

**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 22-26 OCTOBER 1990

Note by the Secretariat

1. The Group held its twenty-second meeting on 22-26 October 1990 under the Chairmanship of Ambassador T. Kobayashi. The agenda contained in GATT/AIR/3123 was adopted.

Agenda Item A

2. The Chairman said that his intention was to continue informal consultations on the basis of the Chairman's working paper (ID Number 2474) and of NG12/W/24 and W/26.

3. The representative of India said that his delegation was concerned about the Chairman's working paper. He said that from the beginning of the negotiations, a large number of participants had agreed that the mandate of the Group did not extend to the creation of an international investment régime under the auspices of the GATT laying down prohibited and permitted measures. The Chairman's paper was in the nature of a GATT framework for investment. Its approach was "prohibition plus", based only on a presumption that investment measures under all circumstances would create adverse effects, notwithstanding the fact that a large number of countries, particularly developing countries, had stated that prohibition of investment measures which were instruments for development and for achieving social and economic objectives by developing countries should not be agreed to.

4. He said that his delegation along with a large number of others had stated that failing to take into account the objectives of the measures and prohibiting them would not be acceptable. He said that many of the measures were used to counter the restrictive business practices of transnational corporations and large multinationals, but there was no recognition of that in the Chairman's paper; he hoped that in the end there would be some effective provisions on that issue in the paper. His delegation felt that the Group should adopt the trade-effects approach, yet in the Chairman's paper that approach had been reduced to a surrogate and subsidiary of prohibition. His delegation wanted the trade effects approach to be reflected as an alternate or substitute for prohibiting measures. Also, in the context of provisions for developing countries, his

delegation noted that irrespective of the use to which investment measures were put, developing countries would be reduced to coming to the GATT and asking for permission as supplicants before they could put any of those investment measures into operation. Such restrictions on the sovereign rights of developing countries to pursue their development policies would be very harmful and would lead to great difficulties. Any decision or agreement on this subject had to recognize the full autonomy and flexibility of developing countries to pursue their development policies without any restrictions.

5. The representative of Nigeria agreed with the statement made by the representative of India. He said that the Chairman's text ignored totally the position of developing countries. The prohibition of TRIMs was not an acceptable approach in this Group. If there were TRIMs that were trade distortive, there should be provisions other than prohibition to take care of them. Also, the effects of the measures should be proven to be trade distortive before action was taken against them. All countries should have the right to formulate their investment régimes and it was not the Group's function to interfere there. His delegation did not like the idea in the Chairman's text which would make it compulsory for developing countries which intended to adopt certain TRIMs to come to the TRIMs Committee or the GATT to obtain permission beforehand. That would be interference in the sovereign right of those countries to formulate their investment régimes.

6. The representatives of China and Egypt supported the two previous speakers.

7. The representative of Hungary said that a number of issues in the Chairman's text caused his delegation increasing concern. Positions with respect to the coverage of the disciplines did not appear to be getting any closer, and his delegation would have great concern with an open-ended definition of TRIMs. The linkage between advantages and disciplines on subsidies was still not clear, and his delegation wanted it spelled out that a TRIMs agreement would not establish different disciplines on investment incentives or subsidies to those agreed to in the Subsidies Negotiating Group. His delegation regretted that in the text there was no differentiation between TRIMs which might fall under existing GATT disciplines and those for which new GATT disciplines had to be elaborated. His delegation could not accept the prohibition of all TRIMs, and particularly not of manufacturing requirements which did not fall under the coverage of the GATT. If such a requirement was to remain in the text, it should be renamed a production requirement to make clear that it would cover not only the manufacturing sector but also agriculture; that might help to restore some balance to the text. Finally, his delegation regretted that there was not yet agreement that countries in a transitional state of economic development should be granted longer periods to eliminate prohibited TRIMs.

8. The representative of the United States said that his delegation was disappointed to hear yet again rhetoric about prohibition and sovereignty. He said that it had been demonstrated in the Group as well as in GATT history that prohibition was a well established principle in Article III,

Article XI and other Articles of the General Agreement. The Group's mandate called for provisions to avoid, not offset, the adverse trade effects of TRIMs. With regard to the question of national sovereignty, he said that the GATT was an agreement to limit some of the things governments could do, in the overall interest of the trading system and of each contracting party. To say that sovereignty could not be touched in the GATT was to say that there should be no negotiations in GATT, and that was not a credible position.

