

# GENERAL AGREEMENT ON

## TARIFFS AND TRADE

RESTRICTED

TRE/W/5

17 November 1992

Special Distribution

---

### Group on Environmental Measures and International Trade

#### THE GATT AND THE TRADE PROVISIONS OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

##### Submission from The European Community

The Group on Environmental Measures and International Trade has made considerable progress in achieving a better understanding of the issues raised by the three items under its current agenda. As a contribution to this process, the European Community is presenting this submission, which focuses on item (1) of the agenda. A number of general reflections on the significance of the trade and environment debate, as it impinges on the activities of the GATT and the multilateral trading system, are also included.

#### 1. The GATT and the trade and environment debate

The Rio Conference has given a new impetus to international discussions on trade and the environment. Several of the documents agreed in Rio contain important orientations on trade issues. In particular, Programme B of Chapter 2 in Agenda 21 identifies a number of objectives and activities which are of particular relevance for the work of the Group on Environmental Measures and International Trade.

UNCED underlines the need for the GATT to fully incorporate into its activities - in those areas that fall under its sphere of competence - a consideration of trade and environment-related issues. As agreed in Rio, the overall aim should be "to make international trade and environment policies mutually supportive in favour of sustainable development". (2.21.a) Furthermore, there is a need "to clarify the role of GATT ... in dealing with trade and environment-related issues, including, where relevant, conciliation procedures and dispute settlement" (2.21.b). Clarification would particularly be needed where there is uncertainty as to the interpretation of GATT rules relating to measures impacting on trade for environmental reasons, so as to create greater predictability in international trade relations and to reduce the scope for unnecessary trade disputes. Clarification is also needed to dispel concerns that the GATT is inimical to the objectives or environmental protection. Finally, another important conclusion arising from UNCED is that, in considering trade and environment-related issues, the development perspective needs to be fully integrated.

In addressing these issues, governments need to develop a clear view on the different aspects of the trade and environment interface, so as to engage in a constructive dialogue with the trade and environment communities. The Community is convinced that there should be no contradiction between upholding the values of a multilateral trading system

and taking action, individually or collectively, for the protection of the environment. This conviction is rooted on a number of basic orientations, which guide the EC position on trade and environment discussions.

1. Trade liberalization and the protection of the environment should not be considered as mutually conflicting policies; they should rather be aimed at achieving the common goal of promoting sustainable development. Trade liberalization will improve the allocation of resources also in environmental terms if appropriate environmental policies are applied. From a policy perspective, there are two basic orientations to follow. Firstly, the protection of the environment should not be misused as an argument for halting or reversing the process of trade liberalization, - such action would not be an appropriate or effective response to the problems of environmental degradation. Secondly, the expansion of trade needs to be supported by the adoption of sound environmental policies. This commonality of aims calls for greater integration of environmental and trade policies at the national level, as well as for parallel efforts, which respect each institution's sphere of competence, to promote international cooperation on the basis of multilateral rules both in the trade and in the environment field. The multilateral trading system should therefore be responsive to environmental concerns and afford full consideration to trade and environment related issues.
2. The GATT is not an institution with the competence to set environmental standards or to review the environmental priorities chosen by individual countries. An important consequence is that a country may not be required by the GATT to lower its level of environmental protection and that the GATT is not therefore an obstacle for the adoption by countries of appropriate environmental policies. GATT rules do not prevent a country from requiring that imported or exported products be subject to the same environmental requirements as domestic products, provided that measures impacting on trade do not go beyond what is necessary to achieve the environmental goal. This implies that in order to achieve the environmental goal set by a country, the least trade restrictive option should be chosen.
3. The basic rule according to which a country should not unilaterally restrict imports on the basis of environmental damage that does not impact on a country's territory needs to be upheld. An important application of this rule is that there is no justification to require by unilateral trade restrictions that imported products conform with domestic regulations relating to the production method if production abroad is unrelated to environmental damage caused in the country of importation. A fundamental issue that needs to be addressed in relation to unilateral trade restrictions of an extrajurisdictional nature relates to equity considerations, in particular as restrictions may affect the exports of developing countries. Environmental

issues of common concern are complex and require discussions and negotiations among countries on environmental priorities and commitments, as well as an equitable sharing of the costs to protect the environment, so as to take into account the common but differentiated responsibilities of countries at different levels of development. This process would be circumvented if a country could take unilateral trade restrictions aimed at changing the environmental policies of another country, while ignoring the costs imposed on that country by trade restrictions. In prescribing such a rule, the GATT is not seeking to impose trade over environmental values, but rather to underline the importance of multilateral cooperation for addressing environmental problems of common concern.

