The Protection of Foreign Investment by Trade-Related Investment Measures (TRIMs)

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INTRODUCTION

Developed countries are both product and capital exporters. They are product exporters because they cannot produce goods at the lowest prices in their own countries due to the high cost of labor and the lack of natural resources. Consequently, the developed countries have had to find new places where they can produce the lowest priced goods. At the same time, the developing countries, which have little technology and capital, attempt to encourage foreign investors[1] to invest in their countries. Nevertheless, they must preserve their natural resources and internal market so they can maintain some ways to compete against developed countries within the international economy. When developing countries tried to protect their gains, international law increased its significant role not only regarding the protection of, but also the promotion of foreign investment. Thus, in international law, there are many criteria that can protect and encourage foreign investment in host countries. There are four types of international legal instruments that can protect foreign investments.

[1] Bilateral Investment Treaty between United Kingdom and Singapore Article 1 provided term 'investment' as including: (1) movable and immovable property and property rights, such as mortgages, liens and pledges, (2) shares, stocks and debentures in companies and other interests in companies, (3) claims to money or to any performance under contracts having a financial value, (4) intellectual property rights and goodwill, (5) business concessions, including concessions relating to natural resources

1. State Contract: State contract is a contract between a state and a foreign investor. There are many clauses that protect foreign investment such as national treatment, Most Favored Nation (MFN) status and arbitration clause. However, these contracts are inefficient because they cannot be enforced under international law. The contracting government may act in breach of contract, legislate in such a way as to make it worthless (for example, by export or currency restrictions), use its powers under domestic law to annul the contract, or repudiate the contract by means illegal in terms of the domestic law. In principle, the position in terms of international law is regulated by the general principles governing the treatment of aliens. Thus an act of the contracting government could entail state responsibility either by itself or in combination with other circumstances and could constitute a denial of justice (in the strict sense) or an expropriation contrary to international law.[2]

However, some theories have removed foreign investment from the sphere of domestic law of a host country, therefore, a supranational system is seen as essential for the protection of foreign investment under international law. The contract acquires stability as it is outside the legislative control of the state authority and its other sovereign powers.[3]

2. Diplomatic Protection : Diplomatic Protection is an international customary law that protects foreign investment from illegal taking of foreign property. Nevertheless, this principle is ineffective at this time because of two inherent weaknesses :

a) *A Company's or Corporation's Nationality.* Recently, foreign investments are not managed by an individual but by transnational corporations. These transnational corporations do not have a registered place, a head office and the nationality of shareholders in any one country. Therefore, it is very difficult to establish a transnational corporation's nationality. A normal and important function of nationality is to establish the legal interest of a state when nationals, and legal persons with sufficient connection with the state, receive injury or loss at the hands of another state.[4]

b) *The Exhaustion of Local Remedies.* An important rule of admissibility applies to cases of diplomatic protection as opposed to instances of direct injury to the state. A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies

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[2] I Brownlie, *Principle of Public International Law,* (Clarendon Press. Oxford, 1979), p. 547.

[3] M Soranajah, *The International Law on Foreign Investment,* (Grotius Publications, 1994), p. 338.

[4] Supranote 2, pp 480-81.

available to him in the state that is alleged to be the author of injury. This is a rule which is justified by practical and political considerations and not by any logical necessity deriving from international law on the whole.[5] Therefore, these two steps of local remedies and international remedies for foreign investments were damaged by host countries. In international business, expedient dispute settlement is very important. After the foreign investors have exhausted the local remedies, they will get more damages from their host countries.

3. Bilateral Investment Treaties (BITs) : These are a rather recent phenomenon on the international investment scene. They seek to set out the rules so as to protect the investments made by the nationals of the two states. BITs provisions are effective, such as corporate nationality and protection of shareholders, standard of treatment, repatriation of profit, nationalization and compensation, subrogation, dispute resolution, etc. Although these provisions are effective, they connot protect foreign investments in all host countries because they are a legally binding force only between parties. If home countries must protect their investments in every developing country, they will have concluded many BITs.

4. Multilateral Investment Treaties : Many capital exporting countries have tried to conclude multilateral investment treaties providing regulations that protect foreign investment and the existence of contending systems relating to the treatment of foreign investment.[6] Several attempts have been made at bringing about a comprehensive code,[7] but they have resulted in failure simply because of the ideological and other cleavage (dividing factors) that affect this branch of international law. Some drafts have proceeded from those who seek to confer as much protection as possible on foreign investment.[8] These have been rejected by the capital - importing states. Other instruments have involved efforts at stating the rules that would favour the capital - importing states.[9] These in turn, have been rejected by the developed states. For instance, the Convention on Settlement of Investment Disputes between States and Nationals of other States and the Convention Establishing the Multilateral Investment Guarantee

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[5] Ibid., pp.495-96.

[6] See M. Soranajah, Supranote 3, pp.187.

[7] Havana Charter (1948) which was to establish an International Trade Organization. Ibid.

[8] An effort was made in the draft convention, known as the Abs-Shawcross Convention to formulate a comprehensive code. It clearly favoured the exporters of capital. It was espoused by Germany and submitted to the OECD. Ibid.

[9] These instruments have usually taken the form of General Assembly resolutions for the obvious reason that it is in this forum that the developing states have numerical power. The resolutions associated with the New International Economic Order and the Charter of Economic Rights and Duties of States have large components of rules relating to foreign investment.

Agency (MIGA) has effective provisions, but has not been ratified by many developing states because their provisions eliminate the sovereignty of host countries over foreign investment.

The world economic order needs some type of multilateral rule structure combining the interest of developing and developed countries. These rules should not give the profit to only developed States because, from the past, developed States have made the profit from their colonies. Therefore, developed states have developed higher potential than developing states in technology and capital. Subsequently, there are many new decolonized states and they have established regulations such as nationalization or expropriation of foreign-owned property. Before the Second World War, expropriation was "illegal" only when carried out in violation of a treaty.[10] At that time States could expropriate foreign-owned property except that which was prohibited by treaties. After the Second World War this rule has changed somewhat as seen in the nationalization carried out in the post-war period by countries of both Eastern and Western Europe as part of their economic and social reform programs.[11] It means that States can now nationalize foreign-owned property, if the reasons for nationalization are based on public utility, security or the national interests that are recognized as overriding purely individual or private interest, both domestic and foreign.