9. The representative of India, in response to the statement by the representative of the United States, said that sovereignty was a very real and live issue. The extent and scope of the negotiations had to fall squarely within what was covered by the GATT, and investment measures were not a part of GATT. Negotiations must not go beyond the Group's mandate, which called for participants to look into the adverse trade effects of investment measures and not to deal with the investment measures themselves. It was true that prohibition was a well established principle of the GATT, but it was limited to the commercial instruments which were covered by the General Agreement, in other words quantitative restrictions and export subsidies. Even then, there were exceptions to prohibition. Prohibiting a large number of investment measures which were not covered by the GATT, irrespective of the purpose they were designed to serve, and providing the same exceptions that were available under the General Agreement would not be desirable nor reasonable. Any economic activity would have some trade implications, but it would be going too far to prohibit them all.

10. The representative of the Philippines said that her delegation was deeply concerned over the ominous turn in the talks in the Negotiating Group towards an unhappy choice between development objectives on one hand and strengthened multilateralism on the other. For her delegation, those were not conflicting objectives. The accelerated and sustained growth and development of developing countries was best served in the context of clear and reinforced multilateral disciplines. Negotiations should be clinched with approaches that would both reaffirm adherence to rules and promote the development of developing countries.

11. Her delegation wanted to present a viable approach to common concerns to address any adverse effects of TRIMs on trade. In that manner, the contributions of such measures to the economic growth of all countries in general, and to the expansion of world trade in particular, could be reinforced. She reiterated that her delegation could not agree to the outright prohibition of investment measures, and allow its development objectives to be compromised by such a solution. Her delegation was, however, prepared to address any restrictive and distortive effects on trade of investment measures on a case-by-case basis through the effects-oriented approach. The adverse effects of TRIMs on trade should be demonstrated by positive and measurable evidence. Her delegation reaffirmed its commitment to the General Agreement. It wanted to ensure that any disciplines enshrined in the GATT should contribute to its aim of raising the standards of living and progressive development of the economies of all contracting parties.

12. She said that her delegation had circulated its proposed drafting changes to the Chairman's text. It wanted the effects-oriented approach used to address any adverse effects of TRIMs, without prejudice to the recourse available to contracting parties under the General Agreement.

13. The representative of Malaysia supported the statement by the representative of the Philippines. In the view of his delegation, what governments did in the field of investment could not be subordinated to GATT. Contracting parties should have the freedom to employ measures which they deemed appropriate for the promotion of their economic and industrial development. His government could not agree to any outcome from the negotiations which would deny countries the right to apply measures consistent with their socio-economic needs. Should any contracting party consider that its trade interest was being adversely affected by the application of a TRIM, his delegation was prepared to address the matter case-by-case and it was open to what mechanism should be used.

14. The representative of Sri Lanka said that his delegation would like the negotiations to proceed on the basis that actions by contracting parties must comply with GATT rights and obligations.

15. The representative of Brazil said that his delegation regretted the fact that its point of view, as contained in NG12/W/26, was not reflected fully in the Chairman's text. Unless that point of view was taken up fully, the only solution would be to maintain NG12/W/26 on the table. His delegation believed that a means could be found to provide remedies for significant and direct adverse trade effects caused by investment measures, such as was contained in NG12/W/26. However, his delegation felt that some participants were still insisting on creating a set of disciplines which could not be followed by developing countries. It would be impossible for his delegation to continue discussions on the basis of the Chairman's text unless that text fully safeguarded his delegation's position.

16. The representative of Thailand said that his delegation could not see how an international agreement that provided for the outright prohibition of investment measures and that would certainly stunt the development of developing countries could lead to an expansion of world trade. It could not, therefore, accept such an agreement.

17. The representative of the European Community said that his delegation considered the Chairman's text to be an excellent basis for further negotiations. To a large extent it reflected what was already to be found in the GATT, and he presumed there was no disagreement among participants that what existed already in the GATT should not be derogated from in the future. He considered that there was enough scope in other parts of the text to find a reasonable solution to all the controversial issues.

18. The representative of Sweden said that his delegation found the new structure of the Chairman's text to be an improvement. As for the contents of the text, there was much that his delegation was not ready yet to accept.

