

GENERAL AGREEMENT ON

RESTRICTED

TRE/3

20 February 1992

TARIFFS AND TRADE

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Group on Environmental Measures and International Trade

REPORT OF THE MEETING HELD ON 21 JANUARY 1992

Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its second meeting on 21 January 1992 under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and relevant documentation were contained in GATT/AIR/3283.

2. The Chairman recalled the agenda that the Group had adopted at its first meeting. He asked that discussion proceed on an item-by-item basis but welcomed also comments of a general nature or on the items together.

General discussion

3. Delegations generally considered that trade and environmental policy were inextricably linked and that gains in one area would not necessarily result in losses in the other. Free trade would benefit the environment through the generation of wealth, the improvement of living standards and the encouragement of sustainable resource utilization. The representative of Switzerland added that these considerations should be reflected in the spirit with which the Group addressed the agenda. Delegations were concerned, however, with the increasing use of unilateral trade measures to achieve environmental objectives and that such measures might be used as disguised means of protection.

4. The representative of New Zealand considered that the Group should ensure a fair and reasonable framework of GATT disciplines which would apply to environmental measures with internationally agreed objectives. The representative of Sweden, on behalf of the Nordic countries, suggested that the Group should identify potential problem areas, and paths to ensure mutually supportive trade and environment policies. The representative of Austria suggested that the Group should aim to avoid confusion of policies and to avoid trade disturbances. The representative of Australia presented a list of questions and issues which he thought might be useful in the Group's future work. (These are included in the addendum to this report).

5. The representative of Japan said that GATT's flexible structure could meet the challenge of environmental policy while preserving the free trade system. The representative of India stressed that the Group should focus only on the specifics of the three agenda items. The representative of Egypt agreed adding that other issues should be left to bodies outside the GATT. The representatives of India and Hong Kong considered the GATT well-equipped to deal with environmentally-based trade measures. The representative of Venezuela agreed, adding that this did not exclude the

possibility that any GATT or Uruguay Round provision could be objectively reviewed and possibly improved to incorporate environmental dimensions in the future. He further said that the Group must clarify the principles and parameters which should orient its work. If not, the complexity of the issues would hamper progress towards finding concrete and objective conclusions.

6. The representative of Malaysia, on behalf of the ASEAN countries, said that no hasty decisions regarding the relationship between trade and environment should be taken. The Group's efforts should not aim at specific amendments of GATT provisions that might facilitate easy justification for protectionist, political or other coercive measures under the guise of environmental protection.

7. He noted three on-going international efforts related to environmental protection: the harmonization of national environmental policies among developed countries which would contribute to the development of international rules; international co-operation to strengthen and develop further existing environmental agreements; and the United Nations Conference on Environment and Development (UNCED) relating comprehensive environmental protection to sustainable development. He added, however, that many efforts were evolving in an uncoordinated, and in some cases, contradictory fashion. This would have an adverse impact on trade and liberalization efforts.

8. He outlined several principles that should guide the Group's work: the scope should be limited to the three agenda items; contracting parties should exercise self-restraint in introducing environmental measures with trade implications; the precautionary principle is not a legitimate reason for introducing environmental protection measures in contravention of GATT rules and should only be considered following its adoption in the UNCED; the particular problems of the developing countries must be taken into account; any conflicts with GATT rules should be settled within GATT and not unilaterally; and the Group should not attempt to set or harmonize environmental standards for the purpose of reducing trade distortions or conflicts. The representatives of India and Mexico echoed this latter point.

9. The representatives of Austria, Argentina, Mexico and Brazil added that the Group should not work in isolation. The latter added that it should consider that similar discussions were, and should be, developing elsewhere, even in the GATT. He noted document A/CONF.151/PC/100/Add.3, prepared by the UNCED Secretariat, which dealt precisely with the trade and environment relationship.

10. Delegations generally stressed that the successful and timely completion of the Uruguay Round must remain the top priority in GATT.

Trade provisions of multilateral agreements vis-a-vis GATT principles and provisions

11. Delegations were generally supportive of the multilateral approach for certain "global" environmental problems as a means to counteract unilateral action. They recognized that trade provisions - used only when necessary and consistent with GATT rules and principles - could be important components of such agreements. However, in the absence of GATT consistency, trade provisions in multilaterally agreed instruments raised certain issues for GATT contracting parties. The representative of Hong Kong stated that if a problem of consistency between the GATT and other multilateral agreements did arise, it could point to either of two reasons: the failure of GATT to accommodate the environmental agenda, or that GATT disciplines were not built into environmentally-based trade measures. He considered that there were a limited number of environmental issues warranting multilateral action; therefore any examination in GATT should be on a case-by-case basis.

