

# Agreement on Trade Related Investment Measures

The Agreement on Trade-Related Investment Measures (TRIMS) recognizes that certain investment measures can restrict and distort trade. It states that WTO members may not apply any measure that discriminates against foreign products or that leads to quantitative restrictions, both of which violate basic WTO principles. A list of prohibited TRIMS, such as local content requirements, is part of the Agreement. The TRIMS Committee monitors the operation and implementation of the Agreement and allows members the opportunity to consult on any relevant matters.

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## Historical background

### GATT and Foreign Investment

Prior to the Uruguay Round negotiations, the linkage between trade and investment received little attention in the framework of the GATT.

#### Havana Charter

The Charter for an International Trade Organization (1948) contained provisions on the treatment of foreign investment as part of a chapter on economic development. This Charter was never ratified and only its provisions on commercial policy were incorporated into the General Agreement on Tariffs and Trade (GATT).

#### 1955 Resolution on International Investment for Economic Development

In 1955, the GATT CONTRACTING PARTIES adopted a resolution on International Investment for Economic Development in which they, *inter alia*, urged countries to conclude bilateral agreements to provide protection and security for foreign investment.

#### The FIRA Panel

Perhaps the most significant development with respect to investment in the period before the Uruguay round was a ruling by a panel in a dispute settlement proceeding between the United States and Canada. In Canada — Administration of the Foreign Investment Review Act ("FIRA") (BISD 30S/140, 1984) a GATT dispute settlement panel considered a complaint by the United States regarding certain types of undertakings or engagements which were effectively required from foreign investors by the Canadian authorities as conditions for the approval of investment projects. These undertakings pertained to the purchase of certain products from domestic sources (local content requirements) and to the export of a certain amount or percentage of output (export performance requirements). The Panel concluded that the local content requirements were inconsistent with the national treatment obligation of Article III:4 of the GATT<sup>(1)</sup> but that the export performance requirements were not inconsistent with GATT obligations. The Panel emphasized that at issue in the dispute before it was the consistency with the GATT of specific trade-related measures taken by Canada under its foreign investment legislation and not Canada's right to regulate foreign investment *per se*.

The panel decision in the FIRA case was significant in that it confirmed that existing obligations under the GATT were applicable to requirements imposed by governments in an investment context in so far as such requirements discriminated between imported and domestic goods. At the same time, the panel's conclusion that export performance requirements were not covered by the GATT underscored the limited scope of existing GATT disciplines with respect to such trade-related requirements.

#### Uruguay Round Negotiations on Trade-Related Investment Measures

The Punta del Este Ministerial Declaration which launched the Uruguay Round included the subject of trade-related investment measures as a subject for the new round through a carefully drafted compromise:

"Following an examination of the operation of GATT Articles related to the trade-restrictive and trade-distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade."

The emphasis placed in this mandate on trade effects made it clear that the negotiations were not intended to deal with the regulation of investment as such.

The Uruguay Round negotiations on trade-related investment measures were marked by strong disagreement among participants over the coverage and nature of possible new disciplines. While some developed countries proposed provisions that would prohibit a wide range of measures in addition to the local content requirements found to be inconsistent with Article III in the FIRA panel case, many developing countries opposed this. The compromise that eventually emerged from the negotiations is essentially limited to an interpretation and clarification of the application to trade-related investment measures of GATT provisions on national treatment for imported goods (Article III) and on quantitative restrictions on imports or exports (Article XI). Thus, the TRIMs Agreement does not cover many of the measures that were discussed in the Uruguay Round negotiations, such as export performance and transfer of technology requirements.

## The TRIMs Agreement

### Objectives

The objectives of the Agreement, as defined in its preamble, include “the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country members, while ensuring free competition”.

#### Limitation of Coverage to Trade in Goods

The coverage of the Agreement is defined in Article 1, which states that the Agreement applies to investment measures related to trade in goods only. Thus, the TRIMs Agreement does not apply to services.

#### What is a “Trade-Related Investment Measure”?

The term “trade-related investment measures” (“TRIMs”) is not defined in the Agreement. However, the Agreement contains in an annex an Illustrative List of measures that are inconsistent with GATT Article III:4 or Article XI:1 of GATT 1994.

