Chapter 8

TRADE-RELATED INVESTMENT MEASURES

1. OVERVIEW OF RULES

After the late 1980s, a significant increase in foreign direct investment, especially in developing countries, took place throughout the world. Some countries receiving the foreign investment, however, imposed numerous restrictions to protect and foster domestic industries and to prevent the outflow of foreign exchange reserves.

Examples of these restrictions include local content requirements (which require that locally-produced goods be purchased or used), manufacturing requirements (which require that certain components be domestically manufactured), trade balancing requirements, domestic sales requirements, technology transfer requirements, export performance requirements (which require that a specified percentage of production volume be exported), local equity restrictions, foreign exchange restrictions, remittance restrictions, licensing requirements, and employment restrictions. Some of these restrictions distort trade in violation of GATT Articles III and XI, and are therefore prohibited.

Prior to the Uruguay Round negotiations, which resulted in a well-rounded Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), only a few international agreements provided disciplines for measures restricting foreign investment and provided limited guidance in terms of content and country coverage. The OECD Code on Liberalisation of Capital Movements, for example, requires Members to liberalize restrictions on direct investment in a broad range of areas. The OECD Code's efficacy, however, is limited by the numerous reservations made by each of the Members. In addition, there are other international treaties, bilateral and multilateral, under which signatories extend most-favoured-nation treatment to direct investment. Only a few such treaties, however, provide national treatment for direct investment. Moreover, although the APEC Investment Principles adopted in November 1994 provide rules for investment as a whole, including non-discrimination and national treatment, they have no binding force.

2. LEGAL FRAMEWORK

GATT 1947 prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions; the extent of the prohibitions, though, was never clear. The TRIMs Agreement, however, specifically prohibits investment measures that are inconsistent with the provisions of Articles III or XI of GATT 1994. In addition, the Agreement provides an illustrative list that explicitly prohibits local content requirements, trade balancing requirements, foreign exchange restrictions and export restrictions (domestic sales requirements) that would violate Articles III:4 or XI:1 of GATT 1994. The TRIMs Agreement prohibited those measures that are mandatory or enforceable under domestic law or administrative rulings, or those with which compliance is necessary to obtain an advantage (such as subsidies or tax breaks). Figure 8-1 contains a list of measures specifically prohibited by the TRIMs Agreement. Figure 8-1 is not comprehensive; it simply illustrates TRIMs that are prohibited by the TRIMs Agreement and calls particular attention to several common types of TRIMs. The figure also identifies measures that are inconsistent with Articles III:4 and XI:1 of GATT 1947.

The TRIMs Agreement is not intended to impose new obligations, but to clarify the pre-existing GATT 1947 obligations. Under the WTO TRIMs Agreement, countries are required to rectify measures inconsistent with the Agreement within a set period of time, with a few exceptions. The exceptions are detailed in Figure 8-2.

Figure 8-1

Examples of Measures Explicitly Prohibited by the TRIMs Agreement

Local content requirements	Measures requiring the purchase or use by an enterprise of domestic products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production (violation of GATT Article III:4).
Trade balancing requirements	Measures requiring that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports (violation of GATT Article III:4); and measures restricting the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports (violation of GATT Article XI:1).
Foreign exchange restrictions	Measures restricting the importation by an enterprise of products (parts and other goods) used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise (violation of GATT Article XI:1).
Export restrictions (Domestic sales requirements)	Measures restricting the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production (violation of GATT Article XI:1).

Figure 8-2
Exceptional Provisions of the TRIMs Agreement

Transition period	Measures specifically prohibited by the TRIMs Agreement need not be eliminated immediately, although such measures must be notified to the WTO within 90 days after the entry into force of the TRIMs Agreement. Developed countries will have a period of two years within which to abolish such measures; in principle, developing countries will have five years and least-developed countries will have seven years.
Exceptions for developing countries	Developing countries are permitted to retain TRIMs which generally would violate GATT Articles III or XI, provided that the measures meet the conditions of GATT Article XVIII which, by virtue of the economic development needs of developing countries, allows specified derogation from the GATT provisions.
Equitable provisions	In order to avoid damaging the competitiveness of companies already subject to TRIMs, governments are allowed to apply the same TRIMs to new foreign direct investment during the transitional period described above.

3. EXTENSION OF TRANSITION PERIOD

Under the TRIMs Agreement, Member countries are required to notify the WTO Council for Trade in Goods of their existing TRIMs that are inconsistent with the agreement. To date, 27 Members have notified the WTO of such measures. Figure 8-3 details the TRIMs which have been notified to the WTO by member countries. Most measures involve local content requirements for the automotive and agricultural sectors.

