PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

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SUB-COMMITTEE ON TRADE AND ENVIRONMENT

EXPORTS OF DOMESTICALLY PROHIBITED GOODS

Background Note by the Secretariat

1. This note responds to the request by the Sub-Committee for the Secretariat to provide information on the background and history of this subject in GATT and recent developments both within and outside of GATT. It also covers developments in other related international instruments and the work in the Group on Environmental Measures and International Trade which may have implications for any further work in this area.

History of the issue of exports of domestically prohibited goods in GATT[1]

2. The subject of "exports of domestically prohibited goods" was first raised by Nigeria and Sri Lanka during the preparatory work for the 1982 Ministerial meeting (document PREP.COM/W/16). It was included in GATT's work programme at the 1982 Ministerial meeting as a result of the concern expressed by some developing countries at the increasing trend on the part of industries and firms to export products, the domestic sale of which was either prohibited or severely restricted in order to protect human health or safety or the environment. The Ministerial Declaration adopted at the 38th Session of the CONTRACTING PARTIES held at Ministerial Level stated on this subject:

> "The CONTRACTING PARTIES decide that contracting parties shall, to the maximum extent feasible, notify GATT of any goods produced and exported by them but banned by their national authorities for sale in their domestic markets on grounds of human health and safety. At their 1984 Session, the CONTRACTING PARTIES will consider in the light of experience gained with this notification procedure, the need for study of problems relevant to the GATT in relation to exports of domestically prohibited goods and of any action that may be appropriate to deal with such problems."[2]

3. This information was supplied in accordance with a notification format proposed by the Secretariat.[3] By 1984, 23 notifications had been received and circulated in the document series DPG/NOTIF.83.1 - DPG/NOTIF.84.5. It was recognized that the notifications received did not provide a sufficient data base to assess how problems relevant to the GATT might be studied. Consequently, a second request for notifications was issued in 1984 at the 40th Session of the CONTRACTING PARTIES in a Decision on Export of Domestically Prohibited Goods (L/5759/Rev.1). This Decision called for circulation of a draft airgram[4] which clarified and extended the types of measures which were to be notified. It stated:

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[1]Much of this information is based on GATT document L/6467, 2 February 1989 and L/5907, 22 November 1985.

[2]Ministerial Declaration, adopted 28 November 1982, BISD 29S/9.

[3]The format was proposed in GATT/AIR/1885.

[4]GATT/AIR/2087, 4 December 1984.

"Whereas the notification format intended to cover all cases of banned goods being produced and exported from contracting parties, the notifications made only referred to the non-existence of such practices. Accordingly, the information supplied so far does not appear to provide a sufficient data base for contracting parties to consider the need for study of problems relevant to the GATT in relation to exports of domestically prohibited goods.

In order to improve the data base, all contracting parties are requested to respond as soon as possible to the invitation extended to them in GATT/AIR/1885 to notify to the maximum extent feasible any goods produced and exported by them that are banned by their national authorities for sale in their domestic markets on grounds of human health and safety. In this connection, it is suggested that to the maximum extent feasible contracting parties make available to the Secretariat any relevant information which would enable it to prepare, by mid-1985, basic documentation designed to facilitate discussion of the matter. Such documentation would also cover work being done in other organizations."[5]

4. By mid-1985, five more notifications had been received. In addition, the GATT Secretariat prepared a background note on activities of other organizations in related fields[6]. This note was the first attempt to present a picture of the information exchange activities concerning trade in domestically prohibited goods of other international organizations. The note was updated on several occasions throughout the period of discussion of this subject.[7] Consultations were held with interested delegations in July 1985 on the basis of the information provided in these documents. A further airgram was issued in which it was suggested that the provision of similar information by all contracting parties would facilitate understanding of the questions involved. Seven more notifications were received and a further consultation with interested delegations was held in November 1985.

5. At that time, it appeared to the Secretariat that the consultations showed general recognition that the export of goods which were not permitted to be sold in a particular domestic market for health or safety reasons was an area which was of concern to contracting parties. A Secretariat document summarizing the consultations stated:

"...The discussions have thrown light on defining "domestically prohibited" goods in the light of practices followed by particular contracting parties, which may involve positive certification rather than prohibition or restriction. The material notified...on legislative provisions has provided a useful clarification of the practices followed in these countries concerning production and exports of such goods, which varied considerably from case to case. The question of the extent to which exporting or importing country governments should be responsible for taking measures to restrict trade in such products has also been raised. In that context, questions of the provision of adequate information to importing countries and the ability of importing countries to formulate or enforce adequate criteria for permitting or prohibiting the sale of such imported goods, were

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[5] *Id.*

[6] DPG/W/1, 6 May 1985.

[7] See documents L/6459, 30 January 1989; L/6459/Rev.1, 24 November 1989 and L/6459/Rev.1/Corr.1, 30 March 1990; DPG/W/4, 11 October 1989; DPG/W/4/Rev.1, 24 November 1989 and DPG/W/4/Rev.1/Corr.1, 30 March 1990.

brought to light. A number of delegations have pointed to the complexity of the issues involved and the practical problems of management of such trade.

... Some delegations referred to the provisions of Article XX(b) of the General Agreement. It has been suggested that the notification procedures of the Agreement on Technical Barriers to Trade may provide a basis for a better flow of information and guidance for actions to be taken by exporting or importing countries. The question of the extraterritoriality of standards has been raised in this connection. The possibility of export prohibitions by countries with stringent product standards leading to trade diversion in favour of exporting countries with less strict standards has also been raised.[8]

6. In 1986 with the commencement of the talks for launching the Uruguay Round, the Senior Officials Group and later the Preparatory Committee discussed the possible inclusion of the subject in the programme for negotiations. While several developing countries were in favour, others considered that work in this area should be carried out under the regular GATT activities. The latter view prevailed. At the end of the Special Session of the CONTRACTING PARTIES at Punta del Este, the Chairman of the Ministerial meeting, in recommending adoption of the Ministerial Declaration on the Uruguay Round, noted that "there were certain issues raised by delegations on which a consensus to negotiate could not be reached at this time. These issues included the export of hazardous substances..."[9]

7. Subsequently, in November 1986, at the Forty-Second Session of the CONTRACTING PARTIES, it was formally agreed that work in this area should be carried out under the normal work programme. The Agreement called on contracting parties to

"..undertake consultations with a view to establishing guidelines for action relating to trade in domestically prohibited goods, taking into account the following elements:

(a) notification of relevant laws and regulations;

(b) information on specific measures restricting or prohibiting domestic sale, exports or imports of goods on grounds of human health and safety;

(c) the need to maintain close contact with other relevant international organizations operating in this area, and to avoid, so far as possible, duplication of information provided in the context of other organizations;

(d) procedures for consultation among interested contracting parties regarding any problem that may arise as a result of such measures;

(e) provisions for periodic review of developments.

2. That a report on such consultations be submitted to the CONTRACTING PARTIES at their Forty-Third Session."[10]

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[8]L/5907, 22 November 1985.

[9]Ministerial Declaration on the Uruguay Round, Declaration of 20 September 1986, BISD 33S/30.

[10]BISD 33S/54.

