Lecture 20: Trade-Related Investment Measures Agreement (TRIMs)

Dear students, today we will discuss the new agreement, which is the TRIMS Agreement, Trade-Related Investment Measures. What is this new Agreement? So, you can see the name itself says Trade-Related Investment Measures. So, investment is very important for every country, especially Foreign Direct Investments (FDIs), because without Foreign Direct Investment, no country can invest in more and more areas, mainly due to a lack of resources. So, these investing countries always want a code of conduct. Investing countries are mostly developed countries. They want a code of conduct for investment, or basically, they want protection for their investments in the host countries. So, this discussion is not specific to the Uruguay round of negotiations.

CONCEPTS COVERED

- Historical Perspective
- GATT Provisions
- Tokyo Round
- Uruguay Round
- Investment and Trade

From time immemorial period, these discussions were going on and there were some efforts to consolidate some of the provisions. So, in this class, we will discuss the historical perspective of investment agreements and the historical perspective of how these agreements are finalised, what are the old provisions, and what are the efforts taken by the countries to come out with a code of conduct for investment? Then what were the GATT provision, Tokyo round of provision, Uruguay round of provisions and the present Agreement - WTO Agreement or Trade-Related Investment Measures Agreement?

Historical Perspective

Attempts to reach international agreements on investment have a long history. In the late 18th and the 19th centuries the European powers and the US set standards for the protection of foreign investment that were superior to national treatment. Furthermore, host countries were not permitted to interfere with or expropriate foreign assets.

Latin American countries were the first to challenge the favourable treatment of foreign investors. The 1868 Calvo Doctrine established the same rights for foreigners and nationals and prohibited countries from intervening to enforce the claims of their citizens in other countries. Between World War I and II the League of Nations was stalemated on this issue, and since World War II industrial countries have been unsuccessful in their efforts to establish an international regime for the protection of international investment.

So, I was talking about the fact that every time countries want protection of their investment in other countries, especially protection from nationalization, because many of the countries, especially after the 1950s, de-colonisation has happened. Most of the countries nationalised many of the industries, many of the operations, financial institutions, for example, India – in the bank nationalization cases - bank nationalization happened. Other industry's nationalization happened. This happened in some cases without compensation and in some cases with compensation but not adequate compensation. So, you can see that in the history of the 18th and 19th centuries, Europe and the US wanted protection because they were the main investors; they wanted standards of protection for investment. So, they want something more than national treatment. And also, the host countries were not permitted to expropriate foreign assets; expropriation is nothing but nationalisation. So, these countries want certain provisions against expropriation. So, the Latin American countries first challenged the favourable treatment of foreign investors. So, if you are the foreign investor, the attitude is that you should be given a red carpet and give a treatment which is more than a national treatment. So, it means different treatments for different investors. So, I am a foreigner coming to your country with my money. So, you give a special treatment over and above the national treatment. This was the recognised principle at that point in time. So, in 1868, see the Calvo, so you can see that the Argentinian minister talked about these particular rights and prohibited countries from intervening to enforce the claims of their citizen in other countries. The Calvo doctrine clearly says that you should give primacy to domestic law rather than to foreign law, especially in arbitration proceedings. So, there are a lot of discussions between the First World War and the Second World War. So, the formation of the League of Nations was one of the forums for discussions on this particular topic. So, the history after the Second World War is very different. So, you can see that, even during the Second World War, the countries were not successful in establishing an international regime for investment. So, actually, they wanted to form a multilateral investment agreement that did not happen even after the Second World War.

Havana Charter

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

So, in the Havana charter in 1948, which formed the Bretonwood institutions, which talked about foreign investment, there is a chapter on economic development which discussed the treatment of foreign investment, but unfortunately, this Havana charter was never recognised, especially the US has not signed it and never ratified and its provisions became only commercial policies incorporated in the GATT, and it was never a part of the GATT Agreement.

GATT Period

The 1947–48 United Nations Conference on Trade and Employment considered investment in its discussions on the expansion of international trade. Investment measures formed part of a wider discussion of restrictive business practices, and the Havana charter for an International Trade Organization (ITO) contained provisions on such measures. But the negotiations leading to the charter and eventually to the GATT showed that governments were not prepared to subject their investment policies to international rules and disciplines.

You can find that at the same time, in the United Nations Conference on Trade and Employment, they discussed on the expansion of international trade and the expansion of investment measures as a part of the wide discussion of restrictive business practices. So, we talked about the Havana Charter, which included provisions; these particular provisions never took off, that is, the charter of ITO was dead. The ITO never came into

force, but the negotiations based on it were going on in the different rounds of GATT negotiations. But none of them, none of the countries wanted to take the burden of commitments with regard to investment at that point in time.

