

# GENERAL AGREEMENT ON

RESTRICTED

# TARIFFS AND TRADE

DPG/W/6

2 February 1990

Limited Distribution

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## Working Group on Domestically Prohibited Goods

### EXPORT OF DOMESTICALLY PROHIBITED GOODS AND OTHER HAZARDOUS SUBSTANCES

#### Background Note by the Secretariat on relevant provisions in the General Agreement and MTN Agreements and on relevant Uruguay Round proposals

#### INTRODUCTION

1. The mandate of the Working Group on Domestically Prohibited Goods and Other Hazardous Substances requires it to examine trade related aspects "in the light of GATT obligations and principles and having regard to the work of other international organizations". At the second meeting of the Working Group the Secretariat was requested to prepare a Background Note explaining the provisions of the General Agreement and of the MTN Agreements and Codes that may have relevance to the subject matter under discussion. The Secretariat was also asked to consider the relevance of the various proposals made in the context of the Uruguay Round.

2. This note has been prepared in response to the request. In this context, it is recalled that only the CONTRACTING PARTIES and the Code signatories can make definitive interpretations of the General Agreement and of the MTN Agreements respectively.

3. In preparing the Background Note, the Secretariat has attempted to indicate the provisions of the General Agreement and of the two MTN Agreements (i.e. the Agreement on Technical Barriers to Trade and the Agreement on Import Licensing Procedures) that are relevant to the issues and concepts under consideration in the Working Group<sup>1</sup> and give information on their interpretation and application. The note also contains, where considered appropriate, background information on the drafting history of the provisions and, in this context, highlights certain provisions of the Havana Charter.

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<sup>1</sup>The proposals under consideration in the Group include the Technical Note submitted by Cameroon, Cote d'Ivoire, Nigeria, Sri Lanka and Zaire (MTN.GNG/W/18) and the submission by Nigeria (DPG/W/5).

4. Sections I and II deal with the provisions in the GATT and in the MTN Agreements in relation to the trade-related provisions, which have been included in the conventions<sup>2</sup> of other organizations or have been suggested for inclusion in the proposals under consideration in the Group. These can be broadly grouped into two categories:

- (a) prohibition or restriction on imports and exports of products that are prohibited to be sold in domestic market and of other hazardous substances;
- (b) procedures for licensing of either imports or exports through adoption of procedures for prior informed consent, or for those products which require prior approval and registration before they can be marketed domestically, certification of exports by a competent authority in order to establish that the product is registered for sale in the exporting country and, if not, the reasons therefore.

Section III then refers to some of the other provisions which may have a direct or indirect bearing on the subject matter under discussion.

5. As regards the proposals under the Uruguay Round of Trade Negotiations, the Annex to this paper describes the issues surrounding pre-shipment inspection systems that have been adopted by some countries. It explains the issues raised in the Negotiating Group on Non-Tariff Measures concerning employment of the services of private firms, by importers or by the governments of importing countries, for pre-shipment inspection, in the exporting country, of products destined for import. It also discusses compulsory systems for inspection of exports that are instituted by governments of exporting countries in the form of legislation and/or regulation.

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<sup>2</sup>Synoptic table prepared by the secretariat (DPG/W/4/Rev.1) summarizes the trade related provisions contained in the following instruments:

(a) Montreal Protocol on Substances That Deplete the Ozone Layer (UNEP), signed September 1987.

(b) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (UNEP), signed March 1989.

(c) London Guidelines for the Exchange of Information on Chemicals in International Trade (UNEP), signed June 1987.

(d) Certification Scheme on the Quality of Pharmaceutical Products Moving in International Trade (WHO), in operation since 1976.

(e) Recommendation Concerning Information Related to Export of Banned or Severely Restricted Chemicals (OECD) adopted April 1984.

(f) International Code of Conduct on The Distribution and Use of Pesticides (FAO), adopted November 1985.

SECTION I

IMPORT AND EXPORT RESTRICTIONS AND PROHIBITIONS

(I) Provisions in the General Agreement

A. General Elimination of Quantitative Restrictions

6. Article XI contains a general prohibition on import and export restrictions (other than duties, taxes and other charges). In particular, paragraph 1 of the Article states:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

The provisions of this paragraph apply not only to measures affecting imports and exports but also to internal measures restricting sale for exports. However, this general rule against use of restrictions on imports and exports is subject to exceptions. In particular sub-paragraph 2(b) states:

"The provisions of paragraph 1 of this Article shall not extend to:

- import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade."

