

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related
Investment Measures

MEETING OF 29-30 JANUARY 1990

Note by the Secretariat

1. The Group held its fifteenth meeting on 29-30 January 1990 under the chairmanship of Ambassador T. Kobayashi (Japan). The agenda set out in GATT/AIR/2908 was adopted. The Chairman drew attention to a new submission by the United States (MTN.GNG/NG12/W/24).

I Item A of the Agenda

Further discussion of the submissions by the European Communities and the Nordic countries (MTN.GNG/NG12/W/22 and 23)

2. The representative of Argentina asked for clarification from the European Communities of the disciplines they were proposing over exchange restrictions, and said that the varied purposes served by exchange restrictions and the different ways in which they could be employed needed to be borne in mind. He understood the European Communities to be recommending that disciplines should be based upon Articles XI, XII and XV of the GATT. There would be no need to include in a TRIMs agreement disciplines over measures that were already covered adequately by GATT Articles, and he asked why the submission proposed that exchange restrictions should be subject to "equivalent disciplines"; his delegation would have reservations if it was being proposed that they should be disciplined as a TRIM separately from the general provisions relating to them in the GATT and in the IMF Articles.

3. The representative of the European Communities replied by referring to his delegation's previous submission which described the direct, adverse trade effects that exchange restrictions could cause by restricting the importation of goods. Since the Communities' felt that TRIMs disciplines should be based as broadly as possible on existing GATT disciplines, it was proposed that exchange restrictions should be subject to disciplines equivalent to those of Article XI. The provisions of Articles XII and XV could also apply in individual cases where the conditions underlying those Articles were demonstrated to have been fulfilled.

4. The representative of Hungary asked for clarification from the European Communities of the following points: would investment incentives which were used to achieve compliance with TRIMs that were prohibited also be prohibited; was there a conceptual difference between an investment

incentive and a subsidy; and would disciplines apply regardless of the sector of the economy in which a TRIM was employed?

5. The representative of the European Communities said he understood a subsidy to involve a direct financial contribution by a government whereas an investment incentive could cover a wider range of advantages granted. At least one other Negotiating Group was addressing the core issues of subsidy practices. His delegation was not proposing that investment incentives should be subject to disciplines under a TRIMs agreement. However, the granting of investment incentives should not serve as an excuse to allow governments to impose TRIMs, because this would open up a gap in whatever disciplines might be established. While his delegation did not want to prohibit incentives or impose any disciplines over them, it did consider that TRIMs should be subject to discipline whether they were accompanied by an incentive or not. He had not reflected on whether there should be sectorial specificity for TRIMs disciplines; his first reaction was that there should not, but it might prove to be a relevant consideration either in the context of the second category of disciplines or in the context of any exceptions that were agreed to and were demonstrated to apply in specific cases to the discipline of prohibition.

6. The representative of Hungary said that in practice it was not easy to differentiate cause from effect and to distinguish incentives provided to secure compliance with investment policy measures which might be termed "requirements", from incentives offered on the basis of general criteria in the context of national investment policies. By way of example, an incentive offered to an enterprise which intended to manufacture goods locally, and which would therefore cause import substitution to take place, might be interpreted as an incentive intended to secure compliance with a requirement that the enterprise manufacture certain goods locally; it would then seem to run counter to disciplines established over manufacturing requirements even though the European Communities were proposing that incentives should not be disciplined in a TRIMs agreement.

7. The representative of Singapore said that stating simply that investment incentives should not be the subject of negotiations in this Group did not seem to solve the matter. In his view, the confusion arose from the difference between investment and production incentives. Production incentives could be offered without any attached conditions simply to sustain the viability of production, but the same was not true for investment incentives. They were used as promotional tools to attract and reward certain kinds of investment in the form of a bonus, and as such they inevitably had conditions attached to them by governments. They were awarded rather than imposed, typically on the basis of a company meeting certain priorities that figured in national investment policy. That did not mean that a company which applied for the incentive would be obliged to meet particular performance requirements; for one thing, it might have decided already to operate in a particular way which coincided with the priorities contained in national investment policy, for example by exporting or by using technologically modern equipment or processes.

8. The representative of the European Communities agreed that investment incentives were probably offered only in return for certain conditions being met, but said that those conditions need not amount to performance requirements; one example was the provision of regional aid. However, where the condition was that the investor should operate in a way which amounted to the kind of performance called for by the requirements that his delegation was proposing should be prohibited, the conditionality should not be maintained. For example, an incentive to manufacture goods locally should be treated in the same way as a requirement to do the same as long as the incentive would not be granted if local manufacture did not take place. The distinction between a requirement and a reward appeared to be a very fine one and needed further reflection. A decision by a government, after taking note of the operations of an enterprise, to grant an incentive as a reward could possibly be looked at in a different way from a promise by the government to provide an incentive on condition that certain performance was met. However, it was doubtful that in practice governments could operate in such a loose fashion; as long as there existed some kind of indication that incentives could be justified only if certain conditions were met, it seemed doubtful that the conditions could be distinguished from more formal requirements. For TRIMs disciplines to be meaningful, it might be necessary to conclude that certain conditions should not be established for the granting of an incentive, whether it was ex ante or ex post. However, this was not the same as saying that investment incentives could no longer be used at all.

9. The representative of Hungary agreed that the meaning of the term "requirement" was important. If it was taken to cover also incentives in the case of manufacturing requirements, then any investment measure whose basic purpose was to encourage local manufacturing would appear to be covered by disciplines applied to manufacturing requirements, since any new local manufacturing would in practice lead to import substitution. The approach of the European Communities would appear then to amount to prohibiting the offer of any incentives to manufacturing activities and to preclude any investment policy by a government.