Under the TRIMs Agreement, Members must eliminate notified TRIMs within two years after the WTO Agreement took effect. Developing country Members must do so within five years and least developed country Members within seven years.[1] The TRIMs Agreement, however, provides for an extension of the transition period if the notifying Member can demonstrate that circumstances prevent the Member from eliminating the TRIMs in a timely manner. The following countries requested an extension of their transition period (dates when the extensions were requested are in parentheses): the Philippines (October 1999), Colombia (November 1999), Mexico, Romania, Pakistan, Argentina, Malaysia, Chile (all December 1999), Thailand (May 2000), and Egypt (February 2001).

There was discussion during the third Ministerial Meeting in Seattle about granting extensions to developing countries, but no formal agreement was reached. The General Council and the Council for Trade in Goods are currently reviewing such requests.

In November 2001, at the end of an extremely rocky road, an extension of the transition period for eliminating the notified TRIMs was granted until the end of December 2003 for:

[1] Among the Members with TRIMs, Uganda is categorized as a least-developed country (LDC) and therefore had until January 1, 2002, for elimination.

Argentina, Colombia, Mexico, Malaysia, Pakistan, Romania, and Thailand, and until the end of June 2003 for the Philippines, on condition that these countries submit elimination plans and undergo status reviews. No conditions were placed on Chile, which was granted an extension until the end of December 2001; no decision was reached with respect to Egypt.

Presently, Argentina, Chile, Colombia, Thailand, Mexico, Malaysia and Romania have eliminated their TRIMs measures as scheduled. The Philippines eliminated local-content requirements and foreign exchange restrictions in the automotive sector on July 1, 2003. However, the Philippines still maintains 60% local content requirements in some sectors. Although these measures are suspended, the Philippines has not committed to eliminate them. Pakistan also did not eliminate local-content requirements in the automotive sector in 2003 but requested another extension until the end of December 2007. The TRIMs Committee currently are examining whether Pakistan should receive a TRIMs extension（In July 2006, the Deletion Program was abolished. In its place, the Tariff Based System was introduced. However, provisions of this system promote localization by, for example, levying a 35% tariff on CKD parts for local automakers but a 50% tariff on others. For all intents and purposes then, the measure may constitute a demand for local content.

As noted above, some of the TRIMs are being eliminated gradually according to their elimination plans. Japan will investigate closely the background, the purpose and the necessity of Pakistan’s additional extension request and will monitor future developments.

Figure 8-3

Outline and Status of Notified TRIMs

	Local Content	Trade Balancing	Foreign Exchange Balancing	Export Restrictions	Present Status
Argentina	●	●			Eliminated
Bolivia				△	Eliminated
Barbados	◇				
Chile	○	○			Eliminated
Colombia	○ ◆	◆			Eliminated
Costa Rica	△				Eliminated
Cuba	△				
Cyprus	◇				Eliminated
Dominican Republic	△	◇ △			
Ecuador	○				
India	△			◇ △	Eliminated
Indonesia	○ ◇ △				Eliminated
Mexico	●	●			Eliminated
Malaysia	● ▲				Eliminated
Pakistan	● △				
Peru	◇				
Philippines	● △		●		
Poland	△				Eliminated
Romania	▲				Eliminated
South Africa	○ ◇ △				
Thailand	○ ◆ △				Eliminated
Uganda	△	△	△	△	
Uruguay		○			
Venezuela	○				

Notes:

1) TRIMs for which no extension requests were filed: Automotive ○, Agricultural ◇, Other △.

2) TRIMs for which extension requests were filed: Automotive ●, Agricultural ◆, Other ▲.

3) Egypt, Nigeria, and Jordan have informed the WTO of incentive systems for industrial promotion, but the nature and coverage of the systems is unknown.

4) Poland has informed the WTO of income tax rebates for cash registers.

5) Figure 8-3 is based on notifications submitted to the WTO by each country.

4. ECONOMIC ASPECTS AND SIGNIFICANCE

Some governments view TRIMs as a way to protect and foster domestic industry. TRIMs are also mistakenly seen as an effective remedy for a deteriorating balance of payments. These perceived benefits account for their frequent use in developing countries. In the long run, however, TRIMs can retard economic development and weaken the economies of the countries that impose them by stifling the free flow of investment.