12. The representative of Sweden, on behalf of the Nordic countries, said that the trade provisions of these instruments were not, per se, subject to GATT disciplines, but when implemented, the resulting national measures were. Often the subject matter of multilateral agreements were global problems. In justifying national trade measures, it was not clear how evidence could be provided of the benefits to the national environment from measures taken to control a global problem, even if it was accepted that the measures, taken together, would benefit the global environment.

13. He believed that the Group needed a better idea of the types of national measures that have arisen or may arise from existing provisions in multilateral agreements, and suggested that an inventory of such measures be prepared. The Group would then be able to more systematically assess how such measures were treated in the GATT and where GATT obligations may give rise to a conflict of interest.

14. The representative of the European Community said that GATT recognized the right of countries to adopt a number of measures for legitimate purposes, including the environment. In his view a situation of conflict between GATT and other agreements had always been considered undesirable, as indicated by Articles XX(h), XV (regarding obligations under the IMF Charter) and XXI (regarding obligations under the U.N. Charter). He considered that the principle of "joint and differentiated responsibility." should guide the level of responsibility of each individual country to tackle global problems through multilateral agreements. This had been endorsed by the Montreal Protocol which allowed flexibility among parties in phasing out controlled substances. The Protocol also recognized the necessity of financial and technical assistance to tackle environmental goals.

15. He added that some measures contained in multilateral agreements could be considered to be extra-jurisdictional. In this regard, a recent panel report had made important clarifications regarding the scope of Article XX and, the Community believed, had sent a negative message regarding unilateral measures which were extra-jurisdictional in nature, and a positive message regarding measures based on multilateral co-operation. He added, therefore, that the legitimacy of trade measures based on multilateral agreements should in no way be questioned by GATT rules or recent Panel decisions.

16. He added that multilateral agreements were based on international agreement of the appropriate standard of, and means to achieve, environmental protection. This should have an important bearing on how the GATT approached trade measures based on multilateral agreements. In this context he referred to the principle of "proportionality" contained in Article XX of the GATT and in the Agreement on Technical Barriers to Trade, and to another principle in the latter which indicated that measures based on international standards should be presumed not to constitute unnecessary barriers to trade.

17. The representative of Argentina referred to this principle in the context of the Uruguay Round negotiations on sanitary and phytosanitary measures. Under this principle, all national standards and norms which were consistent with approved international standards would be in conformity with GATT. This was an important precedent to guide the Group's work and could help to clarify the application of Article XX. He also believed that such universal provisions, approved through universal bodies under the United Nations auspices, could guide the application of exceptions for environmental reasons.

18. Some delegations noted that trade restrictions on non-signatories of multilateral agreements might be stricter than those applied to signatories; this could pose particular problems for some contracting parties. The representative of the European Community said that this raised the question of the way in which non-discrimination was defined in the GATT. He added that the chapeau to Article XX provided an appropriate framework to consider issues relating to multilateral agreements such as the Montreal Protocol.

19. The representative of Sweden, on behalf of the Nordic countries, said that a non-signatory to an agreement may not consider sufficient the fact that an importing country had adhered to another multilateral instrument as justification for trade restrictions. The representative of Malaysia, on behalf of the ASEAN countries, said in particular that the trade provisions applicable to non-signatories in the Montreal Protocol were more onerous than those applicable to signatories. Their implementation, in particular the provisions related to restrictions on products produced with, but not containing, CFCs and halons, could create problems.

20. He added that the trade provisions of the Basel Convention were based on the principles and procedures of Prior Informed Consent whose consistency with the GATT should be examined in detail. He further added

that the trade provisions in the CITES agreement were necessary to achieve its objectives. However, the representative of Hong Kong said that the CITES ivory ban had raised questions over whether it was the best means to achieve its objective. The representative of Malaysia, on behalf of the ASEAN countries, suggested that the Group consider the consistency of trade-related provisions to protect the environment with GATT provisions and make these views known to the GATT Council.