Although the nationalization of foreign-owned property in the pre-war period differ from the post-war period, it does not play an important role in foreign investment today. If states that illegally seize foreign-owned property invested in their countries, they may lose their legitimacy in international society. Because recently, states can not close their countries or stay by themselves. They must interact with others, especially, through trade and investment. Therefore, they should not destroy their international credit status by seizing foreign-owned property legally nor illegally.

Furthermore, in the view of developed states, not only nationalization but also expropriation of assets have made foreign investment difficult to extend. Because repressive acts of host governments directed against foreign investments in their countries have become part of economic warfare, instruments of pressure and relations in political crisis situations, for example requirements have been set, for example :

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[10] F.V., Garcia-Amador, *The Emerging International Law of Development,* (Oceana Publications, 1990), p. 124.

[11] Ibid., p. 131.

- requiring particular levels of local sourcing,
- restricting the volume or value of imports which an enterprise can buy or use to the volume or value of products it exports,
- restricting the volume of imports to the amount of foreign exchange inflows attributable to an enterprise; and
- restricting the exportation by an enterprise's products, whether specified in terms of the particular type, volume or value of products or of a proportion of volume or value of local production.

In the past, developed states tried to arrange these international regulations not only for protection but also for enhancement of their investment in other states. Unfortunately, these instruments were not perfect.

However, the end of the eight-year Uruguay Round of trade negotiations in 1994 brought a profound change in the legal structure of foreign investment. Since 1947, the General Agreement on Tariffs and Trade (GATT) was the principle international multilateral treaty on trade. The Uruguay Round created a new and better defined framework for protection and encouragement of foreign investment-an Agreement on Trade-Related Investment Measures (TRIMs). TRIMs is the first multilateral investment treaty that many States, not only developed countries but also developing countries, adhere to.

The North American Free Trade Agreement (NAFTA) is an excellent regional treaty which protects and encourages investment. This is true because NAFTA contains a lot of provisions that protect and encourage investment, such as: national treatment (NAFTA, Ch.11, Subchapter A, Art. 1102, at 11-1), most favored nation treatment (Id., at 11-2), elimination of performance requirement (NAFTA, Ch.11, Art.1106, at 11-3), free convertibility of currency (NAFTA, Ch. 11, Art.1108, at 11-5), regarding expropriations and applicable compensation (Id., at Art. 1110), and settlement of investment disputes (NAFTA, Ch. 11, Section B, at 11-11).

On June 21, 1976, the OECD (Organization for Economic Co-operation and Development) issued the Declaration on International Investment and Multinational Enterprises to protect and encourage foreign investments. It enshrined the national treatment principle, international investment incentives and disincentives and consultation procedures.

Trade-Related Investment Measures (hereinafter "TRIMs.")[12] are more effective than any other multilateral investment treaty because its legal status

[12] Trade-Related Investment Measures (TRIMs) Agreement in World Trade Organization (WTO).

resulted from the establishment of the World Trade Organization (WTO) in 1994.

However, NAFTA and the OECD Declaration on International Investment and Multilateral Enterprises are precedent of multilateral protection and encouragement investment treaty. Therefore, this paper will analyze TRIMs in comparison with NAFTA, to show that TRIMs may have advantages and disadvantages in comparison.

Therefore, this paper could be devised in six parts. Part I centers around the trade related investment measures (hereinafter "trims")[13] definition. Part II describes TRIMs legal status in the World Trade Organization (WTO) and the relationship between TRIMs and WTO. Part III is very significant because it focusses on TRIMs' regulations regarding national treatment and quantitative restriction. Part IV concentrates on TRIMs exceptions that are no less important than TRIMs regulations because they are a safety valve of TRIMs. Part V points out the procedures that settle the disputes between Member countries. Finally, part VI shows the domestic regulations that TRIMs regulations cannot extensively cover, moreover, this part will point out the weak points of TRIMs regulations.

I. DEFINITION OF TRADE RELATED INVESTMENT MEASURES.

Although developed states managed to have the multilateral treaties for protection and encouragement of foreign investment signed, they turned out not to be effective because these treaties were for developing states to implement. Especially, the provisions protected foreign investment with regard to non-nationalization, effective, prompt and adequate compensation and subrogation. Therefore, TRIMs resolved this problem by laying down provisions against circumvention.

Trade related investment measures are the governmental measures in the area of investment deemed to have restrictive and distortive effects on trade.[14] However, trade related invesment measures are limited to investment measures related to trade in goods.[15] Moreover, trade related investment measures are part of a large category of investment measures known as investment performance requirements that are imposed by host states to

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[13] Trade related investment measures in general meaning.

[14] P. Sauve, "A First Look at Investment in the Final Act of the Uruguay Round, 28,5" *Journal of World Trade,* (1994), pp 5.

[15] T.S. Shenkin, "Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT:Moving toward a Multilateral Investment Treaty" *University of Pittsburgh Law Review,* 55, 1994, pp 565.

influence the trading and local decisions regarding the foreign investment.[16] This idea was already laid down in GATT/WTO for the purpose that regulation is not to protect the interest of the foreign investor but to ensure that goods originating in any other contracting party benefits from treatment no less favorable than domestic goods, in respect of the requirements that affect their purchase.[17]

Therefore, TRIMs in WTO eliminated the domestic investment barrier or domestic performance requirements of host States, such as[18];

(i) those that require particular levels of local sourcing by an enterprise, i.e. local content requirements ;

(ii) those which restrict the volume or value of imports which an enterprise can buy or use to the volume or value of products it exports, i.e. trade-balancing requirements ;

(iii) those that restrict the volume of imports to the amount of foreign exchange inflows attributable to an enterprise; and

(vi) those which restrict the exportation by an enterprise of products, whether specified in terms of the particular type, volume or value of products or of a proportion of volume or value of local production.

In general idea of trims, host states often seek to control the behavior of transnational corporations and foreign investors in a manner most favorable to the host states. Trims are those performance requirements that the host states have designed to promote these trade policy objectives. The most common trims are the following[19]:

(1) Local content requirements, which require the foreign investor to procure locally produced goods and services as a minimum percentage of the final product's value, or to establish certain related manufacturing operations in the host states.

(2) Export requirements, which obligate the investors to export either: (a) a specified minimum amount of the total goods produced; (b) a certain absolute number of the total produced; (c) a quantity that sufficiently offsets the import purchases of the foreign investor; or (d) an amount that covers expenditures of foreign exchange.

