

TE 004
26 November 1993

GATT COUNCIL TO REVIEW UNCED FOLLOW-UP AFTER THE CONCLUSION OF THE ROUND; WORK ADVANCES IN THE TRADE AND ENVIRONMENT GROUP

GATT members agreed recently to postpone the Council review of GATT follow-up on the Earth Summit results, originally scheduled for this month, until after the conclusion of the Uruguay Round. When the decision was taken at the Council meeting on 27 October, Chairman András Szepesi stressed that the contracting parties continued to be "determined that the GATT should play its full part in ensuring that policies in the fields of trade, the environment and sustainable development are compatible and mutually reinforcing".

One factor motivating the decision is the wish to avoid any distraction from completing the trade negotiations by 15 December and to ensure that the contracting parties can devote their full attention to UNCED follow-up when they take it up. The decision was fully in keeping also with a theme that has dominated discussions so far on the UNCED follow-up in the Group on Environmental Measures and International Trade and the Committee on Trade and Development: that concluding the Uruguay Round successfully is the most significant, immediate contribution that governments can make through the GATT to

improving the climate for better environmental protection and conservation at both national and international levels and to meeting the objectives of sustainable development (see *Trade and Environment Bulletin* No. 3).

GATT TRADE AND ENVIRONMENT GROUP

At the final meeting for the year of the Group on Environmental Measures and International Trade on 5-6 October, delegations responded to the invitation of the Chairman, Ambassador Hidetoshi Ukawa, to assist him in drawing up a progress report by highlighting what they felt had been accomplished by their discussions in the Group since its activation two years ago. The Chairman intends to submit his progress report to the 49th Session of the Contracting Parties in late January 1994. The Group is recommending that on that occasion the background papers prepared for it by the GATT Secretariat be de-restricted so that they also can help respond to public interest in GATT's work on trade and environment.

Several delegations have commented on how valuable the Group's work is proving to be in helping their national authorities to understand better the substantive linkages between environmental and trade policies. Canada noted that it had strengthened further the conviction that there need not be any conflict between meeting environmental objectives and trade policy objectives. Clearly it is important that the multilateral trade rules do not present an unjustified obstacle to environmental policy-making. However, as the Nordic countries pointed out, an important point too often overlooked is the considerable extent to which policies used to protect the environment can already be implemented flexibly in full compliance with the GATT. It does not require any explicit mention of the word "environment" in the GATT to accomplish that.

Many delegations stressed that an open, non-discriminatory trading system underwritten by GATT rules and disciplines can facilitate environmental policy-making and environmental conservation and protection by helping to encourage more efficient resource allocation and to generate real income growth. In this respect a much repeated theme at the meeting was the importance delegations attached to a successful conclusion of the Uruguay Round negotiations.

Trade provisions of multilateral environmental agreements

Austria circulated a discussion paper which reviewed the Group's work under this agenda item and linked several of the themes which had been taken up to the UNCED results in the Rio Declaration and in Agenda 21. In Austria's view, seven possible solutions had been identified in the Group to ensure that GATT rules did not impede the implementation of legitimate trade obligations in multilateral environmental agreements (MEAs), but did provide reasonable safeguards against misuse of trade measures in this context. These ranged from preserving the status quo in the belief that GATT disciplines are already flexible enough to accommodate legitimate trade measures used in MEAs; using GATT waiver provisions where additional scope is

needed; and interpreting or revising the provisions of Article XX of the GATT to cover explicitly the use of trade measures in MEAs.

During the discussions, delegations reviewed the evolution of their own thinking on this agenda item, but most said they were not yet prepared to conclude on what action, if any, might need to be taken. Several have pointed out that the Group is not a negotiating forum; its role is one of examining and analysing the issues. Even those delegations that have indicated their preference for one solution or another to deal under the GATT with trade measures used in MEAs emphasized that they are still open to examining alternative propositions.