#### The TRIMs Agreement and Regulation of Foreign Investment

As an agreement that is based on existing GATT disciplines on trade in goods, the Agreement is not concerned with the regulation of foreign investment. The disciplines of the TRIMs Agreement focus on investment measures that infringe GATT Articles III and XI, in other words, that discriminate between imported and exported products and/or create import or export restrictions. For example, a local content requirement imposed in a non-discriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement because it involves discriminatory treatment of imported products in favour of domestic products. The fact that there is no discrimination between domestic and foreign investors in the imposition of the requirement is irrelevant under the TRIMs Agreement.

#### Basic Substantive Obligations: Article 2 and the Illustrative List

Article 2.1 of the TRIMs Agreement requires Members not to apply any TRIM that is inconsistent with the provisions of Article III (national treatment of imported products) or Article XI (prohibition of quantitative restrictions on imports or exports) of GATT 1994. An Illustrative List annexed to the TRIMs Agreement lists measures that are inconsistent with paragraph 4 of Article III and paragraph 1 of Article XI.

#### Mandatory and Non-mandatory Measures

The Illustrative List covers both TRIMs which are mandatory or enforceable under domestic law or under administrative rulings and TRIMs compliance with which is necessary to obtain an advantage.

#### Distinction between Paragraphs 1 and 2 of the Illustrative List

TRIMs identified in paragraph 1 of the Illustrative List as being inconsistent with Article III:4 concern the purchase or use of products by an enterprise, while the TRIMs listed in paragraph 2 as inconsistent with Article XI:1 of GATT 1994 concern the importation or exportation of products by an enterprise.

#### **TRIMs which are inconsistent with the national treatment obligation of Article III:4 of GATT 1994**

Paragraph 1(a) of the Illustrative List covers local content TRIMs, which require the purchase or use by an enterprise of products of domestic origin or domestic source (local content requirements) while paragraph 1(b) covers trade-balancing TRIMs, which limit the purchase or use of imported products by an enterprise to an amount related to the volume or value of local

products that it exports. In both cases, the inconsistency with Article III:4 of GATT 1994 results from the fact that the measure subjects the imported products (to be purchased or used by an enterprise) to less favourable conditions than domestic products (to be purchased or used by and enterprise).

### **TRIMs which are inconsistent with the prohibition on imposition of quantitative restrictions of Article XI:1 of GATT 1994**

Paragraph 2(a) of the Illustrative List covers measures which limit the importation by an enterprise of products used in its local production, generally or to an amount related to the volume or value of local production exported by the enterprise. There is a conceptual similarity between this paragraph and paragraph 1(b) in that they both cover trade-balancing measures. The difference is that paragraph 1(b) deals with internal measures that affect products after they have been imported, while paragraph 2(a) deals with border measures affecting the importation of products.

Measures identified in paragraph 2(b) of the list involve a restriction of imports in the form of a foreign exchange balancing requirement. Importation by an enterprise of products used in or related to local production is limited by restricting the enterprise's access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise.

Finally, paragraph 2(c) covers measures involving restrictions on the exportation of or sale for export by an enterprise, whether specified in terms of particular products, volume or value of products or in terms of a proportion of volume or value of its local production. Since paragraph 2 applies the provisions of Article XI:1 of GATT 1994, it deals only with measures that restrict exports. Other measures relating to exports, such as export incentives and export performance requirements, are therefore not covered by the TRIMs Agreement.

Exceptions

### **General exceptions**

Article 3 of the TRIMs Agreement provides that all exceptions under GATT 1994 shall apply, as appropriate, to the provisions of the TRIMs Agreement.

### **Developing countries**

Article 4 allows developing countries to deviate temporarily from the obligations of the TRIMs Agreement, as provided for in Article XVIII of GATT 1994 and related WTO provisions on safeguard measures for balance-of-payments difficulties.

Notification requirements

Under Article 5.1 Members were required to notify to the Council for Trade in Goods, within 90 days after the date of entry into force of the WTO Agreement, any TRIMs that were not in conformity with the Agreement. A decision adopted by the WTO General Council in April 1995 provided that governments that were not Members of the WTO on 1 January 1995, but were entitled to become original Members within a period of two years after 1 January 1995, were to notify under Article 5.1 within 90 days after the date of their acceptance of the WTO Agreement.

