

Foreign Investment

GEORGE KLEINFELD AND DEBORAH WENGEL

The world of foreign investment law witnessed two ominous trends in 1996: (1) the proliferation of U.S. extraterritorial sanctions against non-U.S. foreign investors in Iran, Libya, and Cuba; and (2) the implementation of highly discriminatory investment measures by Brazil, Indonesia, and other developing countries intent on increasing the size and sophistication of their domestic automotive industries. Both trends have generated substantial traffic on Rue de Lausanne in Geneva, Switzerland, home of the World Trade Organization (WTO). The outcome of these disputes will either demonstrate the WTO's effectiveness or expose its limitations in the field of trade-related investment measures.

I. Extraterritorial Sanctions

The Cuba Liberty and Democratic Solidarity (LIBERTAD) Act¹ and the Iran and Libya Sanctions Act,² both passed during the 1996 session of Congress, explicitly and directly extend U.S. law to cover transactions between foreign companies outside U.S. borders. The LIBERTAD Act, also known as the Helms-Burton Law after its principal House and Senate sponsors, is the more egregiously extraterritorial of the two, because it potentially subjects foreign investors in Cuba to private lawsuits and treble damages in U.S. courts, in the event they are found to have "trafficked" in property expropriated by the Castro regime.³ In contrast, the Iran and

George Kleinfeld and Deborah Wengel are attorneys with Fonthiem & Hammonds in Washington, D.C. Mr. Kleinfeld is also adjunct professor of International Finance at George Mason University Law School in Fairfax, Virginia.

1. 22 U.S.C. §§ 6021-6091.

2. Pub. L. No. 104-172, 50 U.S.C.S. § 1701.

3. Title III of the Helms-Burton Act allows U.S. nationals to recover treble damages from foreign companies that have engaged in trafficking, which is broadly defined to include possessing, distributing, transferring, holding an interest in, or benefiting from commercial activity involving property confiscated from a U.S. national, even if the plaintiff acquired U.S. nationality after the confiscation occurred. President Clinton suspended the right to bring suit under Title III until February 1997, and may extend the suspension thereafter, but he did not suspend Title IV, which provides for exclusion from the United States of aliens that have engaged in trafficking. See, generally, Judith A. Lee, *Conflict over Cuba*, LEGAL TIMES, September 9, 1996. On May 3, 1996, the European Communities requested WTO consultations with the United States concerning Helms-Burton. See U.S.—*The Cuban Liberty and Democratic Solidarity Act* (WT/DS38/2).

Libya sanctions, if imposed by the president, would involve punitive action taken directly and exclusively by the U.S. Government, not by private plaintiffs.

Although the United States claims that the "national security" exemption under the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT) will vindicate all of its sanctions measures, it has yet to explain how lawsuits to recover damages from foreign defendants over disputed property confiscated by Cuba over thirty years ago would enhance America's national security in 1997 and the years ahead.⁴ If NAFTA and WTO challenges filed by U.S. trading partners fail to compel the withdrawal or suspension of U.S. extraterritorial sanctions, blocking statutes adopted by the European Union, Canada, and Mexico could create acute legal difficulties for foreign companies caught in the middle of the sanctions debate.⁵

Because other authors have addressed (and excoriated) the U.S. extraterritorial sanctions at length, this article will focus on Brazil and Indonesia's automotive investment measures, and the landmark WTO cases filed against them.

II. Automotive Trade-Related Investment Measures

GATT has since its inception in 1947 governed the trade-related aspects of investment measures, while leaving other aspects of investment policy to national discretion. The Uruguay Round of GATT negotiations, which led on January 1, 1995, to the birth of the WTO, also yielded an Agreement on Trade-Related Investment Measures (TRIMs).⁶ Rather than reaching beyond the realm of trade, the TRIMs Agreement left no doubt that it "applies to investment measures related to trade in goods only," such as the required use of domestic content in preference to imported goods.⁷ But within the agreement's scope lie many policies and restrictions that discourage investment as well as inhibiting trade.