7. It should be noted that this sub-paragraph applies to commodities only. Under this provision it may be possible for a country to prohibit or restrict imports or exports of certain commodities, (including agricultural commodities such as fish, beef, chicken)<sup>1</sup> if it considers that they do not conform to the minimum quality or marketing standards applicable for sale in its domestic market, or fail to meet its national or international grading standards. The restrictions imposed would be, however, inconsistent with the provisions of this sub-paragraph if the measures taken "went beyond what would be necessary" to achieve its objective. (GATT Analytical Index: Article XI: page 8). The Panel Report on Canadian "Measures affecting exports of Unprocessed Herring and Salmon" noted that the provisions in the Canadian legislation which prohibited the export of fish not meeting the Canadian quality standards could be considered as being consistent with these provisions. However, since Canada "also prohibited exports of unprocessed salmon and unprocessed herring, even if they could meet the standards generally applied to fish exports", the measures providing for prohibition of exports "could not be considered as necessary to the application of standards within the meaning of Article XI:2(b)." (L/6268 - paragraph 4.2).

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<sup>1</sup>In this context it should be noted that the Nigerian submission states that sub-standard or harmful products that were traded internationally included contaminated beef, chicken and powdered milk (DPG/W/5, page 4).

B. Non-discriminatory Administration of Quantitative Restriction

8. Article I requires most-favoured-nation treatment "with respect to .....all rules and formalities in connection with importation and exportation". Article XIII provides for non-discrimination in the administration of import and export quantitative restrictions. The provisions of Articles I and XIII would thus require non-discriminatory administration of any import or export prohibitions or restrictions, of licensing procedures including those administered for prior informed consent procedures or for any import/export licensing and certification scheme.

C. National Treatment on Internal Taxation and Regulations

9. Article III requires national treatment with respect to internal charges and regulations. It requires contracting parties not to discriminate between an imported product and a like product of national origin, both at the border and after it crosses the border, with respect to "all laws, regulations and requirements relating to their internal sale, offering for sale, purchase, transportation and distribution or use".

D. General Exceptions

10. Any action which is inconsistent with the provisions of Article I, III, XI and XIII could be permitted, if it conforms to the General Exceptions provided in Article XX. However, as noted below, such actions must not be applied in a manner which would constitute "unjustifiable discrimination among countries where the same conditions prevail,<sup>2</sup> or disguised restriction on international trade". Since measures taken under Article XX, constitute exceptions to GATT obligations, it is necessary for a contracting party to ensure that its actions meet the specific conditions laid down by each exception and the general conditions laid down in the Article. The Article inter alia states:

Subject to the requirement 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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

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<sup>2</sup>The Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada" considered that since the United States action prohibiting imports had not been taken exclusively against imports from Canada, "but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru for similar reasons", the trade measure "should not be considered as unjustifiable discrimination among countries where the same conditions prevail. (GATT Analytical Index: Article XX; page).

- necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the protection of patents, trade marks and copy rights and ... the prevention of deceptive practices; (sub-paragraph (d));
- relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with domestic production and consumption (sub-paragraph (g)).
- undertaken in pursuance of obligations under any inter-governmental commodity agreement which conforms to the criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which itself is so submitted and not so disapproved (sub-paragraph (h)).

(i) Measures taken for protection of health

11. 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 or substances. The provisions of this sub-paragraph may also be relevant if, in order to protect the health of its consumers, an importing country applies 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.

(ii) Measures taken for prevention of deceptive practices

12. 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:

(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) Measures taken for conservation of natural resources

13. 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.

14. 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. The GATT Analytical Index states that so far no contracting party has formally complained that a measure taken in pursuance of a commodity agreement was inconsistent with the General Agreement. (GATT Analytical Index: Article XX, page 11).

15. That the provisions of the Article may be relevant for elaboration of additional rules to impose binding obligations, was also reflected in the document, "Draft Agreement to Discourage the Importation of Counterfeit Goods" (MTN.GNG/NG11/W/9), tabled in the early phase of the negotiations in the Negotiating Group on Trade Related Aspects of Intellectual Property Rights, by the United States, the European Community, Japan and Canada. The Preamble to the draft Agreement includes the following paragraphs:

- Desiring to discourage international trade in counterfeit goods by cooperation among parties to this Agreement and by strengthening measures to combat such trade without inhibiting the free flow of legitimate trade;
- Noting that contracting parties are exercising their rights under Article XX of the General Agreement, inter alia, to adopt or enforce laws and regulations relating to protection of trademarks.