One factor cited widely as having a bearing on the Group's discussions is that only a small number of the MEAs negotiated to date contain any trade provisions; few of those seem to raise questions about compatibility between GATT and MEA provisions, and none has led to a formal challenge under the dispute settlement provisions of the GATT. Nevertheless, as Sweden stressed at the meeting, that should not diminish the importance attached to this subject because many governments are committed to strong international action on the environment and the negotiation of MEAs will continue to be an active area of environmental policy-making. Most delegations see clear grounds for believing this approach will prove more effective and durable, and less disruptive to the multilateral trading system, than *ad hoc* resort to unilateral trade measures to try to deal with environmental problems of a transboundary or global nature. However, the United States reiterated that it saw real practical limitations in certain cases to multilaterally-based solutions.

When it is felt necessary to use trade measures in MEAs, many delegations share the view that most often this need not involve action which extends beyond that available to contracting parties under the GATT. The ASEAN countries, Japan and New Zealand all reiterated that as long as its key principles are respected, in particular MFN and national treatment, the GATT provides considerable scope for using

trade measures to help reduce or eliminate environmental damage. In exceptional circumstances that scope can be enlarged through recourse to the provisions of Article XX of the GATT. They permit a contracting party to apply trade measures which could otherwise be considered inconsistent with its GATT obligations but which are felt to be necessary to protect human, animal or plant life or health or which relate to the conservation of exhaustible natural resources. However the measures must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail nor a disguised restriction on international trade. As noted by Canada, these checks and balances are needed to guard against protectionist abuse which would be as detrimental to the environmental agenda as it would be to the trading system.

Given the considerable scope which exists already under the GATT to use trade provisions in the context of MEAs, debate in the Group has focused on the most challenging questions raised: the use of trade measures to help protect extra-territorial environmental resources and trade measures that apply separately to non-parties of MEAs.

Canada, Japan and New Zealand recalled that some delegations see a need for caution to be exercised in the negotiation of MEAs before including such trade provisions at all. They feel most particularly that it is generally undesirable and should not normally be necessary for contracting parties to use discriminatory trade restrictions against non-parties to an MEA. Matters of sovereignty weigh heavily here, and doubts have been expressed about the appropriateness of dealing with them in GATT. However, the possibility has been raised in the Group that an element of trade discrimination in the treatment of non-parties to an MEA may be justified in exceptional circumstances, for example when a country decides not to join an MEA that has broad and representative international support with the deliberate aim of seeking a commercial advantage from its non-participation and its con-

duct threatens to undermine the environmental objectives of the MEA.

One suggested approach, then, is to consider in GATT the treatment of trade provisions contained in MEAs *ex post* and on a case-by-case basis. As pointed out by the ASEAN countries, this builds on the view that Article XX already provides considerable scope for using trade measures for environmental purposes. Where doubts exist about the probable compatibility of trade measures in MEAs with the provisions of the GATT, or where it proved necessary to move deliberately outside those limits, recourse could be taken to the waiver provisions of Article XXV.

The appeal of this approach has been described in several ways. One is that the scale of the remedy fits the problem. Korea noted that there has not, to date, been any challenge under the GATT to the trade provisions of an MEA, and having recourse to a waiver would provide a measured, case-by-case response to any problems that might arise in the future. Also, it could be presumed that if an MEA reflected a genuine multilateral consensus it would find broad support among GATT contracting parties and there need be little, if any, uncertainty about the chances of securing a waiver for it. On the other hand, the EC, Sweden, Switzerland and the United States recalled doubts that have been expressed that the waiver approach would provide negotiators of MEAs with the necessary degree of security that there would not be a GATT challenge if they felt the need to include trade provisions in an MEA. Furthermore, trade provisions in an MEA, even if granted a waiver, could still be challenged under Article XXIII of the GATT on the grounds of non-violation, nullification and impairment. Some feel that the waiver approach could be time-consuming and possibly cumbersome, and they have concerns that GATT waivers are time-limited whereas environmental problems are increasingly recognized as requiring long-term and global solutions. The EC added at the meeting that the GATT has little experience in dealing with collective waivers of multilaterally agreed measures, which is what would be required in the case of trade measures

applied under the terms of an MEA. Also, it has been suggested that in the absence of a clear hierarchy among different, self-standing international agreements, a formal denial of a waiver in GATT could create an untenable conflict of international obligations for contracting party governments.