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[16] Ibid., pp 550.

[17] Ibid., pp 551.

[18] See Sauve, P.,Supranote 14, p. 7.

[19] C.W. Schwarz, & Caplan B.A., "Trade-Related Investment Measures (TRIMs): Scrutiny in the GATT and Implications for Socialist Countries" 11 *Hastings Int'l & Com L. Review,* 1987, p. 57.

Other restrictions on foreign investors, while technically not trade-related, can also be imposed, such as the following:[20]

(3) Technology transfer requirements, which require the technology involved to be licensed to citizens of the host states or stipulate the introduction of certain types of technology into the host states.

(4) Local equity participation obligations, which impose a minimum equity position to be held by nationals of the host states in the investment project.

(5) Employment, size, location, and financing requirements, which specify the use of local labor and management, the actual size of the undertaking; the location of the project or projects (often in depressed areas of the host states), and strict rules regarding the ability to obtain local financing.

However, foreign investors generally submit to trade related investment measures because of other specific inducements provided by host states. These attractions can include the following:[21]

(1) Direct subsidies or tax incentives, which raise the firm's profitability in relation to the profits the firm would make if it were subject solely to market forces (including the provision of government-subsidized inputs, often in the form of cheap raw materials or cheap capital);

(2) Export subsidies, which reduce the cost of exporting the required level of exports to reasonable level;

(3) A protected market, which compensations a foreign investor for higher input costs by sheltering its final product from competition; and

(4) Subsidized training of local labor, prohibitions against strikes, and preferred access to local credit, all of which induce a foreign investor to locate in the host states.

Thus, these inducements often suffice to overcome the burdensome requirement of the trade related investment measures. Furthermore, Annex I of TRIMs Agreement in GATT/WTO provided illustrative lists of two examples that are inconsistent with the obligation of national treatment and the obligation of general elimination of quantitative restrictions. These two examples will be described again in Part IV TRIMs' Regulations. TRIMs are not the first effective multilateral investment treaty. There is an effective precedent in Article

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[20] Ibid., pp 57-58.

[21] Ibid.

1106:Performance Requirements of North American Free Trade Agreement or NAFTA provide that:[22]

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such in investment;

(e) to restrict sale of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

TRIMs are not regulations that protect and encourage foreign investment directly in the same way as Bilateral Investment Treaties (hereinafter "BITs") and NAFTA. Because BITs and NAFTA have had the regulation that protects foreign investment such as nationalization & compensation (NAFTA Article 1110, BITs Article 5)[23], standard of treatment (NAFTA Article 1102-1105, BITs Article 8-9) and transfers (NAFTA Article 1109, BITs Article 6). Moreover, NAFTA

[22] J.R. Holbein, & D.J. Musch, *NAFTA: Final Text, Summary, Legislative History & Implementation Directory,* Oceana Publications INC., 1994, pp 348-349.

[23] Agreement between the Government of the Kingdom of Thailand and the Government of the People's Republic of Bangladesh for the Promotion of the Investment of Capital and for the Protection of Investment 1988, *Investment Laws of the World : Investment Promotion and Protection Treaties,* compiled by Investment Centre for the Settlement of Investment of Disputes (ICSID), 1988-b, pp 1-10.

and BITs have provided the performance requirements (NAFTA Art. 1106, BITs Article 2). *TRIMs are only the measures eliminating the domestic regulations of host states that contain barriers against trade in goods.* Consequently, TRIMs have not the provisions that protect foreign investments. If foreign investments have been nationalized or expropriated by host states, foreign investors will not be protected by TRIMs. Finally, TRIMs are the provisions that encourage or advance the foreign investors to investor or undertake projects in host states conveniently.

II. TRIMs' LEGAL STATUS IN WTO.

Since 1947, the General Agreement on Tariffs and Trade (GATT) was the primordial international multilateral treaty for trade, but TRIMs did not come up until only recently as a legal instrument on foreign investment in the Uruguay Round of trade negotiations in 1994. The TRIMs issue first appeared formally in the GATT system in 1982, when a GATT Dispute Resolution Panel was faced with the issue of performance requirements imposed on the establishment and maintenance of foreign investment in Canada.[24] Therefore, in this part I would like to describe the history of TRIMs and the legal status of TRIMs in WTO.

1. History of trims. In January 1982 the United States requested consultations with the Canadian government under the GATT Article XXII:1 concerning the administration of Canada's Foreign Investment Review Act (FIRA). The FIRA provided that acquisition or establishment of individual business by foreigners would be allowed in Canada only if the Canadian government determined that such operations would be a 'significant benefit to Canada.[25] Moreover, FIRA also provided that foreign investors could submit their own' written undertakings' (voluntary performance requirements) for consideration in the light of five factors. These performance requirements were optional, but would become legally binding on the investor if the investment was approved. Eventually the GATT Panel found that Canada's local content requirements violated GATT Article III:4 (national treatment of imported products) because imported goods were treated 'less favourably than domestic products'.[26]

The FIRA Panel Report was remarkable for two reasons. First, it recognized that some GATT provisions did include trims. Second, it spured

[24] See T.S. Shenkin, Supranote 15, p. 559.

[25] Canada-Administrative of the Foreign Investment Review Act 1984, Article 2 (1)

[26] FIRA Panel Report, p. 159.

for United States to get the trims issue included in a new Multilateral Investment Treaty Round in order to settle how TRIMs should be treated by all GATT Contracting Parties.

As mentioned above, the legal concept of trims did not only affect investment, but also trade. First, the FIRA Panel recognized that some GATT provisions did include TRIMs. However, GATT provisions protect goods but do not protect foreign investment because TRIMs apply only to investment measures related to trade in goods (see 2.1 TRIMs definition). Consequently, the significant purpose of TRIMs is trade in goods.

2. ***Legal status of TRIMs in WTO.*** From 1947, the General Agreement on Tariff and Trade (GATT) was established as an international multilateral treaty for trade, although technically it was only "provisionally" enforced. In theory, the General Agreement did not establish an "organization," although in practice GATT operated like one.