In 1996, Brazil and Indonesia's automotive investment measures attracted the first two WTO cases filed under the TRIMs Agreement.⁸ Because of the breadth of the measures in dispute and the diverse claims and defenses available to the parties, these cases could result in either strong and effective WTO discipline on TRIMs, as broadly interpreted, or the creation of substantial loopholes for developing countries.

The automotive sector in both developing and developed countries is often the subject of special trade and investment restrictions, from import quotas and voluntary restraints to local content rules and other forms of investment incentives and requirements. Only a few years

4. Also under attack is the denial of visas under Helms-Burton to foreign business executives doing legitimate business in the United States. *Id.*

5. For information on these blocking statutes, see Richard G. Dearden, *Trade with Cuba, Canada and the United States*, ABA INT'L LAW NEWS, Spring 1996, at 1; see also *European Commission Proposes EU Anti-Boycott Law*, Office of Press and Public Affairs, European Commission Delegation, July 30, 1996, No. 47/96.

6. General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, substantially reprinted in 33 I.L.M. 1 (1994), Agreement on Trade Related Investment Measures [hereinafter TRIMs]

7. TRIMs, *id.* at art. 1.

8. Two complaints have been filed with respect to the Brazilian measures. *Brazil—Certain Automotive Investment Measures*, WT/DS1, filed by Japan on July 30, 1996, and *Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector*, WT/DS52, filed by the United States on August 9, 1996. Three complaints have been filed against Indonesia. *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54, filed by the European Communities on October 3, 1996, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS55, filed by Japan on October 4, 1996, and *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS59, filed by the United States on October 8, 1996.

ago, the U.S. Congress had considered (without passing) a mandatory local content ratio of seventy percent to reduce the automotive trade deficit with Japan. Canada, another self-styled paragon of GATT, has maintained automobile local content measures for many decades, first on an independent basis, and beginning in 1966 under an Auto Pact with the United States.⁹

Auto trade attracts controversy because of its predominant role in total employment, wages, investment, and income in virtually all countries large enough to maintain domestic automobile production. Although GATT did not exclude the automotive sector from its various prohibitions on nontariff barriers, the absence of a binding dispute resolution mechanism prior to formation of the WTO encouraged widespread evasion and disregard of GATT rules to protect domestic automobile producers.¹⁰

An Annex to the TRIMs Agreement now clarifies that violations of the TRIMs Agreement (and GATT Articles III and XI) can take the form of investment incentives and inducements, as well as mandatory restrictions, and that trade balancing as well as local content requirements are prohibited. Trade balancing requirements, which many developing countries have applied in their automotive sector, mandate a particular ratio of exports to imports by individual producers.

In addition to GATT and the TRIMs Agreement, the WTO Agreement on Subsidies and Countervailing Measures (SCM) also prohibits domestic content and trade balancing requirements, if imposed as preconditions for receipt of a subsidy.¹¹ A subsidy can include "government revenue . . . forgone or not collected," such as a tariff reduction or tax exemption.¹² But developing countries receive "special and differential treatment" under Article 27 of the SCM Agreement. In particular, Article 27.3 waives the prohibition on domestic content subsidies for five years (*i.e.*, until the year 2000), and Article 27.4 provides an eight-year phase out for export subsidies (while prohibiting developing countries from increasing the level of their export subsidies during the phase-out period).

The TRIMs Agreement also gives developing countries a period of five years to eliminate nonconforming TRIMs, but only if the developing country has notified such TRIMs to the WTO within ninety days of the agreement's entry into force (*i.e.*, April 1, 1995). TRIMs notified in this manner may not be made more restrictive during the phase-out period. Unlike the TRIMs and SCM Agreements, the GATT has no generalized waiver or phase out of Articles III or XI for developing countries, although, "in the event of a conflict between a provision of [GATT] and a provision of another [WTO] agreement . . . the provision of the other agreement shall prevail to the extent of the conflict."¹³ The confluence of these SCM, TRIMs, and GATT provisions will determine the outcome of any WTO panel decisions on automotive investment measures, whether involving Brazil, Indonesia, or other developing countries.