8. As background material for the consultations, the Secretariat circulated a note which compiled the information derived from 13 notifications submitted by contracting parties relating to legal provisions and measures applied to domestically prohibited goods. The note contained a list of domestically prohibited goods, the export of which was also prohibited, which was drawn from more detailed information contained in the note on the laws or regulations concerning production and trade in domestically prohibited goods. The note also listed all notifications received by the Secretariat on exports of domestically prohibited goods. The products which were cited included certain chemicals such as highly toxic liquids, benzene, some chlorides, PCT and asbestos; certain pharmaceutical products for both human and animal use, quasi-drugs and carcinogenic substances; fertilizers, pesticides, and other plant protection products; certain substances used in foodstuffs and feedstuffs, such as additives; cleansing agents, cosmetics and perfumery; certain substances used in toys and car accessories; certain substances used for treating products, such as lead; specific dangerous products such as auto-ignition candles, certain toy planes, unstable watershoes, flammable substances, gunpowder, explosives and military equipment; radioactive substances; and poisonous and deleterious substances.[11]

9. In informal consultations prior to the 1987 Session of the CONTRACTING PARTIES, delegations noted that the United Nations Environment Programme (UNEP) had recently adopted guidelines relating to banned or severely restricted chemicals entering international trade. It was noted that these, as well as the work that was being done by other organizations, would have to be carefully studied in order to determine the nature and type of action that could be taken in GATT. Therefore, at the Forty-third Session, the CONTRACTING PARTIES agreed that more time was required for consultations and that a report on further consultations be presented at the Forty-Fourth Session.

10. During 1988, two rounds of consultations were held. At the Forty-Fourth Session of the CONTRACTING PARTIES, the then Deputy Director-General, Mr. C. Carlisle, reported on the progress of these consultations. He explained that, as a basis for discussion, the delegation of Nigeria had circulated a technical note explaining the type of action that it proposed be taken in this area to control trade in such products.[12] He added that:

> "...During the consultations, delegations had been requested to address the following points in their remarks: (1) what prevents developing countries from taking action to prohibit imports of domestically prohibited goods or of hazardous waste? (2) What are the countries exporting such products doing to control those exports? (3) How well are the arrangements working in other international organizations? Both developing and developed countries had been asked to address the latter question.
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> On the first point, some developing countries had explained that in most cases they were unable to prohibit imports of hazardous products because their governments did not know that the products were prohibited or restricted for sale in the domestic markets of the exporting countries. It was also common, they said, particularly in the case of hazardous substances and wastes, for exporters to make false declarations. Further, the customs authorities in a large number of developing countries did not have adequate testing facilities to check the truthfulness of declarations made by exporters. According to developing country representatives, the absence of consumer protection regulations in many developing countries also enable other countries to market in those developing

[11]DPG/W/3, 23 December 1986.

[12]This document was later circulated as MTN.GNG/W/18, 17 November 1988.

countries pharmaceutical, food and other products, beyond the dates specified on the manufacturers' labels.

Regarding the measures taken by developed countries to control trade in such products, most delegations had replied that their governments considered the problem to be serious, and had referred to measures requiring firms to notify the authorities if any product prohibited for sale was being exported to other countries. Some developed countries stated that further measures were under consideration to make information exchange systems more effective.

On the third point, both developed and developing countries, had considered that international organizations like WHO, FAO and UNEP, as well as regional organizations like the OECD, had developed useful guidelines and procedures for notification and exchange of information. Some delegations, however, had considered that it would be necessary to examine the operation of these arrangements more closely in order to decide whether further complementary action in GATT would be necessary and effective. These delegations had also noted that the issues in this area were of a highly technical nature, and had expressed doubt whether it would be possible for the trade policy experts...to deal with these subjects effectively. Some of these delegations, however, had thought that GATT could...play a useful role in monitoring the work being done in other organizations. Other delegations, mainly from developing countries, had explained that one reason the arrangements developed by other international organizations were not fully effective was that these arrangements were of a voluntary nature and did not impose any binding obligations. These delegations believed that the experience with these arrangements had been somewhat mixed. They felt, therefore, that it was necessary to use GATT to impose binding obligations on both exporting and importing countries. They said that the aim of any action in GATT would not be to duplicate notification and information exchange procedures developed elsewhere, but rather to develop rules which would reinforce the implementation of these schemes."[13]

11. The CONTRACTING PARTIES agreed to ask the Secretariat to hold further informal consultations with a view to enabling the Council to make, if necessary, appropriate arrangements for pursuing the work further. Following this meeting, the delegations of Cameroon, Côte d'Ivoire, Nigeria, Sri Lanka and Zaire circulated a communication to the Trade Negotiations Committee in an effort to have this issue included on the agenda of the Montreal Ministerial meeting. The communication, building on the previous technical note, proposed how a possible mechanism or agreement in this area might evolve.[14] It described the scope of the problem, why present efforts at the international level were inadequate, and the main priorities for a possible agreement in GATT in this area. In particular, the note suggested:

"One form of action in GATT might be to elaborate an Agreement or a Code of Conduct, on the lines of the Agreement on Technical Barriers to Trade...

The main objective of such an Agreement might be to lay down the principle that governments, in formulating regulations, should pay adequate attention to the protection of environment and of health and life not only of its own country or population but also of those in other countries and populations. It might, *inter alia*, apply to:

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[13]SR.44/2, 30 November 1988, pp. 2-3.

[14]MTN.TNC/W/14, 30 November 1988.

(i) all products which in the domestic market of a country:

(a) are prohibited from being sold
(b) can be sold only under severely restricted or controlled conditions; or
(c) are withdrawn from sale

(ii) industrial, toxic and other wastes whose disposal in the domestic market is severely restricted or controlled

on the grounds that they are dangerous to human health or safety, animal or plant life or health or other reasons of environmental protection.

In relation to industrial and toxic wastes and of other substances (e.g. those falling under item (ii) above) which are considered to be inherently hazardous, rules of the Agreement should provide for the total ban on exports. Such a ban would be in keeping with the principle that the wastes created in a production process should be re-cycled, further treated or disposed of, in the country of manufacture as in most cases it is not possible for the exporting country to meaningfully evaluate whether the facilities for storage, re-cycling or otherwise disposing waste are adequate in the importing country, particularly in the case of developing countries.

As regards other products (e.g. those falling under item (i) above) governments should, in formulating regulations, give adequate consideration to whether exports thereof shall be prohibited or restricted. In cases where prohibition of exports is not considered desirable and appropriate, given factors such as environmental and climatic differences among countries, and differences in dietary habits, regulations should permit only exports on the basis of export licences and lay down conditions for their issuance. Such conditions could include an undertaking that in the case of products falling in this grouping (e.g. hazardous chemicals, pesticides, radioactive materials and toxic waste), export licences will be issued only after "prior informed consent" to the importation of such product has been received from the relevant control authority in the importing country.

In addition to laying down rules governing measures to be taken by exporting countries, the Agreement should aim at reinforcing actions that are being taken by organizations like the UN, FAO, WHO and UNEP by urging its member countries to participate effectively in the schemes for notification and exchange of information and in relevant technical work of these organizations.

Finally, the institutional machinery to be established under such an Agreement should, by providing mechanisms for consultation and for settlement of disputes, enable the international community to monitor and control trade in such products in an effective way."[15]

12. At the Montreal Ministerial in December 1988, the issue was raised. The Chairman, in his concluding remarks, noted that:

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[15] *Id* at pp 3 - 4.

