

**Committee on Trade and Environment**

TRADE MEASURES FOR ENVIRONMENTAL PURPOSES TAKEN PURSUANT TO  
MULTILATERAL ENVIRONMENTAL AGREEMENTS:  
RECENT DEVELOPMENTS

Note by the Secretariat

This Note has been prepared in response to the request from delegations that they be provided by the Secretariat with information on developments in the negotiation, implementation and administration of trade-related provisions in multilateral environmental agreements (MEAs). The Note reports on the results of two recent meetings which the Secretariat attended as an observer: (i) the twelfth meeting of the Open-ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 28 August - 1 September 1995; and (ii) the third meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 18-22 September 1995.

(i) The Montreal Protocol

The Montreal Protocol entered into force on 1 January 1989 and has been ratified by 149 Parties.<sup>1</sup>

At the eleventh meeting of the Open-ended Working Group of the Parties to the Montreal Protocol ("the Open-ended Working Group"), held in Nairobi in May 1995, Mauritius put forward a proposal entitled "Dumping of Products Containing ODS<sup>2</sup> and of Equipment Manufacturing Such Products in Article 5 Countries". In introducing the draft proposal, Mauritius said that it was intended to address the increasing practice of dumping obsolete ODS using products and technologies in Article 5 countries, a practice which could affect the implementation of the Protocol. Dumping could significantly increase ODS consumption in the countries in question and there were some grounds for suspecting that some suppliers in Article 2 countries were deliberately engaging in dumping in order to maintain their ODS production. Thus, Mauritius proposed that Parties to the Montreal Protocol take legislative and administrative measures, including labelling of products, to regulate exports and imports, as appropriate, of products containing ODS and of equipment used in the manufacturing of such products. At the request of the Open-ended Working Group at that meeting, the Ozone Secretariat transmitted the draft proposal to the WTO Secretariat, who in turn submitted it to the Chairman of the Committee on Trade and Environment who circulated it to WTO Members<sup>3</sup>. Subsequently, the Ozone Secretariat asked the WTO Secretariat to make it clear to WTO Members that, in its opinion, the proposal did not aim at including "new trade provisions" in the Montreal Protocol.

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<sup>1</sup>See PC/SCTE/W/3:5-6.

<sup>2</sup>Ozone Depleting Substances.

<sup>3</sup>Letter by the Chairman to Members of the Committee on Trade and Environment, 7 July 1995.

At the twelfth meeting of the Open-ended Working Group<sup>4</sup>, the WTO Secretariat made a statement, at the invitation of the Chairman of the meeting, whereby it confirmed that consultations among WTO Members on this matter had not been completed, and transmitted to the Ozone Secretariat a list of questions related to the proposal. These questions were drawn up on the WTO Secretariat's own responsibility and were intended to help clarify the proposal for the benefit of WTO Members. (see Annex).

The representative of Mauritius said that he could not understand the delay in arriving at a ruling on the matter. He expressed disappointment that the WTO had not yet given guidance on whether or not the draft decision, as currently worded, was in conformity with the rules governing international trade.

The issue is expected to be taken up again at the next meeting of the Open-ended Working Group to be held in Vienna on the days set aside for the Preparatory Meeting for the Seventh Meeting of the Parties to the Montreal Protocol, in December 1995.

At its eleventh meeting in May 1995, the Open-ended Working Group also considered two proposals (one by Australia on behalf of other OECD countries, and the other by India) addressing the term "basic domestic needs" in Article 2 (Control Measures) and Article 5 (Special Situation of Developing Countries) of the Montreal Protocol. The background is as follows. Article 5 grants developing countries, whose consumption of ODS is below a certain level, a ten year grace period to comply with control measures contained in Articles 2A-2E, in order to meet their "basic domestic needs". Articles 2A-2E also provide that Parties operating under Article 2 can produce up to 15 % in excess of their base year production in order to meet the basic domestic needs of developing country Parties operating under Article 5.

The two proposals aim at clarifying whether developing country producers of ODS are entitled to export to other developing country Parties, or whether the grace period given to them is only for the purpose of meeting their own domestic needs, and, hence, they cannot export. The amendment proposed by Australia and other OECD countries seeks to restrict the production destined for exports in developing countries, and to make exports of ODS from one developing country to another developing country conditional upon (i) a prior determination by the Parties that there is a shortfall in supplies of controlled substances to Parties operating under Article 5 from Parties not operating under that Article, and (ii) a written confirmation by the importing country, reported back to the Parties, that the controlled substance is required to meet its basic domestic needs. The counter proposal of India seeks to reduce the production allowed to industrialized countries to meet the domestic needs of Parties operating under Article 5.

No agreement was reached at the meeting. The issue is expected to be taken up again in December.

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<sup>4</sup>See *Report of the twelfth meeting of the Open-ended Working Group of the Parties to the Montreal Protocol*, UNEP/OzL.Pro/WG.1/12/4, 18 September 1995.