9. JON R. JOHNSON & JOEL S. SCHACHTER, *THE FREE TRADE AGREEMENT—A COMPREHENSIVE GUIDE* (1988), at 72.

10. *See, e.g.*, George Kleinfeld, *Taxation of Automobiles and GATT National Treatment Obligations Where to Draw the Line*, *WORLD COMPETITION*, Vol. 19, No. 1, September 1995, at 77.

11. Under Article 3.1 of the SCM Agreement, "Prohibited Subsidies" include: "(a) subsidies contingent in law or in fact . . . upon export performance . . . ; (b) subsidies contingent . . . upon the use of domestic over imported goods." General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, substantially reprinted in 33 I.L.M. 1 (1994), Agreement on Subsidies and Countervailing Measures [hereinafter SCM].

12. SCM art. 1.1 (a)(1)(ii).

13. See Annex IA of the Agreement Establishing the World Trade Organization.

A. THE BRAZILIAN MEASURES

Brazil and Argentina, along with Uruguay and Paraguay, conceived the southern common market, Mercosur, in 1991, with elimination of intra-regional tariffs and trade restrictions occurring in stages through the year 2000.¹⁴ In the early 1990s, Argentina used a combination of incentives and performance requirements to attract investment in local production by major world automakers, enabling it to develop a substantial trade surplus with Brazil in the automotive sector. In 1995, Brazil responded by increasing its duty on automobiles from thirty-two to seventy percent, its bound (maximum permissible) rate under the Uruguay Round agreement. Brazil also imposed a comprehensive regime of trade restrictions and investment incentives in the automotive sector, including both domestic content and trade balancing requirements, as a condition for preferential access to its market.

The Brazilian measures were authorized by a presidential decree issued in December 1995.¹⁵ Under this decree, qualifying producers can, through 1999, receive a reduction in duties of up to ninety percent on imports of capital goods, and from eighty-five to forty percent on imports of inputs (raw materials, parts, and components). Qualifying producers also enjoy a reduction by fifty percent of the duty on imported vehicles. To qualify, producers must maintain a domestic content ratio of sixty percent (*i.e.*, the ratio by purchase price of domestically produced inputs to total inputs used by the producer must equal or exceed sixty percent). In addition, the producer must maintain one-to-one ratios of imported capital goods to domestically produced capital goods and of domestically produced raw materials to imported raw materials. Finally, the producer must satisfy the following trade balancing requirements: its imports of vehicles and inputs combined may not exceed its level of "net exports," and its imports of auto parts may not exceed two-thirds of net exports. Net exports include exports of both vehicles and parts, with a multiplier applied to export value in order to reward domestic manufacturing by the producer, particularly manufacturing using domestic tools and other capital goods.

U.S. and European automakers who already had substantial manufacturing operations in Brazil (*e.g.*, General Motors, Ford, and Volkswagen) almost immediately achieved qualifying status under the decree.¹⁶ The substantial reduction of duty rates on imported inputs and capital goods have increased the price competitiveness of their locally produced vehicles. In addition, they pay only one-half the prevailing seventy percent rate of duty on imported automobiles, giving them a substantial pricing advantage on their sales of imported as well as domestically produced vehicles. Understandably, the objections to Brazil's measures have come not from the qualifying automakers, but from those which had intended to serve the Brazilian market primarily by exporting to, rather than producing in, Brazil.