"some delegations had, in their statements, emphasized the need for early action in GATT to bring under control trade in domestically prohibited goods and other hazardous substances. He understood that the subject was covered by GATT's regular work programme and therefore suggested that the GATT Council be requested to take an early, appropriate decision for the examination of the complementary action that might be necessary in GATT, having regard to the work that was being done by other international organizations"[16]

The Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances

13. At the following meeting of the GATT Council on 20 December 1988, it was agreed to include the subject of Exports of Domestically Prohibited Goods in the agenda for the February meeting of the GATT Council for further examination. During the first half of 1989, informal consultations to determine further action continued. Ultimately in July 1989, the GATT Council agreed to establish a Working Group to examine the issue at a technical level. The terms of reference of this Working Group read:

"... the Council agrees to establish a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances which, in the light of GATT obligations and principles and having regard to the work of other international organizations on these goods and substances, will examine trade-related aspects that may not be adequately addressed, and report to the Council.

The Working Group should take into account the specific characteristics of domestically prohibited goods and those of other hazardous substances, and the need to avoid duplicating the work of other international organizations.

The Working Group should complete its work by 30 September 1990, and submit a progress report to the Forty-Fifth Session of the CONTRACTING PARTIES in 1989.[17]

14. The Working Group met fifteen times between September 1989 and June 1991. At the first meeting, the Working Group, noting its mandate to address trade-related aspects having regard to the work of other international organizations, agreed to invite, as observers, to its meetings representatives from UNEP, FAO, WHO, the UN Secretariat, the ILO, the UN Centre for Transnational Corporations, the OECD, the ITC, and the International Atomic Energy Agency. Throughout the work of the Working Group, these representatives provided technical expertise and advice to delegations, to the Chairman and to the Secretariat. Their contributions to the meetings were often included as Annexes to the minutes of the meetings.[18]

15. At the second meeting the delegation of Nigeria submitted a paper which contained specific information on domestically prohibited goods and other hazardous substances that had been exported to Nigeria. It presented ideas for an agreement or legal instrument within GATT based on the elements and product coverage that had been described in its previous proposal,

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[16]MTN.TNC/8(MIN), 17 January 1988, pp 11 - 12.

[17]C/W/605/Rev.1, 19 July 1989.

[18]The Minutes of the meetings of the Working Group are contained in documents Spec(89)48 and 52; Spec(90)3, 12,20,27,36, and 39; and Spec(91)3, 4, 23, 60, and 62.

(MTN.GNG/W/18, submitted with the delegations of Cameroon, Côte d'Ivoire, Sri Lanka and Zaire). The paper emphasized that three points had to be included in any such agreement:

- international trade of products which had been banned or severely restricted for sale, distribution, or consumption in the country of production must be banned and/or regulated;

- products directed towards re-export must also be controlled;

- the burden of decision, as to whether to import a product or not, must be equally shared by both the importer and the exporter.[19]

16. For the fourth meeting, the Secretariat presented a paper entitled "Background note on relevant provisions in the GATT, MTN Agreements, and on relevant Uruguay Round proposals".[20] This note, which stimulated discussion in the Working Group, addressed Articles I, III, XI, XIII, and XX in the context of this work, as well as the Agreement on Technical Barriers to Trade and the Agreement on Import Licensing Procedures. An Annex to the note discussed Preshipment Inspection Systems. The delegation of Cameroon circulated a response to the note in document DPG/W/7.

17. At the fifth meeting, in May 1990, the delegations of Cameroon and Nigeria presented a proposal for an agreement in this area.[21] This proposal contained objectives, principles, and scope of an agreement in this area. Elements which should be included in an agreement included:

- binding obligations on contracting parties to control the export of products which were domestically prohibited from being sold or whose sale was severely restricted on the basis of being dangerous to human, animal or plant life and the environment;
- publication obligations contained in Article X of the General Agreement;
- a binding obligation on contracting parties to participate in the schemes of other international organizations working in this field;
- mechanisms for dispute settlement that contained provisions for interim action to limit damages and provisions for payment of damages as a possible outcome to the dispute settlement procedures.

18. A second proposal was presented by the European Communities.[22] At the meeting the representative from the EC noted that there were common elements in the two proposals, among them the objective of ensuring further GATT involvement in this area. However, significant differences existed. His delegation's proposal was built around several principles including:

- the recognition of the importance of action to protect not only one's own environment, but that of others as well, and of the value of the work of other international organizations in this area, whose legal capacities and technical expertise should not be encroached upon;

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[19]DPG/W/5, 8 November 1989.

[20]DPG/W/6, 2 February 1990.

[21]DPG/W/8, 30 March 1990.

[22]DPG/W/9, 17 April 1990.

- the principle that where international agreements destined to further the objectives outlined in the proposal already existed, GATT contracting parties undertake to accept and apply them;
- the need to avoid creating unnecessary obstacles to trade;
- the need for transparency and publication in accordance with the provisions of Article X of the General Agreement; and
- the necessity of a forum for review of the operations of the instrument adopted in GATT in the light of developments with regard to the provisions adopted by other international organizations.

19. For discussion at the seventh meeting, the Chairman presented a working paper containing a Draft Decision on Trade in Banned or Severely Restricted Products and Other Hazardous Substances, which was based on the two proposals presented by Cameroon and Nigeria on one hand, and by the EC on the other, and took into account the clarifications given by their sponsors and the comments by other delegations. This Draft Decision was the subject of discussion, both at the technical and drafting level, at this meeting, at the following four meetings and at additional informal meetings. The text was revised numerous times to meet the requirements and advice of delegations and technical experts. By September 1990, when the Working Group was expected to complete its work, it was clear that more time was needed. Therefore, at the Council meeting in September 1990, the Chairman requested an extension of the Group's mandate until the end of December 1990. By December, the Group had made significant progress on the draft Decision. The delegations of Cameroon, Côte d'Ivoire, Nigeria, Senegal and Zaire communicated the text, through the Group of Negotiations on Goods, to the Brussels Ministerial meeting of the Trade Negotiations Committee in December 1990 in order to inform the meeting of the substantive progress made.[23] The Chairman of the Working Group also submitted a report containing the draft Decision to the Forty-Sixth Session of the CONTRACTING PARTIES in December 1990,[24]in which he explained that the Group had been unable to reach consensus on the present text but that, given the significant progress made, he requested another extension of the Group's mandate until the end of March 1991 in order to complete the work.

20. At a meeting of the Working Group in March, it was clear that a solution to resolving the problems with the text could not be found and the Working Group agreed to request the Council for a further extension of the mandate until 30 June 1991. During this time, it was agreed that the delegation which had problems with the text the United States, would attempt to elaborate a proposal for its revision and would consult with delegations. These proposed revisions were circulated in DPG/W/10 and were the subject of discussion at a following meeting in May. The text was subsequently revised to incorporate some of the proposals, but others could not be agreed upon. Hence, another proposal was submitted by the United States (DPG/W/11) which was the subject of the final meeting of the Working Group in June 1991. Despite efforts, a final version of the text could not be agreed.

21. At the July 1991 meeting of the Council, the Chairman of the Working Group reported on the results of the Group's efforts. He submitted a report with the text of the draft Decision attached and explained that:

> "At present, although the attached text has been generally agreed by delegations, the country making the reservation remains unable to accept it without amendments. It

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[23]This communication is contained in MTN.TNC/W/39/Rev.1, 29 November 1990.

[24]L/6769, 12 December 1990.