10. The representative of Switzerland said that no enterprise accepted a TRIM without some counterpart measure, whether in the form of direct financial assistance or some other advantage, all of which could be referred to as an incentive. This Group could not avoid considering the issue of investment incentives, although in doing so it should remain in close touch with the negotiations taking place in the Subsidies Group. It was irrelevant whether the emphasis was placed on subsidies or incentives; as had been pointed out in the Swiss submission (W/16), what was decisive was whether the incentive was granted at the time of the decision to invest or later when the investment became operational. To the extent an incentive did not contravene GATT rules on subsidies, it should be tolerated in terms of TRIMs disciplines; for example, a reasonable advantage given in terms of regional policy to an investment would not be considered to result in trade distortion. However, investment aids given as compensation for TRIMs and attached to the operations of an investor would be unacceptable even if they were admissible in the general GATT context. This applied not only to subsidies but to incentives in general;

for example, in the event that the government imposing the TRIM reserved its market to the investing firm through import barriers it would distort trade, and this type of measure should be prohibited.

11. The representative of Hong Kong recalled some of the arguments which had been put forward in the Group. The right of governments to determine their own investment policies should only be restrained to the extent a TRIM demonstrably impeded the legitimate trade interests of other countries. Outright prohibition across the whole range of TRIMs identified by participants was a severe approach to take, particularly since prohibition was applied only in a limited way in more traditional areas of GATT concern; it could be justified only where a TRIM was demonstrated to have an adverse trade effect in all circumstances. Hong Kong had a degree of sympathy towards these arguments and considered they could not be ignored, but at the same time felt that the use of TRIMs ran counter to free trade since TRIMs were, broadly speaking, trade restrictive measures which discouraged trade and foreign investment.

12. The economic and trade climate in which TRIMs were used appeared to have changed in recent years. In the past they had been employed in response to the restrictive business practices (RBPs) of multinational corporations, and this continued to be a justification put forward by some participants for using TRIMs and for calling for disciplines over these practices as a necessary condition for disciplining TRIMs. However, it was questionable to what extent RBPs were endemic and how much of a problem they caused now; the UN Centre on Transnational Corporations had observed recently that the climate for foreign investment had changed, that investment capital was in shorter supply than in the past, and that developing countries were taking a less critical attitude towards attracting foreign investment. With ever scarcer investment capital, the use of TRIMs appeared to be receding worldwide.

13. Hong Kong favoured meaningful disciplines on TRIMs. It supported the Nordic approach, which recognized the terms of the Group's mandate and pragmatically tried to strike a balance between the concerns of governments which used TRIMs and the need to restrain the use of TRIMs which had adverse trade effects.

14. The representative of Japan asked for clarification from the Nordic countries on the criterion they were proposing for the evaluation of TRIMs in case-by-case dispute settlement; was it the negative trade effects of a measure or the nullification or impairment of GATT benefits or both, and how feasible did they consider such an evaluation would be when the complainant was a third party suffering adverse trade effects from the measure? She asked also for examples of measures that would fall under the second category of disciplines.

15. The representative of Brazil asked for clarification from the Nordic countries of the term "under normal conditions" in the context of the description in their proposal of the trade displacement caused to third countries by export performance requirements. His delegation believed that if a foreign investor knew beforehand of the existence of such a

requirement, the investor would plan more precisely and ensure that an adequate export market existed; no trade displacement would then take place beyond that which would have occurred anyway "under normal conditions". Regarding the reference in the proposal to the monitoring of investment policies by international organizations, he considered such an idea to be inconsistent with the acknowledgement in the submission that investment policies belonged to the internal competence of states. More generally, discussions in the Group appeared to be moving into areas that lay outside the mandate, such as development strategies and policies related to investment; this was not acceptable.

16. The representative of the Nordic countries said that the criteria for dispute settlement would be a core issue for the second level of discipline proposed in the submission. Both nullification or impairment and material injury could be relevant, the first relating to a contracting party and the second to an individual firm. The concept of injury was difficult to pin down at a general level in the TRIMs context, but it might be easier to handle in individual cases since ultimately the issue was the use of regulations to induce decisions contrary to normal economic principles; this could be the focus of an injury concept. A different concept of injury would be needed for third parties, and nullification or impairment could possibly be used in this context. The question of which measures would be covered by the second level of discipline was closely related to the question of which criteria should be used in dispute settlement cases. In principle, any TRIM not covered by the first level of discipline could be brought up for consultation and dispute settlement on a case-by-case basis, but the burden of proof would fall to the complainant on the basis of the criteria decided upon. The term "under normal conditions" meant one where there was no mandated export performance requirement and where exports took place autonomously based on commercial considerations and demand. His delegation saw no inconsistency between respect for the sovereign rights of governments to dictate their own investment policies and the proposed requirement that they should subject their investment measures to multilateral review.

17. The representative of Colombia said his delegation believed that national development strategies should not be subjugated to the strategies of multinational corporations; this made substantive discussion of all of the submissions difficult because of their underlying philosophies. Also, it was far more difficult to speak of disciplines on TRIMs at the practical than at the theoretical level since from a practical point of view everything was trade-related.

Discussion of the submission by the United States (MTN.GNG/NG12/W/24)

18. The representative of the United States introduced the submission and underlined two particular points. His delegation was seeking an effective agreement on TRIMs that applied to all contracting parties, and not a separate, free-standing instrument that concerned only a few. Also, the proposed agreement was based on the GATT; it included many GATT concepts, and existing GATT language had been used in places in the draft. In his

view, general debate in the Group had been taken as far as was possible; the next step was to focus on an operational outcome to the negotiations.

19. Most participants that commented on the United States' proposal said their remarks should be considered preliminary ones.

20. The representative of Japan welcomed the fact that the comments of other participants had been taken into account, and considered the draft to be a good basis for further discussion. His delegation supported the basic framework of two tiers of discipline, and the important rôle given to transparency and non-discrimination and to a TRIMs committee. The proposal for ensuring transparency seemed particularly thorough and effective. His delegation recognized the need for transition periods. It would need to reflect on which TRIMs should fall into which category of discipline. He asked for clarification of the following points: how would the proposed agreement fit into the legal framework of the GATT; would local government measures also be covered, to ensure that important loopholes were not created in the agreement; why should business sensitive information be excluded from the transparency requirements of Article IV:B, and who would decide what information was business sensitive?

