

WORLD TRADE ORGANIZATION

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Committee on Trade and Environment

REPORT OF THE MEETING HELD ON 16 FEBRUARY 1995

Note by the Secretariat

1. The Committee on Trade and Environment held its first meeting on 16 February 1995 under the chairmanship of Ambassador Juan Carlos Sánchez Arnau of Argentina. The agenda for the meeting, contained in WT/AIR/10, was adopted.
2. The Chairman recalled that this meeting would focus on the seventh item of the work programme, the issue of exports of domestically prohibited goods, as had been agreed at the October 1994 meeting and reiterated at the November meeting of the Sub-Committee. He noted the Secretariat document which had been prepared for this meeting (SCTE/W/7) on the history of this issue in GATT and recent developments in various international fora.

Observer status of inter-governmental organizations

3. The Committee agreed to endorse the ad hoc procedure agreed upon at the informal meeting of the General Council at the level of Heads of Delegation to extend observer status for the Committee's first meeting to those inter-governmental organizations (IGOs) which had had observer status in the Sub-Committee on Trade and Environment. This would be without prejudice to the treatment of IGOs at future meetings which would be decided by the Committee on a meeting-by-meeting basis, pending agreement by the General Council on the conditions and criteria for IGO observer status. These IGOs were: the United Nations (UN), the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the International Monetary Fund (IMF), the United Nations Environment Program (UNEP), United Nations Development Program (UNDP), Commission for Sustainable Development (CSD), the Food and Agriculture Organization (FAO), the International Trade Centre (ITC), the Organization for Economic Cooperation and Development (OECD), and the European Free Trade Agreement (EFTA).

Item seven of the work programme:

The issue of exports of domestically prohibited goods

4. The representative of Egypt said that although agreement had not been reached on the 1991 draft Decision on Products Banned or Severely Restricted in the Domestic Market (hereafter the draft Decision), work had continued in this area. The entry into force of the Basel Convention in May 1992 and its ratification by over 80 countries as of October 1994 had been a milestone in this regard. The Committee's work should draw on past experiences and not seek to undermine or put into question international agreements that had acquired legality through their international context and broad, geographically-diverse membership.

5. He considered that the WTO's examination of domestically prohibited goods (DPGs), since there was no international agreement dealing with domestically prohibited consumer products, should build on the draft Decision. The WTO was a mechanism of rights and obligations with the widest membership which could impose binding obligations on both exporting and importing Members. Noting that environmental standards needed to be dealt with in a comprehensive framework, without giving priority to some standards over others, DPG-related standards should be part of the Committee's overall trade and environment work. He emphasized that this issue was a concern to developing and developed country importers and exporters, governments and public and private sectors, and commercial interests should not prevail over the protection of human, animal or plant life or health.

6. In his delegation's view, the Committee's DPG work should be pursued with a view to reaching notification guidelines and binding obligations for full compensation and liability, as well as specific, interim measures for products which were prohibited or severely restricted for domestic use and for which no equivalent action had been taken for exports. The onus of responsibility fell on exporting countries through the choice of buyers, the environmentally-sound disposal or safe-use of waste and in bearing the environmental clean-up costs of false notification or illegal trafficking. However, importing countries had to decide responsibly based on clear information and in full knowledge of the reasons for prohibition or severe restrictions of goods in the domestic markets and the consequences for present and future generations. This concept was not new; Article 3.1 of the draft Decision referred to the exporting countries' responsibility. His delegation felt it was desirable to strengthen but, under no circumstances, weaken the language of Article 3.1. At a minimum, further work should examine whether exporting countries should apply the same measures taken for DPGs to exports. Hence, notification procedures on banning or restricting a product, stating why the product constituted a danger to human, animal, plant life or health, were of importance to the Committee's work.

7. Since the Basel Convention's entry into force and the recent adoption, by consensus, by the Conference of the Parties (Decision II/12) of an immediate ban on the movement of hazardous wastes for final disposal and, as of 1998, of wastes destined for recycling and recovery, the Convention had become vulnerable to a future WTO challenge. The Committee should discuss the compatibility of the Basel Convention's trade-related restrictions with WTO obligations under item one of the work programme. He considered there was a reduced likelihood of future challenge given that the Basel Convention was a multilateral agreement comprising over 80 geographically-diverse countries, and that the Basel Convention's trade restricting measures and the recent ban could qualify under Article XX(b) and (g) of the GATT as it had not been taken unilaterally and did not constitute arbitrary discrimination. It aimed to stem the in-flow of wastes that could be detrimental to domestic human, animal or plant life or health and, although reference to Article XX had been generally to prohibit imports, nothing in the Article denied a wider interpretation to prohibit or restrict exports that damaged human, animal or plant life or health.

8. His delegation considered that there was ample room to cover DPGs in the WTO; work should address products previously identified by the DPG Working Group, including: (i) products not permitted to be sold in the domestic market because approval for sale had not been obtained or had expired (e.g. pharmaceutical and processed agricultural products); and (ii) plant and other capital goods whose use in manufacturing the exporting country only permitted subject to strict rules due to the risk of danger to public health and safety. Work should continue within the context of clear terms of reference which might constitute, *inter alia*, setting specific characteristics of various categories of DPGs and not duplicating, derogating or undermining other international organizations' work. He looked to the Secretariat to assist in the categorization

of various DPG product groups as well as in identifying their legal regimes to avoid such duplication, and to distinguish between DPGs, hazardous wastes, and potentially toxic chemicals, in cooperation with UNEP and FAO.

