

Committee on Trade and the Environment

ITEM 4: THE PROVISIONS OF THE MULTILATERAL TRADING SYSTEM WITH
RESPECT TO THE TRANSPARENCY OF TRADE MEASURES USED FOR
ENVIRONMENTAL PURPOSES AND ENVIRONMENTAL MEASURES
AND REQUIREMENTS WHICH HAVE
SIGNIFICANT TRADE EFFECTS

Note by the Secretariat

This Note has been prepared by the Secretariat to provide background information for the Committee's discussions under Item 4 of the Ministerial Work Programme.

I. REFERENCES TO PREVIOUS DOCUMENTATION

At its meetings from 1992-94, the Group on Environmental Measures and International Trade (EMIT) discussed the subject of transparency regularly under the second point of its agenda: "Multilateral transparency of national environmental regulations likely to have trade effects". A record of those discussions is contained in TRE/3, 4, 6, 7, 8, 9, 10, 11, 12 and 13.

The following documents related to the subject of transparency were prepared by the Secretariat at the request of the EMIT Group:

TRE/W/2	Summarises issues raised in the course of the Group's early discussions on the multilateral transparency of national environmental regulations
TRE/W/4	A description of environmental policy instruments to supplement information contained in TRE/W/2
TRE/W/7	Generic listing of trade-related national environmental measures that may not be covered adequately or at all by GATT transparency provisions
TRE/W/10/Rev.1	Notification requirements that exist in multilateral environmental agreements
TRE/W/13	Outline analysis of the trade effects of various environmental measures

In addition, TBT/W/156 and SCTE/W/1 contain compilations of notifications made under the provisions of the Agreement on Technical Barriers to Trade (TBT) where the objective or rationale of the measure notified was given as the protection of the environment.

II. POINTS OF BROAD AGREEMENT REACHED IN THE EMIT GROUP

No attempt was made by the EMIT Group to draw definitive conclusions on its work, but it was felt that a common understanding was emerging on several points related to transparency. These were reflected in the report by the Chairman of the EMIT Group made on his own responsibility to the GATT CONTRACTING PARTIES Session in February 1994 (L/7402).

(a) Although transparency is not viewed as an end in itself, it is regarded as an important means to build confidence in and provide security and stability to the multilateral trading system, to help minimize trade restriction and distortion, to assist private sector operators to adjust to changing trade policies, and to prevent misunderstandings and ultimately trade disputes from arising.

In the Committee's own discussions of "the issue of exports of domestically prohibited goods" the importance of transparency has been highlighted for an additional reason: to assist importers, particularly in developing countries, to make informed decisions about whether to import particular products that may pose a danger to human, animal or plant life or health or the environment.

(b) Transparency requirements in the area of environmental measures should not be more onerous than those in other areas of policy-making that affect trade. Nor is it usual in GATT to establish transparency mechanisms based on the purpose of a measure as opposed to its nature.

(c) Duplication of transparency requirements is to be avoided, both within the WTO and between it and other multilateral transparency mechanisms operating in the field of trade and environment.

(d) Transparency needs to be as comprehensive as possible but without imposing an unmanageable administrative burden on individual governments; that could cause compliance problems. Higher orders of transparency (such as notification requirements) should not be over-extended.

(e) GATT transparency provisions, especially now they have been supplemented by new WTO provisions on transparency as well as the TPR Mechanism, create a broad basis for ensuring transparency and go a long way towards satisfying the need for multilateral transparency of national environmental measures likely to have significant trade effects. There is no perceived need for a completely new transparency mechanism in this area, but rather a desire to build on and elaborate where necessary existing mechanisms.

(f) *Ex post* publication and notification is the GATT norm. When properly complied with it can go a long way towards meeting the objectives of transparency, particularly in the case of market-based instruments which by their nature tend to be more transparent than quantitative measures or regulations. Nevertheless, substantial benefits are felt to derive from *ex ante* notification of measures under the TBT Agreement, particularly in making foreign suppliers aware of measures in place or in preparation, allowing them to provide input at the stage of development of new regulations and standards, and allowing them to adapt promptly to regulatory changes so as not to jeopardise continued access to markets.

(g) The use of enquiry points in the TBT Agreement to act as a central point of contact for the provision of information on measures in place is valuable and felt to provide a broad basis for ensuring multilateral transparency.

(h) Effective compliance with the GATT/WTO transparency provisions is an essential aspect of securing transparency in practice. The TPR Mechanism is expected to assist in drawing attention to areas where compliance could be further improved.