> should also be noted that some delegations also made proposals for changes of a drafting nature which are reflected in the minutes of the meetings (Spec(91)60 and Spec (91)62). The Working Group has, therefore, been unable to complete its work within the time allocated to it.
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> The Working Group nonetheless considers that the need to introduce a notification scheme for domestically prohibited goods remains urgent. The Group, therefore, recommends that the Council should make arrangements for discussion of the draft Decision to continue, whether by an extension of the mandate of the Group or by some other appropriate means.[25]

The Council agreed to extend the mandate of the Working Group for a period of three months which would begin from the date of the Group's next meeting, and authorized the Council Chairman to hold consultations on the timing for convening this meeting. The Working Group never met again. It was agreed in the Marrakesh Ministerial Decision on Trade and Environment to incorporate this issue into the work programme of the WTO Committee on Trade and Environment.[26]

The Draft Decision on Products Banned or Severely Restricted in the Domestic Market

22. The text of the draft Decision of July 1991 creates a notification system for all products, substances or wastes that a contracting party has determined present a "serious and direct danger to human, animal or plant life or health or the environment in its territory, and which for that reason are banned or severely restricted in the domestic market of that contracting party by governmental regulatory action, except: fissionable and radioactive materials; and arms, ammunition and implements of war supplied directly of indirectly to a military establishment". The notification system would also cover products, substances or wastes that a contracting party has determined to "be hazardous and which for that reason are required to be disposed of in accordance with governmental regulatory action, except: such wastes which, as a result of being fissionable or radioactive, are subject to international control systems, including international instruments, applying specifically to fissionable or radioactive materials; and such wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument."[27]

23. There are essentially three obligations under this draft Decision whenever a product is banned or severely restricted in a domestic market. First, the contracting party should consider whether the export of such a product should be subject to equivalent measures. Second, if such measures are not applied to exports, the contracting party shall promptly notify the GATT Secretariat of the measures taken, as well as the reasons for which they were adopted. The GATT Secretariat shall then forward all notifications received to the enquiry points that contracting party shall establish in accordance with the provisions of the Decision. Third, the contracting party shall provide additional information on the product if asked to do so.[28]

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[25]L/6872, 2 July 1991.

[26]MTN.TNC/W/141, 29 March 1994. See the seventh item of the work programme, pg. 3.

[27]L/6872, Article 1.

[28]L/6872, Article 3.

24. Finally, the draft Decision would provide that contracting parties publish all laws, regulations and administrative rulings in so far as they relate to international trade in these products, would establish a Committee for consultations on the operation and implementation of the Decision, would provide for technical assistance on mutually agreed terms, and would provide for contracting parties to consult on the operation of the Decision to find mutually satisfactory solutions to any problems, without prejudice to Articles XXII and XXIII of the General Agreement.

25. The participation of technical experts from relevant inter-governmental organizations who were present in the meetings and in many of the informal meetings was used, in particular, to elaborate appropriate definitions for the terms "banned" or "severely restricted" based on the expertise and related work of other international organizations,[29] to define exceptions to the coverage and understand precisely the coverage, functioning, enforcement and dispute settlement procedures of other related international agreements. The coverage of the draft Decision is based on this work as are the provisions regarding coordination with the other related international instruments.

26. An important issue which is stated in the Working Group's terms of reference, was the need to avoid duplication of activities in this area. In this regard, extensive work was carried out by the Secretariat in order to learn what other international schemes existed which dealt with these types of products and to understand their provisions and obligations. This revealed eleven such international instruments, which were included in an Annex I of the draft Decision. The text seeks to give priority to the obligations of these instruments by stating that the obligation to notify would not apply if the product concerned was covered by one of the instruments listed in the Annex and if the exporting contracting party was a signatory or a participant of that instrument. The draft Decision also states that its provisions shall not affect the rights and obligations of signatories or participants of these instruments, and that the question of whether a contracting party, which is a signatory or participant of an international instrument contained in the Annex, was applying the procedures therein, shall be determined by the competent body of that instrument. The Decision also encourages contracting parties involved in other international schemes to participate fully in them and to extend them to additional products as appropriate. Contracting parties not so involved are encouraged to join such schemes.

27. During the negotiation of the draft Decision, the question of its coverage was influenced by the results of the analysis of the other existing international instruments related to this area. In particular, the analysis revealed that systems for exchange of information seem to have been relatively well developed in relation to three important product groups (chemicals, pesticides and pharmaceuticals). For other product groups, particularly for consumer products, the work was at a preliminary stage, if it existed at all. Although the United Nations Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Severely Restricted and/or Not Approved by Governments contains some information on consumer products, this List is mainly a reference document. In addition, it includes information on only those consumer products which are hazardous because of their chemical composition. The OECD Recommendation Concerning the Safety of Consumer Products and Recall Procedures, while relevant to the subject matter, contains recommendations for the exchange of information among OECD countries only.

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[29]These definitions ultimately were based on the definitions for banned or severely restricted chemicals, pesticides, fertilizers, and pharmaceuticals which had already been elaborated and in use in the following international agreements, respectively: the UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade, the FAO International Code of Conduct on The Distribution and Use of Pesticides, the WHO Certification Scheme on the Quality of Pharmaceutical Products Moving in International Trade, and in the United Nations Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Severely Restricted and/or Not Approved by Governments.

28. Further, this analysis revealed that most of the work of other international instruments emphasized the development and improvement of systems for exchange of information on products banned, severely restricted or withdrawn from sale in the markets of the exporting countries for reasons of danger to public health, safety and the environment. All these systems, while admitting that it is up to the importing country to adopt measures aimed at protection of human health and the environment, seek to ensure the provision of information from authorities or firms in the exporting countries in order to enable importing countries to make informed judgements on these products.

29. The analysis further showed that efforts had also been made by some of these organizations to elaborate principles and guidelines which both exporting and importing countries might wish to adopt to bring trade in such products under control. These include prior notification to the designated authorities in the importing countries that chemicals, pesticides or pharmaceutical which are to be exported are banned or severely restricted in the exporting country in order to enable them to decide whether the products should be imported or not; the elaboration of the concept of "prior informed consent" (PIC) under which an exporting country would permit exports of certain banned or severely restricted chemicals, pesticides or fertilizers, only if the importing country consents in writing to this importation; and the prohibition, where feasible and appropriate, of exports of goods which are considered to be inherently so hazardous that they present a severe and direct danger to human life or health and safety of consumers.[30]

Recent Developments Related to this Subject

Relevant developments in the international instruments contained in Annex I of the Decision

30. Annex I of the draft Decision lists the nine international instruments which are recognized as related to the subject matter of this Decision. These are the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, the London Guidelines for the Exchange of Information on Chemicals in International Trade, Amended 1989 (all administered by UNEP); the International Code of Conduct on the Distribution and Use of Pesticides (administered by FAO); the Certification Scheme on the Quality of Pharmaceutical Products Moving in International Trade (WHO); the 1971 Convention on Psychotropic Substances and the Single Convention on Narcotics, 1961, as Amended by 1972 Protocol (UN); and the Convention Concerning Safety in the Use of Chemicals at Work (ILO). Two additional instruments referred to are the United Nations Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Severely Restricted and/or Not Approved by Governments (UN) which is a reference document containing information relating to such products, and the Recommendation Concerning the Safety of Consumer Products and Recall Procedures for Unsafe Products Sold to the Public (OECD) which also contains information on such consumer products for OECD countries.

