure or the requirement itself was subject to the application of such a principle, and putting it in this perspective altered considerably the nature of the question.

114. The representative of the Nordic countries replied that this was an over-interpretation of the issue, and it could be cleared up through bilateral discussions.

II Other Business

115. Following informal discussions, the Chairman requested the Secretariat to prepare an informal synopsis of the issues raised in the negotiations to date, taking account of written submissions to the Group and statements made during the meetings. Some participants reserved the right to make further written submissions to the Group.

116. The Group agreed to hold its next meetings on 29-30 January and 29-30 March 1990. The Chairman suggested that arrangements be made tentatively to hold two further meetings, towards the end of April and towards the end of May, with a final decision on those meetings to be made in the light of the progress made in the negotiations.