III. AREAS FOR FURTHER DISCUSSION

Work in the EMIT Group led to a number of concerns being raised about the adequacy of GATT and (at that time prospective) Uruguay Round transparency mechanisms in covering environment-related trade measures and trade-related environmental measures that can cause significant trade effects. The concerns arose with respect to three broad issues:

(a) Do any of the measures in question escape the transparency mechanisms altogether, either because they are not subject to substantive GATT/WTO disciplines or because those disciplines are not linked adequately to transparency requirements?

(b) To the extent the measures are captured by existing transparency mechanisms, should they be subject to higher levels or different forms of transparency requirements?

(c) Is compliance with GATT/WTO transparency requirements satisfactory and sufficient to ensure transparency is achieved *de facto*?

The following is a summary of the EMIT Group's discussions, organised around those three issues:

A. **What is the reach of the basic GATT/WTO transparency mechanisms with respect to environment-related trade measures and trade-related environmental measures that can cause significant trade effects?**

The main transparency provisions applying under the GATT were summarized in TRE/W/2, and an indication was given there also of how new transparency provisions emanating from the Uruguay Round negotiations could lead to improvements in this area.

In the EMIT Group's discussions, it was generally felt that the scope of GATT Article X is very wide, and in the view of some delegations comprehensive in securing transparency at the level of publication of all measures applied by WTO Members that can have a significant effect on trade. Certain doubts were expressed, however, about whether it extended publication obligations effectively to measures applied by regional and local governments and authorities. Also, it was noted that Article X does not cover voluntary measures administered by the private sector, such as voluntary programmes for eco-labelling, packaging, or waste handling.

The scope of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (which has been carried forward in the Uruguay Round Decision on Notification Procedures) was also felt to be wide, but doubts were expressed about whether it extended to cover measures which are not trade measures in the more traditional sense of the term, particularly domestic taxes and charges subject to Article III.

The Uruguay Round Decision on Notification Procedures was expected to make a significant improvement to transparency. However, there was some discussion of what is covered by the "Indicative List of Notifiable Measures" annexed to it, and particularly the last item on that list: "Any other measure covered by the Multilateral Trade Agreements in Annex 1A to the WTO

Agreement". One delegation understood this provision to represent "a place-marker", inserted at a time when the final structure of the Uruguay Round package was still unclear, and not to have been intended to oblige WTO Members to notify everything covered by a GATT/WTO discipline in the area of trade in goods.

The TBT Agreement was considered a model of a high level transparency mechanism, with provisions for *ex ante* notification of measures, opportunities for foreign suppliers to comment on and influence the drafting of technical regulations and standards that might significantly affect their trade, and the establishment of enquiry points. Concerns expressed in this regard related not to the transparency mechanism as such but to the coverage of the substantive disciplines of the Agreement, and whether certain environmental regulations, such as packaging and waste handling requirements, were covered.

B. What level of transparency should be sought for individual environment-related trade measures or trade-related environment measures that can cause significant trade effects?

Although there was a general feeling that transparency requirements in this area should not be more onerous than those in other areas of policy-making affecting trade, there was extensive discussion in the EMIT Group of whether existing levels of transparency were sufficient (notably for measures covered only by an obligation to publish) or whether a different form or higher level of transparency should be sought, for example through enquiry points or notification obligations, and if so for which measures.

One issue discussed was the relative merits of *ex ante* notification requirements. Some delegations felt that the GATT/WTO norm of *ex post* notification could be less than adequate with respect to certain environmental measures that can cause significant trade effects and that in such cases *ex ante* notification obligations would be desirable -- product-specific subsidies for environmental purposes, prohibitions or restrictions on imports or on domestic sale or use, and (to the extent they are not considered to fall under the disciplines of the TBT Agreement) technical regulations and standards related to product handling, waste management and disposal and voluntary eco-labelling schemes, were mentioned in this regard.

Many delegations felt that rules on transparency should be commensurate with a measure's trade effects; the greater the potential for a measure to have "significant" trade effects, the more transparent it should be to a country's trading partners. This was described as one of several "filters" through which the adequacy of existing transparency obligations might be examined, and a possible indicator of the need to trigger higher levels of transparency.

Discussion extended into a review of the trade effects of different kinds of environmental measures and environment-related trade measures on a case-by-case basis, and the Group began examining the potential trade effects of various types of measures with an emphasis on those which it was felt were not already subject to a high level of transparency under existing GATT provisions. One of the difficulties encountered in this regard was that the context in which a measure is applied can often affect considerably the significance of its trade effects, and it can be hard then to generalize about the effects of individual measures. This was noted and elaborated on in TRE/W/13. The EMIT Group's analysis in this area was not completed.