9. The representative of Nigeria considered the subject of DPGs to be as important today as when his delegation, together with Sri Lanka, had raised it in preparation for the 1982 Ministerial Meeting. He said that PC/SCTE/7 provided a starting point for the Committee's discussions and highlighted the valuable work done on this subject. There was no doubt that DPGs remained a major problem. Three concerns were still valid: (i) a ban and/or regulation should be considered for international trade in goods which were banned or severely restricted for sale, distribution, or consumption in the country of production for health or safety reasons; there ought to be a reasonable degree of responsibility on exporters to control the export of products which were domestically prohibited for sale on the basis of danger to human, animal, plant life, or the environment; (ii) products that were directed towards re-export should be controlled; and (iii) the onus of the decision to import or not should be shared equally by importers and exporters.

10. He considered that, although hazardous, toxic, recyclable and disposable wastes had been dealt with in other fora, principally the Basel Convention, other product categories had yet to be satisfactorily treated. These included some consumer and manufactured goods and pharmaceutical products for human and animal use, such as the examples contained in PC/SCTE/W/7, paragraphs 8 and 22. Relevant examples for Nigeria were contained in DPG/W/5 (pp. 4-5), which his delegation had presented in November 1989. There remained a strong rationale for concluding a DPG agreement as there was an increasing trend for industries and firms to export products for which domestic sale had been prohibited or severely restricted to protect human health or safety or the environment.

11. He noted that the Annex to the draft Decision detailed the scope, product coverage and basic obligations of eleven international instruments and accorded priority to obligations under these instruments by providing that notification obligations would be inapplicable if the product at issue was covered by another instrument to which an exporting Contracting Party was a signatory. This provision ensured that scope and coverage would not be duplicated nor provisions of related international instruments overridden. His delegation considered that the draft Decision was a good basis for recommencing work on DPGs with a view to an early conclusion and the history of the DPG Working Group should guide the Committee. Until its mandate expired in July 1991, the Working Group had conducted negotiations to achieve consensus on DPGs. His delegation, therefore, proposed that the Committee establish a technical Working Group on DPGs in order to discuss Members' concerns and reach mutually-agreeable solutions that would ensure environmental protection, sustainable development and WTO-consistency. The Working Group could submit a report to the Committee to ensure that DPGs was part of the Committee's report to the Ministerial Conference.

12. The representative of Korea said that discussions on DPGs should take into account recent developments in the multilateral trading system and in other international fora, which were not reflected in the draft Decision. Bearing in mind that the draft Decision had addressed concern for human health and the environment with provisions which were trade-restrictive in nature, the coverage of any further Decision should be elaborated in a careful and strict manner in order to avoid unnecessary disputes and strengthen its effectiveness. He agreed with the objective of the draft Decision, to protect human health and the environment. Since it touched on the relation between MEAs and the trading system, potential conflicts might be avoided with careful approaches that would benefit from the Committee's discussions of MEAs and dispute settlement procedures.

13. He noted Articles 2.3, 2.4 and 3.5 of the draft Decision which gave priority to international instruments that might contain WTO-inconsistent provisions, and Articles 4.1 and 4.2 which encouraged Members to join or implement them. Its eighth preambular paragraph qualified exporting Members' right to restrict exports, whereas Article 3.1 implicitly imposed obligations on exporting Members to examine export restrictions. He considered that these provisions supported extrajurisdictionality by exporting countries which was incompatible with the trading system practices. It was more important to respect importing Members' rights through effective PIC procedures than to regulate exporting Members. Another practical measure, which would not prejudice MEA provisions, would be to assist importing Members' capacity to inspect the products concerned.

14. In addition, it was unclear whether the draft Decision's scope was consistent with the provisions of the new TBT and SPS Agreements; this should be considered in future discussions regarding DPG coverage.

15. The representative of India recalled that the Committee's terms of reference recognized the need for rules to enhance positive interaction between trade and environmental measures and to promote sustainable development with special consideration to the needs of developing countries. Given the importance of this issue for his delegation and developing countries, clear rules governing the exports of DPGs were needed. In considering whether the Committee's work should start from scratch or build on previous GATT work in this area, he said that, although much had occurred since the unadopted draft Decision of July 1991, the Committee should pick up from where work had left off. An alternative approach would be to factor in recent developments while looking at previous work. In any case the valuable GATT work in this area should not be lost.

16. He emphasized the broad parameters which should govern the Committee's work on DPGs. First, international rules on trade in products that were banned or severely restricted in the domestic market on the grounds that they were dangerous to human, animal or plant life or health or the environment were essential. Second, these rules should not create unnecessary obstacles to international trade. Third, it had to be recognized that standards relating to human, animal or plant life or health or the environment differed among countries. Obviously, the objective was not extraterritorial imposition of standards that prevailed in one country over another. Hence, it should be made clear that every country should assume full responsibility for decisions regarding its imports, but this involved cooperative actions by the exporting country. New rules evolved by the Committee might include specific obligations of DPG exporters. These rules should not be construed, however, to affect in a discriminatory manner exports of countries which had adopted different standards of health and environmental protection or a country's prerogative to allow the import and use of such products.