(iv) Provisions of the Havana Charter

16. In this context, it is also worthwhile to note that the text of the General Agreement was negotiated on the basis of the provisions on "commercial policy" in Chapter IV of the Havana Charter. The GATT Analytical Index refers to two exceptions related to environmental issues under discussion in the Group, which were included in Article 45 of the Charter, but which are not explicitly found in GATT Article XX. These concern measures:

- necessary to the enforcement of laws and regulations relating to public safety;
- taken in pursuance of any intergovernmental agreements which relates solely to the conservation of fisheries resources, migratory birds or wild animals;

## II. Provisions in the Agreement on Technical Barriers to Trade

17. The basic objective of this Agreement is to ensure that standards and technical regulations<sup>3</sup> which countries adopt as well as certification systems (adopted for certifying conformity with standards) are not prepared, adopted or applied, with a view to creating barriers to trade. For the purposes of the Group, it may be relevant to note that the regulations which countries adopt for prohibiting sale of a product or for imposing restrictions or conditions relating to their sale (including packaging, marking and labelling requirements) could be considered to be "technical regulations" in terms of the provisions of the Agreement.

18. The Preamble recognizes that the provisions of the Agreement should not prevent both exporting and importing countries from taking measures, provided that they are not applied in a manner which constitutes a means for arbitrary or unjustifiable discrimination among countries in which similar conditions prevail or disguised restriction on international trade:

- necessary to ensure quality of exports;
- or for the protection of human, animal or plant life or of the environment;
- or for the prevention of deceptive practices.

19. These preambular provisions which, inter alia, spell out the objectives and aims of the Agreement are hortatory and, as such, do not have a binding effect as do the substantive provisions of the Agreement. They appear to explicitly recognise that, subject to the general qualifications stated in paragraph 18 above, technical regulations could be adopted by both exporting and importing countries for the following two reasons, not explicitly provided in Article XX:

- for the protection of the environment
- and to ensure quality of exports.

In certain provisions of the Agreement, protection of the environment is cited as a rationale for the adoption of technical regulations. Under the procedures provided in the Agreement for notification of draft technical regulations, signatories have notified a number of them for environmental reasons.

20. It would appear that the primary intention for including a provision relating to "quality of exports" in the preamble was to recognise that the adoption of systems for compulsory inspection of all or designated products could be considered as being in conformity with the provisions of the Agreement. Such systems are adopted by governmentally designated agencies, in certain exporting countries, in order to ensure that products exported meet specified quality standards and to prohibit exports where they do not.

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<sup>3</sup>The term "technical regulation" is defined as a technical specification (which lays down characteristics of a product, such as levels of quality, performance, safety or dimensions) including the administrative provisions, "with which compliance is mandatory." A standard is defined as a technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not mandatory.

(The Annex describes in more detail the main features of these systems). It is not clear from the drafting history whether this issue, while reflected in the preamble, was extensively discussed during the negotiations since it is not further elaborated in the body of the Agreement.

## SECTION II

### IMPORT AND EXPORT LICENSING SYSTEM AND CERTIFICATION SCHEMES

#### I. Provisions in the General Agreement

21. Import and export licensing systems are adopted by countries for statistical and other purposes as well as for administration of import and export restrictions. Maintenance of licensing systems for exports and imports, including those instituted through procedures of prior informed consent, and/or adoption of certification systems for assurance of quality are not inconsistent with Article XI.1 of the General Agreement, provided that the licenses or certificates are issued in a transparent manner, within a reasonable period and without undue delay.

22. It may be noted that the Report of the Panel on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" (BISD, 25S/95) concludes that a delay of five working days was not restrictive in terms of Article XI:1; the Report of the Panel on "Japan - Trade in Semiconductors" (L/6309) concludes that a delay of up to three months, in the case of a non-automatic licensing scheme, constituted a violation of the Article.

23. Article VIII requires that "all fees and charges" by government authorities for issue of import and export licenses or for "documentation and certification" relating to exports and imports, "shall be limited to the approximate cost of services".