19. The representative of Mexico said that the general orientation of the Chairman's text concerned her delegation, particularly with regard to its structure and the question of definition. The definitions offered in the text were too open and did not embody the real nature of the measures involved. With respect to structure, there were now no alternatives to prohibition for dealing with certain measures. Her delegation would like to have the effects-based approach maintained throughout the text as the basic option, and not just as a subsidiary or residual approach.

20. Following a series of informal consultations, the Chairman presented a Chairman's Draft Text on Trade-Related Investment Measures. He drew attention to what was stated on the cover note to the text, and said that his intention was to forward the text to the Chairman of the TNC with a covering letter in which he would emphasize that the text should not be viewed as an agreed text from the Negotiating Group. He added that in view of the differences of opinion that still existed on many important aspects of the text, he felt it would be appropriate to ask the Chairman of the TNC for guidance on the Group's further work.

21. A large number of participants expressed their appreciation of the way in which the Chairman had handled the work of the Negotiating Group, and for the leadership he had provided over the past four years. They congratulated him on producing a text which closely reflected the views of participants in the face of highly polarized positions in the negotiations. Some participants said that they had not yet had time to study the text and could not therefore comment on it in detail.

22. The representative of Colombia said his delegation's position was that the subject of negotiations was the direct and adverse trade effects of investment measures and not the measures themselves. His delegation believed that foreign investment policy must be a sovereign right, and that the importance for developing countries of allowing direct investment on the basis of national development priorities and within their sovereign competence should be fully recognized. He said that for his delegation it was very important that any agreement reached on TRIMs should cover only trade in goods. Regarding the trade-effects approach, his delegation attached great importance to the need for an affected party to provide positive evidence of the existence of three criteria which defined the adverse effects of a TRIM: (i) that there was an investment measure which was related to trade applied by one contracting party; (ii) that there were negative trade effects caused by the measure; and (iii) that there was a causal relationship between the measure which was being applied and the effect on trade. He added that Colombia was rapidly liberalizing foreign investment, so much so that the government have even given thought to the idea of eliminating TRIMs.

23. The representative of Australia said that her government continued to have real concerns about the direction in which the negotiations had proceeded and it did not accept the extreme approaches to TRIMs which had been proposed and sustained in the Group's work. Her delegation was

concerned that some countries were continuing to demand an extensive prohibition of TRIMs based on an unacceptably broad definition. Her delegation had consistently opposed this cavalier approach which was based on some highly specific panel reports and which sought to prohibit TRIMs on the basis of alleged inherent trade distortion. Her government could only accept an outcome on TRIMs which was consistent with the intent and content of relevant GATT provisions, and which established disciplines on investment measures that had trade restrictive and distortive effects, which applied equitably to all types of investment measures that had those effects, and which were consistent with other GATT disciplines on other types of measures which had comparable trade restrictive and distorting effects.

24. She said that the incidence of different types of trade distorting investment measures and investment distorting trade measures varied across countries and sectors. It was therefore imperative that trade Ministers should be able to take a complete view of the extent to which such trade distortions had been satisfactorily addressed across the board in the Uruguay Round. This required the assessment of results from various negotiating groups as part of a balanced, comprehensive and coherent overall package. The Chairman's draft text on TRIMs contained options which Australia could not accept as an outcome from the negotiations if there was to be a balanced package, and she believed many other delegations shared that view. The presentation and structure of the text made it difficult for delegations not at the extremes of the negotiation such as her own to feel comfortable that their positions were adequately represented in a way which would facilitate the right decisions at a political level. She hoped that after further guidance from the Green Room it would be otherwise and that a better balance could be achieved.

25. She said that the following were key areas of concern for her delegation:

(i) The approach to definition could lead to unacceptably wide interpretations of even current GATT obligations. Her delegation continued to believe that a definition of application of a TRIM as contained in Chapter I:4(i) of the Chairman's draft text was an appropriate definition which would contribute to greater certainty and predictability. The broader approach being pursued in the negotiation was not soundly based and could not be sustained in the face of orthodox GATT interpretations;

(ii) Prohibition of the measures listed in Chapter III, which were alleged to be contrary to GATT Articles III and XI, was unacceptable. The definition proposed in this respect, on which the list was based, went well beyond the orthodox GATT interpretation of legally enforceable measures;