17. He said a number of issues deserved further consideration. First, countries should notify measures which banned or severely restricted sale of a product along with the reasons why, as developing countries might be unable to control imports because they did not know that the products were restricted in the exporting country's domestic market; exporters could falsely declare products prohibited or restricted in the domestic market of the exporting country, and customs authorities in some developing countries did not have adequate testing facilities to check these claims. The absence of consumer protection regulations in some developing countries also enabled exporting countries to market products beyond the expiry dates. For all these reasons, notification obligations, including Prior Informed Consent (PIC) procedures, should be considered.

18. He said that the Committee should also discuss: (i) the need to take into account work done in other international fora to avoid duplication; (ii) coverage of products, keeping in mind that, for some products, work had been well developed; (iii) dispute settlement provisions, including "damages" and "interim measures"; and (iv) the relationship between the WTO and other international instruments. His delegation considered that, after a period of reflection, the Committee could return to this issue and specific proposals could be considered and mutually acceptable rules developed.

19. The representative of Argentina said that in view of the draft Decision and the Sub-Committee's discussions, his delegation had some concerns. If the consensus was that the draft Decision should be adopted as contained in L/6872, his delegation would agree, although there were risks in adopting that document as it was. His delegation shared the draft Decision's objectives and agreed with the only substantive obligation it imposed on its Members, namely notifying bans or restrictions applied to the "products concerned" unless they were products covered by Annex I international instruments to which the exporting country was a party.

20. He drew attention to the wording of Article 3.1, which could give rise to misinterpretation and should be subject to careful scrutiny, taking into account that the use of trade measures for environmental protection was a sensitive issue, especially when the "environment" was not that of the country applying the measures. The Committee's work was largely aimed at analysing circumstances in which trade measures for environmental purposes would be acceptable. Judging by previous discussions, delegations appeared to agree on the need to avoid allowing a WTO Member to apply trade restrictions under its domestic environmental law to tackle environmental problems arising within another Member's jurisdiction. While this was not the intention of Article 3.1, his delegation did not want it to be open to misinterpretation. Even though Article 3.1 encouraged Members to apply their environmental legislation extraterritorially with respect to exports, it would not be conceivable to apply this to imports. There was a risk in the way Article 3.1 was worded and if the Committee adopted the draft Decision it should decide whether to retain the Article 3.1 requirement. His delegation's view was that Article 3.1 was a "best endeavour clause" that did not exempt countries applying such export restrictions from fulfilling their WTO obligations. It was also worth studying the relationship between the draft Decision and the SPS Agreement, as well as the scope of the coverage.

21. The representative of Côte d'Ivoire recalled that a considerable amount of work had been done on DPGs which had resulted in the draft Decision. Her delegation considered that work should continue in a Working Group of the Committee based on the draft Decision. She agreed with the Nigerian and Egyptian delegations that other fields of study should be considered. Her delegation was interested in achieving a balance, whereby the quest for free trade would not overrule the protection of human life.

22. The representative of the United States appreciated the concerns that had given rise to the desire for multilateral cooperation in the area of DPGs, which his delegation had been dealing with in a number of international environmental fora. His delegation was committed to developing effective mechanisms to address health and environmental concerns associated with the export of DPGs. His delegation strongly supported the joint UNEP/FAO PIC procedures and the recent process to develop a legally-binding international PIC regime for toxic chemicals and pesticides.

23. The Committee's focus concerned how the WTO might contribute to dealing with DPGs. His delegation was prepared to take a fresh look at this issue and work cooperatively with other Members. However, it was important to bear in mind the decisions which already had been taken

on the scope of WTO activities related to environmental matters and the need to avoid duplicating other international organizations' efforts. Much had happened since discussions on DPGs had ended and it was appropriate to take stock of previous work as a preface to further work.

24. He welcomed document PC/SCTE/W/7, but said it understated relevant developments that had taken place in GATT since 1991. This was not a criticism of the paper, as these developments involved subjective assessments of the lessons from GATT work on trade and environment. One development of particular relevance was Ambassador B.K. Zutshi's statement, as Chairman of the Council, on UNCED follow-up at the 1992 meeting of the GATT Contracting Parties:

"GATT's competence is limited to trade policies which may result in significant trade effects for GATT Contracting Parties. In respect neither of its vocation nor of its competence is the GATT equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment."

25. The same thoughts were reflected in the Ministerial Decision setting out the Committee's terms of reference. It was not the WTO's task to duplicate the role of international environmental organizations in regulating international commerce in DPGs. Nevertheless, his delegation was willing to explore what contribution the WTO could make within its mandate on this issue. One contribution might be to ensure that WTO rules did not conflict with obligations under MEAs dealing with DPGs. Transparency might be another area, although the Committee should avoid duplicating MEAs' efforts. For example, it was not clear what purpose would be served by notification of measures already subject to notification under MEAs or notification of products that were subject to internationally-agreed PIC procedures. Of equal importance would be to ensure that one Member's notification of a DPG would not lead to its exports being treated differently from exports of the same product from other countries or from domestic production of such products in an importing country. As recognized in the SPS Agreement, national decisions on measures to protect health and the environment reflected not only scientific and technical judgements but also societal choices as to the level of acceptable risk. Considerations raised in the discussion of other issues, such as eco-labelling and MEAs, were equally applicable to DPGs.