The Uruguay Round 1994 results created a new and better defined international organization and treaty structure- -the World Trade Organization (WTO)- -to carry forward GATT's work.[27] The WTO plays the essential role of unifying the existing and new obligations under one administrative roof and further provides an internationally recognized organizational structure which its forerunner, the GATT, had lacked. The WTO presents neither a qualitative change in the scope and functions of GATT nor the advent of a supranational trade institution with power and authority to usurp sovereignty from its Member Nations.[28]

The WTO annex 1A[29] incorporate a document labeled GATT 1994 that is essentially GATT 1947 as amended and changed through the Uruguay Round, along with all the ancillary agreements pertaining to GATT 1947, as modified.

a) WTO's structure, WTO is an international organization that enforces the obligation of the WTO Agreement. This Agreement is divided into two parts that are Multilateral Trade Agreements and Plurilateral Trade Agreements.

aa) Multilateral Agreements comprise the bulk of the Uruguay Round results and which are all "mandatory," in the sense that these texts impose

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[27] John H. Jackson, *Legal Problems of International Economic Relations: Cases, Materials and Text,* 3rd, (West Publishing Co. 1995), pp 355-356.

[28] T.J.Jr, Dill, "The World Trade Organization: A New Legal Order for World Trade", 16 *Michigan Journal of International Law,* (winter 1995), pp 355-356

[29] J.F. Dennin, General Editor, *Law & Practice of the World Trade Organization,* Booket 1, Oceana Publications, INC, (March 1995) : 3

binding obligations on all members of the WTO. These Agreements consist of Multilateral Agreements on Trade in Goods (Annex 1), including:

i) Annex 1A consists of GATT 1994, which includes the revised General Agreement with new understandings, side agreements on 12 topics ranging from agriculture to preshipment inspection, and the vast "schedules of tariff concessions" that make up the majority of pages in the official treaty text. The schedule for each of the major trading countries, the US, Japan and the European Union, constitute a volume of printed tariff listings. There is a number of "side agreements," some originating from the Tokyo Round results (as revised in the Uruguay Round). These are as follows:

- Agriculture
- Application of Sanitory and Phytosanitory Measures
- Textiles and Clothing
- Technical Barriers to Trade
- ***Trade-Related Investment Measures(TRIMs)***
- Implementation of Article VI of GATT 1994 (Dumping Code)
- Interpretation of Article VII of GATT 1994(Valuation Code)
- Preshipment Inspection
- Rules of Origin
- Import Licensing Procedures
- Subsidies and Countervailing Measures
- Safeguards.

ii) Annex 1B consists of the General Agreement on Trade in Services (GATS), which also incorporates a series of schedules of concessions.

iii) Annex 1C consists of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

Besides, these texts include an Understanding on the Rule and Procedures Governing the Settlement of Disputes in Annex 2 and the Trade Policy Review Mechanism (TPRM) in Annex 3.

bb) Plurilateral Agreements impose binding obligations on only those members of the WTO that accept these texts. These texts exist in Annex 4 of WTO Agreements that contain the four agreements:

i) Trade in Civil Aircraft (Annex 4A)

ii) Government Procurement (Annex 4B)

iii) Trade in Dairy (Annex 4C)

iv) Trade in Bovine (Annex 4D)

b) TRIMs' Legal Status, TRIMs is the agreement in the Multilateral Trade in Goods that, binding all Member countries of WTO, so TRIMs contain significant provisions that are no less than General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights(TRIPs). WTO established a general regulation for investment other than trade in goods and intellectual property rights than did TRIMs. On the other hand, at least, developing Member countries could fulfill their obligation in WTO. If TRIMs had provided a more specialized rule like the other multilateral treaties, developing countries could not have fulfilled their obligation because the other multilateral investment treaties established difficult obligations that limited the sovereignty of developing countries. For instance, MIGA has the provision that obligated the member states to accept the right of Agency to subrogate, and ICSID has the provision that limited the sovereignty of member states to settle the disputes between them and foreign investors. The next Part will describe the TRIMs regulations which is the most significant Part in this thesis.

III. TRIMs' REGULATIONS.

The Agreement on Trade-Related Investment Measures acknowledges explicitly that certain measures governing the treatment of investments have restrictive or distortive effects on trade. Article 2(1) of this Agreement, which applies only to investment measures related to trade in goods, provides that

Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIMs that are inconsistent with the provisions of Article III (National Treatment) and XI (General Elimination of Quantitative Restrictions) of the GATT 1994.

In order to clarify this point, there are two significant principles in TRIMs, these are National Treatment and General Elimination of Quantitative Restrictions. The content of these two principles are not provided directly in TRIMs, but they are provided under GATT 1994. Therefore, the analysis of TRIMs regulations should refer back to GATT 1994 regulations. At least, TRIMs' Annex provides an Illustrative List that provides the scope of National Treatment and Elimination of Quantitative Restrictions. The Illustrative List requires that:[30]

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings; or in compliance with that which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, 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; or

(b) 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.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or in compliance with that which is necessary to obtain an advantage, and which restrict;

(a) 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;

(b) the importation by an enterprise of products 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; or

(c) 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.

In order to describe TRIMs regulations, the Illustrative List of Annex is not sufficient to analyze the way to conform to or fulfill the Member States'-obligations and the application of General Agreement, drawn from official documentary sources of GATT. It is represented by the disputes that are settled in GATT. By the way, it centers around two significant principles that are

[30] Ibid., pp 165

authorized in the Article 2 of the Agreement on Trade-Related Investment Measures of the National Treatment and General Elimination of Quantitative Restrictions.

1. ***The definition & application of National Treatment for TRIMs,*** The WTO Annex 1A incorporates a document labeled GATT 1994 that is essential GATT 1947 as amended and changed through the Uruguay Round, along with all the ancillary agreement pertaining to GATT 1947, as modified. Therefore, Article III referred to in Article 2 of Agreement on Trade-Related Investment Measures is Article III (National Treatment) on Internal Taxation and Regulation in General Agreement on Tariffs and Trade (GATT) 1947. Nevertheless, the essential problems of Article III applying to TRIMs are the scope or extent of Article III and the definition of this Article. Consequently, this part will be divided into two subdivisions that are, (a) the definition of National Treatment in Article III; and (b) the application of Article III for TRIMs.