21. The representative of Egypt said that a key objective of his delegation was to ensure a more favourable international environment for foreign direct investment which was an important tool for promoting economic development. However, the mandate required the Group to discuss the adverse trade effects of TRIMs, if any, and not to create an international investment régime under GATT auspices. Governments had sovereign rights to regulate and direct foreign and domestic investment according to national development objectives and priorities. In addressing the adverse trade effects of TRIMs, the Group had to consider not only government measures but also corporate practices. Adverse trade effects had to be direct and significant to warrant consideration, and the specific circumstances in which measures were applied should be taken into account. His delegation did not accept the concept of the prohibition of any TRIMs.

22. The representative of Chile said that it appeared the United States envisaged the negotiation of a code on TRIMs, even though it had expressed the hope that all participants would sign any agreement reached. While his government was party to some of the Tokyo Round codes, it did not consider a code approach to be healthy for the multilateral trading system since it created two levels of rights and obligations and pressure on countries to sign however reluctant they might be to do so. Article I of the draft agreement gave cause for concern since it implied that all of the TRIMs listed always gave rise to adverse trade effects; this was not the case. His delegation had stated in the past that some TRIMs could be subject to the discipline of prohibition, but only if they could be shown to have direct and significant adverse trade effects in all cases. Technology transfer requirements, for example, should not be subject to prohibition.

23. The representative of Hong Kong asked for clarification as follows: was a particular distinction being drawn between the two measures listed in

Article I:4 and those measures listed in Article I:2; and how would the principle of national treatment be applied in the agreement?

24. The representative of Brazil noted with utmost concern the circulation of the draft agreement, and doubted that its approach was consistent with the hope of the United States to have broad participation in a TRIMs agreement. It was more akin to a code approach, and could result in a situation similar to that prevailing in the areas of subsidies and dumping where countries applied countermeasures more as a form of trade harassment to protect domestic industry than as a means of correcting distorted competition. The focus on investment measures rather than on their adverse trade effects would undermine the judicial apparatus of the GATT. His delegation recognized that some investment measures might have occasional adverse trade effects, but it did not agree that any measures caused such effects inherently; even local content requirements could produce trade creating and enhancing effects. He noted that the proposal was silent on the issue of the RBPs of multinational corporations. In order to respect the balance of interests among participants, the Group should examine the need for obligations from private investors in many areas, one of them being to ensure transparency by requiring investors to provide information on their business activities. Home governments should also assume the responsibility of entering into specific kinds of cooperation with host governments in this regard. Brazil had maintained a liberal and stable foreign investment régime for many years, and viewed with great concern the suggestion that governments would be limited in their ability to discipline investment measures. It could not accept, therefore the use of this proposal as a basis for the Group's work.

25. The representative of India said the proposal confirmed his delegation's concern that an attempt was being made to move the negotiations in a direction contrary to the Group's mandate and that issues raised by developing countries would not receive the attention they deserved. His delegation had stated repeatedly that the prohibition of investment measures was unacceptable, yet the proposal tried to attribute inherently trade restrictive and distorting effects to almost all TRIMs, including such measures as technology transfer and licensing requirements which were not even clearly trade-related. It appeared that the intention was to try to apply the GATT to investment, which was unacceptable.

26. The proposal failed to address the basic issues that had been raised by developing countries for integrating development aspects into the negotiations. One was that only a few investment measures caused significant adverse trade effects, and then only in some circumstances so that a case-by-case approach to avoiding those effects was necessary. Also, account had to be taken of the trade creating and enhancing effects of the measures in developing countries. A second was that some private corporate practices caused the same trade restrictive and distorting effects as government mandated measures, and these had to be addressed in order to bring about a balanced approach in the Group and to respect the mandate. If the Group continued to go in the direction suggested by this proposal, he considered it unlikely that any agreement would be reached to which developing countries could subscribe.

27. The representative of Switzerland welcomed the proposal as timely and for respecting the Group's mandate. Its introductory paragraphs reflected the consensus which appeared to exist among a large number of participants. It did not appear to take a code approach, but even if it had his delegation was not opposed to the negotiation of codes which it did not consider to be instruments for excluding certain contracting parties. His delegation supported the general objectives proposed in the draft agreement, and the prohibition of certain TRIMs; the Group had time to agree on specifically which measures should be prohibited. However, his delegation had a fundamental divergence of view over the appropriate means of dealing with TRIMs that would not be prohibited, and he recalled the contents of Switzerland's own submission in this regard. His delegation continued to believe that consensus would be easier to reach if there was agreement to explicitly authorise the use of certain measures, since this would provide greater long-term security for investors and contracting parties in this sensitive area.

28. The proposals on transition periods and development considerations were welcome. Specific time-frames for transitional arrangements could be negotiated. A careful reading of Article III:4 should allay the concerns of participants that the proposal did not encompass development aspects sufficiently, and his delegation considered that monitoring and disciplining the use of TRIMs in and of itself would favour the development process. He expressed certain reservations on the proposals for the application of provisions relating to transparency. This would be a very sensitive area that required careful consideration and the adoption of a flexible approach; in particular, it would be important to strike a balance between the interests of individual firms and the general objectives the Group was seeking to achieve. The proposal for creating a TRIMs committee was useful, but he believed the Group should think more ambitiously about the rôle such a committee might play.

29. The representative of Colombia said that the proposal did not meet his delegation's line of thinking on this subject. The objectives of a TRIMs agreement set out in the preamble were worthy of support and conformed to the Group's mandate, but the remainder of the text contradicted the preamble. There was no recognition of development considerations, nor of the need to ensure the transparency of private corporate practices.