26. Concerning the suggestion to use the draft Decision as a starting point for the Committee's discussions, his delegation considered that it was more important where the Committee finished than where it started. He said that the draft Decision would not have been drafted as such if there had been the experience gained in the intervening years on trade and environment. Although his delegation continued to see important weaknesses in the draft Decision, it would not object to its use as a starting point if that was the Committee's general desire. However, substantial work would be needed for the Committee to achieve a successful conclusion. Concerning the suggestion that the Committee establish a DPG Working Group, his delegation agreed with the underlying premise that work might need to be intensified in some areas in order to achieve results by the time of the Ministerial meeting. However, to ensure a coherent approach to the Committee's work, his delegation did not want to take decisions on how this should be done until after the Committee had completed its first discussion of its agenda. Only then would it be appropriate to revisit this suggestion and others.

27. In response to the Egyptian delegation's suggestion that the Committee take up work not done in other international organizations and the Nigerian delegation's comment that there were gaps in international instruments related to DPGs which the Committee could take up, he asked whether, if gaps existed, it was the WTO's role to fill them or should they be pursued in the

relevant environmental organizations. It was the impression of his delegation, from Ambassador Zutshi's statement and the Committee's terms of reference, that the latter approach was appropriate. If this was not the case, his delegation would like to be informed accordingly.

28. The representative of Brazil said that his delegation had participated in elaborating the draft Decision and it still supported the idea of a Decision with basic disciplines of notification and "best endeavour" measures on DPG exports in response to developing countries' lack of information and capacity to deal with DPGs. The importing country had the primary responsibility and any result of the Committee's discussions should not hinder the importing country from taking measures necessary to protect human, animal or plant life or health, as long as it was able to do so. A Decision would be a multilateral instrument through which some countries requested others to take appropriate action, and it must not give rise to extraterritorial measures. This would need to be clarified as a Decision might give the impression that parallel unilateral decisions could be taken, even in the DPG area.

29. A number of international developments had occurred since the draft Decision was proposed, such as in the London Guidelines and the Basel Convention; the Committee would need to see if any adjustments were necessary to reflect the importance the DPG issue had assumed. In this respect, panels in the environmental area had shown a greater awareness of the problems that exports of DPGs caused. He agreed that the Committee needed to complete an initial discussion on all items of its work programme but that the next phase should give specific attention to DPGs. He considered that it would be important for delegations to coordinate with government sectors dealing with similar issues in other fora, such as the negotiations on legally-binding PIC procedures or the Basel Convention.

30. The representative of Chile said that the draft Decision, resulting from over three years of negotiations, remained valid and should be considered as the Committee's starting point. Nevertheless, while recognizing the progress it represented, his delegation considered that WTO disciplines could provide institutional tools for reaching consensus in this area. He proposed the introduction of a DPG notification system which would be compatible with Article X provisions and the TBT Agreement. His delegation considered that the contractual WTO framework was the proper setting in which to impose rights and obligations on both exporting and importing countries. There were already guidelines and procedures for notification and exchange of information developed internationally by WHO, FAO and UNEP and regionally by the OECD, however, some of which were not effective as they were voluntary. As a result, he proposed that the Committee consider DPGs in an Ad Hoc Working Group, with the participation of experts from WHO, UNEP, FAO and OECD.

31. The representative of the European Communities said that his delegation advocated multilateral solutions to environmental problems, taking into account the needs of less-developed countries, and supported DPG-related initiatives in other international organizations, including measures to increase information sharing and the development of legally-binding PIC procedures. The latter had been mandatory for EC exporters of dangerous chemicals since the 1992 adoption of Regulation 2455/92. The WTO should not undermine or duplicate work in this area and where DPG-related MEAs existed they should take precedence. However, this did not preclude the WTO from taking complementary action, as a "safety net," if reinforcement was necessary. Action could be taken to cover DPGs not included in existing MEAs and non-participants to MEAs. For example, if a WTO Member did not participate in the future international PIC Convention, goods covered by the scope of PIC and produced in the non-participating country could be covered by the WTO.

32. The work of the DPG Working Group was useful and should not be disregarded. However, much had occurred since then which had changed the picture. As such, his delegation considered that the Committee could proceed by: (i) re-examining its work in light of developments; or (ii) considering the issue again from first principles, taking previous work into account if appropriate. His delegation was open to either route, but the discussions' parameters needed to be defined. First, it was essential to identify whether there was a practical problem through information from importing countries on types of goods where a problem was perceived and the nature of and reasons for the problem. Next, the Committee should undertake a "definitions exercise" to define "prohibited" and the extent of product coverage and the reasons for creating DPGs. For example, he asked whether the focus should be on DPGs covered by international instruments, together with consumer product DPGs which presented a danger to human, animal or plant life or health. His delegation did not exclude the possibility that the outcome of this definitions exercise might be that the issue went beyond the Committee's mandate.