After informal consultations had failed to yield any progress, the United States and Japan initiated consultations with Brazil in Geneva under the WTO's Dispute Settlement Understanding (DSU). To date, none of the parties have requested the formation of a panel. On October 11, 1996, the Office of the U.S. Trade Representative (USTR) initiated an investigation of Brazil's measures under section 301 of the Trade Act of 1974, inviting comments from interested

14. See generally, *Remapping South America: A Survey of MERCOSUR*, THE ECONOMIST, October 12, 1996.

15. Decree No. 1,761 of December 26, 1995.

16. For information on automaker investment in Latin America, see, generally, *Special Supplement: Automakers Strategies*, FDI NEWS, December 1995 (supplement).

parties on whether and how it should respond to the measures.¹⁷ Only General Motors (GM) and Honda North America submitted comments. Since the measures are good for GM, GM also portrayed them as good for America (in keeping with the time-honored aphorism).¹⁸ In contrast, Honda, which exported 5,000 automobiles from its assembly plants in Ohio to Brazil in 1994, criticized the Brazilian measures for violating "accepted principles of international trade and investment."¹⁹ Honda's U.S. exports to Brazil fell to only 821 over the first three quarters of 1996 compared to 4,049 during the same period in 1995 (prior to imposition of the measures).

The U.S. Trade Representative appears mindful of the concerns of Honda and other foreign-owned automakers that export from U.S. assembly facilities, as well as the concerns of U.S. auto workers, whose job security rises with the level of U.S. automobile exports. Although, as qualifying automakers under the measures, GM and Ford can import vehicles and inputs from the United States into Brazil at lower rates of duties than some of their competitors, they also have an obligation to produce locally in Brazil. But even if the measures did not, on balance, appreciably reduce U.S. auto exports to Brazil, USTR would still have a much broader interest to pursue: defending the integrity of the TRIMs Agreement and its potential benefits for U.S. exporters and investors as a whole by attacking blatant departures from its terms in Brazil and elsewhere.

Brazil's measures violate the TRIMs Agreement by providing more favorable treatment to domestic over imported goods, in the form of incentives for the purchase and use of domestic inputs and capital equipment. The use of domestic goods entitles a producer to reduced duties on its remaining imports of inputs and equipment, as well as its imports of finished vehicles. Such inducements for the use of domestic content violate GATT Article III:4 as well as the explicit terms of the TRIMs Annex, as referenced in Article 2 of the TRIMs Agreement.²⁰ The trade balancing portion of the measures also violates GATT Articles III:4 and XI and the TRIMs Agreement, by restricting imports of finished automobiles and parts at reduced tariff rates to the producer's level of net exports.²¹ A producer that fails to satisfy the trade balancing requirements will lose the ability to import vehicles and inputs without payment of prohibitively high tariff rates.

Brazil did not establish its measures prior to the January 1, 1995, effective date of the TRIMs Agreement or notify them to the WTO by April 1, 1995. It therefore has no entitlement to a transition period for the measures. In addition, Brazil also fails to qualify for a phase-out

17. Initiation of Section 302 Investigation and Request for Public Comment; Practices of the Government of Brazil Regarding Trade and Investment in the Auto Sector, 61 Fed. Reg. 54,485 (1996).

18. See Comments of General Motors Corporation, submitted to the Office of the U.S. Trade Representative, Docket 301-110, November 6, 1996.

19. Comments of Honda North America, Inc., submitted to the Office of the U.S. Trade Representative, Docket 301-110, November 8, 1996, at 1.

20. The TRIMs Agreement restated and clarified the applicability of GATT Articles III and XI to investment measures. GATT Article III: 4 obliges WTO members to provide imported goods with treatment "no less favorable" than domestic like products under "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." These national treatment requirements apply to trade-related investment measures under both GATT Article III and Article 2 of the TRIMs Agreement.

21. The trade balancing requirements violate GATT Article III by treating domestic goods more favorably than imports—in that use of domestic parts and equipment reduces the floor level of net exports required of the producer, as the floor level of net exports falls in proportion to use of domestic over imported goods. Trade balancing also violates GATT Article XI, which prohibits the use of quantitative restrictions (import and export quota ceilings on goods).

period under the SCM Agreement. Its measures promote exports by conditioning the reduction of duties on the achievement of a floor level of net exports, in clear violation of Article 3.1 of the SCM Agreement. Since the measures were introduced after the effective date of the SCM Agreement, they constitute new subsidies without any protection under the SCM transitional provision for developing country export subsidies.

