Chapter 2 Annex

Some GATT Provisions and Principles Pertinent to Environmental Matters

This annex discusses some GATT provisions and principles relevant to environmental issues. It assumes a knowledge of the background material about GATT in the body of this chapter.

Environmental Regulations as Nontariff Barriers; National Treatment and Most-Favored-Nation Rules

GATT addresses both tariff and nontariff barriers. Nontariff barriers include any domestic laws, customs, or practices that hinder imports from competing with domestic products.[1] This can include health, safety, and environmental regulations concerning goods (e.g., automobile safety, suitability of beverage bottles for reuse, food and drug safety). At the least, it is a burden for a foreign manufacturer to inform itself about local standards, to comply, and to prove to the local authorities' satisfaction that it has complied. At worst, the laws could be deliberately slanted to make it difficult for foreign manufacturers to comply. For example, a country could demand certain technical approaches while aware that other approaches, already in use by foreign manufacturers, would do the job as well; and a country could refuse to accept the results of tests in a foreign laboratory even though it believed those results to be reliable. International disputes can arise when one nation's regulations strike another nation as unduly restricting trade.

From its beginning in 1947, GATT' contained provisions designed to reduce nontariff barriers. These include the "national treatment" rule in Article III that once goods have been imported from another member country, they must be treated by the law no less favorably than like goods produced domestically. (This means, for example, that taxes could not be higher for imported goods, nor regulations sticter.) Another provision is the 'most-favored-nation' rule in Article I, by which goods imported from or exported to one member country must be treated no worse than like goods imported from or exported to another member country. A third provision is Article XI, which (with certain exceptions) prohibits any bans or restrictions on imports or exports other than tariffs. These provisions prevent explicit discrimination against foreign goods, but domestic regulations could still impede imports in more subtle ways. These subtle barriers have increased in importance and attracted more scrutiny as tariffs have been reduced and quotas mostly eliminated.

Such subtle barriers were addressed in 1979 in GATT's Agreement on Technical Barriers to Trade, popularly called the Standards Code.[2] The Standards Code sets out procedures and principles to avoid undue trade effects of technical regulations. For example, nations are to consult with each other as they formulate technical standards; to follow international standards when possible; to accept foreign test results when possible; and to favor standards that merely mandate ultimate performance over standards requiring that such performance be achieved by certain technical means. The Standards Code also requires a member country to notify other members, give a justification, and (except in emergencies) allow time for other countries to raise questions before adopting a technical standard not agreed to internationally. The Code recognizes that one justifi cation for such standards could be "protection for human health or safety, animal or plant life or health, or the environment."[3] From 1980 through 1990,211 notifications under the code explicitly listed environmental protection as a justification for the standard; another 167 appear to concern environmental issues, but the justification was framed in terms such as public heath, human safety, and

1 E-@ of nontariff barriers in other countries, and U.S. attempts to remove them, are given in *Competing Economies*, op. cit., pp. 125-138.

2 Several GATT codes were negotiated d@ the Tokyo Round, which concluded in 1979. A code is an optional supplementary agreement, effective only among countries that have signed it. The two codes discussed in this chapter, the Standards Code and Subsidies Code, have been signed by the United States and its major trading partners.

3 Standards Code, paragraph 2.2.

consumer information.[4] The Standards Code provides for resolution of disputes concerning standards. While no cases have been formally resolved under the Standards Code, the United States did try to challenge an EC regulation concerning beef from cattle fed certain hormones (see app. A).

While it provides helpful procedures and principles, the Standards Code leaves considerable play for nations to erect trade barriers under the guise of health, safety, and environmental regulations. Provisions proposed in the Uruguay Round could go further toward reducing the potential for trade barriers, though some provisions could also potentially impede legitimate environmental regulations. How to permit legitimate domestic regulations but avoid trade barriers is a difficult problem. This problem is discussed in chapter 4.