30. The representative of Pakistan said that the proposal was premature and appeared to seek the application of the GATT to investment and investment measures. It viewed the trade effects of the measures solely from the point of view of private investors, and made no mention of any obligations that those investors might be expected to undertake for doing business in a host country. The preamble recognized the rôle played by direct foreign investment in economic development and the right of contracting parties to regulate it in a manner consistent with the GATT and their other international obligations, but he found no reflection of this in the remainder of the draft agreement; also, he asked which specific international obligations were being referred to in the preamble. The investment policies of developing countries, as well possibly as some developed countries, were based on national requirements and objectives in

pursuit of which governments employed certain policy tools. In order to accept the case for prohibiting the use of those tools, it was necessary to have a clear idea of what the ultimate purpose of prohibition would be. To identify such a purpose, the Group should return to the task of identifying and agreeing on the trade restrictive and distorting effects of investment measures, as called for in the mandate.

31. The proposal asserted that all of the measures listed in Article I had inherently trade restrictive and distorting effects, which was a view his delegation did not share. There appeared to be broad appreciation in the Group of the justification for using certain investment measures for purposes of regional development, yet Article I made no reference to such considerations. Furthermore, it proposed the prohibition of manufacturing limitations, and his delegation could not accept such an obligation; the manufacture of liquors, for example, was prohibited in his country for cultural and moral reasons. The prohibition of technology transfer requirements was proposed on the grounds that they caused inherently adverse trade effects, yet in the view of his delegation these were outweighed by their trade creating and enhancing effects. The use of the phrase "for example" in certain places in Article I suggested there were still a number of loose ends, and these needed to be clarified before his delegation could give its definitive views on the proposal.

32. The representative of Peru felt the proposal was useful, but that presenting a draft legal text at this stage represented a considerable leap forward in the negotiations when the Group had still not completed its discussion of basic concepts. Several of those concepts, particularly prohibition, needed careful and detailed examination. On development considerations, he recalled the view of many participants that these needed to be integrated directly into the negotiations and not treated in terms of time-limited derogations. If broad participation in a TRIMs agreement was to be achieved, the results of the negotiations had to be balanced.

33. The representative of Hungary said the proposal was timely. Some account had been taken of the views expressed in the Group by other participants, but the proposal remained very ambitious and his delegation continued to have major difficulties with parts of it. He asked, in view of the reference in the preamble to foreign investment only, whether the proposal addressed TRIMs applied to domestic investors as well.

34. His delegation was concerned about the wide coverage of prohibition in Article I; it questioned the direct adverse trade effects of many of the measures listed and the extent to which prohibition was the only effective way of avoiding those effects. These concerns were increased by the reference in the annex to the term "requirement" applying not only to rules and regulations but also to the use of investment incentives to achieve compliance with performance requirements. He noted that the proposal referred to requirements in terms of particular products or technologies, but said that in practice national investment policies often provided only general guidelines which referred to certain areas of manufacturing or certain products which required high levels of processing or the use of advanced technologies being eligible for preferential treatment through the

granting of investment licences or incentives. Under the United States proposal, such policies might be interpreted to be equivalent to manufacturing or technology transfer requirements and prohibited; his delegation would have serious reservations if such a conclusion was drawn since it did not recognize the direct relation to trade of such policies. However, it would welcome the abolition of the use of restrictions on the use of particular technologies, as called for in Article I:2(d).

35. With regard to the disciplines proposed in Article II, his delegation had no difficulties with a commitment to the non-discriminatory application of investment measures where this meant m.f.n. treatment. However, guaranteeing national treatment in the application of certain investment measures appeared impossible; a local equity requirement, for example, inherently denied national treatment since a foreign investor was not provided the same rights as a domestic investor with respect to ownership.

36. The representative of the Nordic countries welcomed the proposal as timely and helpful in clarifying a number of points. His delegation found some aspects of the proposal far-reaching, and he recalled the elements put forward in the Nordic countries' submission to the Group (W/23). Strict disciplines were called for over TRIMs that were inherently in contradiction to the GATT, but they should be phased in over time. It was still an open question which TRIMs should be subject to such disciplines. The Nordic countries considered that at least two TRIMs had inherently trade restrictive and distorting effects, and felt there was need for further discussion of their definition; however, some TRIMs which were being proposed for prohibition did not have inherently trade restrictive and distorting effects. He welcomed the recognition by the United States of the need for transition periods, and agreed that incentives should not be included under a TRIMs agreement. He asked for clarification of the principle of non-discrimination that was being proposed, and said that it appeared to include some element of national treatment. He asked also whether, under the proposed disciplines of Article II, normal dispute settlement proceedings would come into play if bilateral consultations proved inconclusive. The proposal for transition periods provided flexibility, particularly for developing and least-developed countries, and he expressed the hope that individual transition plans would be applied in a non-discriminatory fashion. He asked whether the possibility of counter-notifications would be allowed under the proposed mechanism for securing transparency, and if so how it would work in practice.

37. The representative of Canada welcomed the proposal as timely and as a precise legal articulation of the United States' position which should help to focus attention on key issues. His delegation agreed with the aim of situating a TRIMs agreement firmly within the GATT and making it applicable to all contracting parties, and with the proposals to establish two tiers of disciplines and not to include incentives in a TRIMs agreement. In order to proceed with the proposal, it would be necessary to define precisely and comprehensively the measures to be covered and the attendant criteria so as to dispel concerns over the independence of national investment and industrial policies. While Canada did not hold the same views as the United States on which investment measures always had direct

and significant adverse trade effects, it felt that prohibition was necessary for those measures which the Group agreed to be directly trade distorting.

