

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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Group on Environmental Measures and International Trade

AGENDA ITEM I: TRADE PROVISIONS CONTAINED IN EXISTING MULTILATERAL ENVIRONMENTAL AGREEMENTS VIS-A-VIS GATT PRINCIPLES AND PROVISIONS

ARTICLE XX(h)

Note by the Secretariat

1. This note, requested by the Group at its meeting of 5-7 July 1993, examines Article XX(h), the exception to the General Agreement for certain measures taken in pursuance of obligations under intergovernmental commodity agreements. It provides background on the negotiating history of Article XX(h), its amendment during the 1954-55 Review Session of the CONTRACTING PARTIES, and its application in the GATT, and general background on international commodity agreements. It does not attempt to identify any potential relevance of the provisions of this Article for the Group's work.

2. Article XX(h) and its interpretive note cover measures where an international commodity agreement: (a) conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them; (b) is itself submitted and not disapproved; or (c) conforms to the principles approved by an ECOSOC Resolution, the text of which is attached to this note as an Annex. No contracting party has submitted a complaint under Article XXIII that a measure taken pursuant to an international commodity agreement was GATT-inconsistent, nor has an international commodity agreement been submitted to the CONTRACTING PARTIES for approval under XX(h), nor have any criteria for international commodity agreements been established by the CONTRACTING PARTIES.

A. The Havana Charter

3. Chapter VI of the Havana Charter recognized that special treatment of trade in primary commodities through intergovernmental agreement would be necessary in certain defined circumstances. Actions taken in pursuance of international commodity agreements which were permitted under Chapter VI were excepted from the Charter's obligations on commercial policy and restrictive business practices.

4. Intergovernmental commodity agreements were permitted, pursuant to Chapter VI, with respect to primary commodities -- "any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade" -- as well as other commodities so closely related in terms of the conditions of production or consumption that it was appropriate to deal with them in the same way (Article 56). The International Trade Organization (ITO) could also, in exceptional circumstances, decide (by majority vote) to apply Chapter VI to other commodities if it found that the conditions specified applied to them.

5. The Charter provisions in Chapter VI provided for two types of commodity agreements: commodity control agreements (agreements involving regulation of production or quantitative control of exports or imports of a primary commodity, to control production or trade in that commodity, or agreements regulating prices) and other intergovernmental agreements (Article 58). All intergovernmental commodity agreements had to: (1) be open initially to all members on equal terms; (2) provide for adequate participation by countries whose interest was in the importation or consumption of a commodity; and (3) accord fair treatment to members who did not participate. In addition, their negotiation and administration needed to be given full publicity (Article 60).

6. The provisions of Chapter VI prescribed a procedure for negotiating an intergovernmental commodity agreement. Article 59 provided that the ITO could summon an intergovernmental conference based on the recommendation of an ITO-convened study group, or at the request of members with important interests in a commodity, or on its own initiative. Members of the ITO, as well as invited non-members could attend. As outlined in Article 62, commodity control agreements could only be entered into if such a conference, or the ITO, had made a finding that one of two sets of conditions applied: either (1) small producers accounted for a substantial portion of the total output; a surplus had developed or was expected to develop; this surplus was so burdensome as to cause or threaten serious hardship; it was impossible to prevent this hardship by relying on the normal operation of market forces; and this impossibility was attributable to the fact that a substantial reduction in price would not lead either to a significant increase in consumption or decrease in production; or (2) unemployment had developed or was expected to develop; this unemployment was so widespread as to cause or threaten serious hardship; and it was impossible to prevent this by relying on the normal operation of market forces.¹

7. Commodity control agreements were also subject to requirements regarding their content and governance. According to Article 65, they were not to be concluded or renewed for more than five years at a time. Each agreement had to be administered by a separate commodity council (Article 64), and participating countries importing the commodity had to have the same number of votes as countries exporting it. Article 65 also outlined provisions for periodic review of the operations of the commodity agreement by the ITO, whereby if the agreement were not operating in accordance with the rules established in Chapter VI it would be revised or terminated; and for the inclusion in commodity agreements of withdrawal provisions. Article 68 provided for the settlement of disputes.

