

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG12/18
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Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related
Investment Measures

MEETING OF 13 AND 15 JUNE 1990

Note by the Secretariat

1. The Group held its eighteenth meeting on 13 and 15 June 1990 under the Chairmanship of Ambassador T. Kobayashi. The agenda contained in GATT/AIR/3011 was adopted.

Agenda Item A

2. The Chairman drew attention to a new submission from Bangladesh, Brazil, Colombia, Cuba, Egypt, India, Kenya, Nigeria, Pakistan, Peru, Tanzania and Zimbabwe entitled "Draft Declaration on Trade-Related Investment Measures" contained in MTN.GNG/NG12/W/26.

3. The representative of India introduced the new submission, on behalf of all the delegations sponsoring it. He recalled the Punta del Este mandate, which had been further elaborated by Ministers in Montreal, and said that investment measures per se were not the subject matter of negotiation and that investment measures were clearly in the domain of the sovereign rights of contracting parties. He recalled also the conclusions and recommendations for a successful outcome to the negotiations contained in NG12/W/25, and said that most of the countries sponsoring that submission were sponsoring also NG12/W/26.

4. He said that the concerns expressed by developing countries generally, and in particular by those developing countries sponsoring NG12/W/25, had not found expression in the draft paper put forward informally by the Chairman at the end of the last meeting which, it was being suggested, should serve as a basis for the further work of the Group. This had raised profound concerns among those delegations sponsoring NG12/W/26.

5. He illustrated the reasons for those concerns with reference to the Chairman's draft paper. He said that the paper departed from the Punta del Este mandate as elaborated at the Mid-Term Review. Under the heading of Definitions, a definition had been provided which, although seemingly effects-oriented, was without any qualification or limitation, covered domestic and foreign investors, and was phrased very generally. There was no reference to significant or direct trade effects. The definition of when a TRIM was "applied" was also very general and sweeping, and it extended to cover investment incentives. It could include totally unrelated things such as stocks and shares and other intangibles.

6. Under the heading of General Provisions, a catch-all obligation was presented. Paragraph 1 amounted to a "GATT-plus" approach, under which not only were all GATT obligations to be applied to investments, but also additional obligations were sought to be imposed. Paragraph 3 contained a more onerous obligation than that contained in Article XXIV:12 of the GATT, and he did not see how it could operate under federal constitutions where a central government might not have the authority to issue directives to regional governments. Paragraph 4 pointed to the GATT being made applicable to investment measures, and this was confirmed by proposals later in the draft paper for including provisions on Consultation, Conciliation and Dispute Settlement.

7. Chapters 3 and 4 were based on interpretations of Articles III and XI of the GATT which had not been accepted by the Group, and which in the view of his delegation reflected in part a mis-reading of the findings of the FIRA panel. He had heard it being suggested that the concerns of developing countries had been taken into account in Paragraphs 3 and 4 of these Chapters. However, countries covered by Article XVIII:4(b) were not included in the scope of these paragraphs, and more importantly Article XVIII:C had been mis-applied since manufacturing requirements, for example, did not in all cases affect imports. In addition, very onerous conditions attached to invocation of Article XVIII:C. In sum, these paragraphs did not address the concerns of developing countries that sovereign States must be able to order their development.

8. Chapter 5 contained a new set of obligations regarding notification and phasing-out certain TRIMs. Treating developing countries differentially in the context of phasing-out TRIMs was not sufficient to address the development aspects of these measures.

9. The delegations sponsoring NG12/W/26 felt that all that had been said by developing countries in the negotiations to date, with regard to their development concerns and the fact that the Group was not mandated to draw up an agreement on investment, had not found expression in the Chairman's draft paper except by way of suggesting that the GATT in its entirety should be made applicable generally to investment measures.