#### II. Provisions of the Agreement on Import Licensing Procedures

24. The Agreement on Import Licensing Procedures lays down principles and rules, which countries should follow in adopting their licensing systems. It defines import licensing "as administrative procedures" used for "the submission of an application (other than required for customs purposes) to the relevant administrative body as prior condition to the importation". The systems for licensing are classified under the Agreement into two categories: automatic and non-automatic. Automatic licensing is defined as import licensing where the approval is freely granted. All systems which are not automatic are treated as non-automatic. The "prior informed consent" procedure may constitute a system of "non-automatic" licensing.

25. The Agreement provides that applications for a licence under the automatic system should be approved "within a maximum of ten working days". As regards non-automatic licensing, no period has been specified. The Agreement only provides that the period for processing of such applications "should be as short as possible" and that their validity should be of reasonable duration and should not be so short as to preclude importation.

The Committee on Import Licensing Procedures, which has been established under the Agreement, has recommended that in cases of non-automatic licensing systems used for administration of quota restrictions, the period for processing should not be longer than twenty-one days, if applications are considered as and when received and no longer than sixty days, if all applications are considered simultaneously. In this context, it may be mentioned that issues relating to a reasonable time period for the granting of licenses involving prior informed consent have not been discussed so far in any of the GATT bodies.

26. It should be noted that proposals for further modifications and improvements in the Agreement on Import Licensing Procedure are under negotiation in the Negotiating Group on MTN Agreements and Arrangements.

### SECTION III

#### OTHER RELEVANT PROVISION IN THE GENERAL AGREEMENT

27. Some of the other provisions in the General Agreement which may be relevant to the issues discussed in the Group are briefly noted.

(a) Publications and Administration on Trade Regulations

28. Article X:1 requires contracting parties to publish promptly "in such a manner as to enable governments and traders to become acquainted with them," all laws, regulations, judicial decisions and administrative rulings of general application, "pertaining to ... restrictions or prohibitions on imports or exports".

(b) Provisions of Part IV: Trade and Development

29. (i) Article XXXVI which lays down "principles and objectives" of the measures which contracting parties are expected to take for raising the standard of living and progressive development of less developed contracting parties, inter alia states that:

"There is a need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organizations and agencies of the United Nations system, whose activities relate to the trade and economic development of less developed countries".

(ii) Article XXXVIII which pertains to joint action that should be taken by CONTRACTING PARTIES for furtherance of the objectives of the General Agreement in relation to less developed contracting parties set forth in Article XXXVI, inter alia states that, they shall:

"seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies ..."

(c) Freedom of Transit

30. Article V defines transit of goods, vessels and other means of transport (excluding aircraft in transit) as passage across the territory of a contracting party which constitutes only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party. The Article, inter alia, states:

"There shall be freedom of transit through the territory of each contracting party, via the routes most convenient...No distinction shall be made which is based on... any circumstances relating to the ownership of goods of vessels or of other means of transport...Such traffic shall not be subject to any unnecessary delays or restrictions and shall be exempt from... charges imposed in respect of transit". In addition, "each party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country".

(d) Consultation and Dispute Settlement Procedures

31. Articles XXII and XXIII contain the provisions on consultations and dispute settlement. The CONTRACTING PARTIES also adopted, on 12 April 1989, the Decision on Improvements to the GATT Dispute Settlement Rules and Procedures (L/6489).

ANNEX  
PRESHIPMENT INSPECTION  
SYSTEMS

Introduction

1. "Preshipment inspection" measures are adopted by governments to inspect and control the quality of both exports and imports. In the first case, countries may require preshipment inspection of exports in order to control the exportation of products which are not found to meet the minimum quality standards adopted for sale in its domestic market or specific higher standards required for exports. This is usually accomplished through legislation and/or regulations for compulsory inspection of products to be exported by a governmental agency. The agency may designate, in certain cases, private firms to carry out inspections on their behalf. Such systems are distinguished from the pre-shipment inspection of products destined for importation. In this case, governments and/or importers employ the services of private preshipment inspection firms to test and inspect, in the exporting country, the quality standards of products destined for importation.