(a) The definition of National Treatment in GATT: The principle of national treatment exists in Article III:4 of GATT. There are many paragraphs in this Article because it includes both internal taxation and regulation. For instance, paragraph 1 establishes the general principle. Paragraph 2 requires national treatment in respect of internal taxation, and paragraph 4 is the core of national treatment of this Article requiring the following:

4. 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 international, offering for sale, purchase, transportation, distribution or use. The provision of this paragraph shall not prevent the application of differential internal transportation charges that are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The most important condition of this paragraph is "treatment no less favourable" a condition the GATT Panel interpreted in "Italian Discrimination against Imported Agricultural Machinery". In this case, the Panel decided that, **It was clear from the English text that any favourable treatment granted to domestic products would have to be granted to like imported products and the fact that the particular law in question did not specifically prescribe conditions of sale or purchase appeared irrelevant in the light of the English text.**[31]

[31] GATT: General Agreement on Tariffs and Trade, *Analytical Index: Guide to GATT Law and Practice.,* (6th ed., Geneva, 1994), p. 148.

Therefore, member States could not apply laws, regulations and requirements in favor of domestic products. The word "treatment no less favorable" in paragraph 4 calls for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or uses of products. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favorable treatment. On the other hand, it also has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favorable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them are in fact no less favorable.[32]

(b) The application of National Treatment in TRIMs, The text of Article III:1 in GATT 1994 refers to the application to imported or domestic products of "laws, regulations and requirements affecting the internal sale...of *products*" and "internal quantitative regulations requiring the mixture, processing or use of *products*". Accordingly, literally speaking, Article III could not apply to investment, but TRIMs authorize Article III to apply to investment, which is a significant problem for application.

In one case a GATT Dispute Resolution Panel has recognized that National Treatment in Article III could be applied to investment. In this case, the Panel was faced with the issue of performance requirements imposed on the establishment and maintenance of foreign investment in Canada.[33] This Act required the foreign investors wanting to establish or set up an undertaking in Canada to obtain permission from the Government Officer. The United States requested consultation with the Canadian government under the GATT dispute resolution.[34] Legally, this point does not directly involve National Treatment in Article III because it centers on National Treatment for Internal Taxation and Regulation.

In Article III, paragraph 1 lays down the general principle that internal taxes and regulations "should not be applied * * * so as to afford protection to domestic production." In some cases, this principle is specifically incorporated into the obligations established in the other provisions of Article III. Paragraph

[32] See John H. Jackson, Supranote 27, p. 511.

[33] Canada-Administrative of the Foreign Investment Review Act 1984

[34] Article XXII Consultation

2 of Article III requires national treatment in respect of internal taxation (such as sales, excise or value added taxes), while paragraph 4 requires it in respect of regulations affecting the sale and use of goods generally. The other paragraphs of Article III deal with particular situations, including paragraph 8, which carves out important exceptions for government procurement and subsidization.[35]

Therefore, both parties agreed to file the dispute with a GATT Panel to find out whether the FIRA itself and Canada's right to regulate direct foreign investment such as the local content and export performance requirements were inconsistent with Canada's trade obligations under the GATT. The United States argued that the performance requirements were inconsistent with GATT Article III:4, III:5. Canada, of course, argued that the performance requirements were consistent with the GATT.

The Panel found that Canada's local content requirements violated GATT Article III:4 (national treatment of imported products) because imported goods were treated "less favourably than domestic products."[36] The Panel then reiterated the GATT's basic purpose:

When these undertakings are conditional on goods being 'competitively available' (as in the majority of cases) the choice between Canadian or imported products may frequently coincide with normal commercial consideration and the latter will not be adversely affected whenever one or the other offer is more competitive. However, it is the Panel's understanding that the qualification 'competitively available' is intended to deal with situations where there are Canadian goods available on competitive terms. The Panel considered that in those cases where the imported and domestic products are offered on equivalent terms, adherence to the undertaking would entail giving preference to the domestic product. Whether or not the foreign investor chooses to buy the Canadian goods in a given practical situation, is not at issue. *The purpose of Article III:4 is not to protect the interests of the foreign investor but to ensure that goods originating in any other contracting party benefit from treatment no less favourable than domestic (Canadian) goods, in respect of the requirements that affect their purchase (in Canada).* On the basis of these considerations, the Panel found that a requirement to purchase goods of Canadian origin, also when subject to *competitive availability*, is contrary to Article III:4. The Panel considered that the alternative qualification 'reasonably available' which is used in some cases, is *a fortiori* inconsistent with Article III:4, since the undertaking in these cases

[35] See John H. Jackson, Supranote 27, p. 501.

[36] FIRA Panel Report, pp 146-147.

implies that preference has to be given to Canadian goods also when these are not available on entirely competitive terms.[37]

From the Panel's opinion, national treatment obligations of Article III of GATT do not apply to foreign natural or legal persons but to imported products and serve to protect the interests of products and exporters established on the territory of any contracting party. According to the Panel, GATT did not prohibit Canada from exercising its sovereignty to regulate foreign investment to such an extent that nationalization or expropriation would be allowed. But neither did the FIRA Panel rule out the possibility of any investment regulations falling under the GATT. Because all investment measures have some relationship with trade, and all of them are amenable to the GATT disciplines.[38] At least, the objective of national treatment provisions is to promote competition.[39] On the other hand, applying national treatment of Article III of GATT to foreign investment means to eliminate or restrict the non-tariff barriers such as local content requirements, export requirements and technology transfer. Foreign investors should not be treated less favourable than national investors on the ground of these barriers. From this precedent, the national treatment of Article III could be applied to investment.

However, TRIMs have extended the content of treatment beyond Article III as provided in paragraph 1 of TRIMs' Annex (Illustrative List). This paragraph establishes the definition of application of national treatment for TRIMs that can distribute to three parts:[40]

1. TRIMs mean regulations that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994.

2. TRIMs mean regulations that include those which are mandatory or enforceable under domestic law or under administrative rulings or compliance with which is necessary to obtain an advantage.

3. TRIMs mean regulations requiring :

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of value or value of its local production; or

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[37] See GATT:General Agreement on Tariff and Trade, Supranote 31, pp 151-152

[38] M.A. Knaw, "Trade-Related Investment Measures in the Uruguay Round: Toward a GATT for Investment", 16 *N.C.J. Int'l L.& Com. Reg.*, 1991, p. 324.

[39] Ibid., p. 336.

[40] See J.F. Dennin, Supranote 29, p. 165.

(b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports.

