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GATT [General Agreement on Tariffs and Trade]

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M E M O R A N D U M

DATE:

TO:agj

FROM:lsf

SUBJECT: gatt and the environment

It is asserted that the Uruguay Round raises a number of serious issues for the environment and fails to address certain other problems. Given that it will be many years before there is a follow-on GATT agreement, these deficiencies represent problems and lost opportunities, whose consequences will be of long duration. Various efforts to approach our Trade Representative having failed, the National Wildlife Federation proposes an action based on urgency driven in turn by the December deadline for completion of the Uruguay Round. Specifically, they propose to join other groups in the Congress who intend to seek revocation of the Fast Track status accorded the Uruguay Round in the 1988 Trade Act. The other groups referred to above consist of agricultural and textile interests, which fear that their interests would be harmed by the Uruguay Round agreement for the sake of gains in other sectors. This action begins tomorrow.

I am not sure it is likely that an effort to revoke fast track status would succeed. But anyone joining such an effort ought to consider the consequences. A complex package of implementing legislation designed to bring the US into compliance with a Trade Agreement would -- without a Fast Track process -- be subject to the full panoply of devices available to Congress for delay, amendment and even rejection. The resources of every lobbying group with a stake in the outcome would be mobilized and given almost indefinite room for maneuver. As a result there is an excellent chance that without Fast Track, the US would not come into compliance with the Uruguay Round. The consequences of this for the international trading system, and for many vital American concerns relating to that system, would be incalculable.

No political leader who has regard for the stability of the international order should lend himself to this kind of scenario, unless he is convinced that the Uruguay Round is leading to outcomes much worse than the consequences of its failure. The argument that you should do this merely for tactical purposes, in order to gain attention and a measure of response from the Trade Negotiator, is faulty. And the fault is greater in inverse proportion to the seriousness of

the problem. If the Uruguay Round does not profoundly threaten the environment, it is reprehensible to declare yourself in favor of placing the Round in grave jeopardy.

I am prepared in a subsequent memo to examine the specific concerns raised by the Wildlife Federation, and to demonstrate that in no way do these concerns come anywhere near the threshold where one should consider attacking the Uruguay Round. For now, however, it is possible to make the following recommendations:

1. don't join this effort yourself.
2. do Wirth a favor by warning him off, unless he has already mortgaged himself.
3. call Carla Hills and tell her that there are issues which she has evidently not responded to which are capable of threatening the success of the Round: propose a ventilation of these issues at a meeting consisting of yourself, guests from the Wildlife Foundation, and invited members of the Senate.
4. suggest to Wildlife that it delay its planned attack on Fast Track or condition it so that the attack can be abandoned, if a thorough discussion convinces them that it is better to work with this process than against it.
5. Be prepared to examine some of these issues through hearings at the JEC early in the next session.

Rick will have a copy of this memo and is automatically invited to comment on my analysis to this point as well as on the recommendations. If you like the recommendations, it may be necessary to act today -- and that could well be before I can do the point for point assessment promised above.

M E M O R A N D U M

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SUBJECT:Gatt and Trade II

There are specific and generalized complaints from the environmental community. The specific complaints raised regarding the Uruguay Round come under the GATT headings of Agriculture, Natural Resource -Based Products, and Trade-Related Intellectual Property.

1. In the general field of Agriculture, it was agreed at Punta del Este that one objective of the Round would be to "minimize the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements." This is a US objective. We have wanted uniform and non-discriminatory food health regulations to prevent them from being used as non-tariff barriers.

In May, the GATT secretariat began to circulate language addressing this issue, as follows: " Recognizing that contracting parties have the right to protect human, animal or plant life or health, contracting parties shall seek to minimize the negative effects on trade of Sanitary and Phytosanitary (SPS) measures by ensuring that these are applied only to the extent necessary to protect human, animal or plant life or health, are consistent with existing scientific evidence and are not applied in a manner that creates unnecessary obstacles to trade."

Countries adhering to GATT would act to harmonize their internal SPS regulations with the evolving international standard. That standard would be based on the Codex Alimentarius (Food Code) which is maintained by the Codex Commission in Geneva. The Commission is funded by the Food and Agricultural Organization and by the World Health Organization. It is charged with working out standards for food products in international use to protect the health of consumers. It has 137 nations as members and is staffed by government regulators, scientists, toxicologists, technical experts and industry advisers. The US contingent is drawn from the Food and Drug Administration, the EPA and the USDA. Thousands of codes have already been worked out through an elaborate consensual process based on the views of technical experts. The US wants to make Codex standards the basis for harmonization by all GATT members.