GATT

Following the failure to establish the ITO, industrial countries implemented policies bilaterally through investment promotion and protection treaties and agreements. Such treaties were intended to ensure that investors' property would not be expropriated without prompt, adequate and effective compensation, non-discriminatory treatment, transfer of funds and dispute settlement procedures. In addition, in the late 1950s an evaluation of restrictive business practices was carried out by a GATT group of experts, focusing on activities of international cartels and trusts that could hamper the expansion of world trade and interfere with GATT objectives.

©KDR/RGSOIPL/NPTEL/TRADE LAW

Then, after the failure of ITO, you can see that the GATT ruled from 1947 to 1995, December 1994, a long period of time. So, during this period, the discussions were also very active because of investment promotion. Every country does investment promotion, and at the same time, they want protection as well. So, investment promotion and protection treaties and Agreements were signed in between bilaterally by many countries. Such treaties were intended to protect investors' property, especially protection from expropriation and paying compensation. So, the Hull formula, Corden Hull, who was the state secretary of the United States, prescribed the Hull formula for compensation. So, his formula was very simple that is prompt, adequate settlement of procedures, and settlement of disputes. *Prompt, Adequate and Effective Compensation* on non-discriminatory treatment, transfer of funds and dispute settlement procedures. This was the Corden Hull formula, which was prescribed for any investment. The number of business practices and restrictive business practices has increased even after 1947, and the GATT has discussed this. For example, international cartels, trusts, and other cartels were formed, hampering international trade expansion all over the world at that point in time.

1955 Resolution on International Investment for Economic Development

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

©KDR/RGSOIPL/NPTEL/TRADE LAW

So, studies were done. So, the most important is the *1955 Resolution on International Investment for Economic Development*. So, the parties have adopted this resolution, which clearly says that the countries should conclude bilateral agreements to provide protection and security for foreign investment. Because before 1955 the effort for forming a common single international agreement on investment failed. So, now, they urged the countries to go ahead with bilateral investment treaties. And now also bilateral investment treaties (BITs) are very famous.

Later the issue of international investment surfaced at the United Nations, where developing countries sought international approval for their sovereign aspirations and tried to alter the international investment standards that had prevailed in the colonial period. One outcome was the UN General Assembly's Charter of Economic Rights and Duties of States, passed in 1974. Article 2 of the charter provided for the rights of every state to regulate and exercise authority over foreign investment in conformity with its national objectives and stated that no state would be compelled to grant preferential treatment to foreign investment. The draft Code of Conduct for Transnational Corporations, issued by the United Nations Center on Transnational Corporations, addressed a range of additional issues—almost all of which remain unresolved because most industrial countries opposed a legally binding status for the code. In addition, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Practices, negotiated under the United Nations Conference on Trade and Development, covered investment and competition policy issues—and suffered the same fate.

©KDR/RGSOIPL/NPTEL/TRADE LAW

And there are thousands of bilateral investment treaties(BITs) all over the world. So, here you can also see other developments in 1974. In 1974, the United Nations General Assembly passed the Charter of Economic Rights and Duties of States. And some of the provisions very clearly say the right of every state to regulate and exercise authority over

foreign investment in conformity with its national objectives. So, here you can see that the Hull formula was not adopted, but the Calvo clause was adopted at this point in time. So, a draft code of conduct was formulated for transnational corporations because these TNCs or MNCs: Multinational corporations became more and more involved in the domestic politics and domestic aspects of the country wherever they were going. So, they came up with the code of conduct for transnational corporations, and it was also issued by the United Nations Centre on Transnational Corporations. And you can see that these are legally binding codes of conduct. And also, Multilaterally agreed equitable principles and rules of control of the restrictive practices were also negotiated under the United Nations after 1945. This is under the United Nations Conference on Trade and Development. So, it covered the investment and competition policy as well. So, that also was mostly not adopted by many members.