Compulsory Quality Control and Inspection Systems for Exports

2. A comprehensive law providing for compulsory inspection and control of quality level of exports was first adopted in Japan in 1958. The Act resulted in the establishment of thirty seven inspection agencies to control the quality level of about five hundred products. The spectacular progress which the country was able to make in improving quality standards of its exports and in building up reputation for high quality in international trade, made a number of developing countries adopt similar legislation and mechanisms for development and control of quality of their exports.<sup>1</sup> Countries which have adopted such comprehensive legislation for

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<sup>1</sup>For more detailed information on export Quality Control and Inspection Systems adopted by different countries see GATT/UNCTAD International Trade Centre, document ITC/INF/26.

compulsory inspection of exports include India, Korea, the Philippines, Sudan, Bangladesh, Kenya, Tanzania, Ethiopia. The basic objective of such legislation is to prevent exports of sub-standard goods and thus develop a reputation for high quality exports. Broadly, such legislation includes the following provisions:

- (a) Creation of a governing council made up of representatives of various ministries including the ministry in charge of international trade.
- (b) Creation of inspection mechanisms, usually through specialized inspection agencies (which may be governmental institutions or private institutions authorised by the governing council) which are empowered:
  - to issue export inspection standards;
  - to conduct inspections in accordance with previously established procedures which may involve laboratory testing;
  - and to issue quality certificates on lots or batches which are ready to be exported in order to authorize or reject the exportation of the same.
- (c) Enumeration of the products designated for compulsory export inspection. This list may be modified by the council, either by adding or eliminating products, following stipulated criteria and procedures.
- (d) Inspection fees and other administrative matters.

3. It should be noted that while other developing countries may not have such comprehensive legislations, some of them have adopted regulations for compulsory quality inspection of their principal export products. It also appears that some of the developed countries have similar legislation for quality inspection of agricultural commodity exports, particularly those which are perishable; such legislation may authorize the inspecting authorities to prohibit exports, if the products do not meet the prescribed standards.

4. As regards the provisions in GATT and in the Agreement on Technical Barriers to Trade which may be relevant for these compulsory inspection systems, attention is drawn to paragraphs 3, 5 and 24 of the note.

Preshipment inspection services provided by private firms for imports

5. Since the early part of this century, it has been customary for traders to arrange for some categories of goods to be inspected in the exporting country prior to shipment, with a view to determining whether or not they conform to the quality standards and other terms of the contract. Waiting until the goods have reached the country of destination may not always be appropriate, since they may need to be sent back to the exporter if problems arise. For this purpose, specialized private companies have

emerged which conduct, on behalf of the firms employing their services, preshipment inspections to ascertain whether the goods conform to the quality standards in the contract; these companies also provide to their clients a variety of other services, including advice on the appropriateness of prices charged by the exporting companies.

6. This business appears to have developed rapidly in the past few years, and the services of preshipment inspection companies are used today not only by traders but also by governments. In particular, governments of some twenty five developing countries have been using the services of such specialized firms inter alia to inspect systematically, in the country of export, products to be imported. Such services are employed by them to deal primarily with three illicit practices:

- (a) under-invoicing or over-invoicing of imports, the former being a means of evading customs duties and the latter being a principal means of capital flight;
- (b) over-charging of imports;
- (c) importation of sub-standard or hazardous products.

7. The countries which employ the services of these private agencies consider that the various functions they perform provide useful support to their administrations in dealing effectively with unfair and illegal practices. Some of the exporting countries, on the other hand, maintain that these services act as barriers to trade as in practice they can:

- (a) cause delays in exportation and payments;
- (b) create additional administrative costs which the exporter must incur;
- (c) result in price determinations that are, on occasion, arbitrary with modification requests that often pose practical problems for the buyer and seller;

8. In addition, exporters complain that inspection procedures and price comparison criteria are not always applied equally, and that there is no system of appeal against the findings of preshipment inspection agencies. (See also MTN.GNG/NG2/W/11). These issues as well as the consistency of preshipment inspection procedures with GATT principles and objectives are at present under discussion in the Negotiating Group on Non-Tariff Measures. The GATT provisions that may be relevant for work in this area have been analysed in the secretariat background note on preshipment inspection (MTN.GNG/NG2/W/11/Add.1).

9. From the point of view of the Working Group on Domestically Prohibited Goods and Other Hazardous Substances, the services which these agencies could provide for preventing importation of domestically prohibited goods or of sub-standard products, might be of particular interest. The GATT provisions relevant to the employment of such preshipment services for this purpose, could include:

(i) sub-paragraph (d) of Article XX, which permits countries to take measures that are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of (the General) Agreement, including those relating to...the prevention of deceptive practices," and

(ii) sub-paragraph (b) of Article XX which permits countries to apply measures which are "necessary to protect human, animal or plant life or health".

It should be noted however, that Article XX requires that any such measures or procedures should not be 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", and that they should not be more restrictive than necessary to achieve their legitimate objectives.