31. Recent developments in relation to the Montreal Protocol, the Basel Convention, and the London Guidelines are contained in document PC/SCTE/W/3 of 13 October 1994. Several developments noted in this document are of particular importance to the issue of domestically prohibited goods. First, in the context of the **Montreal Protocol**, the Copenhagen Amendments accelerated the timetable for the phase-out of controlled substances listed in Annex A (the original CFCs and three halons) and in Annex B of the Protocol (the chemicals added in the London Amendments: other fully halogenated CFCs, carbon tetrachloride, and methyl chloroform).

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[30] L/6459/Rev.1. p. 21.

Halon production and consumption in developed countries was phased out on 1 January 1994 and production and consumption of CFCs in both Annexes are to be phased out in industrialized countries by 1 January 1996. In addition, the Copenhagen Amendments added an Annex C of controlled substances which included hydrobromoflourocarbons (HBFCs), hydrochlorofluorocarbons (HCFCs) and methyl bromide. Consumption and production of HBFCs are to be phased out by 1996 and HCFCs by 2030. The consumption of methyl bromide is to be frozen by 1995 and further control measures will be decided thereafter based on further study.

32. Furthermore, in the context of the Montreal Protocol, at the Fifth Meeting of the Parties in November 1993, it was decided that it was not technically feasible to impose a ban or restriction on the import of products produced with, but not containing, controlled substances in Annex A. At the Sixth Meeting of the Parties in October 1994, it was decided that it was neither feasible nor necessary to elaborate a list of products containing controlled substances from Annex B in order to ban the import of products containing those substances from non-Parties. This had been done for Annex A but was considered unnecessary for Annex B given that the phase out schedule for Annex B substances was accelerated at Copenhagen.

33. In the context of the **Basel Convention**, two developments related to the issue of domestically prohibited goods are worth noting. The first is the Decision adopted at the Second Meeting of the Conference of the Parties in March 1994 to ban all exports of hazardous wastes which are destined for final disposal from OECD to non-OECD countries and phase out by 31 December 1997 all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD countries. Intra-OECD and intra-non-OECD transboundary movements of hazardous wastes will continue pursuant to the Convention's procedures of prior informed consent (PIC). At the most recent meeting of the Ad Hoc Committee for the Implementation of the Basel Convention (12-16 December 1994), a Decision was adopted which urged Parties to provide the Secretariat with information on their related national legislation by February 1995 so that a full report could be submitted to the Third meeting of the Conference of the Parties (to be held 18-22 September 1995).

34. The Second meeting of the Conference of the Parties also adopted a decision to convene an Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal. This Group met for the second time on 10-14 October 1994. The objective of the Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation, including reinstatement of the environment, for damage resulting form the transboundary movement of hazardous wastes and other wastes and their disposal. Draft Articles of a Protocol have been elaborated, although with much bracketed text, and will be the subject of further discussion at the next meeting of the Group on 3-7 April 1995. Article 4, Liability, contains three alternative texts which put the liability for damage on the generator or the exporter and/or any person, including the disposer, broker, and/or importer who either is in control of the hazardous wastes or is involved in the transboundary movement or disposal of the hazardous wastes, or any person who at the time of the incident has operational control of the wastes. Certain exceptions are provided for in the Article. Regarding illegal traffic, all persons involved in the illegality shall be held liable. Further, with respect to compensation for loss or damage, the claimant may invoke the forms or modalities of compensation provided for by the applicable law. With respect to compensation for the impairment of the environment, the Article says that if the environment can be reinstated, compensation shall be limited to: the costs of measures of reinstatement actually undertaken or to be undertaken, the costs of returning the environment to a comparable state. If the environment cannot be reinstated, two alternatives were presented to calculate compensation. Article 7 states

that Parties which are states of export, state of transit or state of import shall ensure that liability under this Protocol shall be covered by insurance, bonds or other financial guarantees. Article 8 will establish an international fund for immediate response measures in an emergency situation and for compensation to the extent that compensation for damage under the civil liability regime is inadequate or not available.

35. Article 13, on the relationship with other bilateral, multilateral and regional agreements, contains four alternatives in case of a conflict between the provisions of this Protocol and the provisions on liability and compensation in another international agreement or arrangement:

- the provisions of this Protocol shall take precedence to the extent that they are more favourable to the claimant [, in particular taking into account the interests of developing countries].

- except where all Parties concerned are members of a separate international agreement on liability and compensation with regard to inland, air or maritime transport, the provisions of this Protocol shall take precedence to the extent that they are more favourable to the claimant [in particular taking into account the interests of developing countries].

- the provisions of this Protocol shall take precedence, unless the damage is related to wastes which are specifically covered by international or regional instruments on liability and compensation with regard to inland, air or maritime transport.

- except where all Parties concerned are members of a separate international agreement on liability and compensation with regard to inland, air or maritime transport, the claimant shall have the right to choose which regime shall apply for compensation.

36. Finally, it is worth noting that the Ad Hoc Committee requested the Secretariat to prepare an evaluation of the effectiveness of the Convention for the Third Meeting of the Conference of the Parties in 1995. This study shall, inter alia, take into full consideration the existing institutional mechanism of the Basel Convention as well as developments which have taken place in the context of the Convention and draw upon the experiences gained within other multilateral environmental agreements.

37. In the context of the **London Guidelines**, document PC/SCTE/W/3 provides an overview of the present situation with regard to their implementation. Of particular interest are the discussions leading toward the development of a legally binding instrument for the application of the Prior Informed Consent (PIC) Procedure. A Task Force to consider modalities for such an instrument was established and met twice with the participation of experts from governments and representatives of relevant organizations. The task force reviewed the first year's experience in the full operation of the PIC procedure and elaborated a set of elements for the legally binding instrument. These elements cover the objectives, the scope, exemptions, definitions and general obligations which may be negotiated into the ultimate instrument. An informal consultative meeting to consider issues related to these elements was convened on 1-2 December 1994. Participants at this meeting provided their views and made recommendations on these issues, with a view to prepare for an initial negotiating text of a PIC convention. At this meeting, the following time frame for the development of such a convention was proposed, subject to relevant decisions by the UNEP Governing Council in May 1995:

September/October 1995: an organizational government-designated experts meeting;
December 1995/January 1996: the first session of an intergovernmental negotiating meeting with the mandate to develop a PIC convention;
April/May 1996: the second session of the intergovernmental negotiating meeting;
October/November 1996: the third session of the intergovernmental negotiating meeting and a conference of plenipotentiaries to adopt the convention.

It was agreed that the UNEP Executive Director would seek a mandate to start negotiations for the development of a legally binding instrument for the application of the PIC procedure from the next Government Council in May 1995, with a view to the conclusion of such an instrument possibly by 1997, having noted agreement at the FAO Council on the development of such an instrument.