Later Developments

- **In 1955, the GATT CONTRACTING PARTIES adopted a resolution on International Investment for Economic Development in which they, *inter alia*, urged countries to conclude bilateral agreements to provide protection and security for foreign investment.**
- ***United States v. Canada,* In Canada — Administration of the Foreign Investment Review Act ("FIRA") (BISD 30S/140, 1984) - certain types of undertakings which were required from foreign investors by the Canadian authorities as conditions for the approval of investment projects (local content).**

©KDR/RGSOIPL/NPTEL/TRADE LAW

In 1995, we saw that the adoption of GATT, the adoption of the particular development Agreement in 1955. And the most important development is the case between United States and Canada, which is known as FIRA case, the Foreign Investment Review Act. So, here, Canada insisted that certain types of undertakings be made by foreign investors as a condition for approval of investment projects in Canada; this is nothing but local content. So, certain conditions must be signed or obeyed by these particular multinational companies for those coming to Canada for business.

FIRA Case

- **In Canada — Administration of the Foreign Investment Review Act ("FIRA") (BISD 30S/140, 1984) a GATT dispute settlement panel considered a complaint by the United States regarding certain types of undertakings or engagements which were effectively required from foreign investors by the Canadian authorities as conditions for the approval of investment projects.**

So, these particular restrictions were questioned. So, it is famously known as the FIRA case. It was questioned before the GATT dispute settlement system in 1984. And in this complaint are certain business practices or restrictions from Canada.

US – Canada Case

- **These undertakings pertained to the purchase of certain products from domestic sources (local content requirements) and to the export of a certain amount or percentage of output (export performance requirements).**
- **The Panel concluded that the local content requirements were inconsistent with the national treatment obligation of Article III:4 of the GATT, but that the export performance requirements were not inconsistent with GATT obligations.**

So, this particular case clearly says that purchasing certain materials from the domestic markets or domestic sources constitutes the local conduct requirement and export performance requirement. So, all these additions are barriers. So, the panel in this particular case, the dispute settlement panel held that these particular requirements of local content were inconsistent with the national treatment provisions of Article 3.4 of the GATT Agreement, but the export performance requirements were not inconsistent. This is what the GATT said. So, the local content again was declared as inconsistent with the national treatment principles.

Tokyo Round

After the conclusion of the GATT's Tokyo Round in 1979, renewed attempts were made to bring under its purview a limited number of performance requirements imposed on foreign investors by host countries, particularly local content and export performance requirements (TRIMs). Though many developing countries continued to maintain that foreign direct investment was beyond the GATT's purview, the US and some other industrial countries argued that such performance requirements affect trade and should be addressed by the trade regime.

A 1982 dispute over administration of the Foreign Investment Review Act, brought by the US against Canada, significantly boosted its efforts to bring investment under the purview of multilateral trade disciplines. While many delegations were sceptical about bringing such a dispute to the GATT, its council finally decided to allow a panel to investigate the US claim. Among other things, the panel ruled that Canada's practice of requiring foreign direct investors to purchase Canadian goods was inconsistent with GATT article III:4, though not with article XI:1. The US-Canada dispute set the stage for a more effective challenge of TRIMs at the multilateral level. The ruling also appears to have led to an amendment in US trade legislation to address investment issues more directly.

And this case made a complete problem to the countries like the United States or Canada or the Europe at that point of time, many countries in the Europe at that point of time. So, they have to amend their domestic laws. So, again, in the Tokyo Round Code, you can see that the Tokyo Round of negotiations up to 1979, attempts were made to consolidate a law to eliminate this local content export for performance requirements. So, many developing countries continued to maintain foreign direct investment beyond the GATT's purview. This was the attitude of developing countries. They said that only goods are to be included in the GATT's purview, not investments. So, you can see that the US and some other countries said that this should be there; there must be some kind of regime added to the GATT for the protection of their investments. So, again, the FIRA case, the case between Canada and the US, brought an opportunity to discuss the issues in detail and bring about certain controls or rules and regulations on foreign investment. But I already stated that the GATT panel has very clearly said that the local content provisions were against the national treatment principles, but they have rejected the claim of the US and with regard to Canada with regard to the foreign performance, the export performance criteria. And one is accepted that local content is against the GATT provisions and the other one is rejected.

Uruguay Round

Investment was a major issue in the Uruguay Round, featuring in and affecting discussions and agreements on trade in services (GATS), TRIMs, Trade-Related Aspects of Intellectual Property Rights (TRIPS), government procurement and subsidies. The 1988 Omnibus Trade and Competitiveness Act, which provided the US with negotiating authority for the Uruguay Round, had explicit language on investment. TRIMs were viewed by the US as preventing its transnational corporations from designing coherent global strategies, and their removal became a main negotiating issue for the US and some other industrial countries during the Uruguay Round.