C. Do gaps exist in current transparency provisions?

On the basis of the EMIT Group's discussions on the scope of GATT/WTO transparency provisions and the desirability of seeking a high level of transparency for environment-related trade measures and trade-related environment measures that can cause significant trade effects, a list of measures which certain delegations had suggested might represent "gaps" in existing provisions was compiled in TRE/W/7. The list is reproduced as an Annex to this Note.

Several delegations felt that few, if any, of the measures on the list reflected gaps in practice, particularly given the broad scope of Article X. However, some expressed concern about whether certain measures on the list were covered at all, and if covered whether the level of transparency to which they were subject was adequate. Certain measures received considerable attention in this regard. They are listed below, along with a summary of the concerns expressed on each and, where appropriate, a reference to specific new transparency provisions introduced through the Uruguay Round negotiations which may have helped to address those concerns.

(a) Trade measures taken pursuant to MEAs

Most MEAs that are relevant in this context contain provisions requiring the exchange of certain information among Parties, in many cases using the facility of the relevant MEA secretariats (see TRE/W/10/Rev.1 for a summary of those provisions). However, the level of transparency provided for by different MEAs is not the same. The periodicity prescribed for the publication or exchange of information varies, not all MEAs contain mandatory provisions requiring the exchange of information about any trade measures taken, some leave considerable scope for individual Parties to choose how to implement their obligations relating to the use of trade measures and do not necessarily require a high level of transparency in this regard (e.g. with respect to the allocation of import quotas), some (those dealing with trade in hazardous wastes or chemicals for example) require *ex ante* notifications but most rely on *ex post* transparency, and in general there are no requirements for exchange of information with non-Parties.

Some delegations considered that trade measures taken pursuant to MEAs by WTO Members should be notified in each case under appropriate WTO provisions. They felt that governments bear an individual rather than a collective responsibility to meet their GATT/WTO transparency obligations, and that obligations to notify measures that may affect the operation of WTO Agreements are not materially affected by the context in which such measures are taken.

While not necessarily disputing that conclusion, some other delegations voiced doubts in this regard. One factor involved was concern to avoid unnecessary duplication of notifications under MEA provisions on the one hand and WTO provisions on the other. That factor figured also in the Committee's recent discussions on the issue of exports of domestically prohibited goods.

One question that arose is do measures subject to the TBT Agreement and taken pursuant to MEAs need to be notified separately to other WTO Members? Some delegations pointed in this regard to the fact that the TBT provisions call for the notification of measures only if, *inter alia*, they are not based in whole or in substantial part on international standards. Several others felt, however, that MEAs could not evidently be classified as "international standards" under the definitions used in the TBT Agreement, and that in the light of the importance of these measures, for example in the treatment of non-Parties to MEAs, they should be notified.

A concern was raised that requiring notification under WTO provisions of trade measures taken pursuant to MEAs could provoke problems of conflicting international law. However,

several delegations doubted that this concern was substantive and said it was difficult to imagine conflicts arising in practice, any more than they would in the context of notification through the WTO of trade measures taken pursuant to economic integration or cooperation agreements.

One suggestion made was to seek greater transparency by setting up formal arrangements for the exchange of information between the MEA and WTO secretariats. However, doubts were expressed about the effectiveness of such arrangements given the perceived inadequacy of the information provided to MEA secretariats under the provisions of certain MEAs.

Another suggestion was to establish a GATT/WTO registry of provisions in MEAs relating to the imposition of trade measures. However, the value of such a mechanism was questioned given that the trade effects of any such measures would not be felt until an MEA Party adopted national implementing legislation and applied the measures.

(b) Article XX measures

Certain views were expressed in the EMIT Group that Article XX might exempt measures taken under its provisions from GATT transparency requirements, but the general opinion among delegations was that it did not and that measures taken under the provisions of Article XX were subject to at least the publication requirements of Article X. Some felt that the 1979 Understanding would also apply.

(c) Subsidies

Certain doubts were expressed in the EMIT Group about the extent to which adequate notification of environmental subsidies that could cause significant trade effects was provided for under GATT Article XVI:1 or the Tokyo Round Agreement on Subsidies and Countervailing Measures.

Article 25 of the WTO Agreement on Subsidies and Countervailing Measures obliges Members to meet precise notification requirements with regard to all subsidies. The content of the notification must specify the form of the subsidy, its policy objective and/or purpose, its duration, its amount per unit or the annual amount budgeted for the subsidy, and statistical data permitting an assessment of the subsidy's trade effects. Certain environmental subsidies are subject to special notification obligations. Under Article 8.3 of the Agreement, Members are required to give notice in advance of implementation of subsidies adopted "to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms".