The measures appear to violate other provisions of GATT, in addition to the TRIMs-related Article III and Article XI violations. In particular, GATT Article I requires the "immediate and unconditional" extension of most-favored-nation (MFN) treatment to imports from WTO members relative to imports of like products from any other member country. Brazil cannot permit the entry and sale of automobiles from Canada, for example, at lower rates of duty than imports of "like" automobiles from France. Brazil could attempt to defend its measures under both GATT Articles I and III by claiming that automakers and automotive imports from any country could potentially qualify for reduced duties, if they satisfy the eligibility requirements. But panel decisions have interpreted the nondiscrimination requirements of GATT to apply "to each individual case of imported products."²² Because the non-discrimination obligation applies to goods, not producers, it does not allow the use of performance requirements as a basis for rewarding imports from "qualifying" producers and penalizing imports of like products from "nonqualifying" producers.

Despite the measures' broad and serious vulnerability to WTO challenge, Brazil has not offered to withdraw them. Instead, in August 1996 it established a tariff-rate quota, under which nonqualifying manufacturers from Japan, Korea, and the EU may collectively import up to 50,000 automobiles into Brazil at the reduced rate of duty, even if they fail to satisfy the eligibility requirements for preferential treatment under the measures.²³ Only imports in excess of this ceiling would pay the higher rate. Although the tariff-rate quota does little or nothing to resolve the inconsistencies between the measures and the TRIMs or other WTO agreements, it does preserve the level of imports at reduced duties that prevailed prior to imposition of the measures in December 1995.

From this perspective, adoption of the tariff-rate quota by Brazil represents a victory for the TRIMs Agreement and the WTO as a whole, not in legal terms but in terms of forcing an accommodation at least in part of the concerns of WTO members who had lost access to the Brazilian auto market in the wake of the measures. Whether the United States or other WTO members will resort to a WTO panel proceeding if necessary to obtain repeal of the measures remains to be seen. For the meantime, the bulk of public attention in this area has shifted to Indonesia.

B. THE INDONESIAN MEASURES

The Asian model of automotive investment regulation differs in one overriding respect from the South (and North) American model—by emphasizing local ownership as well as local content.

22. U.S.—*Section 337 of the Tariff Act of 1930*, BISD 36S/345, paras. 5.11, 5.14, adopted November 7, 1989. See also the first panel determination of the post-Uruguay Round era, U.S.—*Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R, April 29, 1996), which concluded that: (1) GATT does not allow discrimination dependent on the characteristics of the producer (e.g., qualifying or nonqualifying), (2) any imported good that is physically identical to a domestic good must be treated no less favorably under GATT Article III: 4, regardless of the identity of the importer, (3) "less favorable treatment of particular imported goods in some instances could not be balanced by more favorable treatment of other imported products in other instances."

23. See U.S. *Considering Two WTO Panels Against Brazil Auto Regime*, INSIDE U.S. TRADE, September 27, 1996, at 6.

Japan's success in developing an indigenous, locally owned auto industry encouraged Korea to follow a similar pattern, with Malaysia also successfully developing a national car—the Proton Saga—in the 1980s. Indonesia had a heavily protected automotive market as well, but discriminated primarily on the basis of local content rather than local ownership until 1996. Then, in reaction to foreign, and particularly Japanese, domination of its auto industry, President Suharto approved a system of tax and tariff preferences to promote the development of a national car by one of his sons, Hutomo “Tommy” Mandala Putra, in a joint venture with Kia Motors of Korea.²⁴ As initially decreed in February 1996, the National Car program granted “pioneer status” to locally owned automakers operating through an indigenous brand name and achieving domestic content levels of twenty percent in year one, forty percent in year two, and sixty percent in year three of their operations.²⁵ Only one company received pioneer status under the decree, PT Timor Putra National, the entity created by Suharto's son to engage in joint venture production with Kia of the “Timor” sedan in Indonesia. The National Car program entitled the manufacturer of the Timor to import parts and materials duty free, and exempted the Timor from the luxury tax of thirty-five percent (twenty percent for cars with low capacity engines) that applied to all other vehicles sold in Indonesia. Other automakers can qualify for duty-free treatment of imported parts only once they have achieved a domestic content level of sixty percent, and even then, their vehicles remain subject to luxury tax.

