

The WTO Agreement on Trade-Related Investment Measures (TRIMs)

by Gerard Greenfield

Overview

In many ways the WTO Agreement on Trade-Related Investment Measures (TRIMs) is less significant than the WTO agreements on services, intellectual property rights, and agriculture. The TRIMs Agreement does not involve any new rules or disciplines, referring only to the existing provisions under the GATT. In fact the whole text of the TRIMs Agreement is only 5 pages long. However, by enforcing GATT provisions on 'national treatment', this short and simple agreement has had far-reaching effects on everything from fresh milk to auto parts.

The TRIMs Agreement bans any laws, policies or administrative regulations favouring domestic products. This includes government incentives to encourage corporations to use domestically made products as a way of creating or protecting local jobs. This has serious ramifications for industrial policies designed to support the development of domestic capacity, secure flow-on benefits from foreign investment or limit the effects of foreign competition.

Yet the real significance of the TRIMs Agreement lies in what it was *supposed to be* - not what it is. Originally it was proposed that a comprehensive agreement on investment be included under the WTO regime. This would guarantee national treatment for foreign investors and ban any kind of government regulation on foreign investment such as: technology transfer requirements, restrictions on the transfer of profits overseas, controls on foreign exchange flows, government reviews of foreign investment performance, nationalisation, expropriation, etc. The governments of the EC, US, Japan and Canada tried to push this proposal through, but faced strong resistance from the governments of developing countries. So a watered-down TRIMs Agreement was the result. However, we have already seen the original plan resurface in the form of the Multilateral Agreement on Investment (MAI) proposal and its realisation in NAFTA's Chapter 11. So there is still pressure for an expanded, more powerful TRIMs Agreement that would act as a bill of rights for transnational corporations. Another possibility is that a new investment agreement in the WTO will be introduced, superceding the current TRIMs Agreement.

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The Agreement

The TRIMs Agreement basically does three things:

1. Highlights obligations under GATT Articles III and XI
2. Lays down deadlines for removing trade-related investment measures
3. Allows disputes between member-states to be settled by the WTO

It is significant that the Agreement does not define what a “trade-related investment measure” is. Instead, there is an Illustrative List attached to the Agreement providing examples of what laws, policies or regulations may be considered a TRIM.

TRIMs may be understood as any measure taken by a government to discriminate between a domestically produced good and goods produced overseas. This includes:

Local content policies - where governments require a corporation to use or purchase domestic products in order to avoid a penalty or to benefit from an incentive.

Example: Under Malaysia's Investment Promotion Act auto companies producing passenger cars and motorcycles with specified domestic content levels (from 20 to 60%) received a 5 year tax exemption on 70 per cent of earnings.

Trade balancing measures - where governments impose restrictions on the import of inputs by a corporation or limit the import of inputs in accordance with its level of exports.

Foreign exchange balancing requirements - where a corporation's permitted imports are tied to the value of its exports so that there is a net foreign exchange earning.

These are just some examples of TRIMs. It should be remembered, however, that there is no clear definition of TRIMs in the Agreement and as such it continues to be the subject of dispute among WTO member-states.

It should also be noted that the TRIMs Agreement only covers goods. Services are covered by the WTO General Agreement on Trade in Services (GATS) and export subsidies are covered in the Subsidies Agreement. Export performance and technology transfer requirements are *not* included in the TRIMs Agreement.

The Process

In setting down deadlines for getting rid of TRIMs, the Agreement outlines a two-stage process :

1. All member-states were given 90 days from the date the Agreement came into effect (January 1, 1995) to notify the WTO of any existing TRIMs.

Note: Of the 43 notifications of TRIMs by 24 developing countries, 19 related to the auto industry and 10 to the agri-food industry.

2. All member-states were given a “transition period” during which TRIMs must be eliminated. The length of time is based on a member-state’s level of development: developed countries were given 2 years; developing countries were given 5 years; and least-developed countries were given 7 years.

Example: Within 90 days of the start of the TRIMs Agreement the Indonesian government notified the WTO that its local content requirements for utility boilers, soybean cake and fresh milk constituted TRIMs. As a result, the Indonesian government was given 5 years to eliminate these regulations. This was done before the January 1, 2000 deadline. In this sense Indonesia's local content requirements for these products were still in force up until 2000, but they did not violate the TRIMs Agreement because the WTO had already been notified.

Note: It's significant that the removal of local content requirements on soybean cake - a staple food in parts of Indonesia - coincided with massive imports of genetically-modified soya produced in the US.