4. There has to be a clear recognition in the GATT of the importance of the international environmental agenda, which ensures a mutually supportive relationship between the GATT and multilateral environmental agreements. In those cases in which trade measures appear necessary to achieve the environmental goals of an agreement, the fact that such measures have been discussed and agreed multilaterally is the best guarantee against the risk of protectionist abuses or that unnecessary trade restrictions will be introduced. The legitimacy of trade measures taken pursuant to a multilateral environmental agreement has not been questioned in the GATT.

The Community firmly supports the conclusions of the Tuna Panel Report, which clarifies certain aspects of GATT rules and in particular introduces essential clarifications on the scope of Articles III and XX of the General Agreement. These fundamental rules are basic for preserving the multilateral trading system and in no way limit the right to introduce sound environmental policies. They must be firmly upheld. At the same time, it is essential to dispel any misunderstanding that the GATT contradicts or puts in jeopardy collective efforts to address environmental problems. If such a perception were to persist, the consequences would be serious both for the GATT system and for the post-UNCED environmental agenda, which is based on the importance of international cooperation for addressing environmental problems of common concern. The suggestions made in Part II of this note aim at clearing up present uncertainty, as well as providing important pointers on the use of trade measures under MEAs. Discussions under agenda item (1) have already shown that this is one of the key issues on which a clarification of GATT rules is needed, as was indeed indicated in UNCED (2.22.j).

II. Trade measures taken pursuant to a multilateral environmental agreement: elements for a collective interpretation of Article XX

The Community considers that a collective interpretation of Article XX provides the best means of clarifying the relationship between the GATT and trade measures taken pursuant to an MEA. Such an approach would dispel current uncertainty and set clear criteria on the use of trade measures under MEAs, if such measures appear necessary to achieve the environmental goals of the agreement. In developing these criteria, three important considerations need to be borne in mind:

1. A number of MEAs envisage the application of trade controls as among the parties to the agreement. In such cases, general principles of public international law should be considered to determine which are the relevant rights and obligations of parties to the two agreements. The Group may wish to consider at a later stage any practical implication for the GATT system arising from possible disagreements relating to the use of trade measures among members of both the MEA and the GATT. However, addressing this issue is not the purpose of developing criteria for an interpretation of Article XX, which should be essentially geared at establishing safeguards against the application of unnecessary restrictions on GATT members which are not parties to the MEA.
2. There are different types of environmental problems which have been addressed - or may be addressed in the future - through MEAs. As far as the GATT is concerned, it is this international recognition that common action is needed to enhance the effectiveness of environmental protection, which is of relevance. As a trade institution with no competence on environmental matters per se, the GATT should limit itself to clarifying the scope for using trade measures within the framework of an MEA rather than defining the type of environmental problem which may require the use of trade measures.
3. The Group is carrying out an important discussion on the rationale for using trade measures within the framework of an MEA. On the basis of an examination of existing MEAs - and, in particular CITES, Basel, and the Montreal Protocol - it appears that in all cases the rationale for trade measures has been to ensure the effective implementation of commitments to protect the environment. Trade measures vis-à-vis non-parties have been used to avoid circumvention of the measures applied by the parties, to ensure that all imports or exports are subject to the same environmental standards that apply to the parties or to address legitimate concerns about the impact that uncontrolled production or consumption by non-parties would have on the effectiveness of the controls agreed by the parties. This is quite different from the argument based on the need to force countries to sign an agreement or to punish "free-rider" behaviour. If such rationale for trade measures was to be accepted, the scope for applying trade measures under an MEA would be practically limitless. At the same time, it is important to note that the Rio Declaration on Environment and Development - and, in particular, Principles 2

and 7 - underlines the duty of countries to cooperate for the solution of global or transboundary environmental problems. Within the context of the negotiations of an MEA, there may be a need to address the risk that the environmental commitments incorporated into the Convention would be undermined or nullified by actions by non-parties to the Convention. Trade measures may play a role to address these concerns, provided that such measures do not go beyond what is necessary to achieve the environmental goals of the agreement. The important point to underline is that the justification for trade measures must be clearly related to the environmental objectives of a multilateral agreement rather than to a judgement of the benefits which countries may obtain from non-membership of the agreement.

#### The scope of Article XX

4. There is still significant uncertainty as to the interpretation of certain key concepts in Article XX, as they relate to trade measures taken pursuant to an MEA. The focus on Article XX does not imply that measures impacting on trade for environmental reasons, including those taken pursuant to a multilateral agreement, necessarily constitute an exception to GATT obligations. As a general exception, Article XX applies only to measures taken by individual contracting parties which are inconsistent with another provision of the General Agreement. (cf. Panel Report on Section 337, para. 5.9). There is a wide range of measures for the protection of the environment which can be taken in conformity with other provisions of the GATT. Indeed, there is a need to dispel the uninformed view that the GATT considers all measures for the protection of the environment as exceptions from GATT rules. The sense of an interpretation of Article XX is therefore to precise the conditions under which a trade measure, which is taken pursuant to an MEA and applies to a GATT member non-party of the MEA, can derogate from the positive obligations imposed by other GATT provisions.