The first part is effective application of national treatment for TRIMs because of the nature of Article III:4 and the reason of GATT Panel in dispute between US and Canada about Canada's Foreign Investment Review Act in 1982. Although the national treatment rule provided for trade, its nature can modify the investment. By this way, the GATT Panel accepted and decided that Canada's local content requirements violated GATT Article III:4 (national treatment of imported products) because imported goods were treated "less favorably than domestic products."

The second and third parts are specific applications of national treatment for TRIMs that the TRIMs Agreement has arranged exclusively. On the other hand, the application of the second and third part are new applications to TRIMs not referring to GATT regulations.

2. The definition & application of General Elimination of Quantitative Restrictions(QR) for TRIMs: The quantitative restriction is the kind of non-tariff barrier in international trade that importing states have erected to restrict the import of products from other states. Quantitative restrictions, quotas and licenses, differ from tariff barriers such as taxes, charges and duties. Tariff barriers have been already eliminated by Article III in that its purpose prevents contracting parties from using their fiscal and regulatory powers for purposes other than domestic production.[41] Therefore, Article XI in GATT provided for the General Elimination of Quantitative Restrictions that supports freer international trade rather than fiscal policies. Consequently, this part describes two subdivisions : (a) definition of Quantitative Restrictions in Article XI of GATT and (b) application of Article XI for TRIMs.

(a) The definition of elimination of quantitative restrictions in GATT: In order to liberlize international trade it was necessary to remove the economic frontiers and legal obstacles to transnational trade. In this theory the operation was based on the twin principles[42] of free circulation of goods and non-discrimination between domestic and foreign products of Member States. Therefore, Article XI is commonly described as GATT's quota prohibition, but it is actually far broader:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or

[41] See GATT:General Agreement on Tariff and Trade, Supranote 31, p. 119.

[42] M. Cuthbert, *E.C. Law in a Nutshall,* Sweet & Maxwell, 1994, p. 54.

other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for exportation or sale for export of any product destined for the territory of any other contracting party.

This provision encourages the first of two principles regarding free circulation of goods because Article XI removes the import restraints that Article III does not remove. Article III generally prohibits the application to imported goods of discriminatory internal taxes or other regulatory measures. Therefore Article XI bans other forms of import restrictions. From the stand point of legal interpretation and application of the General Agreement, the quantitative restrictions that the Member States of WTO should have eliminated can be divided into three groups.[43]

First, quota restriction is a restriction whereby Member States limit imports or exports to a proportion of total imported or exported goods. GATT's regulation prohibits the parties to apply the two characteristics of quotas, import quotas and residual restriction.

Second, the import or export license is a means of quantitative restriction constituting an obstacle to the free movement of goods. Generally these licenses have the effect of being quantitative restrictions like quotas, exeept where states allow free import and export. For example, the importation of *tabacco, cigars and cigarettes* should be subject to licenses issued by a government authority and those licenses should be issued at the discretion of that authority in the light of market requirements.[44]

Third, Article XI prohibits Member States to institute or maintain other measures having equivalent effect such as quotas and import or export licenses; such as import or export prohibitions, minimum price system for import or export and state-trading operations.

The concept of elimination of quantitative restrictions in international trade is accepted and applied exactly by GATT's Member States. However, there are some problems such as with the principle of national treatment in Article III because originally the two principles were applied for trading not for investment. Therefore, the next issue needs to focus on this problem.

(b) Regarding, the application of the General Elimination of Quantitative Restrictions for TRIMs, the dispute concerning the Canada Foreign

[43] See GATT:General Agreement on Tariff and Trade, Supranote 31, pp 289-297.

[44] The Haitian Tabacco Monopoly from GATT:General Agreement on Tariff and Trade, Analytical Index:Guide to GATT Law and Practice, 6th ed., Geneva, 1994, p. 291.

Investment Review Act 1984 [45] is a precedent but the GATT Panel did not apply the quantitative restrictions for investment. In this case, a GATT Panel analyzed Canadian practices whereby foreign companies were permitted to invest in manufacturing plants in Canada only if they undertook that those plants would purchase inputs and other goods of Canadian origin in preference to imported goods. In response to a United States argument that this practice violated Article XI, the panel responded:[46]

The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the "importation" of products, which are regulated in Article XI:1, and those affecting "imported products," which are dealt with in Article III. *If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.* Moreover, the exceptions to Article XI:1, in particular those contained in Article XI:2, would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III. The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI.

From this case, there is no precedent to apply the general elimination of quantitative restrictions to TRIMs, therefore this concept can apply only to trade not to investment. Nevertheless, TRIMs Agreement has imposed this concept to investment. On the other hand, TRIMs are probably ill-founded. Practically, the general elimination of quantitative restriction could not be in proportion to foreign investment because of two reasons shared by the GATT Panel which stated that :

i) if Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous and;

ii) the panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI.

However, in paragraph 2 of Annex in TRIMs Agreement, there is an Illustrative List that defined the extent of application of general elimination of quantitative restrictions for TRIMs. This paragraph establishes the definition of TRIMs and can be divided into three parts :

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[45] See Canada-Administrative of the Foreign Investment Review Act 1984, Supranote 33

[46] Canada-Administration of the Foreign Investment Review Act, GATT, 30 th Supp. BISD 140

1. TRIMs mean the regulations that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994.

2. TRIMs mean regulations that include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with that which is necessary to obtain an advantage.

3. TRIMs mean regulations that include restrictions :

(a) the importation by an enterprise of products used in or related to its local production generally or an amount related to volume or value of local production that it exports;

(b) the importation by an enterprise of products 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; or

(c) the importation 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.

The first part is probably an ill-founded definition of TRIMs because of the nature of Article XI:1 and the reason of GATT Panel in the case between US and Canada about Canada's Foreign Investment Review Act in 1982. By the very nature of Article XI:1 was regulation has been established for trade but not for investment. Moreover, the reason why GATT's Panel made this principle was that it did not particularly work on investment. Practically, the utility of this principle on TRIMs should recognize the posterior state practice of contracting parties.

The second and third parts are the specific definition that TRIMs Agreement have arranged exclusively from the exact purpose of general elimination of quantitative restrictions. On the other hand, the definition of the second and third parts are the definition for TRIMs' existence.