8. Certain types of international commodity agreements were exempt from the Charter provisions in Chapter VI, but the exemptions, provided for in Article 70, were limited in scope. The Charter provisions did not apply to aspects of intergovernmental commodity agreements which were "necessary for the protection of public morals or of human, animal or plant life or health," if the agreement were used to accomplish results consistent with the objectives of the Charter chapters on commodity agreements or restrictive business practices. In addition, the provisions did not apply to any intergovernmental commodity agreement "relating solely to the conservation of fisheries resources, migratory birds or wild animals," if the agreement were used to accomplish results consistent with the objectives of Chapter VI or Article 1 of the Charter, and was given full publicity. However, the ITO could apply the Charter to such an agreement if it

¹Such an impossibility had to be attributable to three facts: a substantial reduction in price would not readily lead to a significant increase in consumption, it would lead to a decrease in production and thus in employment, and there were no alternatives for employment in the areas in which production had been carried on (Article 61:5).

found it seriously prejudiced the interests of a non-participating Member. Also according to Article 70, the procedural requirements and provisions for commodity agreements did not apply to intergovernmental commodity agreements found by the ITO to relate solely to the equitable distribution of commodities in short supply or to the conservation of exhaustible natural resources.

9. At the time of the Charter negotiations, there were a number of intergovernmental commodity agreements in existence or under negotiation.² The Charter contained provisions in Article 68 that required existing and proposed intergovernmental commodity agreements to be submitted for review and possibly adjusted in order to bring them into conformity with the provisions of Chapter VI.

B. The ECOSOC Resolution and GATT Article XX(h)

10. From the earliest proposals, the ITO Charter included rules prohibiting quantitative restrictions (with a few exceptions) and providing for non-discrimination in their administration. Because the Preparatory Committee which drafted the Charter included a chapter permitting and regulating commodity agreements, it decided to provide exceptions for government measures under such agreements. These exceptions were widened, and were relocated to the general exceptions to the commercial policy chapter of the Charter. This commercial policy exceptions article was the source of Article XX of the General Agreement.³

11. At the first session of the Preparatory Committee in London in the fall of 1946, it adopted a resolution noting that governments were already taking action similar to the proposals in the Chapter of the Charter on intergovernmental commodity agreements and requesting the United Nations to appoint an Interim Coordinating Committee for International Commodity Arrangements (ICCICA). In response, the Economic and Social Council of the United Nations (ECOSOC) adopted Resolution 30(IV) of 28 March 1947 (attached Annex). The Resolution recommended, *inter alia*, that "pending the establishment of the International Trade Organization, Members of the United Nations adopt as a general guide in inter-governmental consultation or action with respect to commodity problems the principles laid down in Chapter [VI] as a whole."

12. The original text of Article XX(h), as in force until 1957, provided an exception for measures "undertaken in pursuance of obligations under inter-governmental commodity agreements, conforming to the principles approved by the Economic and Social Council of the United Nations in its Resolution of March 28, 1947, establishing an Interim Co-ordinating Committee for International Commodity Arrangements."

C. 1954-1955 GATT Review Session

13. During the Ninth Session of the CONTRACTING PARTIES in 1954-55, a general review of the General Agreement was held. During this Review Session, certain governments attempted to have the Havana Charter Chapter VI on commodity agreements brought into the GATT. In response, a separate Working Party on Commodity Problems was established which considered:

²In 1947 there were twelve existing intergovernmental commodity agreements: beef, coffee, cotton, petroleum, rice, rubber, sugar, tea, timber, tin, wheat and wool. For the text of these agreements see ICCICA, *Review of International Commodity Arrangements*, Geneva: United Nations, 1947. pp.23-58.

³See London Report, p.14, para. III.C.3(d)(iv); EPCT/103, p.47; EPCT/W/223, p.4-5; EPCT/B/PV/5, pp.44-46; EPCT/A/PV/25, pp.32-34; EPCT/A/SR/30, p.2; EPCT/A/PV/30, pp.4-6; and EPCT/W/137 (proposal by the United Kingdom), EPCT/W/208 (proposal by the United States).