38. He asked whether the specific measures listed in Article I were intended to be a directly dependent subset of the general prohibition contained in the first sentence of Article I:2 or to be supplementary to it. He asked how the general prohibition contained in Article I:4 differed in scope and criteria from the conditions stated in Article I:1, and stated that citing measures as examples in Article I:4 seemed to suggest a case-by-case approach to disciplines that was more characteristic of Article II. Canada agreed on the need for a second tier of disciplines to supplement prohibition, and given the principle of actionability of certain TRIMs in Article II he questioned the advisability of listing illustrative examples since this seemed to imply that the TRIMs mentioned belonged more properly to the prohibited category of measures; establishing the principle of actionability and defining the criteria on which it would be implemented seemed a preferable approach since that would not prejudice the result of any complaint.

39. The drafting of Article II made it difficult to determine exactly what activity or behaviour would be subject to the principle of non-discrimination among companies, and he questioned in general how such a principle might be applied when most individual TRIMs were tailored to specific firms or industries such that it would be virtually impossible to set out "no less favourable treatment" as called for in Article II. He agreed that providing a fully transparent process would be an important part of a TRIMs agreement, and he expressed concern that the proposal in Article IV:B would involve a bilateral process which would not ensure multilateral transparency. With regard to commercially confidential information, it was necessary to balance the need to maintain confidentiality with the need to provide transparency for all contracting parties. He saw no particular need to create a TRIMs committee if all contracting parties were signatories to a TRIMs agreement, and felt that it might undermine the rôle of the GATT Council which already had sufficient flexibility in its mandate to accommodate any of the special requirements which had been mentioned concerning the operation of a TRIMs agreement.

40. The representative of Malaysia, speaking on behalf of the ASEAN countries, said that further discussions and submissions should take into account the deliberations which had taken place in the Group and adopt realistic approaches to the adverse trade effects of investment measures. Governments had the cardinal right to formulate and implement investment policies consistent with national economic and development priorities and objectives. Investment flows needed to be regulated prudently in order to ensure inter alia orderly industrial development and the maximisation of the scarce resources available to developing countries. He emphasised that the ASEAN countries could not support a number of elements of the proposal by the United States for a draft TRIMs agreement. Regarding Article I, the identification of any adverse trade effects of investment measures had to be based upon objective and definitive criteria. While some TRIMs might have trade restricting and distorting effects, the approach of prohibition

was too simplistic to avoid them, and such a discipline could not be justified without adequate proof of the adverse trade effects themselves. The Group had not yet established that any of the measures cited in Article I had trade restrictive and distorting effects, and it was therefore premature to try to identify what measures should be subject to which disciplines if there was to be any agreement on TRIMs at all. The proposal lacked any substantive development provisions, and it was essential that development aspects be fully integrated into any agreement.

41. The representative of the European Communities said the proposal was constructive and helpful, and exactly what the Group needed to focus on at this stage of the negotiations. In his view it was fully consistent with the Group's mandate and it was up to other participants to make concrete proposals if they considered that any elements were not elaborated sufficiently. His delegation shared many of the views contained in the proposal: the Group should aim to reach an agreement on TRIMs which could be signed by all participants; the right of contracting parties to regulate investment should not be contested, and the agreement was limited to what was necessary to eliminate adverse trade effects caused by certain TRIMs; two levels of discipline were needed, according to the trade effects of the measure in question; domestic and foreign investors should be treated alike with regard to disciplines; and investment incentives should not be covered by an agreement.

42. There were a number of points in the draft agreement that the Communities could not agree with. There were not as many TRIMs which had inherently adverse trade effects and which should be prohibited as was suggested in the draft agreement, and exceptions should apply to the discipline of prohibition, which was not brought out clearly. He asked what distinction was being made between the measures listed in paragraphs 2 and 4 of Article I, and questioned the status of the examples cited in paragraph 4. He questioned whether the standard of no-less-favourable treatment contained in Article II was the best one. He agreed on the need for transitional arrangements, but considered that permitting transition periods only for those measures that were in place at the beginning of the Uruguay Round might be too strict. He felt that the modalities for ensuring transparency might not be sufficiently multilateral. The omission of a reference to disciplining TRIMs applied at the sub-national level was important and needed to be corrected if a major loophole in the agreement was not to be created. Also, a number of relevant issues were taken up in the annex to the agreement, and he questioned whether they should be relegated to an annex rather than incorporated in the text.

43. The representative of Switzerland said that while he had no problem with the suggestion by the European Communities to cover measures taken at the sub-national level in a TRIMs agreement, he questioned the importance of such measures; while sub-national entities often had the competence to grant investment incentives, performance requirements were generally imposed by federal authorities which controlled foreign economic policy.

44. The representative of Mexico considered that the proposal was premature because the Group had not yet examined systematically and found

agreement on the adverse trade effects of TRIMs, on the application of GATT rules with respect to those effects, or on the need for additional disciplines. She recalled her delegation's reservations over the concept of prohibition, since it could not be assumed that certain investment measures had trade restrictive and distorting effects in all circumstances. Also, her delegation felt that development considerations had not been adequately incorporated into the draft agreement; transition periods and exceptions were not sufficient to take into account the differences between contracting parties and to ensure their full participation.

45. The representative of New Zealand said the proposal was timely and a useful basis on which to proceed beyond abstract discussions to the stage of negotiating which TRIMs should be subject to what disciplines. Her delegation supported fully the general approach taken and agreed with much contained in the proposal. Prohibition was a sensitive issue, but in her view the proposal clearly tied disciplines in with existing GATT provisions and she agreed that certain investment measures were inherently trade restrictive and distorting and that it was impossible to separate the measures from their trade effects. Where measures had effects similar to those dealt with in the GATT through prohibition, the basic objective of the TRIMs negotiations were to ensure that equivalent disciplines were applied. For this reason, her delegation supported the way in which the concept of prohibition was expressed in Article I. The debate in the Group on what constituted a requirement had been useful and could lead to progress in this regard. Her delegation agreed on the need for two levels of discipline, and could endorse non-discrimination, transparency and a commitment not to use TRIMs if they caused adverse trade effects as basic disciplines for those TRIMs which would not be prohibited. It agreed also on the need for transition periods.