The above-mentioned describes that, in GATT 1994 (except in the specific application of national treatment and general elimination of quantitative restrictions in the Illustrative List of the annex), only national treatment can be applied to investment, but general elimination of quantitative restrictions cannot. This conclusion does not apply absolutely because it is based on only one precedent. We have to follow the other disputes that are decided by a GATT Panel. However, the application that was established in the

Illustrative List of the Annex in TRIMs Agreement, especially the subdivisions of paragraph 1 and 2, is enough for the utility of TRIMs to apply to foreign investment.

IV. TRIMs' EXCEPTIONS.

Significant provisions in international agreement whether they are multilateral in nature such as GATT, regional such as the European Community's Treaty of Rome, bilateral such as the Canada-United States Free Trade Agreement or general such as the Generalized System of Preferences for developing countries are the Escape clauses. The purpose of these agreements is to focus on the liberalization of restrictions on trade in goods, services, workers and capital. **Escape clauses are essential to uphold these agreements.**[47]

Governments adhering to an agreement may decide in subsequent, and different, circumstances that their international commitments prevent, impede or inhibit them from pursuing a desirable policy. If the new circumstances demand immediate action, the government may have to derogate from the agreement, perhaps withdrawing from it over a particular detail affecting only one aspect. It is better that this should be done under special rules, within the agreement, rather than arbitrary. Without such rules, a withdrawal could undermine the faith of other signatories in the agreement, thereby weakening its effectiveness.

In general an escape clause allows member countries, under prescribed conditions, to derogate temporalily from one aspect of an agreement. The underlying aims of the agreement can thus be preserved, and faith in general commitments maintained, as long as access to escape clauses are limited. At the same time, signatory governments can reassure their communities, as they point out the economic gains expected from adherence to the agreement, that national sovereignty or autonomy has been preserved.

Exceptions are more far-reaching than escape clauses. They provide for prior release from certain obligations because of *foreseeable* difficulties, whereas an escape clause allows for temporary withdrawal from obligations in the event of *unforeseeable* difficulties.[48]

1. The Exceptions in GATT(Article XX and XXI): The General Agreement provided two exceptional articles that are Article XX General Exceptions and

[47] D. Robertson, *GATT Rules for Emergency Protection,* Harvester Wheatsheaf, 1992, p. 26.
[48] Ibid., p. 27.

Article XXI Security Exceptions. Article XX established exceptional measures that contracting parties can applly if those measures are:[49]

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importation or exportation of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic process industry during a period when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING

[49] P. Kuning, & Lau, N., ed., *International Economic Law: Basic Documents,* (Walter de Gruyter, 1989), pp 452-453.

PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Article XXI provides Security Exceptions that CONTRACTING PARTIES shall not construe as:[50]

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

*2. **The Practical Exceptions in GATT:*** Six exceptions to the General Agreement have been important in shaping the multilateral trading system.[51]

i) Several special dispensations for agricultural trade are made in the General Agreement, but these were not enough to account for the increased protection of agriculture that has occurred.

ii) Trade in textiles and clothing from developing countries, with the approval of the Contracting Parties, has also been excepted from GATT rules.

The negotiation of the Uruguay Round concluded in 1994 resulted in agreement on agricultural trade and trade in textiles in GATT system that are the Agreement on Agriculture and Agreement on Textiles and Clothing. Therefore, there are no exceptions for agriculture trade and trade in textiles anymore.

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[50] Ibid., pp 453-454.

[51] See D. Robertson, Supranote 47, pp 27-30.

iii) The process for withdrawing industries, such as agriculture and textiles, is based on the exclusive provisions in Part II of the General Agreement. The Protocol of Provisional Application ('the grandfather clause') provided that Part II, which covers the code of behavior for trade policy, should be applied 'to the fullest extent not inconsistent with existing legislation'.

iv) Article XXIV permits customs, unions and free trade areas to be established, notwithstanding the principle of non-discrimination. It calls for the elimination of trade barriers on 'substantially all trade' among the participating countries within a reasonable period. But this condition is not fully met and thus regional preferential arrangements have multiplied.

v) The exception of developing countries from GATT obligations has turned out to be a major breach in the multilateral trading system- -however well-intentioned.

vi) Other exceptions may be obtained under specific GATT articles. According to Article XXV, a waiver may be requested by a contracting party to derogate from a GATT provisions, but it requires a majority vote of members to be approved.

TRIMs Agreement provided the provisions of exceptions, the same as any other international agreement. It provides two articles of exception, that are Article 3 and Article 5(2). Article 5(2)[52] provides for the exception of Member States from TRIMs obligations from two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.

Apart from the exception of obligations of TRIMs, Article 3 of TRIMs establishes the exception which is much more extensive than the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) because of their application and reference provided that:

All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.

This article refers to all exceptions under GATT 1994. Not only the General Exception in Article XX and Security Exceptions in Article XXI, but

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[52] TRIMs Agreement Article 5(2) provided that **Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.**

also the other exceptions that are existent in GATT 1994 can be applied to TRIMs. Because Article 3 provides that all exceptions under GATT 1994 shall apply, **as appropriate.** It reveals the unclear and unconditional point of TRIMs. The unclear and unconditional point exhibits much more the ill-founded application of the quantitative restriction principle in Article 2. The more unconditional exceptions there are the more illegal performances we have. Because the application of quantitative restriction is not absolute, therefore, TRIMs should have a safety-valve for Member States.

It is a possibility that the objective of TRIMs that they try their hand to protect and encourage every part of investments rather than trade in services and intellectual property rights. Therefore, it is not easy to issue comprehensive regulations that can anticipate all of the issues of investment. We must wait and see the decisions from the dispute settlement procedures. Perhaps, because of unclear and unconditional regulations' exceptions of TRIMs, the decisions from dispute settlement procedures are the best resolution for TRIMs.