38. The objective of the instrument would be to make legally binding the PIC procedure, including its operation, based on the procedure contained in the London Guidelines and in the FAO International Code of Conduct (also listed in Annex I of the GATT Decision L/6872). At the recent December meeting, several participants indicated that product and use control should also be addressed in the convention, although some others considered that this should be the responsibilities of each government. It was also noted that the respective responsibilities of importing and exporting countries should be clearly defined in the objectives. With regard to scope, the convention may cover "chemicals banned and severely restricted for health and environmental reasons and hazardous pesticide formulations which may be causing health [and/or environmental] problems under conditions of use in countries that do not have adequate infrastructure"[31]. At present the PIC procedures regarding hazardous pesticides do not take into account environmental damage. There was also a suggestion to include hazardous chemicals and chemical wastes into the scope. However others did not want to overload the PIC procedure by adding such a large number of chemicals. The procedure should be targeted on specific chemicals which are causing health and/or environmental problems under conditions of use in developing countries. Further chemical wastes are already covered by the Basel Convention. At the December meeting, it was agreed that the Secretariat would prepare a paper reviewing the criteria for selection and inclusion of chemicals into the PIC procedure. It was suggested that the export of hazardous chemicals not included in the PIC procedure could be dealt with by appropriate classification, packaging and labelling requirements.

39. With regard to obligations, Parties would exchange information on these chemicals in international trade, strengthen existing national infrastructures and institutions in order to implement the PIC procedure, including import decisions, and prevent exports that contravene prior informed consent decisions, by importing countries, cooperate with other Parties, and employ good management practices in the sale and purchase of pesticides. In the elements, specific procedures for these obligations were elaborated. At the December meeting, it was pointed out that, in addition to regulatory measures, non-regulatory measures should be sought for achieving the goals of regulatory measures such as economic incentives and memoranda of understanding.

40. In addition, at the December meeting, several participants expressed the view that there was a need to ban the export of domestically prohibited chemicals. This proposal appeared to be a parallel initiative to the ban agreed upon in the Basel Convention with respect to hazardous wastes. As other representatives disagreed with this approach, it was agreed that the Secretariat

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[31]UNEP/PIC/WG.1/4/5, 15 April 1994, p. 17.

would prepare a study on actual situations of export of domestically prohibited chemicals to provide a basis for further discussion. The study would also consider the implications of such an export ban. The sponsoring government said it hoped that this study would be completed by 1 April 1995 in order to consider this subject at the next session of the UNEP Governing Council in May 1995.

41. The elements also included the possibility of trade-related provisions, "taking into account progress made since adoption of the London Guidelines in addressing linkages between environmental and trade policies, and ensuring that the ability to take measures to protect human health and the environment is fully maintained."[32] The following elements are included:

> "(a) Ensure that governmental control measures or action taken with regard to an imported chemical for which information has been received in implementation of the instrument are not more restrictive than those applied to the same chemical produced for domestic use or imported from a State other than the one that supplied the information, recognizing that government authorities have the right to take actions that might [discriminate][restrict trade] in some circumstances and certain conditions to protect health and the environment (reference: amended London Guidelines, guideline 2(d); GATT, Article XX(b)(g)...;
>
> (b) The provisions should also recognize the right of government authorities to take action more stringently protective of health and the environment than that called for in this instrument.
>
> Note: Exact wording is under review with regard to "discriminate" and "restrict trade"... above."

42. In addition, the elements include possible provisions for control of trade with non-Parties. These include:

> "Measures concerning the control of trade of chemicals subject to the PIC procedure with non-Parties may be set out (reference: Montreal Protocol, Article 4).
>
> Note: There is a proposal to prohibit trade of chemicals subject to the PIC procedure between Parties and non-Parties. The meeting noted that it would be necessary to address this issue on the basis of careful study."[33]

At the December meeting, it was agreed that this issue should be studied for consideration in the negotiation of the convention, including its trade aspects. The GATT representative present at this meeting informed delegations of the ongoing work on the relationship between trade provisions in multilateral environmental agreements and those of GATT and of the relevant GATT rules related to this issue. Government representatives agreed that a study should be prepared on this issue which should take into account the ongoing work on trade and environment at GATT/WTO. There was a suggestion to take into account provisions of relevant conventions and protocols for consideration of the issue and that the role of unilateral trade measures, such as an import ban by a country, should be studied, in addition to multilateral trade measures.

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[32] *Id.* p. 26.

[33] *Id.* p. 27.

43. Finally, it is worth noting that the elements contain provisions related to the relationship with other international conventions. These provide that:

> "the provisions of the instrument shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would be in contravention to the purpose of this instrument (reference: Convention on Biological Diversity, Article 22, paragraph 1). It is necessary to take into account the existing conventions which might be relevant to this instrument, such as the Basel Convention.
>
> Note: It was felt that it would be necessary to examine the relationship with other relevant conventions with respect to obligations and other legal implications..."[34]

44. The GATT Secretariat will continue to monitor developments in these international instruments, as well as in the other instruments enumerated in Annex I. It will prepare addenda to this document as appropriate in order to keep delegations informed.

Relevant developments within GATT

45. Since July 1991, when the mandate of the Working Group on Domestically Prohibited Goods expired, work on general trade and environment issues has been undertaken in the Group on Environmental Measures and International Trade. This Group met from November 1991 to January 1994. In particular, the analysis and discussion related to the first item of this Group's agenda - trade provisions contained in existing multilateral environmental agreement vis-à-vis GATT principles and provisions - may shed light on some of the concerns that arose in the context of, and might continue to be associated with, the work on domestically prohibited goods, particularly with regard to the relationship between GATT provisions and those of other international agreements and to extraterritorial and extrajurisdictional application. During the course of the work on domestically prohibited goods, some of these issues did arise and some initial discussion on them took place. A summary of those discussions is contained in Annex I of this note to give delegations an indication of the concerns that arose with respect to the draft Decision in L/6872 and to provide a basis for comparing the evolution of thinking on these issues.

46. It is not the intention of this note to explain in detail the discussions of the EMIT Group with respect to these issues. A detailed overview of the analysis and reflection which emerged from the EMIT Group is presented in the Report by Ambassador Ukawa, Chairman of the Group on Environmental Measures and International Trade, to the 49th Session of the CONTRACTING PARTIES (L/7402). Furthermore, these issues, as well as the issue of dispute settlement in the context of obligations of multilateral environmental agreements, will continue to occupy the WTO Committee on Trade and Environment. There is likely to be considerable overlap among these areas of analysis as the Committee takes up respective items of its work programme.

47. In requesting this note from the Secretariat, one delegation considered that it might also be useful to cover developments in the Agreement on Technical Barriers to Trade and the establishment of the Agreement on Sanitary and Phytosanitary Measures emerging from the Uruguay Round results. While any relationship between the obligations of these new Agreements and the work on domestically prohibited goods will be for governments to determine as work progresses, it may be useful to note that in the work of the Working Group on Domestically Prohibited Goods, an effort was made in drafting the definitions and coverage to find language

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[34] *Id.*

that would precisely define the parameters of the coverage to only those limited number of products which were subject to bans or severe restrictions because they constituted a "severe and direct danger" to human, animal or plant life or health. In this regard, an effort was made to distinguish these control actions from those product standards and technical regulations more familiar to contracting parties through the TBT Agreement. Since the SPS Agreement did not exist during the life of the Working Group on Domestically Prohibited Goods, there was no discussion of how it might relate to this specific group of products. However, if the coverage of future work on domestically prohibited goods extends to agricultural products, such as plants and animals, or food items, such as food additives, it would likely be necessary to review the relationship of the SPS Agreement to this work.