If a government does *not* notify the WTO of an existing TRIM, then it is open to legal action by other WTO members.

Example: The Indonesian government originally no-

tified the WTO that its National Car Program involved TRIMs, but then withdrew the notification. This led the governments of Japan, the US and the EC to lodge a complaint against Indonesia in the WTO. It was argued that the local content incentives provided under the National Car Program (e.g. sales tax exemption for vehicles with more than 60% local content) violated the TRIMs Agreement. The WTO dispute settlement panel ruled against Indonesia in July 1998, forcing the elimination of the National Car Program within 12 months.

The Agreement is overseen by the WTO Council for Trade in Goods.

WTO Disputes over TRIMs

Of the 194 disputes brought to the WTO since January 1995, 15 have involved the TRIMs Agreement. In some cases the same issue has been the subject of several complaints. For example, between July 1996 and May 1997, 4 separate complaints were lodged with the WTO by the EC and the Japanese and US governments against Brazil's auto industry measures. All 4 cases cited TRIMs Agreement violations.

In some cases government measures deemed as TRIMs were introduced after the Agreement came into force.

Example: In May 1999 the US government lodged a complaint against the Indian government for the auto industry measures it introduced in November 1997. Under the 1997 law, the Indian government required all new foreign auto manufacturing investments to sign a standard MOU with the government establishing:

- a minimum US\$50 million investment in joint ventures with majority foreign ownership;
- a waiver of import licenses if local content exceeds 50 per cent;
- 50 per cent local content requirements for CKD and SKD in first 3 years and 70 per cent within 5 years;
- and the obligation to export within 3 years, with

possible restrictions on imports for CKD and SKD if export requirements are not met.

Undoubtedly the WTO dispute settlement body will rule that these conditions violate the provisions of the GATT enforced under the TRIMs Agreement and will instruct the Indian government to revoke the 1997 law.

Extending 'Transition' Deadlines

The Agreement allows developing and least-developed countries to request an extension of the transition period for eliminating TRIMs. The request is considered on the basis of the "development, trade and financial needs" of that country. However, the Agreement does not explain how these requests will be decided or what these "needs" could be.

There was still confusion when the 5-year deadline for developing countries expired on January 1, 2000. Before the deadline expired, the governments of 9 developing countries (Argentina, Chile, Columbia, Malaysia, Mexico, Pakistan, the Philippines, Romania and Thailand) submitted requests for an extension of their transition periods. Requests ranged from 5 months (Chile) to 7 years (Argentina, Columbia and Pakistan).

Conflict Over Deadline Extensions

Differences over how to interpret the extension of deadlines under the TRIMs Agreement has led to increasing conflict between the governments of developing and developed countries. The governments of developing countries have argued that the process for negotiating extensions of the deadlines should be based on groups of member-states and be undertaken through a multilateral framework. This position was advanced by the governments of Malaysia, Brazil, Mexico, and Pakistan.

In contrast the US, EC, Japanese and Ca-

nadian governments argued that requests for deadline extensions should only be considered on a "case by case" basis and should be negotiated bilaterally.

This has two important outcomes:

1. Each government must undertake separate bilateral negotiations with the EC, US and Japan respectively, explaining the reasons for their request.
2. During these bilateral negotiations the developed country governments are able to impose additional conditions beyond TRIMs issues. The threat to reject a request for an extension on TRIMs elimination forms a powerful bargaining weapon that can be used to extract other concessions from developing countries.

It is the *bilateral* nature of this process that developing country governments are concerned about.

Example: Although Romania and the Philippines requested extensions before the January 1, 2000 deadline, the US government has targeted these countries for TRIMs Agreement violations. The US has already rejected the Philippines' request for an extension until December 2004 of its deadline to eliminate TRIMs in auto and auto parts. As long as the US government is threatening to lodge a complaint with the WTO, the Philippines government may be forced to make concessions in areas unrelated to the auto industry.

The failure to resolve this conflict over how to process extension requests under the TRIMs Agreement was one of the disagreements which contributed to the internal collapse of the Seattle WTO trade talks.

Since the Seattle talks the WTO Council for Trade in Goods has held several meetings to try to resolve the dispute over extension

procedures. This was partly resolved in early July 2000 when it was decided that the Council chair would oversee multilateral negotiations. However, requests will still be dealt with on a case by case basis and are open to bilateral pressure from the US, Japan and the EC.