©KDR/RGSOIPL/NPTEL/TRADE LAW

So, investment is a major concern of every country that invests in other countries. So, what will happen to their investment? So, in the Uruguay Round, you can see that there is a concerted effort by the developed countries, and I would say that the developing countries and India actively participated in drafting these Agreements. They wanted various disciplines to be included, and that is why you can see the elaboration in the Uruguay Round over and above the goods; services were included, then investment were included, and the intellectual property was included. So, here you can see that some of the provisions, some of the laws passed by countries like the United States, *the Omnibus Trade Competitiveness Act*. So, it happened during the Uruguay Round negotiation. So, this talks about the foreign investment. So, transnational corporations, so all the concerted efforts were considered as barriers by the US. So, the US said that these barriers should be removed. These barriers should be removed by the developing countries for the smooth working of their multinational companies.

During the negotiations attempts were made to go beyond TRIMs to develop a regime for investment in general, including the right of establishment and national treatment. Industrial countries also argued for the elimination of all TRIMs, rather than just minimizing and avoiding their adverse affects on trade. Most developing countries differed from the US, Japan and other industrial countries on two main counts: whether multilateral disciplines should be limited by existing GATT articles or expanded to develop an investment regime; and whether some or all actionable TRIMs should be prohibited or dealt with case by case, based on a clear demonstration of their direct and significant restrictive and adverse effects on trade. The US and Japan favoured an all-encompassing investment regime, with TRIMs as one part of it. Developing countries called for strict adherence to the GATT mandate and for limiting negotiations to investment measures with direct and significant adverse effects on trade. While developing countries managed to limit the scope of the TRIMs agreement during the Uruguay Round, article 9 called for a review of the agreement's operation within five years of its entry into force—with a view to determining whether it should be complemented with provisions on investment and competition policy.

And you can see that the GATT provisions were expanded to develop investment regimes. So, the Trade-Related Investment Measures should be prohibited. This was the concern of the developing countries at that point in time. So, the US, for example, and other Asian countries like Japan favoured all-encompassing investment regimes, a full investment regime as a part of the WTO and limiting negotiations on investment measures with direct and significant adverse effects on trade. So, every country unanimously said that, yes, the measures that have a direct adverse effect on trade should be prohibited. So, in the TRIMs Agreement, you can see that there was a lot of discussion, and finally, they agreed to come up with certain rules and regulations common to all developed and developing countries.

In addition, the General Agreement on Trade in Services (GATS), which takes a 'positive list' approach, covers investment liberalization since it includes commercial presence as one of the modes of service supply (mode 3). In fact, it is believed that the term 'trade in services' was coined as a way of bringing investment within the scope of Uruguay Round agreements in a more forceful way than the TRIMs agreement would allow due to opposition from developing countries. Most developing countries opposed bringing trade in services under the purview of multilateral disciplines and agreed only on the condition that it be kept separate from negotiations on trade in goods. Thus while TRIMs were discussed during negotiations on goods, the GATS was discussed in separate negotiations on services. Nevertheless, the US and transnational private sector actors devoted substantial efforts to ensuring that 'trade in services' was defined to include investment and that it would become acceptable terminology. Thus it is no surprise that the maximum market access commitments under the GATS have been achieved under mode 3, especially in financial services and telecommunications.

That is why you can find it in the GATT Agreement, which is a positive list approach. So, the third supply mode under the services is the commercial presence – in mode 3, you can find trading services and commercial presence. So, even though most of the developing countries were opposed to bringing trading services under the purview of the GATT or the WTO at that point in time, the developed countries were successful in bringing trading services and including investment. And it was included as an acceptable terminology. For example, financial services and direct communication services were accepted terminologies under mode 3.

Regional agreements such as the North American Free Trade Agreement (NAFTA) go further than the TRIMs agreement and the GATS, providing national and non-discriminatory treatment to foreign investment. NAFTA also prohibits a number of performance requirements. For this reason services are clearly differentiated from investment in NAFTA. In addition, by January 1997 there were 1,330 bilateral investment treaties in 162 countries—up from fewer than 400 treaties in the early 1990s.