Subsidies

Subsidies, which are benefits a government confers on particular firms or industries, are another form of trade barrier. Subsidies can enable companies to undersell foreign goods in both the home market and export markets. (In the latter case subsidies are not a trade *barrier, since they* induce rather than inhibit trade. However, they can *distort* trade patterns from what they would be without government intervention.) When countries import subsidized goods, GATT permits them under certain circumstances to levy special additional tariffs, called countervailing duties, to compensate for the subsidies.[5]

Subsidies to help firms comply with environmental regulations or otherwise to improve environmental performance might include support for environmental research and development (R&D), tax incentives for purchase of pollution control equipment, and technical assistance for manufacturers. Amendments proposed in the Uruguay Round would exempt certain R&D support from the application of countervailing duties.[6] (The amendments deal with R&D generally and are not aimed specifically at environmental R&D.) Some have suggested that lax environmental standards are a form of subsidy and should therefore be subject to countervailing duties; this is discussed in chapter 4.

"General Exceptions" (Article XX)

GATT's Article XX, titled "General Exceptions," permits measures that would otherwise violate GATT if done for one of 10 enumerated reasons, provided that the measures 'are not applied in a reamer which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.' Article XX might be invoked in cases, such as the tuna/dolphin case, in which a nation restricts imports of goods based on the process used in producing the good. Such restrictions might be deemed to violate GATT unless Article XX applies.[7] While Article XX does not explicitly mention the environment, it does include measures:

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[4] GATT Secretariat, ''Trade arid Environment,'' op. cit., p. 22. This source breaks these notifications down by the environmental areas covered, which include air pollution, noise, water pollution, several categories of hazardous substances, waste recycling and disposal, transport of dangerous products, radiation, conservation of endangered species, and energy conservation.

[5] GATT Article VI. In addition to permitting countervailing duties as a response to subsidies, GATT normally prohibits export subsidies (i.e., subsidies paid only when goods are exported) on manufactured goods. Amendments under consideration would prohibit subsidies in some additional circumstances. GATT Trade Negotiations Committee, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations," GATT Document MTN.TNC/W/FA, Dec. 20, 1991 @hereinafter, ''Dunkel draft"], pp. 1.3-1.8.

[6] Dunkel draft, pp. I.9-I.10.

[7] It is difficult t· tell how GATT would b, interpreted in particular cases. Many pertinent issues have yet to be addressed in decided cases. However, some possible GATT problems can be identified. Import restrictions based on the process used could be deemed to violate Article XI, which generally prohibita import restrictions other than tariffs (which under Article II may not exceed agreed levels). Under GATT's Note to Article Ill, import restrictions, when matched by identical restrictions on domestic products, maybe treated as internal regulations not subject to Article XI. However, the panel's report in the tuna/dolphin case raises doubt as to whether this Note applies to restrictions based on the process by which a product was made, rather than the nature of the product itself. See "United States: Restrictions on Imports of Tuna,'' op. cit., paragraph 5.15. (While not yet adopted by the GATT Council, this report is an indication of how future panels might reason.)

Even if the Note to Article III were found to apply to process-based restrictions, so that Article XI would not apply when the same process-based restrictions were used for domestic and imported products, the restrictions might be deemed to violate the national treatment rule of Article III. That rule requires that imported products "be accorded treatment no less favorable than that accorded to *like products* of national origin" by all internal regulations (emphasis added). It could be argued that products that are physically indistinguishable, even though they were made differently, are "like products." In this case, to restrict certain foreign items made by one process more than the same domestic products made by another process would appear to violate the national treatment rule. Similarly, to restrict products from one foreign country made under one process more than products from another foreign country made under a different process would appear to violate the ''most-favored-nation'' rule of Article I.

(b) necessary to protect human, animal or plant life or health;

. . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

These two provisions would appear to include many environmental concerns. Members may act on their own based on these exceptions; if another country complains and Article XX is raised in defense, a GATT panel will hear arguments on whether the exceptions apply.