A Compromise Agreement

Conflict over the interpretation of the Agreement reflects the fact that it was a compromise agreement in the first place. Differences between trade officials from developing and developed countries could not be resolved during the Uruguay Round of GATT talks, and this is reflected in the vague wording of the TRIMs Agreement.

If the EC, US and Japanese governments had succeeded, then TRIMs would have been a comprehensive agreement on investment similar to Chapter 11 of NAFTA or the MAI. In fact, the Japanese Ministry of International Trade and Industry still describes the TRIMs Agreement as a "first step" in getting an MAI-like agreement in the WTO. A similar view is held by EC trade officials. The US government position is weaker on this, mainly because it has chosen to focus on GATS and the Agreement on Agriculture.

Where the EC, US and Japanese governments did succeed was building a review mechanism into the Agreement. Article 7 of the Agreement established a Committee on Trade-Related Investment Measures which must meet at least once a year (in practice it meets twice a year) to monitor the implementation of the Agreement. The Committee reports to the WTO Council for Trade in Goods.

In addition, Article 9 of the Agreement states that it must be reviewed after 5 years (in 2000) and be subject to amendments. It specifically recognises that in future the TRIMs Agreement may need to be "complemented with provisions on investment policy and competition policy."

To some extent this open clause authorised the creation a WTO Working Group on Trade and Investment at the WTO Ministerial meeting in Singapore in 1996, despite strong opposition by the governments of developing countries. From the outset it was clear that the Working Group was created to draft investment rules under the WTO regime (which will probably be called a multilateral investment agreement - MIA). In its submission to the Working Group, the South Korean government supported the EC position on banning technology transfer requirements on foreign investment. The report states (inaccurately) that in South Korea's development experience, "... a free hand approach is better than imposing technology transfer requirements."

In this way the built-in review mechanisms of the TRIMs Agreement permit the original proposal for an MAI-like treaty to remain firmly on the agenda.

Is it a foreign investment issue?

One of the reasons that the link with the MAI remains obscure is that the WTO continually claims that the TRIMs Agreement is *not* concerned with limiting government regulation of foreign investment. It is only concerned with discriminatory treatment of imported and exported goods. In this sense, local content policies violate the TRIMs Agreement because there is discriminatory treatment of imported goods in favour of domestic goods. It is not - the WTO technocrats claim - a matter of whether or not there is discrimination between domestic and foreign investors.

When the Indian government responded to the US complaint against its 1997 auto industry law, it claimed that the law did not discriminate against foreign investors. The WTO dispute settlement body rejected this as irrelevant, claiming that the TRIMs Agreement is about goods not ownership. Yet the original

US complaint was very clearly motivated by ownership concerns, seeing the law as a transgression of the rights of foreign investors.

While they view the existing TRIMs Agreement as inadequate, US, EC, Canadian and Japanese trade officials still approach it as a mechanism for removing performance requirements on foreign investment. When challenged on this issue they can easily claim that the Agreement only concerns goods and WTO decisions were taken only on this basis. In this way the vague wording of the Agreement is easily manipulated to serve the interests of developed country trade technocrats and the transnational corporations they represent.

Conclusion

1. Resisting an expanded TRIMs Agreement

The governments of developed countries, particularly the EU, are continuing to push for an expanded TRIMs Agreement. Technically, TRIMs could be expanded by adding more examples to the Illustrative List. This adds to the uncertainty about which aspects of a national industrial policy can or will be challenged in the WTO - either through a loose interpretation of TRIMs or additions to the Illustrative List.

Under current arrangements the question we face is *what kind of socially useful industrial policy can be devised and implemented without the use of domestic content requirements or discriminatory support for locally produced goods*. However, there can be no real answer as long as there is a possibility of an expanded definition of TRIMs in the near future. An expanded TRIMs Agreement could pre-empt attempts to introduce new, more innovative industrial policies based on combinations of public investment, limited competition and job creation.

Opposing the expansion of the TRIMs Agreement is therefore critical. However, at

the same time any new agreement on investment must also be opposed. Organising this opposition should not only draw on recent anti-WTO sentiment, but must draw on the success of the anti-MAI campaigns of 1997-98. This is particularly important in Europe where opposition to the MAI was strong. Since the EU is the strongest advocate for an expanded TRIMs Agreement, it is all the more important that the TRIMs-MAI link is understood and a similar campaign launched. In other words, the TRIMs Agreement must be tackled as an *MAI agenda*.