According to environmental groups an outcome of harmonization would be for inferior international standards, reflecting the interests of multinational food processors, to take precedence over superior US standards. Further, the environmental groups say that other GATT rules would force the Federal Government to neutralize superior SPS standards devised at state level.

2. In negotiations on Natural Resource-Based Products, the Punta del Este Declaration said: "Negotiations shall aim to achieve the fullest liberalization of trade in natural resource-based products, including in their processed and semi-processed forms. The negotiations shall aim to reduce or eliminate tariff and non-tariff measures, including tariff escalation." As US concern was the problem of state control over the production and management of natural resources. Such policies could (and did) include subsidies, tax incentives, export restrictions (my emphasis added), licensing practices, all with the effect of limiting access to natural resources for the purpose of securing advantage in commercial competition.

Environmental Groups complain that Uruguay Round agreements in this area would have the effect of reversing export restrictions that have been imposed by national or sub-national governments, for environmental purposes: e.g. the existing ban on the export of raw timber from the Pacific Northwest.

3. In the area of Trade-Related Intellectual Property (TRIM), the Punta del Este declaration declared in part: "In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines."

Environmental Groups complain that this principle works to the detriment of biodiversity, because it assures continuation of the present system whereby discoveries of new commercial uses for products derived from biota will benefit only large corporations in wealthy nations: hence, removing whatever motivation poorer nations might have to conserve habitat where these biota are mainly found.

4. In a general sense, environmental groups argue that the Uruguay Round had focused entirely on problems of liberalizing international trade, with no consideration for the effects that the GATT rules of the road may have on the environment. They argue, as part of the case for taking GATT

off the fast track, that GATT should be required to pay attention to this issue.

At a deeper level, the environmental groups, or some of them, may harbor the view that it is not GATT or the Uruguay Round, but the entire concept of Free Trade which may be antithetical to the environment. One writer publishing in The Ecologist last February, said: " While the development of an international consensus around environmental standards may be a desirable objective, there are several reasons to suspect that the agenda of 'free trade' is to lower environmental standards, while placing the standard setting process in the hands of institutions that are less accountable to the community and more amenable to corporate influence and control."

I am ready in a third and hopefully final memo, to argue that expressed concerns about harmonization are being overdrawn; that national environmental controls on exports are not at risk as represented; that the proper arena for dealing with issues of North/South equity in the bio-business world is not GATT but a separate Convention on Biological Diversity; that it is legitimate to ask for GATT to open a dialogue on trade and the environment, but not to require that this dialogue be worked out between now and December but on a realistic schedule; and that any view which seeks to establish an inherent contradiction between liberal trade and the environment is just old-time anti-Capitalism coming from people who somehow have not noticed how "well" the environment did under alternative arrangements in the Soviet Union and Eastern Europe.

Again, this third memo may not be finished today.

M E M O R A N D U M

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SUBJECT:GATT and the Environment (3rd installment)

This memo will analyse each of the assertions made by the National Wildlife Federation for real-world credibility: that is -- how to judge whether the actual as opposed to the theoretical problems ahead are so great as to warrant an attack on the entire Uruguay Round, in the form of an effort to remove its Fast Track status.

1. Does the process of harmonization of phytosanitary standards involve a CREDIBLE risk that inferior international standards for food would replace superior US federal standards?

It seems to me that the first question is whether the international standards are in fact inherently inferior. If they are, then one would certainly not want to accept a commitment that implied willingness to adopt them in preference to our own. But, if international standards are of comparable quality, and if the processes by which they are derived are rational and reasonably transparant, then the existance of such standards is enormously important not only for producers of foodstuffs, but for consumers -- given the enormous volume of international trade in foods.

The standards are those contained in the Codex (see earlier memo). The Codex is the product of an elaborate consultative process among experts. These experts are for the most part national, rather than international in orientation -- so the resulting product is not the creation of UN civil servants but a melding of views world-wide. I should add that representatives of the International Organization of Consumer Unions also attend Codex meetings. By straight bean count, the Codex has pesticide standards that are equivalent to our own in 42% of the cases; MORE stringent than ours in 42% of the cases; and less stringent than ours in 16% of the cases. (Rick rightly points out that the devil could be in that 16%, and I am trying to get more information.)