33. GATT work on DPGs had been aimed at creating a mechanism to provide information on DPGs to third countries on the basis of which decisions could be taken. If this was still the aim, the Committee should consider the assignment of responsibility; should it lie primarily with the importing country or be shared between the importing and exporting country. The basic WTO principles, particularly non-discrimination, must be observed and an importing country should not refuse a good from countries where it was a DPG and accept it from countries where it was not a DPG.

34. Another representative of the European Communities presented an explanation of two legislative developments in the EC related to exports of DPGs: Regulation 2455/92 concerning the Import and Export of Certain Chemicals and Regulation 259/93 on the Control of Shipments of Waste. Her delegation attached importance to appropriate international control mechanisms to ensure that the marketing and use of certain hazardous substances did not harm human health or the environment, whether in or outside the EC's territory; EC legislation concerning exports of DPGs had been strengthened to include comprehensive common regulations aimed at controlling shipments of waste, both inside the EC and with third parties. One of the reasons these regulations had been adopted in 1993 and entered into force in early 1994 was to apply, within the EC, the Basel Convention and other international instruments, such as the Lomé Convention and the 1992 OECD Decision on movements of wastes destined for recovery operations. She noted that their scope covered almost all categories of waste and, when the Regulation did not explicitly prohibit exports, the export of waste was subject to a strict system of notification and authorization and took place with the consent of the country of destination.

35. For exports of dangerous chemicals, regulations covering over 100 chemicals had been in force since the end of 1992 and included an internal notification system, with the responsibility on the exporter, that enabled the competent EC authorities to control the export and re-export to third countries of chemicals which were banned or severely restricted domestically. The EC authorities were obliged to provide information concerning the risks posed by the chemicals to the authorities of the countries of destination. Chemicals for export were to satisfy labelling and packaging conditions identical to those which applied in the EC, unless these requirements were contrary to the regulations of the country of destination. Also, the new regulations made the PIC procedures, established by the London Guidelines and the FAO Code of Conduct, binding within the EC which enabled it to participate in the international notification mechanisms set up by these two instruments and ensured that the substances and products they covered could only be exported in conformity with the decisions taken by the countries of destination. Her delegation considered that, by making these mechanisms binding in the EC, the regulations anticipated the discussions in this respect in UNEP and FAO.

36. The representative of Australia said that the issue of DPG exports was of concern to many countries in relation to protecting their populations and environment from potentially dangerous and hazardous products and his delegation considered multilateral cooperation necessary to respond to these health, safety and environmental issues. He said that cooperative international instruments were being strengthened, including those concerning chemicals, pesticides, pharmaceuticals, hazardous wastes, and ozone-depleting substances, and legally-binding PIC procedures for banned or severely restricted chemicals were being developed. The Committee would need to examine the role for the multilateral trading system's provisions in this pattern of international cooperation. Several items of the Committee's work programme were relevant to DPGs and needed to be considered in order to make trade and environment policies mutually supportive. Two important issues were the need to ensure that the provisions of the multilateral trading system allowed each country to take actions necessary to protect health, life and the environment in its own jurisdiction, and that they be supportive of multilateral activity in other fora to address health, safety and environmental concerns.

37. These two issues focused on the permissive nature of the trading system's provisions in supporting actions by Members, individually and collectively, to advance health, safety and environmental objectives; the Committee's work should ensure that this permissive nature of the provisions of the multilateral trading system was adequate to support countries' efforts to deal with DPG exports. Also, as part of its examination of the relationship between these provisions and trade measures taken pursuant to MEAs, the Committee should address DPG-related international activity. The Committee might conclude that there was scope for a more active WTO role concerning DPGs, such as the notification and exchange of information procedures discussed in the DPG Working Group. These arrangements would establish channels for information exchange and enable importing countries to make informed decisions as to whether to import certain products. In this regard, the Committee should recognize the role of technical assistance in developing national means to effectively control DPG trade. In considering whether there was a role for the WTO to establish notification and information exchanges, the Committee should be guided by the need to avoid duplication of other fora's related work, the importance of carefully defining the products being considered, appreciation of the technical complexities involved and the limited WTO competence which would require input from relevant international experts, and the importance of avoiding unnecessary trade restrictions. His delegation would help identify the contribution that the multilateral trading system could make to international efforts to respond to DPG-related health and environmental concerns.

38. The representative of Venezuela said that his delegation had not participated in the DPG Working Group, but considered that the draft Decision could serve as a basis for the Committee's discussions. However, it would need to be reviewed in order, for example, to clarify product coverage. If the draft Decision referred to products not covered by Annex I international instruments, the list of products covered could vary between countries as not all countries were signatories to the same instruments. Therefore, for some countries the products covered would be contained in national legislation restricting their domestic sale or exportation. Concerning the draft Decision's request for countries to participate in international instruments, his delegation considered that the WTO should not exert pressure on Members to join environmental agreements which they had decided not to for legitimate reasons. Thus, Article 4.1 of the draft Decision should be revised.

