

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Group on Environmental Measures and International Trade

AGENDA ITEM 1: TRADE PROVISIONS CONTAINED IN EXISTING MULTILATERAL ENVIRONMENTAL AGREEMENTS VIS-A-VIS GATT PRINCIPLES AND PROVISIONS

Note by the Secretariat

Revision

1. This note responds to the Group's request, made at the meeting of 5-7 July 1993, for a note illustrating where the concepts of "least trade-restrictive" and "proportionality" have arisen in the context of the General Agreement and its instruments, and of panel decisions. The note is factual and attempts to present a historical perspective of these terms.

2. The terms "least trade-restrictive" and "proportionality" do not appear in the main body of the General Agreement. The Declaration on Trade Measures Taken for Balance-of-Payments Purposes, adopted on 28 November 1979, contains a reference to the term "least disruptive effect on trade" (BISD 26S/206, para. 1(a)) which states, "In applying restrictive import measures contracting parties shall abide by the disciplines provided for in the GATT and give preference to the measure which has the least disruptive effect on trade". This phrasing was intended to encourage the use of price based measures over quantitative restrictions.

Panel Decisions

3. The term "least trade-restrictive" first appeared in an argument made by the European Economic Community in the report of the Panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989 (BISD 36S/345). The term was used with respect to Article XX(d) in the context of an interpretation of the word "necessary" in the phrase "necessary to secure compliance". In discussing this phrase, the EEC considered that "any difference between ... two enforcement mechanisms that might be required to adapt the domestic measures to deal with imports [thus requiring the exception in Article XX(d)] must be confined to what discriminated least against imported goods" (para. 3.60). The United States did not believe this to require "an obligation to use the least trade-restrictive measure that could be envisaged" (para. 3.59).

4. In its findings, the Panel did not elaborate on whether necessity was based on the measure being least trade-restrictive; instead the Panel looked at necessity in terms of the measure's consistency with the GATT. Its report stated:

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonable available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same

for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so (para 5.26).

5. This interpretation of the term "necessary" was applied in the report of the Panel on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990 (BISD 37S/200). The report states that "the Panel could see no reason why under Article XX the meaning of the term 'necessary' under paragraph (d) should not be the same as in paragraph (b)" (para. 74). "The Panel concluded ... that the import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives" (para. 75). The Panel found that Thailand could achieve its health policy objectives with GATT-consistent measures.

6. The Panel on United States - Import Restrictions on Tuna and Tuna Products from Mexico similarly based their findings regarding the invocation of Article XX(b) on this same interpretation of the word "necessary". The report of this Panel (not adopted but contained in GATT document DS21/R, 3 September 1991) stated, "The Panel recalled the finding of a previous panel [the Thai Cigarette panel] that this paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable" (page 39, para. xxvii).

7. In the Panel on United States - Measures Affecting Alcoholic and Malt Beverages adopted on 19 June 1992 (DS23/R, 16 March 1992), the United States invoked Article XX(d) with respect to the requirement in some states that alcoholic beverages imported into the state be transported by common carriers authorized to operate as such within the state, whereas in-state producers of alcoholic beverages could deliver their product to customers in their own vehicles. Although the Panel found that this requirement was inconsistent with Article III:4, the Panel stated that, in considering whether Article XX(d) justified the requirement,

It was incumbent upon the United States to demonstrate that particular laws for which compliance is being sought are consistent with the General Agreement and that the inconsistency with Article III:4 of the discriminatory common carrier requirement for imported beer and wine is necessary to secure compliance with those laws. In the view of the Panel, the United States has not demonstrated that the common carrier requirement is the least trade-restrictive enforcement measure available to the various states and that less restrictive measures, e.g. record-keeping requirements of retailers and importers, are not sufficient for tax administration purposes. In this regard, the Panel noted that not all fifty states of the United States maintain common carrier requirements. It thus appeared to the Panel that some states have found alternative, and possibly less trade-restrictive, and GATT-consistent, ways of enforcing their tax laws. The Panel accordingly found that the United States has not met its burden of proof in respect of its claimed Article XX(d) justification for the common carrier requirement of the various states (para. 5.52).

Draft Agreement (1991) on Technical Barriers to Trade and Draft Decision on Sanitary and Phytosanitary Measures

8. The terms "least trade-restrictive" and "proportionality" arose in the context of the Uruguay Round negotiations on the revision of the Agreement on Technical Barriers to Trade (TBT) and on the drafting of the Decision on Sanitary and Phytosanitary Measures (SPS). Both of these draft

instruments contain references to "least trade-restrictive" and the former contains a reference to the term "proportionality". Articles 2.2 and 2.3 of the TBT Agreement state,

2.2 Parties shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. [A footnote here reads: This provision is intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create.] Such legitimate objectives are, inter alia, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia, technology or intended end uses of products.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

9. In the context of the TBT Agreement, therefore, consideration of the degree of trade-restrictiveness necessary to fulfil the legitimate objective would be based on the risks that not fulfilling the objectives would create. Available scientific and technical information, related processing technology or intended end uses of products are the elements listed to assess such risks; regulations should be proportional to these risks.

10. Paragraph 21 of the SPS Decision states,

21. Without prejudice to paragraph 10, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, contracting parties shall ensure that such measures are the least restrictive to trade, taking into account technical and economic feasibility.

11. In the context of the SPS decision, the risks to human, animal or plant health must first be assessed taking into account the scientific, technical, economic and other factors indicated in the text. On the basis of this risk assessment, contracting parties are to determine what level of sanitary or phytosanitary protection is appropriate under the circumstances. Once a level of protection has been determined, there are often a number of alternative measures, or combinations of measures, which may be used to *achieve* this protection (i.e. treatment, quarantine or increased inspection). It is when selecting which specific measures will be applied to achieve the desired protection that contracting parties are to ensure that, except when it is not feasible because of technical difficulties or high economic costs, they institute those measures which least restrict trade.

Conclusion

12. The history of the terms "least trade-restrictive" and "proportionality" in the GATT and its instruments and in Panel decisions indicates that the terms are relatively new to GATT law. The dispute cases presented above illustrate that the term "least trade-restrictive" has arisen in the context of determining necessity with respect to Articles XX(b) and (d) which Panels have viewed in the framework of degree of consistency of the disputed measure with the GATT. Its use in the context of standards has evolved to mean that those standards which have the least degree of trade restrictiveness should be used. Consideration of the degree of restrictiveness should be proportional to the risk of non-fulfilment of the legitimate objectives in the case of TBT. In the SPS case, because the assessment of risks to health are already reflected in the determination of the appropriate level of protection, contracting parties should use the least restrictive means to achieve this level of protection.