ANNEX I

Summary of Discussions in the Working Group on Domestically Prohibited Goods on the relationship between GATT provisions and those of other international agreements and on measures applied extraterritorially and extrajurisdictionally

1. At the third meeting of the Working Group there was some discussion of the interpretation of Article XX which was stimulated by the Secretariat paper DPG/W/6, although there was little follow-up to this discussion or to the paper. The paper stated, with respect to Article XX, after explaining the conditions contained in the chapeau:

> "(i) Under sub-paragraph (b) of Article XX, measures which are considered necessary to protect 'human, animal or plant life or health' can be taken by countries to ban imports or exports of certain products of substances. The provisions of this sub-paragraph may also be relevant if, in order to protect the health of its consumers, an importing country applied higher standards (such as those that may be applied in the exporting country for domestic sales) than those that are applied to similar domestically produced hazardous products or substances, regarding packaging and labelling of certain imported products that are considered to be inherently hazardous. Even if such requirements may be considered inconsistent with the national treatment principle of Article III, they could be justified under Article XX if they do not constitute a disguised restriction on international trade, nor are applied in a manner as to cause arbitrary or unjustifiable discrimination"
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> (ii) Provisions of sub-paragraph (d) which, inter alia, permit countries to take measures both in relation to imports and exports for the 'prevention of deceptive practices' may provide justification for certain provisions of the established conventions and legal instruments:
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> > (i) which require that export of products which are subject to a system of prior approval and registration in the exporting country should be accompanied by certificates which give information concerning why the product is not registered or allowed to be domestically sold; or
> >
> > (ii) which require in the case of exports of hazardous and inherently dangerous products and substances that information should be given concerning the conditions applying to their sale in the domestic market and of their harmful effects on health and the environment.
>
> (iii) Sub-paragraph (g) which relates to conservation of natural resources, may be relevant to the trade related provisions in the Montreal Protocol which provide legal guidelines for the reduction of consumption, production, imports and exports of specified substances that deplete the ozone layer.
>
> The permissive nature of the provisions under Article XX is noted. It allows countries to take certain domestic actions which may otherwise be inconsistent with the General Agreement. However, it is important to note in this context that sub-paragraph (h) of the Article recognizes that, in the case of an internationally negotiated commodity agreement, countries may agree to abide by binding obligations, (either to control production and/or impose restrictions on imports and exports) some of which may not be

> consistent with the basic provisions of the General Agreement but are considered necessary to achieve the objectives of such an agreement...

2. At the third meeting of the Working Group, one delegation, in referring to DPG/W/6, noted that Article XX(b) and (d) " ... were permissive; it would be therefore necessary to impose more binding obligations to prohibit or restrict their export. In the case of hazardous and toxic wastes, this principle could be carried further to impose an obligation to dispose of such wastes within the territory of the country where the wastes had been generated. It was recognized that rigid insistence that exports in such cases be banned could create an imbalance, but in reality such cases were likely to be few."[35] Another delegation stated that DPG/W/6 appeared to indicate that the normal GATT provisions and exceptions provided considerable scope for measures in the field of export controls for health and environmental reasons and called for a need to reinforce the disciplines of the existing arrangements. Another had difficulty with the notion that domestic standards should necessarily apply to exported goods. In this scenario, it envisaged an unfair trade situation in which an exporter with the lowest domestic standards would have an advantage over other suppliers, all of whom satisfied the requirements of the importing country. However, another delegation stated that the standards that were good for one nation were also good for another. It added that in a situation where sub-standard products were exported to other countries, knowing that these products would have hazardous effects on health or the environment, was not only morally wrong but was wrong in all other aspects.[36] One delegation noted that it might not be able to agree with the interpretation described in the paper that Article XX may be used to justify more stringent standards on imports than are imposed on domestically produced goods. Another said that in its view, Article XX would permit restrictions and other measures as well as total bans. He added that sub-paragraph (b) of Article XX permitted restrictions on imports and exports only if these were accompanied by similar restrictions on goods sold domestically.

3. At the sixth meeting, there was further discussion on these issues in response to the proposed text of a Decision by the EC (DPG/W/9, see para. 17):

> "Regarding international measures, some delegations, while generally supportive of the proposal contained in DPG/W/9, noted the potentially complex legal issue involved in imposing binding obligations on GATT contracting parties with respect to other international agreements. Three delegations expressed their view that any agreement negotiated in GATT would have to be formulated as a best-endeavour approach because GATT could not impose obligations on its contracting parties to accept and apply the instruments adopted under other international organizations. The delegate of the EEC explained that his proposal was exhortatory in nature with regard to the substantive obligations established in the instruments of the other organizations."[37]

The EC representative, with regard to its proposal, noted the precedent of the TBT Agreement. He said that under this Agreement, contracting parties are encouraged to apply international standards adopted by the ISO or by other international organizations where they exist. This was the model that he had in mind.

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[35] Spec (90)12, p. 2.

[36] *Id.*

[37] Spec(90)27, p. 2.

4. At this meeting, there was also discussion on the issue of dispute settlement in reference to the proposed text of a Decision by Nigeria and Cameroon (DPG/W/8, see para. 17):

> "...Another delegation understood that any dispute arising within the context of an agreement in this area would be a dispute with respect to GATT obligations and not with respect to obligations under the other international agreements. However since GATT imposed no obligations to restrict trade but only permitted restrictions under Article XX, it was asked how a failure to restrict trade of the products concerned would give rise to any dispute under the GATT. The delegate of Nigeria explained that these dispute settlement provisions were introduced because his delegation considered that the offending party in a dispute should be obligated to pay for damages. The concept of interim measures was introduced because the product at issue were dangerous and if measures to prohibit trade in such hazardous products were left until the dispute was resolved, dangerous health and environmental risks could arise."[38]

5. At the seventh meeting, with regard to the obligation in the Decision for a contracting party which domestically bans or severely restricts a product to examine whether the export of such a product should be subject to equivalent measures (Article 3.1 of L/6872):

> "[One] delegation questioned the right of one country to include an extraterritorial aspect in its national legislation as Article 3.1 [of the Decision] implied. Another delegation stated that interdependence was a reality in the world and that Article 3.1 represented a fundamental principle of global responsibility that had to be accepted by nations. It added that profit should not be the only motive governing trade, but concern for world health and protection of the environment had also to be considered, particularly for those countries which did not have the means to adequately address these concerns with regard to their imports. This delegation also suggested using stronger language in paragraph 3.2 to underline what he believed should be a common objective of controlling and supervising trade in these products. Another delegation noted that, as a best-endeavour obligation, Article 3 posed no problems. It added that since legislation could vary a great deal among countries which could allow significant room for discrimination, the second sentence of Article 3.1, dealing with non-discrimination, was important."[39]

6. Also at this meeting, on dispute settlement:

> "...one delegation stressed that GATT dispute settlement mechanisms could not be used to decide whether obligations under other international agreements had or had not been met and that there could be no cross-enforcement of other international obligations through GATT. Two delegations noted the necessity of following the discussions in the Uruguay Round Negotiating Group dealing with dispute settlement procedures. Another delegation believed that the concepts of interim action during the dispute settlement procedures and compensation for damages should be included."[40]

7. At the eighth meeting there was discussion on Article 3 and on dispute settlement provisions:

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[38] *Id.*

[39] Spec(90)36, p. 2.

[40] *Id.* p. 3.