2900+416 BITS up to 2022
India - 86

©KDR/RGSOIPL/NPTEL/TRADE LAW 16

Also, here you can see that similar provisions and investment protection provisions were added to regional trade agreements, such as the biggest regional trade agreements, such as the *North American Free Trade Agreement (NAFTA)*. Now, it is the *United States–Mexico–Canada Agreement (USMCA)*, but at that point in time, it was NAFTA. In this TRIMs Agreement, you can see that the non-discrimination principle on investment was accepted by most of the Agreements, and NAFTA especially prohibits a number of performance requirements. So, the developing countries used to put performance requirements and differentiate. So, you can see that NAFTA is a regional trade agreement. They wanted to include investment agreement provisions there. You can see that the lack of a multilateral treaty led to 1330 bilateral investment treaties, which included 162 countries at that point in the 1990s. So, bilateral investment treaties flourished much before even the Uruguay Round of Negotiations, before the establishment of WTO. But now, up to 2022, it is reported that around 3000, more than 3000, we can say that 3300 bilateral investment treaties are in place, and India alone is a party to 86 bilateral investment treaties.

Uruguay Round

- **Provided a mandate for the first time to discuss:**
  "Following an examination of the operation of GATT Articles related to the trade restrictive and distortive effects of investment measures, negotiations should elaborate, as appropriate, further provision that maybe necessary to avoid such adverse effects on trade"
- **Previous attempts at incorporating investment provisions included the Havana Charter in 1947**

So, even though a multilateral treaty like the TRIMs Agreement exists, bilateral investment treaties are flourishing, according to the convenience of individual member countries. As we already talked about the Uruguay Round of Negotiations.

Issues During Negotiations

- **Major problem was the lack of definition and clarity in the mandate due to the work in identifying which measures were trade related.**
- **Developed countries took a broad view of investment and investment measures**
- **Some developing countries took a much narrower view, especially in the context of policies such as technology transfer requirements**

What are the issues faced by the member countries during the negotiating period? The major problem reported was the lack of definition and clarity with regard to the investment measures. So, the developed countries took a broader view that the investment and investment measures should be added, and then developing countries took a narrower view and said that the technology transfer requirements should also be taken into consideration.

Uruguay Round Measures

- **The negotiations were examined the operation of GATT Articles related to the trade-restrictive and trade-distorting effects of investment measures.**
- **There was strong disagreement among participants over the coverage and nature of possible new disciplines.**
- **some developed countries proposed provisions that would prohibit a wide range of measures in addition to the local content requirements found to be inconsistent with Article III in the FIRA panel case, many developing countries opposed this.**

And when it comes to the Uruguay Round, again, you can see that there were strong disagreements among the developing countries with regard to the nature of commitments and the addition of new disciplines. This was aggravated by the FIRA case between the US and Canada. So, this was also an important reason.

Investment and Trade

- **The issue is whether or not a policy with a particular target - in this case an investment measure - can affect trade.**
- **Are there different degrees of trade effects?**
- **Export performance requirements, local content schemes and foreign exchange balancing - ok**

And there is a close connectivity between investment and trade. So, the degrees are very clear: investment trade are connected, and the countries want protection for investment. also, the countries do not want to put barriers like local content, export performance and other performances, and the foreign exchange restrictions also need to be removed.

What are TRIMs

- **The Agreement did not define TRIMs, but provided an illustrative list (Annex 1).**
- **Examples of TRIMs are;**
- **Local content requirements where governments require enterprises to use or purchase domestic products.**
- **Trade balancing measures where governments impose restrictions on imports by an enterprise or link the amount of imports to the level of its exports**
- **Foreign exchange balancing requirements where an enterprise has the level of Imports linked to the value of its exports in order to maintain a net foreign exchange earning.**

So, we will come to the TRIMS Agreement. Within the TRIMS Agreement, whether any trade-related investment measure is defined. So, you can see certain measures: Trade-Related Investment Measures were provided as an illustrative list in Annex 1, but there is no specific definition of trade-related investment measures. So, the governments usually impose restrictions by an enterprise or link the amount of imports to the level of their exports. Export performance: Every country wants the foreign exchange created to be in their country only, not transported, not taken back, and not repatriated back to the host country. So, foreign exchange balancing requirements are one of the important criteria in the calculation of the TRIMS measures, and the value of exports and imports is also a requirement.

Examples of TRIMs

- **Market access**
  - ➢**Ownership or equity restrictions**
  - ➢**Joint venture requirements**
- **Performance Requirements**
  - ➢**Local content schemes**
  - ➢**Export performance requirements**
  - ➢**Foreign Exchange balancing**

So, within the TRIMS Agreement: market access principles. So, for example, you can always put a foreign direct investment cap, ownership equity restrictions, joint venture requirements, and restrictions also can be put. If you look into the performance requirements, local content schemes are completely banned, export performance requirements are banned, and foreign exchange balancing measures are also not recognised by many countries. So, the performance requirements are also a problem.