The function of Article XX is to confirm that the GATT does not prevent countries from pursuing a number of public policy objectives, provided that certain conditions are respected as regards trade measures not in conformity with other GATT obligations. For historical reasons, the protection of the environment is not specifically cited in Article XX. This notwithstanding, the public policy objectives reflected in XX(b) and (g) are broad enough to encompass the objectives of environmental protection. A collective interpretation would therefore confirm that environmental protection falls within the range of objectives covered by Article XX. This cannot, however, be achieved by simply incorporating the word "environment" into Article XX, since this could imply broadening the scope for unilateral extrajurisdictional trade restrictions. The Tuna Panel Report quite rightly stated that under such a broad interpretation of Article XX "each contracting party could

unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement ...". The Panel also indicated that an alternative to unilateral action was the negotiation of international cooperative arrangements. For the reasons outlined in the first section of this paper, it is essential that this interpretation of Article XX be confirmed.

The findings of the Tuna Panel Report are closely circumscribed to unilateral trade restrictions for the protection of health, life or resources outside a country's jurisdiction. The concept of unilateral "extrajurisdictional" protection is of no relevance in those cases in which the international community has agreed on the need to take action to address an environmental problem of common concern. A clarification is needed on the conditions for the justification of trade measures applied to non-parties pursuant to an MEA. These conditions should essentially depend on two types of criteria: (a) a number of substantive criteria, based on the interpretation of Article XX, which ensure that trade measures applied to non-participants do not go beyond what is necessary to achieve the environmental goals of the agreements; (b) certain formal criteria related to the concept of a multilateral environmental agreement, so as to ensure that the exception for the application of trade measures to non-participants is limited to cases in which environmental protection commitments have been established through a genuine multilateral process.

The relationship between Article XX and trade measures taken vis-à-vis non-participants pursuant to a multilateral environmental agreement

5. In order to eventually develop criteria on the use of trade measures under an MEA there is a need to clarify the relationship between Article XX and trade measures taken pursuant to such agreements. In this respect, the Community suggests that further discussions are needed on the following issues:

(a) Non-discrimination

The headnote to Article XX indicates the scope for the limited and conditional exception to the GATT rules on non-discrimination when it provides "that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail". It would be opportune to clarify how this provision relates to trade measures applied to non-participants in an MEA. The rationale of the headnote appears to be that no arbitrary or unjustifiable discrimination would occur if the application of trade measures is due to a difference in conditions among contracting parties which relates to the public policy objectives recognized in Article XX. The mere fact that a government is not

party to an MEA does not appear to be sufficient to meet this requirement. What is relevant, from the GATT perspective, is whether there is an actual difference between the environmental protection commitments applied by parties and non-parties. This GATT requirement is indeed fully recognized under CITES, Basel and the Montreal Protocol which allow for trade with non-members to be carried out on the same basis as with members provided non-members apply equivalent environmental guarantees. It can be expected that any future MEA which envisages the application of trade measures to non-members would include similar provisions so as to avoid GATT inconsistencies. Moreover, clarifying the interpretation of this requirement would also provide an insurance against any possible abuse by the signatory of the MEA when implementing the Convention.

(b) "Disguised restriction on international trade"

As in the case above, there is little guidance in the GATT on how to interpret the requirement that measures under Article XX shall not be applied in a manner which would constitute "a disguised restriction on international trade". Moreover, the interpretation of this concept given by previous Panels is not fully satisfactory. The Panel on U.S. prohibition of imports of tuna from Canada seems to suggest that publication of the measure is sufficient to meet this requirement. More recent Panels seem, however, to point to a different rationale, i.e. whether the measure has as its primary purpose achieving one of the public policy goals recognized in Article XX. (cf. Section 337 Panel, Panel on Canada prohibition of exports of salmon and herring). In those cases in which it appears from the context in which a measure was adopted, or from the way in which it is applied, that the objective or effect is to afford protection to domestic producers in circumstances where such protection is not "necessary" to achieve the environmental objectives, a justification under Article XX would not be possible. Measures applied pursuant to an MEA could hardly ever be considered a disguised restriction on trade. However, in some instances, the multilateral environmental agreement may leave a significant margin of assessment to the individual members applying the measure. In those cases, it should be possible to examine whether the measure may not have been taken for protectionist purposes.