39. His delegation agreed that Article 3.1 could give rise to misinterpretations concerning the extraterritorial application of domestic regulations and, hence, disagreed with its present wording. However, a proper balance could be achieved if the notification obligations contained in the draft Decision were based on PIC procedures. Concerning Article XX's applicability to independent

measures adopted by WTO Members on DPG exports, his delegation would need to reflect on whether Article XX, even if it did not expressly refer to measures adopted with respect to exports, necessarily allowed them. His delegation supported a more restrictive interpretation allowing Members to maintain jurisdiction over domestic concerns. It supported also the Nigerian delegation's proposal for a DPG Working Group, depending on progress in 1995 and some Members' limited resources to participate in the possible proliferation of such groups.

40. The representative of Switzerland said that, since the subject of DPG exports had been raised in 1982 and the DPG Working Group had stopped its analytical work in 1991, the international legal framework had changed, especially in the WTO. The Committee had to identify its further work on this subject. However, the most important question remained whether the WTO needed specific DPG-related guidelines, such as notification of relevant regulations, information on specific measures, and consultation procedures. The response to this should take into account if and how existing provisions in the WTO Agreements on notification, information and consultation procedures addressed DPGs and if and how other international guidelines on notification and information exchange and consultation procedures concerned DPGs. Further WTO action should not duplicate such action but should analyze if there were gaps and whether WTO action was necessary to cope with such deficiencies. The Committee should examine the trade-related aspects of the export of DPGs that would not be adequately addressed through WTO and other MEAs' provisions.

41. Chapter 19 of Agenda 21, *Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products* outlined that toxic and dangerous products were those that were banned, severely restricted, withdrawn or not approved for use or sale by governments in order to protect public health and the environment and that governments should: "reinforce national capacities to detect and halt any illegal attempt to introduce toxic and dangerous products into the territory of any State, in contravention of national legislation and relevant international legal instruments. Furthermore, governments should assist all countries, particularly developing countries, in obtaining all appropriate information concerning illegal traffic in toxic and dangerous products." She considered that the Secretariat needed to strengthen its contact with the relevant organizations in this area to avoid duplication of information and notification procedures. In this respect, attention should be given to the implementation of the London Guidelines' PIC procedures and the Basel Convention's information and control procedures and the Secretariat should collaborate with UNEP and FAO. International instruments should establish mechanisms to fulfil their environmental objectives in accordance with the trading system's non-discrimination and transparency requirements. Further work was needed on the implementation of multilateral notification systems, especially in the north-south context to detect gaps in practice and alleviate the administrative burden in their implementation.

42. Her delegation supported a review of the relationship between the SPS Agreement and future DPG work, mentioned in PC/SCTE/W/7, which would be crucial for developments of DPG information and notification systems. Her delegation did not object to basing the Committee's discussions on the draft Decision.

43. The representative of Norway considered that countries were obliged to protect their own environment and consider the impact of their activities on other countries' people and environment. Norwegian regulations prohibiting or strictly regulating chemicals, for example, customarily covered exports as well as domestic use and an export prohibition on hazardous wastes to developing countries had been in force for some time. He underlined a few principles which should govern developments of international rules in this area. First, clear rules should define coverage, facilitate uniform and effective implementation, be easily incorporated at the

national level and avoid duplicating other international fora's work. Second, international rules concerning DPGs should be primarily developed in MEAs and the draft Decision should supplement the rules of other international instruments, for example, the Basel Convention's Decision to ban all exports of hazardous wastes from OECD countries and UNEP's elaboration of PIC procedures. Third, the Committee should not transfer environmental competence to the WTO from MEAs. On the other hand, it's mandate was to see that the WTO rules accommodated environmental concerns. MEAs possessed the expertise to ensure a close link between those who made and used the rules, which was important for their effective implementation. Trade aspects could be taken into account by trade experts from WTO Members. Although duplication of efforts should be avoided, his delegation considered that the Committee might have a role to play if discussions revealed gaps in DPG coverage under existing MEAs and it was not expected that these gaps would be dealt with.

44. The representative of Hong Kong said that his delegation supported the draft Decision as a basis for further work, factoring in recent developments. Work should examine the scope of the issues, including product coverage, re-exports and goods in transit. In addition, he asked whether the emphasis would be information provisions or control measures and whether the approach would be a "best endeavour" one or involve more substantive obligations. The Committee would have to reflect on institutional aspects such as dispute settlement and prevention, and developments in MEA disciplines in this area. There could be a stocktaking of international developments and MEA disciplines, in coordination with other fora, to provide solutions.

45. He considered that the European Communities' idea of a safety-net to set parameters would permit a reassessment of the size of the issue. If there were gaps, then the Committee could assess where re-reinforcement was needed. Until then, and in view of the Committee's overall agenda, his delegation did not yet want to enter a technical phase in this area.

46. The representative of New Zealand said that in view of the serious circumstances which brought about this work and in keeping with the recent developments in other organizations on DPG-related issues, her delegation considered that efforts in this area should be complementary and avoid overlap and duplication. The Committee's work should be consistent and not overlap in product coverage or in the trade implications of measures adopted to encourage compliance with agreed DPG standards. To ensure this, the Committee should clearly define the products which would fall within its scope and give due regard to Members' legitimate interests to choose which goods they imported.