Local content requirements, for example, illustrate this distinction between short-term advantage and long-term disadvantage. Local content requirements may force a foreign-affiliated producer to use locally produced parts. Although this requirement results in immediate sales for the domestic parts industry, it also means that the industry is shielded from the salutary effects of competition. In the end, this industry will fail to improve its international competitiveness. Moreover, the industry using these parts is unable to procure high-quality, low-priced parts and components from other countries and will be less able to produce internationally competitive finished products. Consumers in the host country also suffer as a result of TRIMs because they must spend much more on a finished product than would be necessary under a system of liberalized imports. Since consumers placed in such a position must pay a higher price, domestic demand will stagnate. This lack of demand also stifles the long-term economic development of domestic industries.

5. MAJOR CASES

India - Measures Affecting the Automotive Sector – (DS146 & DS175)

In December 1997, India announced a new automotive policy that requires manufacturers in the automotive industry and the Ministry of Commerce and Industry to draft and sign a memorandum of understanding (MOU) on new guidelines for the industry. The policy has the following TRIMs Agreement-related problems: First, the policy requires that 50 percent local content be achieved within three years of the date on which the first imported parts (CKD, SKD) are cleared through customs; the requirement increases to 70 percent within five years of first clearance. Second, the policy requires that export of automobiles or parts begin within three years of start-up; restrictions on the amount of parts (CKD, SKD) that can be imported depend on the degree to which the export requirement is met. This policy amounts to an export/import balancing requirement. Even prior to this policy, India made auto parts import licenses for companies setting up operations within its borders conditional upon signing an MOU containing local content requirements and export/import balancing requirements — despite the lack of any legal basis for doing so. It is clear that the new automotive policy of 1997 is designed to institutionalize the previous administrative guidelines.

In October 1998, the EU requested WTO consultations (in which Japan and the United States participated as third parties). The first consultations were held in December 1998, but were unsuccessful. A WTO panel was established in November 2000 at the request of the

EU; Japan participated as a third party. In June 1999, the United States requested separate consultations that were held in July 1999. Japan and the EU participated as third parties. These consultations were also unsuccessful. A panel was subsequently established at the request of the United States in July 2000, and Japan, the EU and the Republic of Korea participated as third parties. At the end of November 2000, the two panels were consolidated into a single panel.

Prior to this dispute, India had already lost before the WTO Appellate Body a complaint brought by the United States over import restrictions on specific items, including automobiles. India reached an agreement with the United States to eliminate import restrictions by April 2001. Consequently, quantitative restrictions on 714 items were eliminated on April 1, 2000, and an additional 715 items on April 1, 2001. Consequently, Department of Commerce and Industry Notice No. 60 was abolished in September 2001. However, the export obligations continued and, thus, the measures cannot be regarded as having been fully eliminated. Indeed, the WTO panel subsequently examined Commerce and Industry Department Notice No. 60 and found that the MOU based on it violated GATT Articles III and XI. India, which was dissatisfied with the Panel Report, appealed to the Appellate Body on January 31, 2002, but withdrew the appeal on March 14. Subsequently, in August 2002, the Indian Government abolished the export obligations and, accordingly, the automotive policy was fully eliminated.

Column: Efforts to Establish New Rules Regarding Investment in the WTO

1) Current Status of International Rules on Investment

In the context of a quantum expansion in the proportion of foreign direct investment (FDI) in international economic activities, the number of bilateral investment agreements in the 1990's increased rapidly from several hundred to some two thousand. In addition, parties negotiating FTAs started to incorporate a chapter on investment rules, suggesting the need for establishing multilateral investment rules.

The Member states of the Organization for Economic Cooperation and Development (OECD) began negotiating a "Multilateral Agreement on Investment (MAI)" in 1995. Negotiations ceased in 1998 because of a lack of developing country participation and difficulties involving excessive liberalization obligations, the treatment of general exceptions, considerations on environmental and labour issues, etc. In 1996, discussions on investment began at the WTO. However, they ceased in 2004 because of opposition by developing countries.

2) WTO Considerations on Investment Rules

○ **Disciplines in existing agreements**

Since some of the agreements concluded during the Uruguay Round cover rules on certain types of investments, a brief description of these is provided below. This section then discusses the multilateral investment rules currently under review at WTO.

(a) Agreement on Trade-Related Investment Measures (TRIMs)

The TRIMs Agreement prohibits trade-related investment measures that violate the general elimination of quantitative restrictions and national treatment, both basic principles of the GATT.