46. A large number of issues required further precision. A number of participants had said that the United States appeared to be adopting a code approach, and she asked what formal link the United States saw between this draft agreement and the GATT. The use of examples in Article I might constrain a dispute settlement panel from finding that TRIMs other than those cited as examples were inherently trade restrictive and distorting; the status of the illustrative list needed to be made quite clear. She asked why non-discrimination and national treatment were compressed together in Article II, and suggested that they should be dealt with separately as in the case of the GATT. She questioned the practicality of basing the criteria for determining whether TRIMs caused adverse trade effects to another contracting party on trade which would otherwise have occurred, as suggested in Article II:5(c). Regarding transition plans, she agreed these could most appropriately be left up to individual countries to decide upon but asked whether they should be drawn up within a certain time and whether they should be subject to multilateral surveillance or follow-up. A more multilateral approach to transparency than that suggested in Article IV might be appropriate, and she asked about the possibility of notifications being made more broadly than simply on a request basis. The contents of the annex should not be overlooked.

47. The representative of Uruguay expressed concern that the proposal went beyond seeking remedies to the adverse trade effects of TRIMs. Attempting to discipline TRIMs exhaustively was not a practical approach in his view, since it would only encourage the proliferation of other measures that had similar adverse trade effects but were not subject to disciplines. He considered that investment incentives should be dealt with in the Group; they could have adverse trade effects in much the same way as performance requirements, and performance requirements were often applied when budgetary resources did not allow for the use of incentives. He asked whether the implication of Article II:3 was that a contracting party would not be allowed to prohibit a foreign investment if it had authorised investment by the firms of another contracting party; if so, it was necessary to consider what to do when certain investments were accepted under certain conditions but further investments became unattractive to the host country once these conditions could no longer be applied.

48. The representative of Yugoslavia considered the proposal timely, but unacceptable in substance. The obligations of the draft agreement were not consistent with the recognition in the preamble of the sovereign rights of contracting parties to regulate direct foreign investment. Prohibition was not the correct approach to take in dealing with TRIMs, and the widescale prohibition of TRIMs was the major problem for his delegation.

49. The representative of China recalled the Group's mandate and the Montreal text. These fully recognized the positive effects of some national investment policies in attracting foreign financial resources, aligning foreign investment to national development objectives, maintaining a satisfactory balance-of-payments situation, adopting advanced technology and promoting the development of national economies. There were numerous examples of how investment measures could stimulate external commercial relations. China did not share the view that certain investment measures should be prohibited on account of their adverse trade effects. It supported the statements by Singapore and India in NG12/W/17 and 18.

50. Local content requirements were not included in China's investment laws and regulations, but more often than not specific investment contracts between foreign investors and Chinese counterparts did contain such requirements. There were few cases where they caused trade distortion. When a host country was rich in raw materials and human resources, and where locally produced components enjoyed a comparative advantage, there were no grounds for concluding that local content requirements had trade restrictive and distorting effects and should be prohibited. These measures were particularly relevant in developing countries; one of the objectives of GATT was to develop the full use of world resources, and this should not be forgotten in the context of TRIMs.

51. China did not include compulsory export performance requirements in its investment reviews. However, many industries and enterprises preferred that a specified share of products should be exported and very often they required investors to undertake export obligations when negotiating the investment documents, partly for balance-of-payments reasons and partly to secure hard currency for use as payment for imported technology and capital

goods. Most developing countries believed that their labour costs were lower, their land cheaper, and other relevant production inputs were reasonable. In most cases, products manufactured and exported by foreign investors were internationally competitive. There was no reason to conclude, then, that all export performance requirements were trade distorting TRIMs. He recalled the provisions of GATT Article XXXVI:5, and questioned whether developing countries could expect the meaningful implementation of those provisions if export performance requirements were to be prohibited or restricted.

52. With regard to trade-balancing requirements, the GATT acknowledged that developing countries should enjoy additional facilities for balance-of-payments purposes, including the use of tariff and non-tariff measures. Demanding export performance from investors was natural in the context of Article XVIII, and governments applying foreign exchange controls for balance-of-payments purposes had a big stake in this issue. China did not have a freely convertible currency, and often experienced balance-of-trade deficits. The banking system was in no position to meet requests from foreign investors for foreign exchange, so foreign investors were requested to assume legally the responsibility of maintaining balances of payments individually. The TRIMs negotiations should not nullify the negotiated rights of developing countries, and China found it difficult to agree to the concept of prohibition for export performance.

53. The representative of Australia said the draft agreement was timely and that tabling it now was clearly appropriate in terms of the Group's task and mandate. His delegation continued to have difficulties with some fundamental features of the draft, and in particular was not convinced by the approach of categorising particular TRIMs as prohibited; it believed that the Group should be concentrating on the effects of the measures and not the measures themselves. He stressed that in expressing doubts about the principle of prohibition, his delegation was not supporting the introduction of any measures in any sector of an economy which distorted trade; the whole basis of Australia's industrial and trade policy in recent years had been to consistently remove such distortions domestically and to seek their removal internationally. However, it questioned the approach of prohibition at both the conceptual and practical levels. TRIMs were commonly used in conjunction with other trade, industry or investment measures, so logically they should also be assessed in that context. The same TRIM could lead to a net increase or decrease in protection, depending on the purpose and the policies surrounding it; the conceptual question was then should the Group seek to prohibit a measure which in practice led to a net reduction in protection. At the practical level, prohibiting two or three categories of TRIMs would in the view of his delegation be likely to lead to the substitution of others TRIMs or trade measures which might be adjusted quite readily to have a similar effect; in particular, less transparent measures might replace more obvious and transparent TRIMs. His delegation also continued to question how clearly and inherently trade restrictive and distorting TRIMs were, particularly in view of the fact that different participants, operating with more or less the same standards in mind, came up with different lists of TRIMs for prohibition.