"Two delegations were concerned that the provisions in Article 3.1 would have far-reaching consequences for the GATT system of rules. One of these delegations suggested language which would substitute the portion of this Article which urged delegations to consider the conditions outside their own territories, with the idea of specifying situations where there was a perceived serious risk or serious danger to human, animal or plant life or health. It suggested accompanying this new language with a paragraph in the Preamble to provide a more general formulation of the concept of shared extra-territorial responsibility. However, another delegation believed that specifying situations would create inappropriate limitations because danger to the environment was often a slow process, not always direct and easily specified. One delegation noted that Article 3.1 did not explain how a country would go about taking into account the need to pay fullest attention to the protection of human, animal and plant life and health within the territory of other countries. It believed that the consultation process between the exporter and importer, which would ensure an element of shared responsibility in preventing trade of dangerous products, was lacking. This delegation believed it would be more appropriate to create mechanisms along the lines of the prior informed consent procedures which would allow importing countries to formerly record and disseminate their decisions regarding the importation and use of products which had been banned or severely restricted in other countries. Two other delegations, however, stressed the importance of this Article 3.1 as it presented one of the key concepts in the Decision. One of these delegations noted that this Article did not intend to urge exporters to become involved in the domestic affairs of other countries, but to ensure a certain responsibility concerning products which had been deemed to be dangerous and whose use could have consequences on these other countries. The other delegation stressed that this Article should contain three basic elements: the adoption of domestic rules and regulations to ban, or restrict certain products in the exporting country; the consideration of banning or restricting the export of these products; and the consideration of the effects of these products on third countries. It suggested a textual revision of Article 3.1 to incorporate these ideas and to ensure that contracting parties would commit themselves to strengthening co-operation in this regard."[41]

"Several delegations expressed concern regarding a possible link between the dispute settlement provisions of this Decision, contained in Article 9, and the provisions of the other international instruments listed in Annex II. They agreed that GATT dispute settlement provisions could not be used to enforce GATT contracting parties to fulfil their obligations under the other international instruments listed in Annex II. One of these delegations questioned the necessity of this Article since this Decision, once adopted, would be part of the General Agreement and therefore subject to its dispute settlement provisions. Another of these delegations suggested this problem could be resolved by limiting the dispute settlement provisions to trade-related aspects of this Decision. It added that, at present, to the extent that these other instruments had trade-related provisions, they could be affected by GATT dispute settlement procedures. However, another delegation did not agree that this Article should be confined to trade-related matters because it would be impossible and illogical to divide this Decision into what was trade-related and what was not. It raised the issue of who would decide what was trade-related and what was not. Two delegations expressed the desire for the inclusion of provisions to ensure compensation for damages and interim action in the event of an unauthorized shipment of hazardous or dangerous products. It was noted that the concept

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[41]Spec (90)39, p. 2.

of arbitration, included in the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, could be an option in this regard. However, one delegation believed that it would be difficult to incorporate a provision for financial compensation because this would amount to an agreement between governments and, apart from state trading companies, governments were not directly responsible for actions by private companies."[42]

8. At the ninth meeting, the discussion concentrated on drafting the text:

"... One delegation suggested including in the Decision the idea that an export ban could be revoked at a later time in the event that a contracting party indicated that it wished to import the product. Several delegations also requested the retention of the phrase in the fourth alternative 'recognizing the prerogative of individual importing countries to determine whether to allow the import and use of the products concerned in their specific situations,' but were uncertain as to its appropriate place. Two delegations, however, believed it was unnecessary because it weakened the Article.."[43]

9. At the tenth meeting, there was discussion on the relationship between GATT and the other international instruments:

"All delegations agreed that the Decision should not duplicate the work of other relevant international instruments, but a broad coverage which included all products that were banned or severely restricted on the grounds that they were dangerous or harmful, was essential to the purpose of this work. They were particularly concerned that the proposal would not include consumer and food products. One delegation noted that since the obligations in the present text were not very severe, an open definition on coverage should be perfectly acceptable, particularly since, in the end, national governments would decide what was to be severely restricted or prohibited. The observer from UNEP explained recent developments related to the definition of banned or severely restricted chemicals... [One delegation] could not accept that prior informed consent procedures be regarded as equivalent to a domestic ban or severe restriction. Another delegation agreed that PIC procedures could be regarded as equivalent, however only for those categories of products to which an internationally established system applied."[44]

This statement by the UNEP representative is reproduced as Annex II to this note as it contains an example of the type of technical issues which arose in the discussions of coverage and definitions.

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[42] *Id.* p. 3.

[43] Spec (91)3, p. 2.

[44] Spec (91)60, p. 2.

ANNEX II

Statement by the Representative of the United Nations Environment Programme at the meeting of the Working Group on Domestically Prohibited Goods of 16 May 1991

Thank you Mr. Chairman. I would like to make a brief remark in relation to some of the statements that have been made in the first place by the distinguished delegation from the United States and, later on, by certain other delegations with regard to coverage of consumer products by the London Guidelines, for example. When the London Guidelines were adopted, we, as the Secretariat, with the FAO, had to start interpreting the way in which governments report to our organizations on control actions to prohibit all uses - that is a ban - or to prohibit most uses - that is a severe restriction - on products covered by the Code of Conduct and the London Guidelines, but in particular the London Guidelines. Analysing a great number of such notifications as have been made available to us over at least five years, we had a great deal of difficulty in understanding from the notifications in which use category or what certain type of uses was meant by governments when reporting to us on regulatory actions that would fall broadly in this category. We therefore made a comparative analysis of many such notifications or control action and submitted this to a joint FAO/UNEP expert group, which we have established to provide advice to the two Secretariats on interpretation of definitions and notifications of control action received. We were advised to consider and to propose to governments that notifications of control action should clearly indicate in which broad use category a ban or severe restriction was placed by the government and the broad use categories that were advised to us were: agricultural chemicals, including pesticides for all types of use, industrial chemicals and consumer chemicals.

The expert group recommended that in case a chemical would have been banned for use in one of these broad use categories, the definition of a ban would apply. That means that certain chemicals - and this happens not infrequently - which can be placed in more than one of these broad use categories, when it would only be a ban in one of the use categories, it would still be a ban that would have to be observed and the prior informed consent procedure would apply. There are quite a number of chemicals which are being used as pesticides, for example, but are also used as industrial chemicals. There are also industrial chemicals which are not infrequently components of consumer chemicals. The only way forward that the expert group advised to us to be clear on interpretation of bans and severe restrictions reported to us, was to recommend governments that when notifying under the London Guidelines, prohibitions of all uses or prohibitions of most uses, bans and severe restrictions, they would have to clearly indicate whether it was in one use category - agricultural or industrial or consumer chemicals - or if it was in more than one use category. However, one use category would be sufficient. There are a number of such bans or severe restrictions presently in our database which had been reported by governments, where, for example, chemicals are banned from consumer products. Lead in paint of children's toys is one example, but there are more.

We have recently submitted this recommendation of the joint FAO/UNEP group of experts to a Working Group of government experts which the UNEP Governing Council has requested should be convened to report on implementation of the London Guidelines and difficulties faced by governments in implementation and we have submitted the recommendation to the Ad hoc group of government experts and it was accepted. We have the intention to issue this, very soon, to all designated national authorities under the London Guidelines. There are now

almost 100 countries which have indicated to participate in an operations guidance manual in which we would request governments to clearly indicate when notifying chemicals under the London Guidelines whether the ban or severe restriction was in one, two or all three use categories, but one use category would suffice. Mr. Chairman, I thought this was an important piece of information which should be considered by the delegations. Thank you.[45]

[45]Spec (91)60, p. 3.