(iii) Her delegation had maintained consistently that disciplines on TRIMs should be effects oriented and determined on a case by case basis. It had made every effort to contribute constructively to the development of Chapter II of the text, even though it continued to have difficulties with the concept of trade restriction and distortion which had been introduced;

(iv) her delegation had the gravest of concerns about the proposed prohibition disciplines in Chapter IV which went well beyond clarifying or interpreting existing rules. Prohibitions were being sought on a wide range of measures, notably export requirements and manufacturing requirements. Her delegation did not accept that approach. Insistence on such highly selective disciplines needed to be balanced with flexibility for those measures implemented for structural adjustment purposes. Her delegation believed that investment measures should be assessed in the context of their purpose and the policies surrounding them. They could be used as a tool for industrial restructuring and lead to a net decrease in protection. Australia attached the highest priority to retention of the first option in Chapter III:4 and Chapter IV:3 which supported that concept;

(v) Her delegation was seeking a balanced outcome from the negotiations, and it therefore believed that application of rules to developing countries should be consistent with their individual trade, finance and development needs; her delegation supported differing transition periods on that basis;

(vi) Acceptance of any new disciplines with respect to TRIMs would require adequate transition periods for all countries. Her delegation found it hard to accept that certain participants wished to limit or even not provide for transition periods here, when in other areas of the Uruguay Round in which they themselves were being called upon to undertake adjustment, they were demanding very lengthy time periods for liberalisation, which, where it was on offer, was small in absolute terms if not marginal. In many cases such adjustment was much less drastic than the kind of adjustment which removal of some TRIMs would require in industries where they were currently legitimate instruments of government policy. Australia had adopted a firm and consistent policy of seeking the removal, domestically and internationally, of measures which distorted trade in all sectors. Her delegation supported a transition period even for measures subject to case by case discipline, since the same rationale applied. It would be untenable for countries to find themselves subject to dispute settlement proceedings immediately following the entry into force of any new TRIMs discipline without adequate time for adjustment.

26. The representative of Uruguay said his country applied a liberal investment policy and that TRIMs were almost non-existent, in compliance with the provisions of the General Agreement. International agreements in his country became law, and consequently the Chairman's draft text would be very hard for his government to accept since it contained certain concepts which would affect the rights which existed in a number of nations. From a GATT point of view, the text was not in line with the needs and possibilities of a great many developing countries, and therefore was not in line with the spirit of Punta del Este. He expressed concern at the definitions of terms proposed in the text, which were totally different from those used in the context of the General Agreement. Certain of the options proposed would directly affect existing investments, particularly with respect to the contractual terms of establishment. The right of

establishment had been introduced into the negotiation through the back door, and if some participants had thought that the only way to be able to comply with the mandate was through the imposition of disciplines on legal instruments which created a link between governments and investments and which were part of establishment rights, then there was an imbalance in the negotiation regarding the framework of general rights and obligations. That imbalance was to be seen notably between developed and developing countries, but it also existed on the investment policies that could be carried out by various contracting parties. His delegation had, therefore, a very major concern regarding the text in relation to GATT obligations on commercial policies which could have a more distorting effect than TRIMs. With regard to the cover page of the text, he said that his delegation refused totally the concept that the Chairman of the Group might interpret the decisions of the CONTRACTING PARTIES in Part I of the Punta del Este Declaration.

27. The representative of Switzerland expressed concern at the fundamental positions adopted in the course of the negotiation. His delegation was concerned, inter alia, by the refusal of some participants to acknowledge GATT obligations that contracting parties were to refrain from certain practices and not simply to remedy them. It was also concerned by the relatively recent attempt to introduce into the negotiations concepts which were foreign to GATT, or provisions whose end result in practice would be to nullify completely any agreement reached.

28. The representative of Mexico said that it was important to have a clear and precise definition of the coverage of a TRIM that would not go beyond the objectives of the disciplines which were to be established. Also, her delegation wanted an explicit reference that the Decision would apply only to trade in goods. Concerning disciplines, her delegation attached importance to the effects-based approach being the central approach to be used with regard to the measures that had been included in Chapters III and IV. Without prejudice to the serious difficulty her delegation still had with the concept of prohibition, it considered some of those measures went beyond established GATT obligations. Her delegation considered that irrespective of the disciplines which would be established, special treatment for developing countries which was recognized in the General Agreement should be fully applied in the field of TRIMs, both in terms of existing disciplines and new disciplines.