The Codex is a UN document. It does not relate to the GATT, nor does it have any binding power of its own. Our government wants to create a link between Codex and the GATT. Our proposal is for nations to harmonize standards on

the Codex, and in case of disagreement, for the GATT to rely upon expertise and advice from three international organizations: the Codex Commission; the International Office of Epizootics, and the International Plant Protection Convention. In case of dispute the GATT would ask the Codex Commission to set up special panels to come to a view about whose standards are more firmly based on scientific evidence.

Under Article XX of the GATT, nations may generally have full scope to establish unilateral measures "necessary to protect human, animal or plant life or health," provided that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade." So our first defense in case of challenge is to show that our standards apply equally to foreign and domestic-origin products. Contrast this, for example, to the behavior of governments that ban imports of US tobacco ostensibly for health reasons, but actually as a measure of protection for their domestic growers.

The Uruguay Round seeks to create a second standard, or to be more exact, to buttress a standard already in place: namely, that national measures must be scientifically justified. If we are challenged in a case where our standard differs from the Codex, the submission of the scientific case for our standard is in itself fulfillment of a requirement. A GATT panel would then consider advice in which the merits of our defense would be weighed against the merits of the case for the Codex standard.

I am told by CRS (but am trying to establish from the negotiator's office) that arrangement is NOT a form of arbitration. If so, we are NOT stipulating that we will be bound by the determinations of a GATT panel. It is true that the GATT process allows an aggrieved party to take counter-measures against the trade of a nation which is out of compliance and which refuses to change its policies. Nevertheless, the force that moves us to comply is instead, our overall interest in seeing this system work. If nations by and large ignore such rulings, the system fails. And the judgement here is that we have much to lose if it does fail. But the bottom line is that Federal Standards apply until the Federal government changes them.

2. Does the GATT require the Federal Govt to suppress state standards at variance with CODEX?

The issue of the implications of GATT for federally organized governments has been discussed since the inception of the GATT. Remember that this problem applies not just to

the US but to the Canadians, the Australians, the Brazilians, the USSR, the Germans and all other governments with a federative rather than a unitary structure. Even the Japanese government says it cannot overturn standards established by its prefectures.

In the GATT language there is a provision (para 12, Art. XXIV) which says that: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory." This provision has been interpreted to mean that a central government "is not in breach of its international obligations when a subdivision violates GATT as long as the central government does everything within its power to ensure local observance of GATT." But the question of what is in the power of a federal authority opens up to many interpretations.

In a letter of Aug 27 to Sen. Wilson, the USTR sets out the official US position: "With regard to incursion on states' rights, the GATT agreement will not be a vehicle to achieve national uniformity in the area of S&P measures. The Administration supports a narrowly tailored approach to national uniformity in pesticide tolerance standards, but new legislation, not a GATT agreement, is the appropriate vehicle for achieving that goal." This having been said, the letter points out that state standards must be bound by the same discipline as Federal standards: namely they must be nondiscriminatory and scientifically based.

3. Would the Uruguay Round force nations or subnational governments to abandon restraints on the exports of certain products, even when these are imposed for environmental reasons?

To begin with, it is important to repeat that the GATT does not have the power to automatically shape the laws of the United States. If we choose not to comply with a GATT ruling, they can allow compensation to the aggrieved party in various forms, but US law stands until it is changed by duly constituted US authority.

In the event that we or any other country impose an export restraint that is even-handed, there is a virtually perfect defense against challenge through the GATT. For example, if logs may neither be cut for domestic purchases nor for export, then the principle of equal treatment -- basic to GATT -- has been respected. If on the other hand, a country for "environmental reasons" prohibits the exports of a commodity, while allowing that same commodity to be used for domestic purposes, it is clearly open to challenge in the GATT.

Conclusions:

The very same environmental groups that want to see the United States bind itself to the provisions of an international convention on the greenhouse gases, object to the United States' intention to create more effective international standards on food. You cannot have it both ways. If the international process is not good enough for us to commit to in the case of foodstuffs, it is certainly not good enough for us to commit to in matters that fundamentally influence our economic and social life (greenhouse gases).

The claim that the United States should not commit itself to any process that might in the end over-ride US laws or standards bearing on the environment is the same as the argument that kept us from ratiying the Human Rights Convention for forty years.

The specific concerns raised by the environmental groups are vastly over-stated and the remedy they propose is grotesquely out of proportion to any concrete risk we might face.

Finally, were you to join this effort for environmental purposes you might well find yourself married to it politically because of agriculture and textile interests. Long after the environmental groups fall away from this project, you would be lashed to the oars. I think you have paid enough dues to agricultural and textile concerns in other ways.