A second approach that has been suggested is to define conditions for the use of trade measures in the context of an MEA to tackle transboundary and global environmental problems which, as long as they were met, would ensure that the GATT would accommodate the measures. This approach has been described by Sweden as creating an "environmental window" in the GATT. One formulation put forward earlier this year by the EC would involve a collective interpretation by GATT contracting parties of the applicability of the provisions of Article XX in circumstances where trade measures are applied separately in an MEA to non-parties.

The advantages of this approach have been described in particular in terms of its *ex ante* nature and the predictability it would provide for the negotiation of MEAs. This, some delegations feel, would provide a robust and definitive basis for avoiding any future conflicts between trade and environmental policy-making in the context of MEAs. However, others continued to express doubts at the meeting about the need to make special provision in GATT to accommodate trade provisions taken in the context of MEAs. One specific concern is that this approach could upset the existing balance of GATT rights and obligations, most particularly for contracting parties that are not parties to an MEA. Another is whether it would prove possible to find a single formula for implementing this approach that would, on the one hand, be general enough to encompass all legitimate requirements, present and future, for using trade measures in the context of MEAs and, on the other, would neither overstretch the basic concept of an exception clause which underlies this approach nor open the door to protectionist abuse. Also, some fear it might be difficult to establish criteria for implementing this approach without stepping

outside the competence of the GATT and entering into an examination of the environmental justification for the use of trade provisions in an MEA.

The need for carefully-defined, pre-established criteria on which to base this second, *ex ante*, approach is indeed seen as critical by those who favour it, and a number of criteria have been identified as being of particular importance and have been the subject of preliminary examination and discussion.

One criterion is what defines an MEA. Two factors have been mentioned in this regard. One is the need for a clear understanding of the meaning and coverage of the term "environment" in this context. The other is what constitutes a genuine "multilateral" consensus in an MEA. This is considered important since a broad enough consensus is likely to produce a well-balanced multilateral agreement and a robust outcome. Mexico recalled that preliminary discussions on this point have indicated that negotiation of and participation in an MEA should be open on equitable terms to all countries, and that participation should be numerous and broad in geographical terms and in terms of countries at varying levels of development.

A consideration here also is why a country might decide not to join an MEA. It has been suggested that it may be because it does not find the scientific evidence persuasive, it may not be able to afford to join, or it may consider there are more pressing problems that deserve higher priority. In this regard mention has been made of the reference in Principle 7 of the Rio Declaration to "common but differentiated responsibility" of states in resolving environmental problems of a global nature. Emphasis has been placed on the importance of looking at non-parties strictly from the point of view of their non-cooperative and internationally damaging environmental conduct, and mention has been made in that regard of the need to develop a common understanding of the language in the headnote to Article XX of the GATT requiring that trade measures should not be applied "in a manner which would constitute a means of arbi-

trary or unjustifiable discrimination between countries where the same conditions prevail".

Another criterion referred to widely at the meeting is to what extent a trade measure must be specified in an MEA if it is to be accepted under this approach. Mexico recalled that few MEAs to date include mandatory obligations for the use of specific trade measures, and even those that do, for example by directing their signatories to use quantitative restrictions or import or export licensing schemes, still permit a wide range of individual discretion to be used. One way the issue has been described is whether a general exception should be available in GATT for the use of trade measures in the context of an MEA when a contracting party merely asserts that the trade measure is linked to and is necessary for it to meet the objectives of the MEA, or whether the measures should be specifically mandated in the MEA. Not being specific enough might risk giving excessive liberty without adequate safeguards under the GATT for using trade measures in this context. However, demanding too high a degree of specificity might not be desirable or possible since in practice the trade measures contained in an MEA may have to be tailored by individual signatories to particular circumstances. New Zealand has pointed out in this context that just as the same trade measure may not be appropriate for all signatories, trade measures might not be appropriate at all for some signatories.

The "necessity" of using trade measures in an MEA was also cited by several delegations as being an important parameter. Sweden emphasized that this did *not* refer to whether or not an MEA itself is necessary, which is a task for governments to decide upon elsewhere than in GATT. Rather, it refers to the necessity of using trade measures to achieve the objectives of an MEA, in particular discriminatory trade measures. One view is that as a general rule trade measures should accompany environmental policy measures only if the latter do not suffice to realise a specific environmental objective. Beyond that, Mexico recalled, for some the concept of necessity is related to the use of the

least trade restrictive or distorting measure available, and the proportionality of the measure to the need for trade restriction to ensure the environmental objective is met, but the United States said that those notions are not well-known or well-defined yet in the GATT and they would need to be further elaborated upon.