Countries that are not original Members of the WTO, in other words, newly acceding Members, may be required to notify in accordance with any terms and conditions specified in their Accession Protocols.

Notifications received under Article 5.1

Notifications under Article 5.1 were submitted by 27 Members. These notifications have been circulated in the G/TRIMS/N/1/COUNTRY/—series of documents.

Transition period for the elimination of TRIMs which are inconsistent with the Agreement

Members were obliged under Article 5.2 of the TRIMs Agreement to eliminate TRIMs which were notified under Article 5.1. Such elimination was to have taken place within two years after the date of the entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of developing countries and within seven years in the case of a least developed country Member.

Limitation of the benefits of the transition period to existing measures

TRIMs introduced less than 180 days before the date of the entry into force of the WTO Agreement did not benefit from these transition periods. Thus, the transition provisions of the TRIMs Agreement did not permit the introduction of new TRIMs that are inconsistent with the Agreement.

“Standstill” requirement during the transition period

The Agreement precluded Members from changing measures notified under Article 5.1 in a manner which would increase their inconsistency with the Agreement (Article 5.4). However, if a Member had notified a TRIM under Article 5.1, it could have applied, during the transition period, the same TRIM to a new investment in order to avoid a distortion of competition between the new investment and existing investments (Article 5.5).

Possible extension of the transition period

Under Article 5.3, the Council for Trade in Goods may, on request, extend the transition period for the elimination of TRIMs in the case of a developing country which demonstrates particular difficulties in implementing the provisions of the Agreement.

In August 2001, the Council for Trade in Goods adopted a series of Decision to extend the transition period for eight Members to December 2001, with the possibility of a further extension of two years. In November 2001, the CTG adopted another series of Decisions to extend the transition period for these same members for another two years, to December 2003 (for one Member the period was extended to May 2003 and for another to June 2003).

Transparency

Provisions designed to ensure transparency with respect to the application of TRIMs are contained in Article 6 of the TRIMs Agreement. This Article provides in particular for the notification to the WTO Secretariat of lists of publications in which TRIMs may be found. Notifications received under these provisions are listed in the document G/TRIMS/N/2/- series.

Committee on Trade-Related Investment Measures

Article 7 of the TRIMs Agreement establishes a Committee on Trade-Related Investment Measures as a forum to examine the implementation operation of the Agreement. The Committee meets not less than once a year. Much of the early work of the Committee focused on the notifications received under Article 5.1 of the Agreement. Today, the Committee's work is mainly focused on discussing specific concerns raised by certain Members regarding other Members' trade-related investment measures.

Dispute Settlement

The general WTO dispute settlement procedure, as laid down in the Dispute Settlement Understanding, applies to disputes arising under the TRIMs Agreement (Article 8). Issues relating to the alleged inconsistency of particular measures with the TRIMs Agreement have been raised in 34 requests for consultations under the DSU. 16 of these cases have moved to the establishment of a panel, while 6 have been settled or terminated through a mutually agreed solution. The remainder are still in consultation phase. A full listing of these disputes with summaries of the reports and findings can be found [here](#).

Review of the TRIMs Agreement: Investment Policy and Competition Policy as Subjects for Future Consideration

Article 9 stipulates that, not later than five years after the date of entry into force of the Agreement, the Council for Trade in Goods shall review the operation of the TRIMs Agreement. In this review, consideration is to be given as to whether the Agreement should be supplemented with provisions on investment policy and competition policy. The CTG discussed the Article 9 Review at its meetings from October 1999 to November 2006. In October 2002, India and Brazil proposed that a study on the impacts of TRIMS and their elimination be carried out under the Review. A copy of this proposal can be found [here](#). At the November 2006 CTG meeting, the Chairman stated that members were unable to reach a consensus on the desirability of conducting the proposed study. The CTG agreed to revert to the Article 9 Review at a future meeting at the request of any interested Member. To date, no such request has been made.

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## Footnotes

1. Article III:4 states in relevant part: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [↑](#) **Back to text**