Dispute Resolution Under GATT

GATT provides for resolution of disputes arising under its rules.[8] Normally, disputes that cannot be solved by consultation and mediation are heard by a three-member panel of experts appointed by the GATT Council. From GATT's inception in 1947 through part of 1990, 79 disputes progressed to the point of a decision made by a GATT panel and adopted by the GATT Council.[9] Of these, several concerned environmental or closely related health and safety issues (see app. A). The frequency of environment-related disputes could increase as environmental concerns become more pressing.

A panel normally does its work in 6 months, and the GATT Council normally considers the panel's recommendation within about 10 months after the dispute was first brought to GATT. Under current practice, any country, including the losing party, can delay indefinitely the GATT Council's adoption of the panel's report as an official GATT decision. While this permits countries to escape the legal effect of adverse panel reports, the pressure of international opinion often induces countries to eventually allow their adoption by the Council.

Changes being considered in the Uruguay Round would remove a country's power to block unfavorable panel reports. The Dunkel draft provides for appellate review of a panel decision; but the appellate decision, or the panel's decision if no appeal is filed, would become an official GATT decision unless there were unanimous consent to reject the decision.[10]

If the Council adopts a decision finding a GATT violation, the offending country is supposed to change its practice according to the panel's recommendations. However, GATT *cannot force any changes in a country's domestic laws. If the* offending country does not change its practice, it is supposed to negotiate satisfactory compensation to give to the countries adversely affected by the violation (normally, reduced tariffs on some goods). However, GATT cannot compel this either. If the offending country neither changes its practice nor offers acceptable compensation, the GATT Council can authorize the affected countries to retaliate, normally by levying punitive tariffs on some of the offending country's goods. However, the Council's authorization of retaliation could be vetoed by the offending country. As with adoption of panel reports, it is political pressure, rather than legal compulsion, that currently enforces GATT rulings.

The Dunkel draft now under consideration would make it easier to retaliate, allowing retaliation as a matter of right. Also, the retaliating country could choose to retaliate by suspending any type of obligation under GATT; for example, if the offending country erected a barrier to the import of goods, the retaliating country might restrict imports from the offending country of goods or services, or might refuse to honor that country's citizens' intellectual property rights. This would make retaliation a more versatile tool for ultimately inducing a country to comply with GATT rules. The original panel or an arbitrator appointed by the Director-General would be assigned if needed to set the authorized retaliation at a level commensurate with the magnitude of the offense.[11]

Dispute resolution under GATT is conducted in secret and with restricted participation. The panel normally receives oral and written submissions from governments only; nongovernmental organizations

[8] Some GATT Codes, including those for Standards and Subsidies, provide separate dispute resolution procedures.

[9] These cases are reported in Pierre Pescatore et al., ***Handbook of GATT Dispute Settlement*** (Ardsley-on-Hudson, NY: Transitional Juris Publications, 1991).

[10] Dunkel draft, pp. S.12-S.14, Articles 14-15.

[11] Dunkel draft, p. S.17, Article 20. Trade in go@ and services, and intellectual property, are all covered in the Dunkel draft. See Dunkel draft, "Agreement Establishing the Multilateral Trade Organization (Annex IV),' specifically: p. 92, Article II, paragraph 1, and p. 100, Annexes 1-3 to Annex IV.

(NGOs) cannot directly participate. A government, if it so chooses, can consult with NGOs in preparing its case and can present material supplied by NGOs. However, the current rules give no guarantee that environmental groups or other NGOs can present their views, even indirectly, on trade disputes involving their interests. Also, the governments' submissions are normally kept secret, as is the panel's recommendation, unless and until it is adopted by GAIT Council.[12] This secrecy is a point of contention with U.S. environmentalists, who strongly favor public debate.

[12] The release of the panel's report in the tuna/dolphin case before its consideration by the GATT Council was an exception to the normal practice.