47. The representative of Canada supported the statements of the delegations of Nigeria, Korea, India, Argentina and Australia. Her delegation was prepared to pursue DPGs as a central element of the Committee's work and begin a focused discussion of the draft Decision, taking into account recent developments. She agreed that the WTO should not duplicate other international instruments and should stay within its area of competence, which did not include environmental policy-making or standards setting. Discussion should be aware of the complexities of product coverage and the prerogative should be with importing countries. Although there should be cooperation between importing and exporting countries, the decision point should be with the former and assistance in decision-making should be provided. The Committee would have to guard against the potential for discrimination between exports from different countries and any element of extraterritoriality. She considered that the PIC procedures, mentioned by many delegations, deserved attention. She said that although the initial Committee discussions had established that there was much common ground in terms of objectives and key concerns in this area, it would also discover that there was a need to be cautious on the detailed, technical aspects.

48. The representative of Japan focused on three aspects of the DPG issue. First, as regards the coverage of products whose domestic sale or use was banned or severely restricted by a WTO Member, WTO Members had the right to ban or severely restrict the sale or use of a product under certain conditions, including MFN and national treatment, but the scope of products would differ between countries. Second, he considered the relationship between products whose domestic sale or use was banned or severely restricted and their export, and between those in foreign markets and their imports. One perspective was that a WTO Member could restrict, and even prohibit trade in imports or exports if justified by WTO provisions, such as Articles XI, XX and XXI. The difficulties of border controls in developing countries (noted in PC/SCTE/W/7) could be addressed by more active use of international notification systems. Third, he agreed with other delegations that duplication of notification should be avoided. The WTO had comprehensive notification mechanisms, for example Article X, the TBT and SPS Agreements and the Decision on Notification Procedures, and there were notification mechanisms in other international fora. Although this was more directly related to item four, it was relevant to the Committee's DPG work to explore how best to ensure that existing transparency mechanisms worked.

49. The representative of Morocco said that, according to a UNEP study (November 1994), more than 70,000 chemical products were used globally and 500 million tonnes of toxic wastes were produced annually, of which industrialized countries produced more than ninety per cent. Ten per cent of this waste circulated between OECD countries while hundreds of millions of tonnes were exported to non-OECD countries. This illustrated the extent of the problem of DPG exports and their effects on human, animal and plant life and health. In this respect, his delegation considered that, although the draft Decision could serve as a basis for the Committee's discussions, it should be updated and revised, taking into account recent developments and legal instruments.

50. Recent developments deserving the Committee's attention in this area included the Second Meeting of the Basel Convention's Conference of the Parties' Decision to ban all exports of hazardous wastes from OECD to non-OECD countries as of January 1998 and the Decision to develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal. FAO and UNEP had a joint programme on applying the PIC procedures to provide chemical product management training for developing countries. UNEP's Code of Conduct in the London Guidelines encompassed notifications from over one hundred countries.

51. His delegation proposed updating the draft Decision; defining the term "hazardous substances;" establishing a clear notification system which committed Members to fulfilling their obligations by drawing on international jurisprudence in this field (i.e. the London Guidelines, the Basel Convention); making a distinction between hazardous and non-hazardous substances; creating a DPG database in cooperation with FAO, UNEP, the International Register of Potentially Toxic Chemicals and the relevant environment and trade Convention Secretariats; and establishing a WTO Working Group to examine DPGs, including FAO and UNCTAD experts.

Other items

Item one of the work programme:

The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements.

52. The representative of Norway said that multilateral cooperation was the most effective way to solve global and transboundary environmental problems and that MEAs were a safeguard against unilateral trade measures. Therefore, the initiation and implementation of MEAs should be promoted and their compatibility with WTO rules clarified. The issue of MEAs and GATT had been the subject of much analysis in GATT and his delegation agreed with the Chairman's November 1994 statement that the Committee's work should move to a more prescriptive stage.

53. Conflicts with WTO rules might occur if an MEA included trade measures against non-parties which were not applied on an MFN or national treatment basis, thus requiring establishment of another legal basis for WTO-compatibility. Discussions had focused on an *ex-ante* approach based on Article XX and an *ex-post* approach based on Article XXV. His delegation preferred the former which would provide predictability and stability, and served both environmental and trade interests.

54. The coexistence of MEAs and the multilateral trading system within the framework of a collective interpretation of Article XX could be formulated in several ways. One possibility would be to elaborate strict criteria for WTO-compatibility of trade measures in MEAs. However, such criteria should not unduly limit the possibility of using trade measures for genuine environmental purposes vis-à-vis MEA non-parties. Many of the criteria discussed also fell outside Article XX's scope and would be, thus, difficult to encompass in a collective interpretation.