(1) specific proposals for a separate instrument to govern international action in international trade in primary commodities; (2) the form of an international agreement in this field; (3) the relationship between such an agreement and the GATT; and (4) the relationship between the parties to such an agreement and other international organizations.⁴

14. The Working Party drafted a Special Agreement on Commodity Arrangements containing "general principles governing provisions of all commodity arrangements" and setting out procedural and institutional provisions for dealing with commodity agreements. The draft Agreement contemplated the negotiation of agreements among governments, the implementing measures for which would possibly conflict with GATT obligations unless provision were made. It was envisaged that the GATT and the proposed Special Agreement would be linked by an amendment to Article XX(h).⁵ Discussions concerning this draft during the Review Session did not result in consensus, and the Working Party was held over to the Tenth Session.⁶

15. It was agreed during the Review to amend Article XX(h) and to add an interpretative note, in order to accommodate the potential results of the Working Party on Commodity Arrangements. The records of the Review note that "in view of the steps being taken to develop new principles relating to the conclusion of commodity agreements, Article XX(h) required amendment" and that "Article XX(h) does not itself establish principles for the conclusion of commodity agreements, but stipulates conditions under which measures taken pursuant to commodity agreements may be excepted from the provisions of the General Agreement."⁷

16. As amended at the Review Session, the chapeau of Article XX and its sub-paragraph (h) provide that:

Subject to the requirements 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, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

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

The interpretative note to Article XX(h) states: "The exception provided by this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its Resolution 30(IV) of 28 March 1947." Through this Resolution, the link was made between XX(h) and the Charter Chapter VI on commodity agreements.

17. The Article XX(h) amendments entered into force on 7 October 1957.

⁴BISD 3S/238; See also L/301.

⁵See L/320, Interim Report of the Working Party, February 1955, including the annexed draft Special Agreement on Commodity Arrangements.

⁶BISD 5S/87-88.

⁷BISD 3S/239; See also L/327, for the terms of reference of the Working Party; and L/320, pp.2-5.

18. As amended, Article XX(h) and its interpretative note cover measures where a commodity agreement: (a) conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them; (b) is itself submitted and not disapproved; or (c) conforms to the principles approved by the ECOSOC Resolution (attached Annex).

D. Developments after the Review Session

19. At the Tenth Session in the fall of 1955, discussions on commodity issues continued. The Working Party on Commodity Arrangements submitted a final report which included the draft Special Agreement "with the recommendation of the Working Party that subject as far as possible to resolution of outstanding differences, it be accepted by them as embodying the criteria to which intergovernmental commodity arrangements should conform in order to benefit from the exception provided in the first part of paragraph (h) of Article XX of the General Agreement as revised at the Ninth Session."⁸ However, after considerable discussion at the Tenth Session, the Working Party report and its draft Agreement were not adopted due to disagreements concerning the appropriateness of commodity agreements at all, and concerning the criteria for defining a commodity agreement or arrangements that should be eligible for the Article XX(h) exception.

20. There are no other recorded attempts to define criteria for the application of Article XX(h). After the failure of the draft Special Agreement on Commodity Arrangements in 1955, an alternative approach was pursued, typified by the Resolution of the CONTRACTING PARTIES on "Particular Difficulties Connected with Trade in Primary Commodities." This Resolution provided for: (1) periodic multilateral reviews of commodity problems by the CONTRACTING PARTIES; (2) attention to commodity problems in the context of consultations on balance-of-payments measures; (3) consultations on difficulties in commodity trade under Articles XVIII:5 or XXII:2; and (4) the possible taking of joint international action by convening an intergovernmental conference, not limited to GATT contracting parties, in the event that no other international body had special competence in the field.⁹

21. No contracting party has submitted a complaint under Article XXIII that a measure taken pursuant to an international commodity agreement was GATT-inconsistent, nor has an international commodity agreement been submitted to the CONTRACTING PARTIES for approval under XX(h), nor have any criteria for international commodity agreements been established by the CONTRACTING PARTIES.

E. International Commodity Agreements

22. There is no single definition of an international commodity agreement. However, criteria have encompassed, *inter alia*, that they be international in scope with representation from both producers and consumers, covering a substantial proportion of world trade in the commodity, and in the form of a legally binding international treaty. International commodity agreements generally entail that governments of producer countries and importing countries have agreed to take common steps concerning the production and trade of a specific commodity. These agreements usually allow for administrative (collect and distribute information, undertake studies, operate as a forum for discussion between producers and consumers, etc.) and/or economic mechanisms (buffer stocks (natural rubber) or production and consumption policy instruments

⁸L/416, Final Report of the Working Party, October 1955, p.2, para.5; and L/320, Interim Report, February 1955.

⁹Resolution of 17 November 1956, BISD 5S/26; See also L/592/Rev.1, Report of the Working Party on this Resolution; BISD 5S/87-90.