21. The representative of India said that, in due course, the Group would need to define what a multilateral agreement was, but the first priority was to understand the problems associated with the three agreements already identified. The representative of the Republic of Korea suggested that the Group identify existing provisions in multilateral agreements that impact trade and harmonize them with GATT. He cautioned, however, that this harmonization exercise must not result in delegations resorting to Article XX whose use must be in strict accordance with its conditions. The representative of New Zealand suggested that the Group work through the implications of the amended Montreal Protocol and the CITES agreement. Trade restrictions should be kept under a multilateral umbrella to the greatest extent possible, and he agreed that Article XX(b) should not be opened up to broad interpretations.

22. The representatives of Mexico, India, Austria and Brazil stressed that GATT should avoid any duplication of work going on elsewhere. The representative of the United States said that the Group should examine areas of commonality between GATT obligations and other multilateral agreements. She added that multilateral environmental agreements with trade provisions were likely to proliferate. On this last point, the representatives of Switzerland, Austria, New Zealand, Canada and Venezuela agreed and added that it was therefore necessary for GATT to send a message to other international organizations or to set guidelines to avoid conflicting provisions in future agreements. The representative of Morocco considered that trade measures contained in multilateral environmental instruments should be integrated into the GATT, on the basis of clear and binding provisions, in order to avoid any awkward situations in the future.

Multilateral transparency of national environmental regulations

23. Delegations generally agreed that transparency of environmental legislation with an impact on trade was an important aspect of the Group's work. Article X, the notification provisions of the TBT Agreement, and the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance were cited as elements already in the GATT system to ensure transparency. The representative of Switzerland also mentioned the draft Decision on Products Banned or Severely Restricted in the Domestic Market, elaborated in the Working Group on Domestically Prohibited Goods, which, if adopted, would improve transparency in products which presented a serious and direct danger to human, animal or plant life or health. He and the representative of the United States also mentioned the notification provisions and the indicative list of notifiable measures elaborated in the Uruguay Round negotiating group on the Functioning of the GATT System as relevant to environmental measures.

24. Several delegations questioned whether these provisions were as effective as they should be. The representative of New Zealand considered that they should be strengthened in light of the increase in national environmental legislation. The representative of the Republic of Korea agreed and suggested that the Group elaborate a mechanism to increase transparency of environmental regulations with trade effects.

25. The representative of Malaysia, on behalf of the ASEAN countries, noted that national regulations, particularly the setting of national environmental standards, often entailed compliance costs which could affect competitiveness. He added that a review of how transparency can be ensured in GATT was necessary. The representative of Hungary also saw a need for detailed information on national environmental regulations.

26. The representatives of the European Community and Sweden, on behalf of the Nordic countries, did not, however, believe that a new mechanism was necessary, but the requirements already in the GATT were the most appropriate means to achieve transparency. The latter added that the Group should examine whether these requirements were actually doing the job by examining the notifications in document L/6896 and indicating individual or categories of measures which appeared to be escaping the requirements.

27. To increase transparency of trade-related provisions in multilateral agreements, the representative of Malaysia, on behalf of the ASEAN countries, proposed that the Group consider establishing a GATT registry of such measures, to be updated when necessary. The representative of New Zealand suggested analyzing the effects of national measures that have already been implemented under multilateral environmental agreements. He supported the idea of an inventory of such measures. He and the representative of the Republic of Korea suggested that the Group explore means whereby notification procedures could be standardized. The latter added that to the extent that national regulations were consistent with internationally agreed principles and norms, transparency would increase and monitoring would be facilitated. The Prior Informed Consent procedures were an example of such a principle. The representative of Switzerland suggested that the GATT prepare a study of the kinds of notification requirements which existed in other bodies.

28. The representatives of Hong Kong and Mexico said that the results of the Uruguay Round would serve to increase transparency. The former said, however, that the GATT study of TBT notifications showed that Parties sometimes cited environmental protection as a basis for introducing certain regulations while other Parties cited protection of human health as a basis for the same measure. He asked to what extent these two bases were synonymous, overlapping, or separate.