V. TRIMs' DISPUTE SETTLEMENT PROCEDURES.

Unlike, the other worldwide international economic agreements, GATT combines precise and comprehensive, substantive rules of conduct for, in principle, all trade policy instruments with detailed multilateral dispute settlement procedures delivering legally binding decisions by the GATT CONTRACTING PARTIES on the consistency of trade restrictions or trade distortions with GATT law and on the settlement of disputes among GATT contracting parties.[53]

1. The unique character of GATT Dispute Settlement Procedures: The GATT's dispute settlement system appears to be unique also in several other respects, these are:

i) It permits the successive or alternative use of all "diplomatic" and "legal" means of dispute settlement and prohibits unilateral reprisal in the area covered by GATT unless the GATT CONTRACTING PARTIES have authorized the suspension of GATT obligations (Article XXIII:2)

ii) GATT Article XXIII:1 provides not only for the possibility of **"violation complaints"** if "any contracting party should consider that any benefit accruing

[53] Petermann, E. & Jacnicke, G., *Adjudication of International Trade Disputes in International and National Economic Law,* (University Press Fribourg Switzerland, 1992), p. 85.

to it directly or indirectly under this Agreement is being nullified or impaired...as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement". It also admits **"non-violation complaints"** whenever "any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of ... (b) the application by conflicts with the provisions of this Agreement". And even "situation complaints' may be brought if the "nullification or impairment" result from"(c) the existence of any other situation".

iii) Each violation of a GATT obligation is legally presumed to constitute a "prima facie case of nullification or impairment of benefits accruing under the GATT without need for any statistical evidence of "managed trade".

iv) The lack of uniformity of some of these sectional dispute settlement procedures and their coexistence with the general GATT dispute settlement procedures under Article XXIII have, however, given rise to "forum shopping" and to certain jurisdictional problems.

2. ***The utility of TRIMs' Dispute Settlement Procedures,*** Article 8 of TRIMs containes the consultations and dispute settlement procedures that provided:

> **The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.**

Therefore, disputes resulting from complaints on TRIMs regulations could be settled by harmonizing the provisions of Article XXII and XXIII of GATT 1994 with the Understanding on Rules and Procedures Governing the Settlement of Disputes(DSU). In fact, DSU do not focus specifically on investment-related matters.[54] Rather, the DSU is generic in nature and applies to all areas covered by WTO rules, including all investment-related matters subject to Final Act disciplines.[55] Among the central innovations made to the WTO's-integrated system for consultations and dispute settlements are:[56]

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[54] See P. Sauve, Supranote 14, p. 14.

[55] APPENDIX 1 AGREEMENTS COVERED BY THE UNDERSTANDING

...(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods.

Annex 1B: General Agreements on Trade in Services.

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights.

[56] Supranote 12, p. 14.

(i) the automatic adoption of panel reports. Unless there is a consensus to do so, Members cannot block findings against them (negative consensus);

(ii) the possibility of requesting the review of a panel report by an Appellate Review Body (whose findings are final and binding on Members unless there is a negative consensus);

(iii) the possibility of cross-sectoral retaliation, for instance: a Member can take action in the goods area for a violation of the GATS); and

(iv) the requirement for Members to establish (subject to review by the panel) what the "reasonable time for implementation" will be, which should result in the promoter implementation of panel recommendations.

3. ***The TRIMs Dispute Settlement Procedures:*** The stages of dispute settlement foreseen under the DSU are:[57]

(i) consultations between Members(i.e. State-to-State arbitration);

(ii) establishment of a panel;

(iii) first and second panel hearings based on the exchange of written submissions;

(iv) circulation and adoption of the panel report; and

(v) upon request, review of the Appellate Review Body.

However, TRIMs' consultation and dispute settlement does not give the direct right to private parties for the international settlement of disputes procedures, while the International Centre for the Settlement of Investment Disputes(ICSID) and the Multilateral Investment Guarantee Agency(MIGA) do give these. These two mechanisms make an access to international settlement for private party(ICSID Article 36, MIGA Article 2 of Annex II), but the TRIMs Agreement has only the settlement of disputes between Member States.[58] However, these two agreements have not been accepted by many countries, especially developing countries, because they eliminated the sovereignty of Member States over foreign investment.

TRIMs' dispute settlement has been provided for dispute between Member States, but has not been provided for dispute settlement between foreign investors and Member States. Although TRIMs Agreement was issued to encourage private parties access to investment markets of Member States,

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[57] Ibid., p. 15.

[58] See E. Petermann, & G. Jacnicke, Supranote 53, p. 144, 153.

private parties could not claim their right before TRIMs Agreement. Exactly, TRIMs do not reserve interests of private parties any more. If TRIMs dispute settlement procedures had still accepted the right to claim for damages of foreign investors, TRIMs would have been an agreement just like the other worldwide international economic agreements.

CONCLUSION.

Unlike previous GATT negotiating rounds which mainly dealt with lowering tariffs on the international trade in goods, the Uruguay Round sought to bring an investment with GATT's purview. From 1947, investment were not on the Round's negotiation agenda. The TRIMs in Final Act must be ascribed to the rapidly changing policy environment within which the Round took place. This environment was characterized by a number of far-reaching changes in policy and rule-making approaches which gained currency in a growing number of States and which the multilateral trading system appeared to have internalized by the time the Uruguay Round was completed. Among such changes are:

(i) a growing recognition of the inherently complementary relationship between trade and investment in a globalizing world economy;

(ii) the heightened awareness, particularly among developing states, of the policy-signaling benefits to be derived from credible commitments in the areas of trade and investment.

TRIMs are the most recent multilateral agreement for investment, and its rules eliminated the domestic performance requirements. From this point, there are advantages and disadvantages for developed and developing States. For developed states, TRIMs are the minimum standard that investors should obtain from host countries, but TRIMs should be established along these two points :

i) **Protection and guarantee provisions,** TRIMs uphold only the right of access to invest of individual business foreigners. On the other hand, TRIMs eliminate only domestic performance requirements such as local content requirements, export requirements, technology transfer requirements, local equity participation obligation and other restrictions of foreign investors. By the way, TRIMs should establish the provisions focusing on protection and guarantee such as non-nationalization, just compensation, capital transfer and subrogation just like NAFTA or BITs.

ii) Dispute settlement procedures by individual or transnational corporations, TRIMs uphold only the dispute settlement procedures between Member States. On the other hand, this means that individual investors cannot directly benefit from these procedures. If an investor cannot protect his right by himself, these procedures have no meaning for him.

On the other hand, for developing states, TRIMs are an obstacle to develop their economies because they cannot control the directions of development such as the use of local labor, the use of natural resources, the exportation and importation of goods. Consequently, TRIMs are the maximum standard treating foreign investment for developing states. To protect their benefits and be a member of WTO, developing states have to accept the TRIMs Agreement in spite of the fact that this agreement can be an obstacle.

Therefore, this discussion between the two groups is the main point of negotiation in WTO because the investment will play its role more than it does now. At that time, each group will try and preserve their benefits by using the WTO as a discussion forum.