29. The representative of Tanzania said that investment measures were the single most important instrument for transforming his economy from a developing country to a self-sustained one. The provisions which were being sought for the least developed countries in the text were intended to assist in that regard. The least developed countries found existing GATT obligations already difficult to cope with at their level of development and it would be unrealistic to ask them to assume additional obligations on TRIMs. He hoped that the proposal in Chapter VI would be seen in that light. His delegation continued to believe that the effect oriented approach offered the best hope for a successful outcome in the TRIMs negotiations, not only because it was consistent with the mandate but also



because it was the only approach that could safeguard rights and obligations in the GATT. Those seeking prohibition even in areas not covered by the GATT would only add to existing GATT obligations and further impinge on the development options of developing countries. His delegation hoped that the negotiation would restore balance by moving away from the prohibition approach.

30. The representative of the European Communities said that his delegation was convinced that quite a number of the TRIMs identified in the text were inherently trade distorting. With the growing volume of international investment, such practices were capable of undermining significantly existing GATT disciplines. His delegation continued to believe that TRIMs were not appropriate tools for development and even less so for handling economic and trade policies in developed countries. It was, therefore, seriously concerned about some of the open ended proposals that had been made which could undermine any sort of discipline that might be agreed to in the Group. He expressed his disappointment that some of the proposals made by his delegation had not been reflected in the text.

31. The representative of Brazil said that his delegation found it very difficult to accept the idea of prohibition regardless of the circumstances. Consideration of the elements in this negotiation would depend on developments elsewhere, in particular in textiles and clothing and in agriculture. His delegation's position against the prohibition of TRIMs did not imply in any way that Brazil had a problem concerning foreign investment. On the contrary, Brazil had attracted investments from a number of countries represented in the negotiations over decades and it continued to promote foreign investment as well as the liberalization of the economy; that had to be taken into account in the negotiation.

32. The representative of the United States regretted that certain options that might have led to a consensus had been omitted from the text, for example in the section dealing with definitions. His delegation did not consider it extreme to discipline effectively measures which were incompatible with a trading system based on market forces and comparative advantage instead of on government directives, and it rejected the notion that discipline on TRIMs was anti-development. Many developing countries participating in the negotiations had eliminated TRIMs or were reducing TRIMs in order to promote their economic development.

33. The representative of China said that his delegation believed that prohibition of TRIMs was likely to discourage international investment flows which were of extreme importance to world economic growth. His delegation was unable to accept provisions whose implication would be to grant national treatment to foreign investors. His delegation supported the delegation of India with regard to the need to address the anti-competitive practices of corporate entities. It did not want to see the sovereign right of his government to address anti-competitive practices be put in jeopardy as a result of a negotiation on TRIMs.

34. The representative of India said that any outcome from the Group should apply only to trade in goods and should be within the parameters and the framework of the General Agreement. The mandate of the Group did not extend to creating an investment régime within GATT. His delegation was strongly opposed to the concept of prohibition of certain investment measures. It felt that prohibition was based on a presumption of adverse trade effects and the mandate of the Group did not extend to dealing with measures but only with the adverse trade effects that might arise from such measures. His delegation had stated that even pure trade measures which might create adverse trade effects were not prohibited within the GATT, and that investment measures fell outside the scope of the General Agreement. His delegation was strongly opposed to creating any prohibition régime for investment measures such as export performance requirements which were not governed by any provisions of the General Agreement. He said that with regard to the proposal his delegation had submitted on the control of abusive or anti-competitive practices, his delegation along with a number of others had stated that there would be an obvious imbalance if only the adverse effects of government mandated measures were to be addressed in the Group and the trade restrictive and distortive effects of anti-competitive business practices and policies adopted by private investing enterprises were not dealt with. His delegation was convinced that this was a subject that was covered by the mandate, which stipulated that the Group should deal with the adverse trade effects of investment measures without in any way implying that those be limited to government measures.

35. The representative of Nigeria said that his delegation remained opposed to any prohibition of TRIMs. He said that an effect oriented approach was a fair and objective way of reaching the Group's objective.

#### Other Business

36. The Chairman thanked participants for their cooperation during the four years of the negotiations.