Trade effects of new packaging and labelling requirements

29. Regarding the third agenda item, delegations generally believed that packaging and labelling requirements could be a useful means of achieving environmental objectives, but they could have unintended trade implications or impede market access. The representative of Malaysia, on behalf of the ASEAN countries, noted that such systems often supported local environmental objectives which were not always shared by all. Some might

discriminate against imported products or impose difficult and costly requirements for foreign firms to meet. The representative of New Zealand stated that his Government had already found that the costs of standardization and re-cycling requirements could pose significant barriers to trade, particularly when introduced unilaterally and with short lead times and a lack of consultation. He suggested that the Group explore appropriate mechanisms, such as realistic phase-in times, to reduce surprises and diminish the opportunities for such requirements to be employed as trade-restrictive devices.

30. The representative of Sweden, on behalf of the Nordic countries, noted that the new types of packaging and labelling systems that were appearing merited study to determine whether their trade implications were different from the "traditional" packaging and labelling requirements in the minds of drafters of the GATT or the Agreement on Technical Barriers to Trade. One new system related to the life-cycle of the product and another aimed at providing information to consumers by a common symbol denoting environmentally friendly goods. He added that trade problems may arise because different countries applied different concepts and producers might find that they lacked the necessary information. With the symbol approach, the criteria to determine environmentally friendly, as well as the conditions of access to the symbols, might differ among countries. He added that it would be useful for the Group to gain an overview of existing and planned eco-labelling systems and to study one or more in detail to assess problems related to GATT obligations, or the lack thereof.

31. On packaging, he noted that environmental problems associated with waste disposal necessitated new packaging requirements in some if not all countries which might need to be extended to imported products since the packaging remained after the product had been consumed. The Group would need to gain an idea of the kinds of new packaging requirements that were being implemented and to identify and evaluate the relevant GATT disciplines. He suggested that the secretariat compile the necessary factual information to determine whether GATT disciplines were sufficient from the point of view of legitimate trade concerns and in balance with the equally legitimate and pressing environmental concerns.

32. The representative of the European Community noted that the principle of eco-labelling had been adopted in the Community. Although not yet in legislative form, the idea was that a market mechanism would create incentives for ecological production which would encourage production of products without negative effects on the environment. The system would be made available on a non-discriminatory basis for national and imported products and be fully transparent both in granting and in using the eco-labels.

33. The representative of Malaysia, on behalf of the ASEAN countries, considered that new packaging and labelling requirements might favour the use of recoverable products, largely available in high consumption countries. He feared that, in the long run, misguided packaging and labelling requirements would not mitigate environmental degradation but would perpetuate degrading consumption patterns.

34. The representatives of Hong Kong, the European Community, the United States, and Sweden, on behalf of the Nordic countries, noted that detailed rules on packaging and labelling systems were explicitly included in the TBT Agreement. The representative of Hong Kong added that such systems were thus subject to the same disciplines and requirements imposed for any other objective. The representative of the United States suggested that harmonization in this area might be one way to avoid trade effects arising from national initiatives and supported these efforts in other fora. The representative of Switzerland noted that full transparency in this area was necessary.

35. The Chairman took note of the statements made. It was agreed that seven international organizations, the United Nations Environment Programme (UNEP); the Food and Agriculture Organization (FAO); the International Monetary Fund (IMF); the World Bank (IBRD); the United Nations Conference on Trade and Development (UNCTAD); the United Nations Conference on Environment and Development (UNCED); and the Organization for Economic Cooperation and Development (OECD), may participate in the Group as observers. It was also agreed that the secretariat would list, under each agenda item, the questions and issues that were raised. This may be useful to delegations as points of reference upon which they could reflect for the next meeting (see addendum).

36. It was agreed that the next meeting of the Group would be held on the afternoon of 10 March and the morning of 11 March 1992.

ADDENDUM

Supplementary Issues and Questions Raised
at the Meeting of 21 January 1992

Agenda Item 1: Trade provisions contained in existing multilateral environmental agreements (e.g. the Montreal Protocol on Substances that Deplete the Ozone Layer, the Washington Convention on International Trade in Endangered Species and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal) vis-a-vis GATT principles and provisions

A. General questions

Switzerland

1. Do the general principles of law apply? If so, new legislation (i.e. environmental agreements) would take precedence over older legislation (i.e. GATT) and specific provisions, such as those for the protection of the environment would take precedence over more general provisions, such as those in GATT.
2. What rôle should GATT take to ensure that international agreements can function without contradicting GATT?