A leaked European Commission report in December 1998 clearly outlined the EU's plan to call for an MAI in the WTO. In doing so the report referred to the inadequacy of existing agreements such as the TRIMs Agreement: "WTO rules cover some forms of investment ('commercial presence' for service suppliers under the GATS) or address issues highly relevant to investment (e.g. TRIMs and subsidies) but do not address for instance, investment protection."

The need for investment protection was reasserted jointly by the EU and the Japanese governments in January 1999, when it was announced that an MAI-like investment agreement in the WTO should be negotiated at the Seattle Ministerial. Despite the collapse of the Seattle talks, the MAI proposal will gain further support at the Asia-Europe Meeting (ASEM) in Seoul in October, 2000. Given the South Korean government's support for MAI-like rules for investment protection, the ASEM meeting will be used to push the MAI agenda forward.

In North America, opposition to an expanded TRIMs Agreement or a new MAI-like agreement under the WTO must be linked to existing investment rules in NAFTA's Chapter 11 and the prospect of its expanded application under the FTAA.

2. The stalemate over extensions

The stalemate over TRIMs provides a breath-

ing space since the revision and amendment of the Agreement due in 2000 cannot go ahead until procedural issues are resolved. In the meantime the conflict over extensions can also be used to highlight the political imbalances within the WTO regime and the economic interests that control it.

However, in arguing for a multilateral framework for negotiation of transition period extensions under the TRIMs Agreement, developing country trade technocrats have ended up supporting the kind of framework they had originally resisted under the investment agreement proposal. The EC, US and Japanese governments may capitalise on this, arguing that the confusion and conflict in recent months justifies the need for a more comprehensive multilateral investment agreement.

3. The 2002 deadline for least-developed countries

Another tactical consideration concerns the approach to the January 1, 2002 deadline for least-developed countries to eliminate TRIMs. Clearly this provides an opportunity for raising awareness of the effects of the TRIMs Agreement.

For example, the need for foreign exchange balancing requirements can be linked to the issue of Third World debt. The need for local content requirements can be linked to the social and economic consequences of Export Processing Zones and Free Trade Zones.

It may even be useful to support particular governments in their refusal to meet the deadline or their request for an extension. Of course this should be based on discussions with genuine unions and grassroots workers' organisations in these countries.

4. 'Developing country' issues

More important than the conflict over extensions is the debate over the relationship between TRIMs and the prospects for national

development among 'developing' countries.

A month prior to the Seattle WTO talks the Indian government circulated a set of proposals on behalf of Cuba, the Dominican Republic, Egypt, El Salvador, Honduras, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda. In these proposals it was argued that the TRIMs Agreement should be substantially revised: "There is a need to review provisions in the Agreement on TRIMs which come in the way of acceleration of economic growth in developing countries and deny these countries the means to maintain balance of payments stability."

Specifically it was proposed that: "Developing countries should be exempted from the disciplines on the application of domestic-content requirement by providing for an enabling provision in Article 2 or Article 4 to this effect."

These proposals are important because they challenge the existing WTO-TRIMs mechanism and its restriction of developing countries' capacity for national development.

The 'national development' issue also highlights the fact that the ban on local content policies means that developing countries are prevented from adopting industrialisation strategies used by the US, Japan, France, Germany the UK, etc, in the past.

At present it is tactically important to support the call for revision of the TRIMs Agreement to allow the use of local content policies.

However, there are serious limitations to the 'developing countries' approach. For a start it does nothing to challenge the definition of national development, instead reinforcing dominant notions of levels of development (developed, developing and least developed). This obscures poverty, inequality

and under-development within countries, including those designated as 'developed.' Moreover, developing country objections to the TRIMs Agreement still operate *within* an export-oriented industrialization (EOI) model. The kinds of TRIMs being defended are often defended on the basis that they are necessary to encourage export expansion through foreign investment. The purpose of local content requirements, trade balancing, etc is to secure 'trickle-down' effects from this foreign investment.

More importantly, such an approach ends up supporting trade technocrats from the 'South' (and the domestic capitalist interests they represent) as proponents of an 'alternative view.' The fact is that TRIMs often operate as a form of corporate welfare for local capitalists. For example, Indonesia's National Car Program was ruled a violation of the TRIMs Agreement. Yet the local content policies and tax exemptions involved primarily benefited President Suharto's youngest son, Tommy, who owned the local auto company, PT Timor.

The point is that taking the 'developing countries' approach often distorts the real issue. The focus should not be on providing corporate welfare for local capitalists, but in building capacities for popular democratic control and overcoming restrictions on that control. The TRIMs Agreement is only one such restriction within the broader WTO regime.

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