Objectives of TRIMs Agreement

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

So, the TRIMS Agreement very clearly says, like any other WTO Agreement, that the objective is to improve progressive liberalisation and also increase the economic growth of all trading partners and developing country members while ensuring free competition. So, that means, like any other WTO Agreement, the TRIMS Agreement provides for what is the objective of the TRIMS Agreement.

Legal Framework

- **The TRIMs agreement does not provide any new language**
- **It focusses on two Articles that were identified in a previous case under the GATT**
  - **Article III (National Treatment)**
  - **Article XI (Quantitative Restrictions)**

So, the legal framework of the Agreement again says that it is subjected to the cardinal principle of WTO. One is the national treatment principles, and the other is the quantitative restrictions under Article 11 of GATT.

Aims of the Agreement

- **Desiring**
  - to promote the expansion and progressive liberalization of world trade and to facilitate investment, while ensuring competition
- **Take into account**
  - trade, development and financial needs of developing countries, particularly least developed countries
- **Recognizing**
  - certain investment measures can cause trade-restrictive and distorting effects

So, they say that promoting liberalization and promoting investment and also at the same time, ensuring competitions. And the financial needs of the countries, investment measures, trade restrictive and distorting effects to be removed by every country.

Coverage

- The coverage of the Agreement is defined in Article 1, which states that the Agreement applies to investment measures related to trade in goods only.
- Thus, the TRIMs Agreement does not apply to services.
- The term "trade-related investment measures" ("TRIMs") is not defined in the Agreement.
- However, the Agreement contains in an annex an Illustrative List of measures that are inconsistent with GATT Article III:4 or Article XI:1 of GATT 1994.

In the coverage, you can see that the TRIMS Agreement is not applicable to services, which is why you can see that only Trade-Related Investment Measures are taken care of by the Agreement, but unfortunately, the Trade-Related Investment Measures are not defined in the Agreement. But we can find the illustrative list in Articles 3.4 and Article 11.1 of the GATT 1994.

GATT Articles

- **Article III (GATT)**
  - **National treatment of imported product, unless specified in other agreements**
  - **Subjects the purchase or use by an enterprise of imported products to less favourable conditions than the purchase or use of domestic products**
- **Article XI (GATT)**
  - **Prohibition of quantitative restrictions on imports and exports**
  - **Part of the general trend in textiles and agriculture to phase out the use of quantitative restrictions**

And Article 3 talks about the national treatment principles, and many times, we read about the national treatment principle, which is applicable to the TRIMS Agreement as well. Article 11 talks about the prohibition of quantitative restrictions on imports and exports. So, quantitative restrictions are now banned under the WTO Agreement.

Foreign Investment

- **The Agreement is not concerned with the regulation of foreign investment.**
- **The disciplines of the TRIMs Agreement focus on discriminatory treatment of imported and exported products and do not govern the issue of entry and treatment of foreign investment.**
- **Local content requirement imposed in a non-discriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement .**

And if you come to foreign investment, definitely, you can put a cap, but you cannot prohibit foreign direct investment. In certain areas, you can put restrictions subject to the national treatment principle. Local content requirements are absolutely not acceptable to any country.

TRIMs

- **The Agreement on Trade-Related Investment Measures (TRIMS) recognizes that certain investment measures can restrict and distort trade.**
- **It states that WTO members may not apply any measure that discriminates against foreign products or that leads to quantitative restrictions, both of which violate basic WTO principles.**

And what is the list of Trade-Related Investment Measures that we also have to look into?

Obligations

TRIMS: Basic Substantive Obligations:

- No WTO Member may apply an investment-related measure that is prohibited by or inconsistent with the provisions of:
  - GATT Art. III (National Treatment of imported products) or
  - GATT Art. XI (Prohibition of quantitative restrictions on imports or exports)

  except as permitted under provisions of the TRIMS Agreement.
- * An Illustrative list of prohibited TRIMS is annexed to the TRIMS Agreement. But, generally, they include:
  - Local Content measures
  - Trade Balancing measures.
- "Local Content" measures are measures setting out *minimum* levels of locally-made components that must be incorporated in goods or services produced domestically.
- "Trade Balancing" measures are measures requiring an investor to use earnings from its exports to pay for imported inputs or other imports.

So, you can see there are many trade-related investment measures. We talked about the local content, quantitative restrictions and other trade balancing measures.