Australia

3. What is the relationship between obligations under the GATT and obligations under multilateral environmental treaties, and how does this relationship change, if at all, in respect of the various kinds of environment treaties (e.g. treaties which apply trade measures to non-parties to the treaty; treaties which apply trade measures in order to preserve the global environment or environment outside each party's jurisdiction)?
4. Should the GATT seek to become actively involved in the drawing up of multilateral agreements when these involve trade instruments?

Austria

5. Are trade restrictions used as an instrument of environmental policy necessary, adequate, and appropriate and are they the least distorting means of achieving an objective or could the same objective be obtained by better means?
6. Are parties to various environmental agreements entitled to act on abstract concepts such as "global" concerns; and who will determine which concepts are priorities?

B. Questions related to multilateral agreements

Australia

7. What criteria should be used to determine what constitutes a multilateral agreement and where do regional agreements fit in?

8. What, if anything, differentiates an international from a multilateral agreement from the point of view of the GATT (this was raised during negotiations on the Havana Charter)?

9. What are the differences between binding versus discretionary trade measures taken pursuant to multilateral agreements?

Canada

10. What are the purported objectives of using trade measures, to deal with the "free rider" problem or other objectives?

11. What are the rights of non-signatories? With respect to signatories, what is the relationship between GATT obligations and those of other multilateral agreements?

C. Questions related to GATT Articles and rules

Australia

12. Does the GATT provide specific coverage for multilateral agreements? If so which articles, and if it is an issue that has not yet been confronted by contracting parties as a group, what GATT avenues are open to dealing with such agreements?

13. Is Article XX(h) a possible means of providing an exception to GATT obligations for contracting parties who are members of a multilateral agreement?

14. Do GATT rules offer any scope for trade reciprocity to deal with the "free rider" problem in international agreements?

New Zealand

15. Would a broad interpretation of Article XX(b) have the effect of facilitating unilateral measures of a type that panels in the past have found to be unjustified?

16. If Article XX(h) were to cover multilateral environmental agreements, what sort of general criteria would have to be submitted to the CONTRACTING PARTIES?

Canada

17. What is the relevance of Article XX(b), (g), and (h)?

Malaysia, on behalf of the ASEAN countries

18. Is the maintenance of licensing systems for controlling trade consistent with Article XI?

Agenda item 2: Multilateral transparency of national environmental regulations likely to have trade effects

A. General questions

Hong Kong

1. For notification purposes, what are the parameters in which a measure can be notified as an environmental protection measure (i.e. human health, pollution control etc.)?

Australia

2. Is it possible and/or appropriate for the GATT to develop means for differentiating between legitimate measures and protective measures?

3. Where there is no scientific consensus on an environmental issue, how does the GATT relate to the issue of national sovereignty in terms of political decisions on environmental/conservation matters.

4. The Group could examine trade instruments used for environmental purposes such as environmental taxes and charges, tradeable emissions permits, economic and fiscal incentives to adopt clean technology.

5. What rôle could the opinion of experts play in panel decisions on trade disputes involving environmental measures?

B. Issues and questions related to GATT articles and rules

Australia

6. The Group would need an examination of the drafting history of Article XX(b) and XX(g) against the historical background of "general exceptions" provisions in trade agreements at the time the GATT was drafted. It should also look at the issue of extra-territoriality in respect of Articles XX(b) and (g).

7. What approach should the GATT take toward trade measures for legitimate purposes which may be inconsistent with current GATT rules?

8. Is the interpretation of the "necessary" requirement in Article XX(b) too limited to provide effective coverage of environmental measures?
9. The Group should examine the applicability of Article II to fees imposed on imports for environmental purposes.
10. The Group should examine the issue of process and production versus the "like products" concept in respect of a contracting party's ability to restrict trade in a product because of the manner in which it was produced.

Agenda item 3: Trade effects of new packaging and labelling requirements aimed at protecting the environment

Australia

1. The Group should examine the question of "negative labelling" in relation to Article IX:4 prohibiting the material reduction of a product's value.
2. How does Article III relate to packaging and labelling requirements where, arguably, the greater burden is on imported goods particularly when goods transported long distances generally require larger amounts of packaging?
3. The Group should examine the issue of adversely modifying the conditions of competition in respect of Article III.
4. Does the Agreement on Technical Barriers to Trade have a rôle to play in the development of packaging and labelling requirements and supporting regulations?