Under Article 18.3 of the WTO Agreement on Agriculture, payments under environmental programmes to the agriculture sector for which exemption from the commitments on the reduction of domestic support is claimed must be notified.

(d) Economic instruments

Some delegations questioned the extent to which economic instruments, and in particular environmental taxes and charges such as pollution taxes and deposit refund systems, were covered by Article X and by the 1979 Understanding. Also, it was noted that a notification mechanism did exist for certain taxes that were subject to border tax adjustment, but that the mechanism had rarely been used. Given the increasing importance of the use of economic instruments to address environmental problems, and the potential for such measures to cause significant trade effects,

several delegations felt that a relatively high level of transparency was warranted in this area and that the need for new notification requirements should be discussed.

(e) Measures taken by local authorities

One question raised in the EMIT Group was to what extent a federal state is responsible for ensuring the proper implementation of GATT transparency provisions for measures applied by its regional and local bodies.

With regard to technical regulations and standards applied at the level of state or local authorities, the WTO TBT Agreement states in Articles 3.2 and 7.2 that "local government on the level directly below that of the central government" must notify prepared, proposed or adopted technical regulations and conformity assessment procedures whose technical content is not the same as that of regulations and procedures previously notified by central governments, and in Article 4.1 that Members shall take such reasonable measures as are available to them to ensure their local government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the Agreement, which includes publication and notification obligations.

(f) Environmental measures in the area of services

At the time of the EMIT Group's discussions, no transparency mechanism for environmental measures in the area of services existed and some delegations felt it important to ensure that one was installed in the General Agreement on Trade in Services.

Publication and notification requirements which apply, *inter alia*, to environmental measures that affect trade in services have been included in Article III of the General Agreement on Trade in Services. This contains also a requirement to publish international agreements pertaining to or affecting trade in services to which WTO Members are signatories, and to establish enquiry points within two years of the entry into force of the GATS.

(g) Packaging regulations and waste handling requirements

Several delegations expressed doubts about whether packaging regulations or requirements for the recovery, re-use, re-cycling and disposal of waste were covered by the TBT Agreement (including the WTO Agreement) or any other GATT/WTO disciplines, and whether therefore there were any operative transparency provisions applicable to them. These measures were viewed as having the potential to cause significant restrictions to effective market access. It was felt by many that they should be subject to a relatively high level of transparency, including those applied at the local government level and as voluntary measures by the private sector. Some delegations suggested mandatory measures in this area should be subject to notification requirements, and that enquiry points might be used to provide information on voluntary schemes.

(h) Eco-labelling

There appears to be general agreement that mandatory eco-labelling schemes are subject to notification under the provisions of the TBT Agreement. The definitions contained in the Agreement and the 1992 Decision taken by the Tokyo Round TBT Committee on labelling (TBT/M/43) are felt to make that clear. Given the importance attached to ensuring foreign suppliers have information about and are able to provide input to eco-labelling programmes at the design and development stage, before such programmes are implemented, the *ex ante* notification obligations of the TBT Agreement are considered to be particularly valuable.

Concern was expressed about the transparency of voluntary, private sector eco-labelling schemes. The Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the WTO TBT Agreement has extended obligations of publication and notification to include standardization bodies (including private sector bodies). The Code would appear to extend transparency obligations in the area of voluntary eco-labelling schemes to the extent that such schemes are implemented by bodies falling under the Code's definition of a standardizing body and that the bodies in question have accepted the Code. Each standardization body which has accepted the Code is required to notify the name of the publication in which its work programme appears, indicating standards it is preparing and those adopted in a preceding period.

Some delegations suggested the establishment of special enquiry points might prove of particular value in increasing the transparency of voluntary eco-labelling programmes.

Questions were raised about how, if at all, GATT and TBT disciplines apply to eco-labelling schemes based on product life-cycle analysis that feature unincorporated process and production methods (PPMs not related to the characteristics of the product), and doubts were therefore expressed about whether adequate transparency of such schemes is provided for.

(i) PPM-based measures

The issue of environmental measures that are based at least in part on PPMs not related to the characteristics of a product was addressed in the EMIT Group primarily from the point of view of whether substantive GATT/WTO disciplines apply to such measures.

Some delegations felt that where a PPM did not physically affect the environment of the importing country there was no justification available under the GATT for applying trade restrictions in terms of a product's PPMs; the findings of the (unadopted) tuna-dolphin panel report were referred to extensively in this regard. Consequently, these delegations felt that no GATT/WTO transparency provisions could apply to such measures, nor were any warranted.