TRIMs

Illustrative List of TRIMS:

- *Local Content* – impose some certain amount or value of domestic inputs
- *Trade Balancing* – volume or value of imports tied to levels of exports
- *Foreign Exchange Balancing* – requires that foreign exchange made available for imports must be a certain proportion of the value of foreign exchange realized from exports
- *Foreign Exchange Restrictions* – restricts access to foreign exchange in order to constrain the volume of imported inputs
- *Manufacturing Requirements* – requires certain products to be produced locally
- *Manufacturing Limitations* – prevents firms from manufacturing certain products or product lines in the host country
- *Technology Transfer* – requires specified technology to be transferred to host country for use locally or certain types of R&D to be conducted locally
- *Licensing of Technology* – requires investor to license technology for use in the host country

So, if you look into it elaborately, you can see an illustrative list of TRIMS in the annexure. For example, the local content requirement, which we already talked about, local content - the FIRA case, trade balancing requirement, the balancing of the value of imports and exports, foreign exchange balancing, foreign exchange made available to the imports must be a certain proportion of the value of the foreign exchange realised from exports. So, foreign exchange resistance is also a problem. Then, manufacturing requirements, certain products to be made locally, and manufacturing limitations prevent the firms from manufacturing certain products or product lines in the host country. Then again, technology transfer is the most important and controversial provision, that is, the technology transfer. Technology transfer specifically requires the technology to be transferred to the local collaborator or to certain types of collaborations to be entered into the host country and the investing country. Then, it is not only technology transfer but also licensing of technology, which requires the investors to license technology for use in the host country. For example, China has implemented this particular provision and very recently, the WTO dispute settlement system said that these provisions come under the Trade-Related Investment Measures, and that is to be eliminated from the domestic laws.

TRIMs

Illustrative List of TRIMS (2):

- *Domestic Sales* – requires an investor to sell a certain proportion of its output in the host country
- *Export Performance* – requires that a minimum proportion or value of production in host country be exported
- *Export Controls* – certain products may not be exported
- *Product Mandating* – requires investor to supply certain markets with designated products or products manufactured in a specified facility or operation or some products may be exported only from host country
- *Remittance Restrictions* – restricts the right of the investor to repatriate returns from its investment
- *Local Equity* – requires that a certain percentage of a firm's equity must be held by local investors in the host country.
- *Market Reserve Policy* – some markets reserved for local production

Other illustrative lists are domestic sales, export performance, export controls and remittance restrictions, repatriation restrictions, and local equity. So here, equity must be held by locals or local investors in the host country, restrictions that are local equity restrictions and market reserve policy. For example, in every country small scale industries have market reserves, market reservation which increases the local production.

Basic Obligations

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

So, the basic commitments of GATT say that any kind of trade investment measures which is against Article 3 or Article 11 is said under Article 2.1, which says that inconsistent with the provisions are against the TRIMS mandate, against the TRIMS Agreement, against the TRIMS Investment Agreement. So, paragraph 4 of Article 3 and paragraph 1 of Article 11, talks about illustrative lists and Annex 2 of the TRIMS Agreement.

Obligations

TRIMS: Basic Substantive Obligations (2):

* Members must notify to the WTO any investment measure that is inconsistent with the GATT (Arts. III, XI).
* Members must *eliminate* any TRIM that is inconsistent with Arts. III, XI on a schedule of 2 years from entry into effect of the WTO for developed countries, 5 years for developing countries, & 7 years for least-developed ones.
* But, note: the WTO Council for Trade-in-Goods may, upon request, extend the transition period for developing or LDC countries *subject* to conditions imposed on them.
* Also, note, that Viet Nam *may* be required to eliminate any TRIMS *sooner* by reason of requirements imposed under its bilateral WTO accession agreements.
* Members may *not* institute any *new* TRIMS or *amend* any existing measures that would result in, or increase, their inconsistency with GATT Arts. III, XI ("*Standstill*" Clause).

©KDR/RGSOIPL/NPTEL/TRADE LAW 34

And obligations: you can see substantial obligations. So, the members are to notify every investment measure that is inconsistent with the GATT. Second, members must eliminate any TRIMS that is inconsistent with Article 3 and Article 11 on a schedule of 2 years from the entry into effect. And we can see again that the TRIMS may be amended from time to time, the TRIMS list may be amended from time to time.