(cocoa, coffee)). Since its establishment in 1964, UNCTAD has been active in the negotiation of international commodity agreements. There are eight existing international commodity agreements: sugar, wheat, cocoa (just renegotiated), coffee (to be decided whether to renegotiate in September 1993), tropical timber (under renegotiation and expansion), natural rubber, jute, and olive oil. Only three of these still have economic provisions (cocoa, coffee and natural rubber). The renegotiated cocoa provisions have not entered into force yet, and the coffee and natural rubber provisions have been suspended. The International Tin Agreement, the longest-standing regulated commodity market, effectively collapsed in 1985.¹⁰

23. Three of the above agreements contain a provision or, in the case of tropical timber, several references with respect to the environmental aspects of the commodity concerned.¹¹ The preamble to the International Tropical Timber Agreement of 1983 recognizes "the importance of, and the need for, proper and effective conservation and development of tropical timber forests with a view to ensuring their optimum utilization while maintaining the ecological balance of the regions concerned and of the biosphere." The objectives of the Agreement, outlined in Article 1, seek to "encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources and at maintaining the ecological balance in the regions concerned" and encourage reforestation and forest management activities through research and development projects. The Agreement further mandates in Article 28 that the International Tropical Timber Council "review and assess the world tropical timber economy, including ecological and environmental aspects." In the International Sugar Agreement of 1992, Article 30 on "Environmental Aspects" states that "members shall give due consideration to environmental aspects in all stages of sugar production." In the International Cocoa Agreement of 1993, Article 50 provides that "members shall give due consideration to the sustainable management of cocoa resources and processing, bearing in mind the principles on sustainable development agreed at the eighth session of the UNCTAD and the UNCED."

24. Apart from those established under international commodity agreements, there are two other categories of international commodity bodies: intergovernmental groups within the framework of UNCTAD (tungsten, iron ore) and FAO (bananas, citrus fruit, fish, hard fibres, hides and skins, meat, oils/oilseeds and fats, rice and tea); and international study groups (copper, nickel, lead and zinc, cotton, and rubber).¹²

¹⁰See "Recent Developments Relating to International Commodity Agreements and Arrangements" in *Trade and Development Report*, Geneva: United Nations Conference on Trade and Development, 1993. Annex 1: pp.199-203.

¹¹For a discussion of the potential role of commodity agreements as instruments for reducing environmental damage from the production of primary export commodities and for integrating environmental costs in international commodity prices see *Incorporating Environmental Considerations in Commodity Agreements: The Role of International Commodity-Related Environmental Agreements*, Paris: Trade Committee of the Trade Directorate, OECD, 30 October 1992.

¹²An International Study Group can only enter into force if countries representing a negotiated percentage of world trade in the commodity concerned ratify the Terms of Reference, which are usually established under the auspices of United Nations conferences.

Annex

ECOSOC Resolution 30(IV), adopted 28 March 1947¹

The Economic and Social Council,

Noting that intergovernmental consultations are going forward actively with respect to certain internationally traded commodities, and

Considering the significant measure of agreement regarding commodity problems and the coordination of commodity consultations already reached both in the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, and in the Preparatory Commission on World Food Proposals of the Food and Agriculture Organization of the United Nations:

Recommends that, pending the establishment of the International Trade Organization, Members of the United Nations adopt as a general guide in intergovernmental consultation or action with respect to commodity problems the principles laid down in Chapter [VI] as a whole - i.e. the chapter on intergovernmental commodity arrangements of the draft Charter appended to the Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - although recognizing that discussion in future sessions of the Preparatory Committee of the United Nations Conference, as well as in the Conference itself, may result in modifications of the provisions relating to commodity arrangements, and

Requests the Secretary-General to appoint an interim coordinating committee for international commodity arrangements to keep informed of and to facilitate by appropriate means such intergovernmental consultation or action with respect to commodity problems, the committee to consist of a chairman to represent the Preparatory Committee of the United Nations Conference on Trade and Employment, a person nominated by the Food and Agriculture Organization of the United Nations to be concerned in particular with agricultural primary commodities, and a person to be concerned in particular with non-agricultural primary commodities.²

¹Text reprinted in *Review of International Commodity Arrangements*, ICCICA, Geneva, November 1947. pp.8-9.

²Subsequent ECOSOC Resolutions (296(XI), 373(XIII) and 462(XV)) substituted first ICITO and later the CONTRACTING PARTIES to the GATT as the body to nominate the Chairman of ICCICA, and added a person familiar with the problems of developing countries.