

TARIFFS AND TRADE

Group on Environmental Measures and International Trade

Agenda Item 2: Multilateral Transparency of National Environmental Regulations

Note by the Secretariat

This Note responds to the Group's request, at its meeting on 9-10 July, that the Secretariat prepare a paper pulling together the issues that have been raised under this agenda item with regard to existing transparency provisions in the GATT and those that will result from completion of the Uruguay Round negotiations.

The Importance of Transparency

1. The transparency of national trade and trade-related measures, and of the way those measures are administered, is important for the proper functioning of the multilateral trading system. Transparency creates confidence among Contracting Parties that GATT obligations are being respected and that benefits are not being undermined. It also facilitates investment and production decisions by the private sector when those decisions depend, in part at least, upon identifying overseas market opportunities. Transparency plays an essential role, therefore, in ensuring the security and predictability of market access, in assisting countries -- particularly smaller and developing countries -- to defend their trade interests, and in avoiding trade disputes. However, transparency alone cannot resolve a real conflict of interest.
2. The transparency of national environmental regulations becomes a matter of interest in GATT when the regulations can, or do, have trade effects. Such regulations may take many forms. Those cited most often in the Group's discussions are explicit import or export restrictions and technical regulations and standards (e.g. labelling, packaging and recycling requirements). However, other kinds of regulation have also been mentioned, including environmental subsidies, internal sales and distribution bans, regulations based on production methods, and regulations applied in the context of international environmental agreements.

Existing GATT provisions and prospective Uruguay Round provisions on Transparency

3. The existing provisions cited most often are Article X of the GATT, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, and the notification provisions of the Agreement on Technical Barriers to Trade (TBT). However, separate notification requirements are contained in several other GATT Articles and in many of the Tokyo Round Agreements and Arrangements. These have been listed in a Secretariat Note prepared in 1988 for the FOGS Negotiating Group (MTN.GNG/NG14/W/18).

4. Broadly speaking, the provisions require:

- the prompt publication of trade regulations (Article X);
- notification, to the maximum extent possible, of the adoption of trade measures affecting the operation of the General Agreement, where possible in advance of implementation (1979 Understanding);
- publication of proposed standards and publication and notification of proposed technical regulations, that (i) are not based substantially on relevant international standards and (ii) may have a significant effect on the trade of other Parties, prior to their entry into force¹, or, where that is not possible because of urgent problems of environmental protection among other things, immediately after their adoption; account be taken of comments from other Parties on proposed or adopted standards and regulations; and the establishment of enquiry points to answer enquiries on demand from other Parties on proposed or adopted standards and regulations. Similar provisions apply to the formulation and application of certification systems. (TBT Agreement)

5. Several aspects of the transparency provisions of the TBT Agreement have been remarked on particularly favourably. Allowing each party to judge for itself whether its trade-related measures will have a significant impact on the trade of other parties is considered a practical basis for ensuring transparency, since failure to notify a measure can be regarded negatively if the measure is subsequently challenged. Also, the provisions requiring publication, notification and consultation prior to adoption of a regulation provide a useful early warning mechanism of possible trade problems associated with a measure; experience has shown that it is often possible to modify a draft regulation in order to take other parties' concerns into account without sacrificing the regulation's original objective.

6. A number of new provisions improving and extending transparency will result from completion of the Uruguay Round negotiations. The establishment of a Central Registry of Notifications under the FOGS Agreement, with its indicative list of notifiable measures, will increase clarity and enable the closer monitoring of how well implementation of notification requirements is being met. The adoption of the results of the Round as a single undertaking will widen the coverage of Agreements that, at present, have only limited membership. Transparency of environmental measures related to trade in agriculture and to trade in services will be introduced, along with transparency of technical regulations based on production methods that are related to product characteristics and better transparency of technical regulations applied by local government and non-governmental bodies.

¹Parties are required to allow a reasonable interval between the publication of a technical regulation and its entry into force in order to allow time for producers in exporting countries, and particularly in developing countries, to adapt their products or methods of production to the requirements of the importing country; the TBT Committee has recommended 60 days as the minimum length of time to be allowed for the presentation of comments from other Parties.

7. In addition it has been suggested that if the draft Decision on Products Banned or Severely Restricted in the Domestic Market were adopted, it would improve transparency of trade in products which present a serious and direct danger to human, animal or plant life or health.

How adequately do these provisions ensure the transparency of national environmental regulations?

8. Some delegations have suggested that existing transparency provisions should be strengthened in the light of the increase in national environmental legislation, and that possibly a new transparency mechanism should be created.