54. Regarding other aspects of the draft agreement, he welcomed the fact that efforts had been made in certain areas to accommodate concerns expressed by other participants, and in particular the introduction of a transition period. However, he considered the end rather than the start of the Uruguay Round would be the appropriate base date for TRIMs which would be allowed a transition period, since TRIMs were often associated with large-scale capital investment projects and they could not be unwound as simply as other trade distorting measures.

55. The representative of the United States replied to the questions raised and the comments made. He said that prohibition was not a new concept in the context of the GATT and that in his view it fell clearly within the Group's mandate, and he recalled the findings of the FIRA panel on local content requirements. His delegation considered all of the TRIMs listed in Article I of the draft agreement either met one of the two criteria set out in Article I:1, which meant that they were contrary to existing GATT disciplines, or mandated exports which was contrary to the GATT premise that the market, and not governments, should dictate the actions of firms. His delegation was not seeking disciplines in the TRIMs Group on the ability of governments to provide incentives to encourage foreign investment or domestic investment, but it was objecting to the use of incentives to secure trade distortions. Local content requirements, for example, should not be permitted if they were accompanied by an incentive since the trade distortion caused by the requirements would be exacerbated.

56. He saw no mismatch between the contents of the preamble and the text of the draft agreement with regard to development considerations, and said that reducing the use of TRIMs would promote development; TRIMs generally raised the cost of capital and of doing business to a firm and therefore discouraged foreign investment. It was inconsistent to try to justify TRIMs on balance-of-payments grounds since in discouraging foreign investment they discouraged inflows of foreign capital. Some exceptions would be needed to the disciplines established in a TRIMs agreement, but his delegation had not yet decided which ones would be appropriate and it looked forward to hearing proposals from others on this. Exceptions for national security and for health and morality reasons would be perfectly acceptable, and exceptions for government procurement were well accepted in the GATT system where, for example, a local content requirement was used to define products that were eligible for preferences.

57. He said that his delegation had no firm views on the best way to put a TRIMs agreement into the GATT legal framework, but it did want the agreement to contain effective disciplines and to cover all contracting parties, and not to be a code with only limited participation. It would be important to cover measures applied by sub-national entities in a TRIMs agreement, but whether or not it would be necessary to impose specific obligations on such entities would depend on the general effectiveness of the disciplines agreed to. His delegation wanted measures applied to both foreign and domestic investors to be covered by a TRIMs agreement, and he said the text of the preamble would be changed to make that clear. The reference to other international obligations in the preamble was a general one and such obligations could vary from country to country.

58. The intention of Article I:4 was to catch any TRIM with inherently trade distorting effects that was not explicitly prohibited in paragraphs 2 and 3. The examples provided were to clarify that thought. He was not sure that examples should be included in a final text. There had not been any intention of addressing measures applied for regional development purposes in Article I:2, and particularly not of prohibiting regional development incentives, and the use of the term "particular" in several of the subparagraphs of that Article had been intended to make that clear.

59. On Article II, his delegation wished to reflect on the drafting of paragraph 3 concerning non-discrimination. The intention had been to ensure that a local content requirement, for example, of 40 per cent on firms from one country, including domestic firms from the host country, would act as a ceiling for firms from all other countries. In the case of local equity requirements, his delegation had considered m.f.n treatment but not the possibility of applying also national treatment which would imply that foreign investors had the right to own property without such requirements being attached. He noted the concern that it would be hard to determine what was an adverse trade effect in operational terms in the context of Article II:4, and said that an attempt could be made to try to define it more finely. Regarding the reference to trade "which would have occurred" in Article II:5, and questions about whether this could be used by dispute panels, he said that it would be important for a panel to take into consideration future trade flows and not just consider established trade flows in instances where a TRIM was imposed on a new entrant.

60. Regarding transition plans, it was important that there should be a certain date when specific TRIMs would be removed but it would be left to individual countries to work out how this should be done. In drafting the provisions on transparency, it had been felt that developing a GATT inventory of all TRIMs would overburden the system and generate more information than was really necessary, given that many TRIMs were imposed on a firm-specific basis. The question of what should be considered to be business sensitive information required further reflection.

Other matters relating to Agenda Item A

61. The representative of Brazil stated that the Group's mandate, as defined in the Punta del Este Declaration and the Montreal decision, included two basic substantive elements: (i) discussion of the trade restrictive and distorting effects of investment measures; and (ii) development aspects. Work on identifying adverse trade effects which were or were not covered by existing GATT Articles, as well as subsequent debate on the means of avoiding such identified effects, had to take into full consideration development concerns as an integral element of the discussions.

62. The identification of direct and significant adverse trade effects caused by investment measures was a key element of the Group's mandate. It necessarily preceded any attempt to discuss, as appropriate, any new multilateral provisions concerning the subject. The indication that the

Group should concentrate its attention on "significant" and "direct" adverse trade effects implied that the discussion should not cover possible, potential, indirect or secondary trade effects. The final objective was to determine existing or new ways to deal with such adverse trade effects. Therefore, the discussion of investment measures themselves was neither a step nor a goal in the Group's deliberations. The TRIMs Group had definitely not been asked to elaborate a set of disciplines (prohibition, elimination, reduction, etc) over investment measures.

63. The types of significant and direct adverse trade effects which should be discussed in the Group were possibly those causing nullification or impairment of any benefit accruing to a contracting party directly or indirectly under the General Agreement. For these adverse trade effects, Brazil considered that the GATT already provided adequate means of control. Furthermore, the present round of multilateral trade negotiations would hopefully improve existing rules in a balanced way, with benefits for all participants. Should there, then, be any other type of direct and significant adverse trade effect caused by investment measures which should be discussed in the Group in fulfilment of its mandate?

