

Group on Environmental Measures and International Trade

AGENDA ITEM 2: MULTILATERAL TRANSPARENCY OF NATIONAL ENVIRONMENTAL REGULATIONS LIKELY TO HAVE TRADE EFFECTS

Note by the Secretariat

1. This Note responds to requests at the Group's meeting on 1-2 October that the Secretariat supplement the information contained in TRE/W/2 to assist the Group to examine further the adequacy of existing transparency provisions in the GATT and those that will result from completion of the Uruguay Round negotiations with regard to national environmental regulations likely to have trade effects.

2. The Note sets out a checklist of environmental policy instruments based on one developed in the OECD for examining their potential trade impact¹. A similar typology is being used in UNCTAD as a basis for adjusting UNCTAD's Trade Control Measures Information System. This Note draws also on discussions in the Group and on notifications made to the GATT Secretariat and recorded in L/6896 and in TBT/W/156.

3. The distinction drawn by the OECD between "economic instruments" and "regulatory instruments" has been retained in this Note. In general, economic instruments will have more uniform, less distorting, trade effects in a market economy than regulatory instruments, since they affect prices directly and in a predictable way. For that reason, the transparency of regulatory instruments is likely to warrant more attention than that of economic instruments.

4. With respect to requests by some delegations that an attempt be made to weight potential gaps in transparency by the importance of the trade effects attributable to different kinds of measures, the Secretariat has no firm data that would allow an objective weighting system to be developed; indications of the trade impact of different types of measures are therefore given in general terms only.

¹OECD: Working Party of the Trade Committee "Checklist of Environmental Instruments for Assessing their Potential Trade Impact". (Document TD/TC/WP(91)6/REV2, distributed 24 January 1992).

I. Product-specific measures

(i) Economic instruments

5. Various internal taxes and charges are used for environmental purposes. Even if applied in full conformity with GATT provisions, their trade impact can still be considerable to the extent that tax differentiation brings about major changes in patterns of consumption. The effects may fall more heavily on imported products if the consumption patterns affected are supplied preponderantly by imports. Some taxes may be considered eligible for border tax adjustment. The publication requirements of Article X would appear to apply in all cases, as well as the 1979 Understanding on Notification, but more specific notification requirements would not seem to apply.

Differentiated **indirect consumption taxes** are used increasingly to influence consumption towards less-polluting products. A notable example is to encourage the use of lead-free petrol in motor vehicles. There would not seem to be any direct trade impact of such taxes beyond the general trade effects noted above.

Product charges are applied to products that are themselves pollutants or that otherwise cause pollution, for example because certain of their components create disposal problems (e.g. toxic chemicals, detergents containing phosphates, batteries containing heavy metals, or non-returnable packaging). They may be levied at the stage of production, consumption or disposal. Their trade impact may be increased if alternative and cheaper opportunities to meet environmental standards without paying the product charge are available more readily to domestic than to overseas producers (e.g. by establishing handling systems for recycling packaging), or if the charge is high in relation to the value of the product (e.g. charge on long-distance transport packaging).

Emission charges are applied on the discharge of pollutants into air, water, soil and on the generation of noise. They may be levied at the point of consumption (in which case they are similar to product charges and would have similar trade effects), or they may take the form of **user charges** to cover the cost of public treatment of effluents and waste. Private **disposal charges** for particular products may also be applied. They are not believed to involve any particular trade impact.

Administrative charges are typically linked directly to regulatory instruments to cover the costs of government services, and can take the form of licence, registration, testing and control fees (e.g. to test and register chemicals, or to license motor vehicles). They may be levied at the point of production, import, distribution or consumption. Their trade impact may be increased if the charges are high in relation to the value of the product and if the market is segmented among competing, differentiated products each of which requires separate testing or registration.

6. Deposit refund schemes are applied increasingly widely to address problems (both bulk and hazard) of waste disposal and to encourage recycling, and there is a tendency to make producers responsible for both retrieval and recycling. They are applied in particular to packaging and containers, but are envisaged also for used products such as dry cell batteries. They are generally levied at the point of consumption. Their trade impact may be increased if imported products need more or different kinds of packaging (e.g. because of longer transportation distances), particularly if the deposit is high in relation to the value of the product, or if access to retrieval and recycling schemes is less readily available to, or more costly for, importers. The basic transparency provisions of Article X and the 1979 Understanding would seem to apply.

7. Product-specific subsidies for environmental purposes may take the form of grants, soft loans or tax allowances for the purchase of less-polluting products. They are available more usually to producers (e.g. to purchase intermediate inputs, machinery or equipment) but can apply also to final consumers (e.g. tax credits for home insulation). Their trade impact would appear to depend substantially on how they are administered, but it may be increased if imported products are less clearly eligible than domestically produced goods to receive subsidies, or if the subsidies displace purchases of competing imported products. Notification of such subsidies might be called for under Article XVI:1 of the GATT.