When it became apparent that the Timor could not achieve the twenty percent local content threshold in its first year of production, President Suharto issued a second decree in June 1996 that allowed the import of 45,000 national cars duty free during their first year of sales, if the manufacturer used at least twenty percent Indonesian content in the offshore assembly operation or purchased an equivalent amount of Indonesia parts for other purposes (and employed a minimum number of Indonesia workers in the offshore production facility). Kia will supply the Timor from a Korean auto plant until production shifts to its joint venture facility in Indonesia, with no duty applied to the Korean-made Timor in contrast to duty rates of one hundred twenty-five percent (plus a seventy-five percent surcharge) on all other imported automobiles.

Unlike the Brazilian measures, Indonesia's National Car program discriminates against virtually all of the world's leading automakers. Nothing less than universal condemnation has greeted the National Car program in Washington, Brussels, and Tokyo. At WTO consultations with Indonesia that began in October 1996, the U.S., EU, and Japanese delegations presented a number of objections to the program under GATT, the TRIMs Agreement, and the SCM Agreement, among other WTO agreements.

The tariff and tax exemptions for imports of National Cars and their parts from Korea violate the MFN requirement of GATT Article 1. Although the National Car program does not explicitly discriminate in favor of Korea, the fact is that imports of vehicles and parts from Korea enjoy substantial competitive advantages against other imports under the program. The MFN violation is more extensive but basically the same as that occurring under Brazil's measures—particular imports from third countries will enter Indonesia at higher tariff rates and be subject to higher excise taxes than imports of like products from Korea. For similar reasons,

24. John McBeth & Emily Thornton, *Power Steering: Jakarta's National Car Angers Auto Makers—Again*, FAR EASTERN ECONOMIC REV., June 20, 1996, at 60.

25. *Indonesia's National Car Drives into Trouble*, FINANCIAL TIMES, August 30, 1996.

the program also violates the national treatment provisions of GATT Article III.²⁶ The exemption of a domestically produced automobile from luxury tax triggers an obligation under GATT Article III:2 to extend the same exemption to "like" automobiles from all WTO member countries.²⁷

Indonesia reportedly claims an exemption from GATT under Article 27.3 of the SCM Agreement. As noted above, for developing countries such as Indonesia, Article 27.3 waives for five years the prohibition of SCM Article 3.I(b) on the award of subsidies (such as tariff exemptions) contingent on the use of domestic content. Indonesia appears to maintain that this waiver not only immunizes it from challenge under the Article 3.I(b) prohibition, but also from challenge under any other provision of the SCM Agreement or GATT (by virtue of the precedence given to the SCM Agreement "in the event of a conflict" with GATT). But the conflict between the Article 27.3 waiver and the grounds for objection to the program under GATT appears more illusory than real. The program violates GATT because it denies MFN and national treatment to imports from third countries, regardless of whether it also subsidizes domestic production.

Nevertheless, Indonesia's waiver claim under the SCM Agreement increases the importance of the TRIMs Agreement in resolving the dispute. The TRIMs Agreement incorporates GATT Article III, including the Article III:2 prohibition against imposing higher excise taxes on imported goods than on domestic like products. Moreover, the TRIMs Agreement and the SCM Agreement have equal stature under the WTO system.

Even in the event of a conflict, nothing in the WTO canon of agreements would suggest that the SCM Agreement takes precedence. This leaves one overriding issue in the case and for global commerce in general—does the TRIMs Agreement apply to the National Car program?