The assurance of safeguards against the protectionist abuse of trade measures taken in the context of an MEA is seen as being of considerable importance. Several delegations have suggested in this regard that if this approach is to be seen in terms of a collective interpretation of Article XX of the GATT it would be necessary to clarify the language in the headnote to that Article which requires that trade measures should not constitute "a disguised restriction on international trade". Transparency is also considered to be important here. While it has been suggested that the importance of ensuring transparency in GATT might vary inversely with the extent to which a trade measure is openly negotiated and clearly specified in an MEA, Canada pointed out that a high degree of transparency is desirable in all cases and would assist in minimizing unintended trade effects and reducing the possibility of protectionist abuse.

A related institutional issue that was raised at the meeting is dispute settlement. Several delegations noted that this is an important aspect of the relationship between MEAs and the GATT and an area of considerable public interest, and hence an issue that will require further consideration.

Transparency

A good deal has been accomplished under this agenda item, and there is felt to be broad agreement in the Group on several points. One that was noted by Canada, is the centrality of transparency to the Group's work on all of its agenda items. Mention has already been made of the importance attached to ensuring the transparency of trade measures introduced in the context of MEAs; ensuring the transparency of new packaging and labelling requirements aimed at protecting the environment, where possible at their developmental stage, is also

considered crucial. Another point on which there appears to be broad agreement is that transparency is not an end in itself. It is a means to build confidence in and provide security and stability to the multilateral trading system, to minimize trade restriction and distortion, to assist private sector operators to adjust to changing trade policies, and to prevent trade disputes from arising.

Sweden suggested that a consensus seemed to be emerging in the Group on a number of other issues too. One is that transparency requirements in the area of environmental measures should not be more stringent than those in other areas of policy-making that affect trade. Several delegations have said that current GATT provisions relating to transparency (notably Article X, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, and the transparency provisions of various Tokyo Round Agreements, particularly the Agreement on Technical Barriers to Trade), especially once they have been supplemented by the new Uruguay Round provisions, create a sufficiently broad basis to ensure adequate multilateral transparency of national environmental regulations likely to have trade effects. Sweden added that effective compliance with these requirements is essential, and said the TPRM exercise would assist in drawing attention to areas where compliance could be further improved.

Some delegations have said that lack of specificity in GATT's basic transparency provisions can make them too general to be effective. Sweden drew attention to certain trade-related environmental measures that might not be covered adequately, such as measures applied by local governments and non-governmental organizations. Other delegations have cautioned against excessive ambition at a detailed level of transparency, and particularly against over-extending notification requirements.

It was stressed by several delegations that *ex ante* notification (before adoption and implementation of trade-related measures), such as that required under the terms of the

Agreement on Technical Barriers to Trade, can be particularly valuable, as the United States pointed out, as long as it offers the opportunity for other interested parties to provide input at the stage of development of new legislation and time for affected producers to adapt to new regulations. However, it was noted that *ex post* notification is more usual in GATT and, if properly complied with, can go a long way towards meeting the objectives described above. In the case of environmental regulations, including those contained in MEAs, governments may need to intervene quickly to address an urgent cause, and that in itself may preclude meeting a requirement of *ex ante* notification in all cases.

Brazil, Mexico and Sweden noted that there has been a generally favourable response to the proposal that governments might consider establishing enquiry points (as is done under the Agreement on Technical Barriers to Trade) open to all interested parties, public and private. These would provide information on trade-related environmental measures - including, and in some respects in particular, those not subject to formal notification requirements under the GATT - and on trade opportunities presented by changes in national environmental legislation. Such a system could also assist in increasing the transparency of private schemes (notably environmental labelling) and local and state government programmes. However, doubts have been expressed, particularly by the United States, about the desirability and practicality of organising enquiry points around the stated objectives of policy measures rather than around particular categories of measures, and this issue will require further consideration.