(c) "Necessity"

Some guidance on the interpretation of the concept of "necessity" can be obtained from recent Panels, as well as from related provisions included in the draft Uruguay Round texts on Technical Barriers to Trade and Sanitary and Phytosanitary Measures. Two principles are fundamental in the interpretation of the concept of "necessity". Firstly, the trade measure applied should not be more restrictive than it is necessary to achieve a public policy

goal as encompassed in Article XX. Secondly, "Article XX(b) allows each contracting party to set its human, animal or plant life or health standards. The conditions set out in Article XX(b) ... refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the contracting party" (Tuna Panel Reports, para. 5-27). In order to consider how an interpretation of the concept of "necessity" can relate to trade measures taken pursuant to an MEA, several issues require examination:

(i) A fundamental principle reflected in the draft TBT and SPS texts is that measures which conform to international standards shall be deemed to fulfil the "necessity" test. This principle applies a fortiori to trade measures taken pursuant to an MEA. In effect, agreements which impose binding obligations on members to achieve a common goal reflect a much higher degree of international consensus than standards.

However, the reasoning above may need to be subject to certain nuances since it has to be recognized that not in all cases do MEAs fix with sufficient precision the type of trade measures to be applied by members. In such cases it would be opportune to look more closely into the issue of whether the measure chosen is the less trade restrictive option to achieve the environmental goal.

(ii) A question on which Article XX is not clear is the type of products on which a restriction may be applied. This question is, however, crucial in the context of an MEA and an interpretation of Article XX should therefore clarify this issue. There is a legitimate concern to avoid a situation - however hypothetical - in which an MEA would provide for the application of trade measures vis-à-vis non-participants on products which have no connection with the environmental damage addressed by the agreement. It is highly questionable whether such a measure could ever be considered to fulfil the necessity test. This issue is highly complex and further reflection is needed. However, some basic orientations could be as follows:

(a) restrictions can be applied on products which are themselves, or through the substances physically incorporated, environmentally damaging; (b) restrictions may only be applied on products on the basis that their production is damaging to the environment under certain circumstances. These may relate, for instance, to the fact that members of the Convention are applying controls on such production, to the feasibility of precisely identifying those products directly and specifically linked to the environmental damage, or to the need for parties to consider such option only if other forms of trade control are not sufficient to achieve the environmental goals of the



agreement; (c) no restriction may be applied on products which do not fall under categories (a) or (b) and therefore do not have a connection with the environmental damage.

(d) The concept of a multilateral environmental agreement

The concept of a multilateral environmental agreement needs to be clarified. Otherwise there would be a risk that measures that have been agreed by a limited number of countries could set extrajurisdictional environmental standards that need to be respected as a condition for access to their markets. A specific exemption under Article XX is only justified when the environmental agreement is genuinely multilateral in nature. In order to arrive at such a definition, certain criteria could be examined:

(i) The agreement should have been negotiated under the aegis of the United Nations or a specialized agency such as UNEP or the procedures for negotiation should have been open for participation of all GATT members.

(ii) The agreement should be open for accession by any GATT members on terms which are equitable in relation to those which apply to original members.

(iii) Certain environmental problems are regional in nature and therefore may need to be addressed at the regional level. In such cases, the criteria suggested above should apply to all countries within the region - i.e. openness in negotiation and accession. Quite clearly, such regional agreement cannot provide any justification for applying extrajurisdictional trade measures vis-à-vis countries outside the region.

The suggested criteria guarantee the multilateral nature of the agreement. It is necessary, however, to consider the issue of the level of participation in the agreement. Quite clearly, it would not be appropriate for the GATT to prescribe which level of membership is required from other multilateral agreements. On the other hand, reflection could be given to the idea that certain types of trade measures applied vis-à-vis non-participants should only benefit from the provisions of the exception if the agreement fulfils certain criteria as to a level of participation which is sufficiently representative of the producers of the specific product subject to restriction.

An essential point of clarification needs to be made about the purpose of a discussion of the concept of an MEA within the context of an interpretation of Article XX. The GATT would exceed its institutional competence if it was to aim at defining the circumstances under which international

agreements may be negotiated for the protection of the environment. In this respect, it is important to note that the suggestions made here on the concept of an MEA are without prejudice to the fact that: (a) most international environmental agreements do not envisage any application of trade measures and, in such cases, there is no reason why the GATT should even consider the issue of its relationship to environmental agreements; (b) similarly, there is no reason why the criteria suggested for the concept of an MEA would in any way limit the scope that countries have under international law to enter into international agreements which envisage the application of trade measures as among the parties to the agreement; (c) there may even be cases in which an agreement which does not correspond to the criteria suggested, envisages the application of trade measures vis-à-vis non-parties. However for GATT purposes, such trade measures should be considered in the same way as measures applied autonomously by an individual contracting party.