Traditionally, restrictions on ownership as opposed to content raised no claims under GATT, as GATT applied only to trade in goods. Countries had the right to prohibit foreign ownership of production assets in the automotive or any other sector, as long as such measures did not restrict the access of domestically owned firms to imported goods. Bilateral investment treaties were used to address such ownership restrictions, not GATT, and the pending Multilateral Agreement on Investment is an initiative of the Organization for Economic Cooperation and Development (OECD), not the WTO.²⁸ But, somewhat unexpectedly, the TRIMs Agreement may have crossed the line from regulation of trade into regulation of ownership, by virtue of a close link between trade restrictions and ownership limitations in some cases, including Indonesia's National Car program.

The TRIMs Agreement applies, simply enough, to TRIMs: trade-related investment measures.²⁹ If a policy is established for the purpose and with the effect of promoting investment, then it should qualify under the dictionary definition and plain meaning of the term "measure" as an investment measure. If the method chosen to promote investment is trade-related, then the investment measure is a TRIM.

26. With respect to tax policy, GATT Article III:2 prohibits the levy on imported goods of "internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

27. As for the duty exemption for imported parts contingent on the achievement of specified levels of domestic content, the same analysis would apply under GATT Article III and the TRIMs Agreement as apply to the Brazilian measures.

28. See *Approaching the Next Frontier for Trade in Services: Liberalization of International Investment*, INDUSTRY, TRADE AND TECHNOLOGY REVIEW, U.S. Int'l Trade Commission Pub. No. 2962, April 1996, at 1.

29. Article 1 of the TRIMs Agreement states: "This Agreement applies to investment measures related to trade in goods only."

This construction of the Agreement reflects the general rule of interpretation applied by the WTO Appellate body, namely that WTO agreements "shall be interpreted in good faith in accordance with the ordinary meaning to be given to [their] terms in their context and in light of [their] object and purpose."³⁰ By its terms, the TRIMs Agreement applies to any investment measure, regardless of whether it regulates domestic or foreign companies, so long as it relates to trade in goods. The preamble of the TRIMs Agreement lists among its purposes "to facilitate investment across frontiers," to avoid "adverse effects on trade," and to regulate "investment measures [that] can cause trade-restrictive and distorting effects."

Given the ordinary meaning of its terms and express purposes of its preamble, the TRIMs Agreement appears fully applicable to the National Car program. Indonesia conceived the program as a method of promoting investment by PT Timor Putra National and its joint venture partner, Kia, in the manufacture of a national car. Indeed, this program had no purpose other than to promote investment in production of the Timor. As intended by the government, investment in Timor production has occurred specifically because of the exemption from luxury tax incorporated in the program. This investment measure also relates directly to trade, as is amply demonstrated by the many GATT violations generated by it.

As a trade-related investment measure, the National Car program is subject to and violates the TRIMs Agreement, irrespective of whether it is also subject to and violates the SCM Agreement. Under this interpretation, not just the Indonesian measures, but other trade-related programs for the promotion of locally owned production operations, whether in automotive, pharmaceutical, computing, or other trade-sensitive sectors, also fall within reach of the TRIMs Agreement. WTO member countries may not be as free as many of them thought to limit participation in particular industries to domestic firms or citizens, at least not in cases involving the use of trade-related incentives for local production.

The Indonesia case appears headed for a WTO dispute resolution panel. If a panel finds the National Car program in violation of the TRIMs Agreement, then 1996 may be remembered in the investment field as the beginning of the end for nationality-based investment incentives, particularly those effected through tax and tariff exemptions. As for the extraterritorial sanctions imposed by the United States against foreign corporate activity in Cuba, Iran, and Libya, the backlash of European, Canadian, and Mexican blocking statutes has raised the importance of a negotiated solution, and may impede the successful conclusion of a Multilateral Agreement on Investment by the members of the Organization for Economic Cooperation and Development.

30. Article 31 of the Vienna Convention on the law of treaties established a "General Rule of Interpretation" that DSU Article 3(2) has incorporated into WTO practice, as confirmed by the WTO Appellate Body in *U.S.—Standards for Reformulated and Conventional Gasoline*, NW/DS2/AB/R, April 29, 1996, at 17.