As Sweden pointed out, discussions under this agenda item have evolved from the scope of existing and future transparency provisions in GATT to the trade effects of different kinds of trade-related environmental measures on a case-by-case basis. The Group has begun examining the potential trade effects of various types of measures with a view to considering how adequately their transparency is ensured. The potential for a measure to have significant trade

effects was described by New Zealand as one of several "filters" through which the adequacy of existing transparency obligations might be examined.

Environmental packaging and labelling requirements

New forms of packaging and labelling requirements aimed at protecting the environment are being used by an increasing number of countries around the world. Discussions in the Group have been enriched by the provision by delegations of information that reflects their own national experience with these measures, both in terms of the environmental objectives that are being pursued and the trade effects that some countries are experiencing. Given the technical nature of the subject matter under this agenda item, the information has been particularly valuable. A co-operative approach to the sharing of information between governments on their environmental objectives and the development of their policies in this area can help to prevent trade problems from arising, and discussions at this meeting continued to build on that approach.

Brazil recalled earlier discussions in the Group on the problems that could be raised for exporters, especially in developing countries, by eco-labelling systems based on life-cycle analysis. It went on to describe difficulties that could face the Brazilian paper and pulp industry in this respect. Brazil was conscious of the voluntary character of eco-labelling schemes and their potential usefulness from an environmental point of view. However, schemes that required overseas producers to meet environmental conditions particular to the domestic market where the eco-labelling scheme was operating could produce significant trade restricting effects without necessarily contributing to improved environmental management abroad where environmental resource endowments and constraints were not the same. Schemes that favoured recycled content in paper products, for example, did not take account of whether waste paper from which to make pulp was available to

overseas suppliers nor of the environmental benefits provided by sustainably managed forests from which pulp based on wood was produced. Similarly, eco-labelling criteria based on energy consumption or on emission standards would not necessarily be well-suited from an environmental point of view to conditions facing overseas suppliers.

Chile reiterated several of the general concerns described by Brazil about eco-labelling schemes based on processes and production methods. It extended the analysis also to trade problems that could be caused by packaging requirements based predominantly on domestic environmental resource endowments and constraints in the country applying the requirements.

Canada and New Zealand recalled several of the issues that had been discussed earlier in the Group under this agenda item, such as the relationship between market-based and regulatory approaches to packaging and labelling requirements, the distinction between voluntary and mandatory measures, the scope for harmonization and mutual recognition of different countries' schemes, and approaches to the setting of criteria (for example in terms of processes and production methods) and threshold levels and to certification of eco-labelling schemes. All of these issues, they concluded, required further detailed analysis in the Group.

UNCED follow-up

The decision to postpone the GATT Council meeting devoted to UNCED follow-up until after conclusion of the Uruguay Round negotiations has meant that the Group's discussions on UNCED follow-up cannot be completed as planned this year. The Group nevertheless took the opportunity at this meeting of listening to a report from Finnish Ambassador Antti Hynninen, who chaired recently Sessional Committee 1 of the UNCTAD Trade and Development Board, on UNCTAD activities relating to UNCED follow-up. Many delegations emphasized in this context the importance of avoiding duplication of work on UNCED follow-up in different fora.

Delegations also recalled points that had been made at the Group's first formal debate on UNCED follow-up in July. References were made to UNCED principles such as the need for international co-operation and for actions based on international consensus when addressing transborder or global environmental problems as essential elements to guide work in the Group. Several delegations stressed that the concepts of sustainable development and the need to address specifically the problems of developing countries, where the prescription for achieving sustainable development may be different from that of other countries, should be central to the Group's work.

Some delegations reiterated their view that the Group should identify issues raised in Chapter 2 of Agenda 21 which are not already covered by its existing agenda and engage in a focused analysis of them in its future discussions. Proposals made in

this regard are to focus on the issues of clarifying GATT's role in dispute settlement, clarifying the trade effects of process and production based environmental measures and exploring their link to the GATT concept of "like product", examining the potential trade effects of economic instruments such as environmental taxes and subsidies, and the impact of environmental protection on competitiveness. However, other delegations insisted that the Group should first confirm basic principles and recommendations contained in Agenda 21, such as in their view the rejection of extra-territoriality and unilateralism, as the common basis and point of departure for further work in the Group. Several said in this respect that there is an obligation on those delegations proposing the addition of new items to the Group's work programme to explain more clearly what they are seeking from a discussion of them.