55. A second possibility would be to establish only a few main criteria which, together with the headnote to Article XX, would cover the relationship between MEAs and the WTO. Setting broad parameters for the use of trade measures in an MEA would not give MEAs a blank check to apply trade measures vis-à-vis non-parties and should be sufficient to avoid disguised protectionism. His delegation favoured this approach for a number of reasons. First, GATT had a tradition of not interfering in other fora's work, i.e. international commodity agreements. Furthermore, the WTO was not an environmental policy-making institution and it should let MEAs establish the environmental goals and measures necessary to achieve them. Second, trade measures for environmental purposes should not be subject to a disproportionate number of criteria in relation to other issues covered by Article XX. Third, in order to achieve the Committee's mandate that trade policy contribute to sustainable development, the use of trade measures when necessary to protect the environment should not be subject to unnecessarily strict disciplines.

56. In the view of his delegation, the Committee could concentrate on a few basic criteria, which could be divided into those related to the MEA and those related to trade measures in the MEA. The criteria for MEAs could include the concept of openness. In principle, all countries should have the right to become parties to an MEA and regional agreements should be open to all the countries in the region. Concerning trade measures, necessity was a basic criterion as contained in Article XX. This implied that trade measures could be used, *inter alia*, where trade itself might impede the MEAs effectiveness or cause the environmental problem. Other criteria

were proportionality and least-trade restrictiveness. As they were overlapping, he considered that it was sufficient to include least-trade restrictiveness as it had been already established in the SPS and TBT Agreements. Also, this concept was linked to the necessity criterion in the 1990 Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes" (DS/10/R, adopted November 1990). Although these suggestions were inputs to the Committee's discussions, his delegation did not want to prejudge its final position in this matter.

57. His delegation considered the following criteria to be sufficient to ensure that trade measures in MEAs did not accommodate protectionism but served the genuine purpose of environmental protection: (i) the MEA should satisfy formal criteria concerning openness; (ii) the MEA should be specific with regard to the use of trade measures; (iii) the trade measures should be necessary to achieve the environmental goal; and (iv) the least-trade restrictive trade measures that allowed for achievement of the environmental goal should be chosen. He recognized that the dispute settlement procedures contained provisions allowing for all types of expertise to be sought, yet he raised the question whether an "environmental window" of Article XX should include a specific reference to environmental expertise in connection with dispute settlement.

58. The Chairman considered that the diversity of views which still existed concerning exports of DPGs, which had been the subject of lengthy GATT discussions, was due to the breadth of the issues covered and their technical elements, which went beyond purely commercial matters. The development of international instruments, linked to many of the DPG-related issues, raised considerations that some might be insufficient. He said that the Committee would have to re-examine this issue in greater detail in the future.

Programme of work

59. The Committee adopted the Chairman's proposed schedule of meetings and programme of work for 1995 which had resulted from his informal consultations. This was premised on the understanding that the Committee would meet at two month intervals and would discuss the items of its work programme which had not yet been addressed. It would then take stock of the situation, taking into account that the Committee would report to the first biennial meeting of the Ministerial Conference in late 1996 when the Committee's work and terms of reference would be reviewed, in the light of the Committee's recommendations.

60. The schedule of meetings and programme of work is as follows:

- 6-7 April:
- Item 4: "the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects"
 - Item 5: "the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements"
 - Item 10: "appropriate arrangements for relations with non-governmental organizations referred to in Article V of the WTO and transparency of documentation"

- 21-22 June: - Item 8: "TRIPS"
 - Item 9: "Services"
 - Item 2: "the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system"

early

- September: - Item 6: "the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions"

late

- October: - Item 1: "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements"
 - Item 3: "the relationship between the provisions of the multilateral trading system and:
 (a) charges and taxes for environmental purposes
 (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling
 - Stocktaking and planning program of work for 1995/1996"

61. The Chairman stated his intention to hold informal consultations before the Committee's 6-7 April meeting on "appropriate arrangements for relations with non-governmental organizations referred to in Article V of the WTO and transparency of documentation" (item 10), and before the 21-22 June meeting on TRIPS (item 8) and Services (item 9) in order to orient the Committee's formal discussions. Between the September and October meetings, he planned to hold informal consultations in preparation for the October stocktaking exercise to clarify where the Committee stood on all items of the work programme. This exercise would serve to draw conclusions on any items for which a consensus had been achieved and determine which items required further discussion and studies, with a view towards reporting to Ministers at the end of 1996.

62. The Chairman said that meetings would be organized such that, once discussion of the item(s) constituting the focus of the meeting had been completed, delegations could address, if they wished, the item(s) that were discussed at the previous meeting. However, delegations could submit papers on any of the items at any time which would be discussed at the appropriate time according to the agreed schedule of work. In this respect, he noted the Secretariat document, requested by the Sub-Committee, on the environmental benefits of removing trade restrictions and distortions, WT/CTE/W/1, which would be discussed when the Committee took up this item in September. It was agreed that the Secretariat would prepare background papers on items in advance of the meetings at which they would be discussed. For those items which had already been the subject of considerable analysis, the papers would capture the progress achieved in the EMIT Group and in the Sub-Committee, highlighting specific issues in need of further analysis to ensure a forward-looking approach.

63. The Chairman said that the Committee would need to adopt rules of procedure. He would return to this item once consultations in this regard had been concluded. He invited delegations to continue the exercise, initiated in the Sub-Committee, of submitting individually, and on a voluntary basis, to the Secretariat for compilation, information that reflected their own national experiences with measures that were covered under this item of the work programme.