8. Voluntary eco-labelling schemes (for labelling requirements, see technical regulations and standards) are increasingly widely used. The schemes are sponsored privately, allowing participating producers to draw attention to the environmental qualities of their products so that consumers may express a choice in the marketplace about the environmental qualities of the products they purchase. Governments may be involved in such schemes to verify the information given on a label. The trade impact will depend substantially on how the schemes are administered; it may be adversely affected to the extent that imported products do not have access to national schemes on the same terms as domestically produced goods. Such schemes would not appear to be covered at present by the GATT, and are therefore not subject to any transparency requirement. In future they may be covered, at least in part, by the Code of Good Conduct for the Preparation, Adoption and Application of Standards in Annex 3 of the Uruguay Round Agreement on Technical Barriers to Trade, which contains certain notification requirements.

(ii) Regulatory instruments

9. Prohibitions or restrictions on imports or exports or on the domestic sale, purchase, transportation, distribution or use of products are widely applied for environmental purposes. Many variations are possible, including combinations of the measures listed below. Their potential trade impact may easily go beyond that of internal taxes and charges which cause

a once-and-for-all relative price shift, since regulatory instruments tend to block price signals and mask evolving changes in international competitiveness. In addition to being subject to Article X and the 1979 Understanding, many of these measures are subject to specific notification requirements under the GATT and the draft Uruguay Round Agreements.

Prohibitions or restrictions on imports are used to enforce domestic environmental standards (see technical regulations and standards) and to reinforce third countries' export restrictions, for example in the context of a bilateral, regional or multilateral environmental agreements (e.g. endangered species, hazardous waste). Their trade impact would seem evident, but it may be affected by the way in which restrictions are administered (e.g. quota allocation). Specific notifications may be called for by the Questionnaire on Import Licensing Procedures (L/5640 series) or under a 1984 recommendation adopted by the CONTRACTING PARTIES (BISD 31S/12) (see L/6896, Annex V). Some notifications have been made under the Agreement on Technical Barriers to Trade (see TBT/W/156).

Prohibitions or restrictions on exports are applied to reinforce domestic controls on production or consumption of specific products (e.g. exhaustible natural resources) and in the context of bilateral, regional and multilateral environmental agreements (e.g. endangered species, hazardous waste). Their trade impact would seem evident. Specific notifications may be called for under the 1984 recommendation adopted by the CONTRACTING PARTIES (See above reference, and also L/6896, Annex V). Some notifications have been made under the Agreement on Technical Barriers to Trade (see TBT/W/156).

Prohibitions or restrictions on domestic sale, purchase, circulation or use are widely used for environmental purposes. They may be backed up by explicit import restrictions, or be made effective through customs verification and controls authorized under national legislation to secure the integrity of domestic market regulations. In either event, their direct trade impact would seem to be evident, although much can depend upon the particular way in which the measures are administered. The requirements of Article X and the 1979 Understanding would appear to be the principal transparency instruments that apply to such measures, but additional notification requirements would seem to apply to some of them. The draft Decision on Products Banned or Severely Restricted in the Domestic Market may introduce new transparency provisions in this area.

In particular, **technical regulations and standards** are probably the most important sub-set of these measures. They may target and be applied at any or all stages of a product's life-cycle through its production, packaging, labelling, handling, transport, sale, use and disposal (see also TRE/W/3). They are often applied in conjunction with **testing and certification schemes** to verify that the norms in question are being met. In some countries there can be significant variations in technical

regulations and standards between the national and sub-national government levels. Their trade impact can depend on many factors, including how regulations and standards are set and administered, their compliance costs (see also administrative charges) and the accessibility of testing and certification schemes for imported products, technological ability to meet higher regulations and standards than exist in other markets, and whether market share is sufficient to allow the additional production costs of meeting different standards in different markets to be amortized over a production run. Specific notification requirements are contained in the Agreement on Technical Barriers to Trade (see TBT/W/156). However, not all such measures fall unambiguously under the provisions of that Agreement. In particular, technical regulations and standards relating to product-handling and to waste management and disposal (such as retrieval and recycling) are not mentioned explicitly in Annex 1 of the Agreement.

The draft Uruguay Round Agreement on Technical Barriers to Trade extends transparency to technical regulations and standards laying down "product characteristics or their related processes and production methods", including "... packaging, marking or labelling requirements as they apply to a product, process or production method".

10. Resource use quotas on products may be applied to restrict the use of renewable natural resources or the amount of emissions (e.g. fisheries or forestry quotas, limits on water use, requirements on using recycled products such as newsprint, packaging or containers in certain proportions). They are applied at the point of production. The trade impact may be increased by checks on the origin of imports to achieve effective enforcement of the resource quotas, or by requirements to use recycled products in place of new imported products. Resource use quotas may also reduce exports. Article X and the 1979 Understanding would seem to apply, but the measures would not appear to be subject to specific notification requirements in GATT.