64. Some of the Group's discussions had revealed a certain degree of misunderstanding of the mandate on the part of a number of participants who had addressed investment measures per se. GATT provisions, as well as the agreement reached by ministers in Punta del Este, clearly recognized the sovereign right of countries to maintain investment measures as a legitimate instrument for the promotion of development. It would therefore be illogical to consider their abolition or reduction. One type of adverse trade effect not yet covered by the GATT related to investment measures taken by private operators. To the extent that these effects directly and significantly affected international trade, they should automatically be included in the agenda of the Group. The CONTRACTING PARTIES, in a decision of 18 November 1960, had recognized that "business practices which restrict competition in international trade may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement". Since then, the subject had not been thoroughly discussed among contracting parties. Therefore, the Group could make a very positive contribution to the Uruguay Round by addressing the issue of adverse trade effects of restrictive business practices in the area of TRIMs. In this context, Brazil was proposing the following steps: (a) identification of adverse trade effects of measures adopted by private operators; (b) discussion of existing mechanisms to deal with such adverse trade effects; and (c) consideration of possible new mechanisms designed to eliminate, reduce or inhibit such adverse trade effects.

65. Development aspects should permeate every discussion held in the Group. In practical terms, this would imply, inter alia that: (a) the discussion of direct and significant adverse trade effects of investment measures must include the notion of "developmental priorities". According to this notion, developing countries have the right to adopt certain measures in line with their development projects and consistently with the

provisions of the General Agreement. When a contracting party claimed nullification or impairment of a benefit caused by such measures, it would be necessary first to assess the development implications of such measures before considering the recourse to the dispute settlement mechanisms of GATT; (b) developing countries should receive appropriate compensation for the adverse trade effects caused by restrictive measures of private operators; (c) the adverse trade effects caused both by developed countries' governmental measures, as well as private companies' measures aiming at limiting developing countries' access to modern technology, should receive adequate treatment during the discussions of the Group.

66. The representative of the European Communities said that the crucial issue which the Group needed to focus on was whether disciplines for TRIMs should be based upon the prohibition of certain measures or on a case-by-case examination of their adverse trade effects. He did not consider these two approaches to be fundamentally different. Both involved the prohibition of certain investment measures, since even with the case-by-case approach governments would be obliged to avoid using investment measures which caused adverse trade effects. The essential difference between the two approaches was one of burden of proof. Even under the discipline of prohibition the use of the measures could be permitted under certain circumstances, since where a GATT Article provided the discipline of prohibition, existing GATT exceptions might apply; the burden of proof would then fall to the government using the measure in question, which would have to demonstrate that it was justified on the basis of the exceptions which were at hand. Where case-by-case discipline applied, the burden of proof would fall to the complaining party, which would have to show that the measure in question should not have been taken because it was causing adverse trade effects.

67. The concept of prohibition was not alien to the discussion of TRIMs. The FIRA panel had decided that local content requirements were in conflict with Article III:4, but left open the question of whether other Articles provided exceptions. He did not believe that any participant could claim that local content requirements should be subject to case-by-case discipline. The question then was not whether the discipline of prohibition should be applied to TRIMs, but whether measures other than local content requirements should fall under that discipline. He recalled in this context the submission by India (W/18) where manufacturing requirements had been equated with local content requirements, and where trade-balancing and export performance requirements had been treated alike.

68. He disagreed with the argument that TRIMs were a justifiable response to the practices of private operators. Normally, TRIMs were applied across the board and their application did not presuppose an exact analysis of what the practices of investors were. They were applied to small and medium sized companies as well as to multinational corporations. In so far as the application of TRIMs was in response to presumed RBPs, it was an excessive reaction. Where, for example, tied-purchasing practices could be proven, the proper response was to prevent the investor from continuing such practices through appropriate domestic legislation, not to apply a

local content requirement which would prevent the import of inputs not only from the investor's home country but from other countries as well.

69. The representative of India disagreed with the implications drawn by the representative of the European Communities from the FIRA panel findings with regard to investment measures mentioned in the Indian submission. He recalled that the FIRA panel had concluded that purchase undertakings sought from investors were inconsistent with Article III, but it had not examined manufacturing requirements which were not, therefore, subject to GATT case law on prohibition. He disagreed also that there was no difference between the case-by-case approach and the approach of prohibition; on the contrary, the difference was fundamental. The adverse trade effects of investment measures had to be proven in terms of the injury they caused, and account had to be taken of the development dimension of the measures in question as well as the fact that their trade creating and enhancing effects could outweigh their adverse trade effects over the long-term. The issue of the practices of private operators could not be ignored. If the Group considered that measures such as export performance requirements had to be prohibited because they were trade-distorting, it should address the export restrictions of market operators and their adverse trade effects in the same manner because it was trade distortion that the Group was trying to address more than anything else. The Indian submission had shown that RSPs were a widespread phenomena, and governments had to have to legal authority to deal with them. That was one of the reasons why his delegation was advocating that developing countries needed to be free to impose performance requirements, and unless the issue was dealt with the Group would not make progress.

70. The Chairman drew attention to a paper containing a synopsis of the issues raised in the negotiations which had been prepared by the Secretariat at the request of the Group, and he proposed that it be used in future discussions as a reference paper. There was an exchange of views in which some participants said that the Group should focus now on operational texts such as that put forward by the United States, while some others said that the Group still needed to have more in-depth discussions to arrive at areas of agreement before going on to consider operational texts. The Chairman proposed that at its next meeting the Group should maintain the same agenda that it had for this meeting, revert to further consideration of the submission by the United States, and focus in operational terms on the following four questions through which the issue of identifying the adverse trade effects of investment measures permeated:

- how adequately do GATT Articles ensure that the adverse trade effects of TRIMs are avoided?
- what new disciplines are needed to avoid the adverse trade effects of investment measures?
- what should be the scope and coverage of further provisions?
- how should development aspects be integrated into the negotiations?

II Other Business

71. The Chairman said that Secretariat Notes on the Group's meetings would be circulated in future in English as soon as possible, and in the other two languages as soon as these were available.

72. The Group agreed to hold meetings on 29-30 March, 17-18 May, 13 and 15 June, and 12-13 July 1990.