10. It was in that context that the new submission contained in NG12/W/26 had been tabled. The Preamble reflected the mandate, the importance of foreign direct investment and the inalienable right of any country to determine whether, to what extent and on what terms it would allow such investment to take place. Section A contained a provision for avoiding the adverse trade effects of TRIMs. Section B set out the promotion of development objectives with reference to the GATT, and indicated in what circumstances contracting parties might continue to employ investment measures in the context of their programmes and policies to promote socio-economic growth and development in a positive sense and (in Section C) to counterbalance the restrictive business practices of private operators. He noted that the Chairman's draft paper did not refer to the issue of restrictive business practices. Section D reaffirmed the existing

commitment of contracting parties with respect to transparency. Section E reflected the case-by-case approach of addressing the trade distorting effects of TRIMs, and permitted the use of existing provisions of the GATT in the event that adverse trade effects occurred.

11. The delegations sponsoring W/26 believed that the approach they had outlined could be a more useful basis for further work than one based on an application of the GATT to investment measures or a GATT-plus approach, which could not lead to any fruitful conclusion to the negotiations.

12. The representative of China said that his delegation wished also to sponsor NG12/W/26. There should be a balanced outcome to the TRIMs negotiations, conducive to the benefit of all participants, and in the view of his delegation W/26 contained a number of important elements for achieving this objective. Investment measures were applied by governments, especially in developing countries, as important instruments to maintain the balance-of-payments situation, attain the aim of industrialization, increase the competitiveness of domestic industries, offset the trade restrictive and distorting effects of corporate practices, and attain social and economic policy objectives which were consistent with the provisions of the GATT. Investment measures were not inherently trade restrictive or distorting. If in certain circumstances a specific investment measure proved to be trade restrictive and distorting, it should be dealt with on a case-by-case basis. The Group's mandate did not include any concept of prohibition of investment measures.

13. With regard to the Chairman's draft paper, he said that the definition of a TRIM seemed to cover almost all the activities of domestic and foreign investors. This definition went far beyond the Group's negotiating mandate. The text failed to reflect the serious concerns of a large number of developing country participants by concluding that local content and export performance requirements caused trade distorting effects. In fact these TRIMs provided advantages in many cases. Indiscriminate prohibition of such TRIMs would hinder the flow of international investment and discourage the expansion of international trade. The text overemphasized the rights of investors without providing necessary obligations for them. Nor did the text touch upon the issue of restrictive business practices of multinational corporations. Many developing countries were participating in the TRIMs negotiations with the expectation that they would be able to implement their foreign investment policies in pursuance of their established development objectives. In his view, the Chairman's draft paper fell short of those countries' expectations.

14. The representative of the United States welcomed the submission of W/26 since it helped to clarify the views and objectives of the countries sponsoring it. However, the message it contained was profoundly disturbing; it was "let us do nothing", and it therefore amounted to a proposal for this Group to have no result at the end of the negotiations. The approach disregarded the Group's mandate. Also, in the broader context of the Uruguay Round, it was a matter of serious concern if at this critical stage participants began to single out those negotiating groups

which they found difficult and would involve real concessions and decided that those groups would not produce results. The Round was a single undertaking and the Punta del Este Declaration committed governments to participate constructively in all negotiating groups. This had been his delegation's policy, and it expected all other delegations would work to produce positive results from this Group.

15. With regard to the Chairman's draft text, he said it fell short of what his delegation had wanted to see addressed. His delegation had identified more TRIMs that it believed were trade distorting; the discipline of "seek to avoid" contained in Chapter 2:2 of the text did not set a clear standard and it was unclear what would be the result of the consultations referred to; and the specific exceptions identified in paragraphs 3 and 4 of Chapters 3 and 4 gave grounds for concern about whether they fitted the practices being addressed in those Chapters.

16. The representative of India disagreed with the representative of the United States that the message contained in W/26 was "let us do nothing". The submission was consistent with what his delegation had been saying: it was committed to results in this Group but it wanted the adverse trade effects of TRIMs, if any, to be addressed on a case-by-case basis.

17. Following informal consultations, the Chairman stated that he intended to hold further informal consultations before the Group's next meeting with a view to helping to bring the Group to a position where it would be able to report on the state of its negotiations to the GNG at the end of July.

Agenda Item B

18. The Chairman recalled that the Group had agreed to hold its next meeting on 12-13 July 1990.