11. Prior informed consent (PIC) procedures aim to provide information on the environmental qualities of traded products and on the measures adopted by an exporting country with respect to its domestic treatment of the products, so that third countries may take a better informed decision themselves on whether or not to allow imports of the product into their markets. A principal purpose of such procedures is therefore to increase the transparency of trade in the products concerned. PIC procedures are included in the CITES, the London Guidelines and the Basel Convention. PIC procedures would appear to be subject to transparency requirements on import and export licensing, including under the Agreement on Import Licensing Procedures. The draft Decision on Products Banned or Severely Restricted in the Domestic Market may introduce new transparency provisions in this area.

II. Measures applied to processes and production methods (PPMs)

12. Measures applied to PPMs are an increasingly important area of national environmental policy-making. Environmental degradation can be caused throughout a product's life-cycle (from production, to marketing and consumption, to final disposal as waste). The theory of optimum policy intervention suggests that the most efficient policy is the one which addresses a problem at its source, so that environmental policy-making (based, for example, on the Polluter-Pays-Principle) can be expected justifiably to focus in part at least on pollution caused by PPMs.

13. PPM measures applied at the national level can cause trade effects for domestic producers; for example, a tax applied to a particular PPM (which may affect the production of one or many products) can raise production costs and decrease the competitiveness of producers subject to the tax. That in and of itself, however, would not appear to be a legitimate matter of concern under the GATT or the draft Uruguay Round Agreements, any more than other policy-induced changes to domestic production costs.

14. Nor does it appear that the GATT or the draft Uruguay Round agreements recognize PPMs as a justification for differentiating between products in terms of their trade policy treatment if the PPMs do not alter a product's characteristics. There would appear to be no basis in GATT, therefore, for applying trade or trade-related measures to products on the basis of unincorporated PPMs, and it would follow that there are no transparency provisions in GATT which would cover such measures.

15. The main types of PPM measures are listed below. In view of the above, they may be considered by the Group to be of no relevance to its discussions. It is worth pointing out, however, that it is currently foreseen in the Montreal Protocol that trade restrictions could be applied in certain circumstances to products produced with, but not containing, the controlled substances covered by the Protocol.

16. Prohibitions and restrictions on PPMs are becoming more widely used in the OECD countries and elsewhere. They may be prescribed by regulations or they may be voluntary, working through the effect of public pressure. They may be applied at any stage of production, from harvesting or mining natural resources that are used as inputs through to the final production process.

17. Technical regulations and standards applicable to PPMs are widely used (e.g. emission standards).

18. Certain types of information-generating requirements are used to ensure that information about the environmental qualities of PPMs is disseminated to consumers. **Eco-labelling** (both voluntary and compulsory) can be used in this way. Other forms include **environmental impact assessment schemes** and **environmental audits**. If such requirements are

publicized only for domestic producers, the absence of information on overseas producers may adversely affect consumer opinion of imported products. If the requirements are applied equally to domestic and overseas producers, extraterritorial standard-setting of PPMs may be implied.

19. PPM subsidies can be used to help producers meet higher environmental standards. The subsidies could have the effect of reducing a competitive disadvantage vis-à-vis producers overseas who are not required to meet equivalent environmental standards of production. The most direct effects on trade would occur if PPM subsidies were granted to raise the competitiveness of exports, or to raise the competitiveness of domestic producers in domestic markets vis-à-vis imports.

20. Marketable permits are used to allow producers to trade among themselves, and subject to a given set of rules, environmental quotas, allowances or ceilings on pollution levels or resource use quotas that are initially allocated by the appropriate authorities. These schemes exist at present only at the sub-national and national levels, but they could in principle be used at regional and international levels. The approach gives producers more flexibility to organize their PPMs, and hence may help to mitigate the trade impact of environmental norms and standards on PPMs.

III. Environmental regulations taken in pursuance of Multilateral Environmental Agreements (MEAs)

21. This Note does not identify separately national environmental regulations taken in pursuance of the provisions of a Multilateral Environmental Agreement (MEA). That is in any case the subject of another agenda item. Also, it would appear that Contracting Parties bear an individual rather than a collective responsibility to meet GATT obligations on transparency, and it would appear that obligations to notify measures that may affect the operation of the General Agreement are not materially altered by the context in which such measures are taken. Nevertheless, one issue that has been raised in the Group's discussions, and that was noted in TRE/W/2, is that the provisions of the Agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures call for the notification of technical regulations and standards only if, inter alia, they are not based in whole or in substantial part on international standards; to the extent those Agreements are relevant, therefore, the Group may wish to consider what implications this may have for the transparency of measures taken in pursuance of the provisions of an MEA.