Obligations

TRIMS: Basic Substantive Obligations (3):

* *Special & Differential Treatment:*
  - *Developing* Members that can demonstrate particular difficulties in implementing the provisions of the TRIMS Agreement may request extension of the transition period from the Council on Goods. More than 30 Members have requested such an extension.
  - The Agreement allows *developing* countries to *deviate temporarily* from TRIMS requirements as permitted under GATT Art. XVIII & related WTO provisions authorizing *safeguards* for balance of payments purposes.
* TRIMS: Transparency Provisions:
  - The TRIMS Agreement requires Members to notify to the WTO Secretariat lists of publications in which their TRIMS may be found.
  - The TRIMS Agreement established the WTO Committee on Trade-Related Investment Measures to review notifications & serve as a forum to examine Member implementation of the Agreement.

©KDR/RGSOIPL/NPTEL/TRADE LAW 35

And obligations: we saw that there is a special provision with regard to the obligations of special and different differential treatment to developing countries. But none of the countries give special treatment under this particular provision, and the developing countries are finding it very difficult to get special treatment. Also, the TRIMS Agreement established a WTO committee on Trade-Related Investment Measures to take care of the functioning of the particular Agreement.

TRIMs Inconsistent with NT A.III

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

So, TRIMS inconsistent with national treatment principles: so here an illustrative list of all the examples such as local content are against exports or against their selling in other countries. So these provisions, any provision which is inconsistent with Article 3, the national treatment provisions are held inconsistent with the TRIMS Agreement.

Prohibition of QR

- **Paragraph 2(a) of the Illustrative List covers measures which limit the importation by an enterprise of products used in its local production in general terms or to an amount related to the volume or value of local production exported by the enterprise.**
- **Finally, paragraph 2(c) covers measures involving restrictions on the exportation of or sale for export by an enterprise, whether specified in terms of particular products, volume or value of products or in terms of a proportion of volume or value of its local production.**

So, an illustrative list, a long illustrative list which covers most of the areas, the volume, value, local production, export, import, etcetera. And also you can see that, the value of products is also very important or value of its local production is also important.

General Exceptions

- **Article 3 of the TRIMs Agreement provides that all exceptions under GATT 1994 shall apply, as appropriate, to the provisions of the TRIMs agreement.**
- **Article 4 allows developing countries to deviate temporarily from the obligations of the TRIMs Agreement, as provided for in Article XVIII of GATT 1994 and related WTO provisions on safeguard measures for balance-of-payments difficulties.**

General exceptions also deal exclusively with Article 3. So, all the exceptions must be related to or appropriate to or be under the provisions of the TRIMS Agreement. For balance of payment problems, the members can put restrictions on any agreement.

Transparency

- **Article 6 provides for the notification to the WTO Secretariat of lists of publications in which TRIMs may be found.**
- **Article 7 of the TRIMs Agreement establishes a Committee on Trade-Related Investment Measures as a forum to examine the implementation operation of the Agreement.**

Article 6 provides for the notification of the WTO secretariat of the list of obligations and a list of publications in which TRIMS may be formed. Article 7 talks about the TRIMS Agreement and establishes the committee on trade-related investment measures as a forum to examine the implementation of the Agreement. So there is a committee on Trade-Related Investment Measures, which looks into it. Transparency provision: the transparency provision is applicable to all the WTO Agreements, including the TRIMS Agreement. So, all the laws and regulations are to be published from time to time.

Conclusion

- It is observed that TRIMs has a long history, that dates back to 18th and 19th centuries, wherein several attempts had been initiated for establishing an international agreements on investment and trade.
- The main objective behind adopting TRIMs was to liberalize the trade by facilitating the investment at international frontier.
- It is also observed that Uruguay Round and Tokyo Round were the major factors for considering investment as a prospective ground for enhancing global trade.

So, I would say that the TRIMS Agreement, at the beginning of the 20th century or 19th century is different from the present scenario. Because in the present scenario, the WTO Agreement on Investment is applicable to 164 member countries. They cannot commence with a new provision, with a new TRIMS. This can only be defined as TRIMS. What I can explain to you is if you adopt any local content provisions, if you adopt any kind of illustrative list, or any one measure from the illustrative list, then it is considered to be against the TRIMS Agreement. So, the TRIMS Agreement deals with only Trade-Related Investment Measures mentioned under this particular list. So otherwise, there are no rights at all.

So, most importantly, we can see that the Uruguay Round of Negotiations, at that point in time, had agreed only upon Trade-Related Investment Measures, and it is considered to be against Articles 3 and Article 11 of the GATT Agreement. So, no countries can put local content requirements, no country can violate Article 3 of the GATT Agreement and which will be considered as null and void by the countries, or you can go to the dispute settlement system. So, we will continue with the discussion on the TRIMS Agreement, Trade-Related Investment Measures and some of the cases dealt with by the WTO in the coming classes.

Thank you.