A number of other delegations, while agreeing with the above reasoning with respect to the non-conformity of measures based on unincorporated PPMs with GATT/WTO provisions, nevertheless felt that such measures should be notified. In the view of some of them, the basis for requiring the notification of at least certain such measures was to be found in the WTO TBT Agreement, Annex I, where technical regulations covered by the notification provisions of the Agreement are defined.

Some other delegations felt that the issue of differential trade treatment of products whose final characteristics were not modified by their PPMs had yet to be resolved, and that until then it was not possible to expand upon what transparency provisions, if any, might be applicable to such measures.

D. Compliance with transparency obligations

Inadequate compliance with existing transparency obligations was felt by some delegations to be a matter which deserved more attention than possible deficiencies in transparency mechanisms. In this regard a distinction was drawn between negligence in fulfilling transparency obligations, which it was generally felt could not be usefully addressed in the context of the EMIT Group's work, and differences among WTO Members in their understanding and interpretation of their transparency obligations.

With regard to the latter, it was suggested by some that WTO Members might be surveyed by the Secretariat through questionnaires to assess how and when each of them made the decision to notify trade measures for environmental purposes. Attitudes towards notification under the TBT Agreement was considered a possible basis upon which to conduct such a survey, and it was felt the results could help clarify to what extent there was a common, shared understanding among WTO Members of notification obligations and identify why and where discrepancies existed.

One suggestion in this area was to establish a procedure for reviewing notification and publication practices in the context of the TPR Mechanism.

Another suggestion was to create a WTO body with a specific mandate to examine and discuss notified measures in the area of trade and environment. Some felt this would make transparency generally more effective. Another potential advantage, it was felt, was that while some measures taken for environmental purposes fell clearly under the jurisdiction of existing bodies in the WTO, others did not, and in some cases (packaging requirements was given as an example) a combination of trade or trade-related policy instruments might be used to achieve a particular environmental objective with the consequent potential for overlapping responsibility among WTO bodies.

E. Enquiry points

It was suggested that governments might consider establishing enquiry points (such as those established already under the TBT Agreement) open to all interested parties, public and private, to provide general information on environment-related trade measures and trade-related environmental measures, including those not subject to formal notification requirements under the GATT, and on changes in national environmental legislation. It was felt that such a system might assist, for example, in increasing the transparency of measures which were not covered adequately or at all by existing transparency mechanisms, such as handling and waste disposal schemes, eco-taxes, voluntary product standards and private schemes (notably eco-labelling), local and state government programmes, and procedures affecting market access which were decentralized among many public and private entities.

The other potential advantages of enquiry points, it was suggested, are:

- to provide information about new trade opportunities for environmentally-friendly products in particular markets, such as government incentives for consumption of certain products, public procurement regulations that give preference to products which fulfil voluntary environmental standards, and promotional programmes for ecologically sound products conducted by non-governmental organizations;
- to provide developing countries with information on the availability of technical assistance to help their producers comply with, or take advantage of, environmental regulations and other measures; and
- to act as a complement to specific notification procedures, and help ensure that environmental measures affecting trade would not be subject to stricter notification disciplines than other similar measures affecting trade so that notification requirements are not over-extended.

One doubt raised about the practical aspects of implementing enquiry points was the need to avoid raising problems of official responsibility within the particular circumstances of each WTO Member, and it was suggested that an official pledge of assistance to help find information

upon request might prove equally valuable. Another was that it was felt somewhat unusual to require special bodies to provide information based on the purpose of a measure as opposed to its nature; for example, is it useful to distinguish environmental taxes from taxes applied for other purposes and set up enquiry points specifically to respond to enquiries about them? In this context, it was pointed out that there was no operational definition in the WTO for the time being of the term "environment".

Case-by-case examination was favoured by several delegations as a way of studying further the potential value of establishing enquiry points.

ANNEX

(From TRE/W/7)

Potential Identified Gaps in Existing Transparency Provisions
(February 1993)

1. Handling requirements
2. Other packaging requirements including bans, technical regulations that may require compliance with certain characteristics in order for packaging to be put on the market or allowed into the country, and take-back requirements
3. Labelling and eco-labelling schemes including the criteria to be satisfied in order to be granted a label
4. Process and production methods, including those emanating from product life-cycle analyses
5. Packaging, labelling and other general environmental measures taken by governments at the sub-federal level
6. Economic instruments or regulations
7. Deposit refund schemes
8. Domestic taxes
9. Measures related to subsidies
10. Measures under Article XX
11. General measures taken for environmental protection
12. Article III measures
13. Trade measures taken for the implementation of multilateral environmental agreements
14. Regulations or standards based substantially on international standards
15. Environmental measures in the area of services