(b) Agreement on Subsidies and Countervailing Measures (SCM)

The SCM Agreement covers "specific subsidies" with a view to addressing those subsidies with a particularly high trade-distorting effect. "Specific subsidies" are those granted by host governments only to specific businesses or industries as an incentive to attract investment (tax breaks, for example) and fall within the "yellow" (subject to elimination) category as defined under the Agreement. Because the SCM Agreement deals with the granting of subsidies related to trade in goods, it does not cover all investment incentives.

(c) General Agreement on Trade in Services (GATS)

Article I:2 of the GATS specifies four modes of trade in services, of which the third, commercial presence (supply of services by a service supplier of one Member through commercial presence in the territory of another Member), covers direct investment in services (branch establishment by banks, etc.). General obligations that must be applied in all service sectors include most-favoured nation treatment and transparency, while obligations with respect to national treatment and market access are undertaken in these sectors according to the specific commitment for each sector and mode.

3) Considerations from the Singapore Ministerial Meeting to the Doha Ministerial Meeting

The impetus behind the WTO's efforts to review multilateral investment rules stems from the decision to establish "the Working Group on the Relationship between Trade and Investment" during the First WTO Ministerial Meeting in Singapore in December 1996. The Working Group met 15 times between 1997 and 2001 and engaged in a broad range of activities, including analysing the economic effect of FDI and its impact on development policy. The Working Group also discussed investment provisions, including defining investment, transparency, and development provisions.

4) Doha WTO Ministerial Conference Discussion and Results

The Fourth Ministerial Conference, held in Doha, Qatar in November 2001, achieved little convergence between Japan, the EU and other WTO Members in favour of immediately launching negotiations toward the creation of a WTO investment framework. India, Malaysia, many African nations, as well as other Member countries, perceived such negotiations as premature and pushed instead for further Working Group considerations. After some coordination, the Ministerial Declaration noted that the Working Group would, in the period until the Fifth Ministerial meeting, focus on the clarification of investment framework components. Negotiations taking place after the Fifth Session would be contingent on whether a decision could be reached by consensus on modalities of negotiations.

5) Discussions under the Doha Development Agenda

After the Doha Ministerial Meeting in November 2001, the Working Group met six times and worked on clarifying seven factors identified in the Doha Ministerial Declaration: (1) Scope and definition; (2) Transparency; (3) Non-discrimination; (4) Modalities for pre-establishment commitment; (5) Development provisions; (6) Exceptions and Balance-of-Payments safeguards; and (7) Consultation and the settlement of disputes between Members. At the Fifth Ministerial Meeting held in Cancun, Mexico, in September 2003, developed countries announced that work on clarifying the seven factors was complete and requested an initiation of negotiations. Developing countries, however, strongly opposed the start of negotiations and demanded that the Working Group continue discussions.

While countries led by the EC and Japan emphasized the importance of investment negotiations, developing countries maintained their strong opposition. The Doha Work Programme established during the July 2004 WTO General Council was designed to provide a framework for negotiations on trade facilitation under one of the four Singapore Issues. However, investment, competition and transparency in government procurement were excluded from the Doha framework. While discussions in these areas are not prohibited under the current round, they cannot form the basis for beginning negotiations. There currently are no prospects for resuming these discussions.

6) The reasons of developing countries' opposition

The major reasons that developing countries oppose the start of negotiations are: (i) implementation of existing agreements already poses a burden and, therefore, they are not prepared to address additional rule-making in a new field; (ii) while well-aware of the importance of attracting investments for their economic development, they also seek to restrict direct investments from foreign companies in order to develop their own domestic industries; and (iii) investment-related rule making through the WTO does not necessarily guarantee investment increases.

7) The reasons why Japan endeavours to establish a multilateral investment framework

Due to accelerating globalization, cross-border investment and trade in goods and services has become indispensable for international Japanese companies. Through investment, these companies have developed an international network centered around East Asia for the division of labor. However, the lack of a multilateral investment framework has sometimes proved disadvantageous to the companies when looking to protect and liberalize investment in host countries. In view of these circumstances, Japan, during the current DDA, has emphasized the importance of creating such a framework.

Also, a multilateral investment framework, once created, would benefit developing countries by improving investment conditions in terms of transparency and stability, offering an attractive business environment to foreign investors. Since foreign investment contributes to the economic growth of developing countries, the establishment of such a framework is important in ensuring that these countries can profit from liberalization. In other words, an investment framework benefiting both investors and host countries will become an essential element of the future world economy.