9. Many other delegations consider that the provisions described above, and particularly the improvements in transparency that it is expected will result from implementation of the Uruguay Round Agreements, are adequate in principle to ensure proper transparency of national environmental regulations with trade effects and that there is no need for any new mechanisms. Some have concluded, for example, from an examination of the Secretariat's compilation of notifications (L/6896) that a broad spectrum of trade-related environmental measures is covered already, including quantitative restrictions, limit values for harmful substances, emission standards, limitations or bans on the use of products, import bans, sales bans, recycling requirements, and labelling and packaging requirements; and measures such as technical regulations and SPS measures based on production methods will also be covered after completion of the Round.

10. Nevertheless it has been suggested that even after implementation of the Uruguay Round results, some gaps may exist. One concerns trade-related environmental measures introduced under the provisions of Article XX of the GATT; views differ over whether Article XX relieves a Contracting Party of all its GATT obligations, including the obligation to notify, or whether the requirement in that Article that "measures are not applied in a manner which would constitute a disguised restriction on international trade" is in fact a transparency requirement. In this context, it has also been suggested that even if transparency is not a requirement of Article XX, the measures introduced under its provisions would not escape notification requirements elsewhere, for example under the 1979 Understanding or the TBT or SPS Agreements. Whatever the case, transparency is considered important in this context by those delegations that believe Article XX provides the basis for an increasing number of trade-related measures taken legitimately to protect domestic environmental resources.

11. Other actual or potential gaps in transparency that have been mentioned are:

- there is no requirement to publish or notify technical regulations or standards (TBT or SPS) that are based substantially on international standards;

- handling requirements, such as recycling systems for the handling of wastes, are not evidently subject to publication or notification;

- local government and non-governmental bodies are required to comply with the transparency provisions of the revised TBT Agreement and the new SPS Agreement, but are not covered so well in other Agreements;

- there is no requirement to publish or notify voluntary measures, such as standards or eco-labelling schemes;

- it is not clear that economic instruments that work with the market rather than against it are covered by the procedures. Examples given in this context are tradeable emission permits, environmental taxes and charges, including environmental import fees, and incentives to adopt clean technology.

12. However, it has been noted that trying to gather information on all trade-related environmental measures could make the task unmanageable.

13. Many delegations have questioned whether transparency provisions in general are applied effectively in GATT, and to what extent implementation of the Uruguay Round results will lead to improvements in this regard. It has been stated, for example, that Parties to the TBT Agreement appear to interpret the obligations to notify very differently, judging from evidence in TBT/W/156 of a wide variation in the number of notifications that are received from different Parties. For example, many new forms of packaging and labelling requirements have not been notified, even though they apply to imported products. Also, attention has been called to the fact that the list of notifications in L/6896 contains no Article III notifications nor Article XVI:1 notifications of environmental subsidies. One suggestion in this regard is that the Group discuss and elaborate more clearly the appropriate implementation practices for these and other transparency obligations, to strengthen their day-to-day implementation. Another is that each delegation has a responsibility to examine how well it is complying with existing notification requirements and to assess any residual gaps in the system.

14. A number of suggestions have been made for improving transparency beyond what is contained in existing GATT provisions or would result from the Uruguay Round negotiations. One is that the Group establish a GATT registry of trade-related measures in international environmental agreements; one delegation has commented in this regard that only measures which have a significant trade effect should be included in such a registry. A second is that the Secretariat prepare a study of the kinds of notification requirements that exist elsewhere, for example in international environmental agreements; prior informed consent procedures were mentioned explicitly in this regard. A third, is that the parameters used to determine when a trade-related measure should be notified as serving the purpose of environmental protection should be clarified. A fourth is that the notification requirements prior to the adoption of a

measure, such as those contained in the TBT and SPS Agreements, should be introduced for all trade-related, national environmental measures. A fifth is that the Group should place particular emphasis on improving the transparency of environmental measures in the review of notification mechanisms which is called for in the Uruguay Round FOGS Agreement. It should be noted that similar reviews are called for in the Agreement on Subsidies and Countervailing Measures and in the Understanding on Interpretation of Article XXIV of the GATT.

Further Work

15. In order to clarify the existing situation with regard to transparency in practice, the Secretariat could revise and update the lists of measures notified as serving an environmental purpose which are contained in L/6896 and TBT/W/156. However, it is unlikely that there would be very much to add to either list.

16. The Secretariat could compile a list of trade-related measures in international environmental agreements, and it could prepare a study of the kinds of notification requirements which exist in those agreements.

17. The Group could discuss further what parameters should be used to identify national environmental measures that should be notified routinely to other Contracting Parties, but which perhaps at present are not.

18. This could be supported by a notification exercise in the Group of national environmental measures, on a formal or informal basis and involving reverse notifications or not. That might help to clarify the extent to which existing or prospective Uruguay Round transparency provisions are adequate, and whether certain measures fall outside them. Such an exercise has, in part at least, been started already with the Group's invitation at its meeting in July to delegations individually, and on a goodwill basis, to submit to the Secretariat for its use information that reflects their own national experiences with packaging and labelling requirements.