(ii) The Basel Convention

The Basel Convention entered into force in May 1992 and has been ratified by 93 Parties (including the European Union). At the second meeting of the Conference of the Parties of the Basel Convention in March 1994, Parties adopted by consensus Decision II/12<sup>5</sup>, whereby Parties decided:

1. to prohibit immediately all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States;
2. to phase out by 31 December 1997, and prohibit as of that date, all transboundary movement of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States.

Norway supported by the European Union proposed that Decision II/12 be included as an amendment to the Basel Convention at the third meeting of the Conference of the Parties in September 1995. Parties adopted the following amendment<sup>6</sup> by consensus at that meeting.

Amendment to the Basel Convention

*The Conference:*

1. *Recalling that at the first meeting of the Conference of the Parties to the Basel Convention, a request was made for the prohibition of hazardous waste shipments from industrialized countries to developing countries.*
2. *Recalling Decision II/12 of the Conference.*
3. *Noting that:*
  - *the Technical Working Group is instructed by this Conference to continue its work on hazard characterization of wastes subject to the Basel Convention;*
  - *the Technical Working Group has already commenced its work on the development of lists of wastes which are hazardous and wastes which are not subject to the Convention;*
  - *those lists (UNEP/CHW.3/Inf.4) already offer useful guidance but are not yet compete or fully accepted;*
  - *the Technical Working Group will develop technical guidelines to assist any Party or State that has the sovereign right to conclude agreements or arrangements including those under Article 11 concerning the transboundary movement of hazardous wastes.*

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<sup>5</sup>See PC/SCTE/W/3:4-5.

<sup>6</sup>UNEP/CHW.3/L.5/Add.1, 23 September 1995.

4. *Instructs the Technical Working Group to give full priority to completing the work on hazard characterization and the development of lists and technical guidelines in order to submit them for approval to the fourth meeting of the Conference of the Parties.*<sup>7</sup>
5. *Decides that the Conference of the Parties shall make a decision on a list(s) at its fourth meeting.*
6. *Decides to adopt the following amendment to the Convention:*
  - *Insert new preambular paragraph 7 bis:*

*Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention*
  - *Insert new Article 4A:*
    1. *Each Party listed in Annex VII<sup>8</sup> shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A<sup>9</sup>, to States not listed in Annex VII.*
    2. *Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1(i)(a)<sup>10</sup> of the Convention which are destined for operations according to Annex IV B<sup>11</sup> to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterized as hazardous under the Convention.*

Another development at this meeting concerns the implications for the Basel Convention of the import and export of recycled and used ozone-depleting substances which are controlled under the Montreal Protocol.<sup>12</sup> Parties to the Basel Convention agreed that controlled substances under the Montreal Protocol which are reclaimed and purified to usable purity specifications prescribed by appropriate international and/or national organizations, including the International Organization for Standardization (ISO), do not fall under the scope of the Basel Convention.

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<sup>7</sup>Concerning the definition of which wastes are classified as hazardous, which is considered to be crucial for the implementation of the amendment, the Technical Working Group will continue to work on hazard characterization of wastes and develop lists of wastes which are hazardous and those which are not subject to the Convention. It will then submit a report to the fourth meeting of the Conference of the Parties in September/October 1997. See *Report of the Technical Working Group*, UNEP/CHW/WG.4/8/5, 22 June 1995.

<sup>8</sup>Annex VII lists *Parties and other States which are members of the OECD, EC, Liechtenstein and Monaco*.

<sup>9</sup>Annex IV A lists *disposal operations which do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses*.

<sup>10</sup>Article 1 (1)(a) reads as follows:

1. The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention:
  - (a) wastes that belong to any category contained in Annex I [which lists the categories of waste streams and wastes having as constituents to be controlled], unless they do not possess any of the characteristics contained in Annex III [which lists the hazardous characteristics].

<sup>11</sup>Annex IV B lists the *operations which may lead to resource recovery, recycling, reclamation, direct re-use or alternative uses*.

<sup>12</sup>See PC/SCTE/W/3:4.

ANNEX

Statement of the WTO Secretariat made under its own responsibility to the  
Twelfth Meeting of the Open-ended Working Group of the Parties to the Montreal Protocol  
28 August - 1 September

1. The WTO Secretariat would like to express its appreciation for having been invited to attend as an observer this Twelfth Meeting of the Open-Ended Working Group of the Parties to the Montreal Protocol and to have been invited to address the meeting under this point of the agenda.
2. In July, the Ozone Secretariat requested comments from the WTO Secretariat on the proposal tabled by Mauritius at the Eleventh Meeting of the Open-Ended Working Group entitled "Dumping of Products Containing ODS and of Equipment Manufacturing Such Products in Article 5 Countries." The WTO Secretariat has no authority to interpret the provisions of the WTO or its Agreements and we felt unable to give comments ourselves on the substance of the proposal. Consequently, we passed on the request from the Ozone Secretariat to the Chairman of the WTO Committee on Trade and Environment (CTE), who in turn informed all Members of the CTE (all WTO Members are members of the CTE).
3. That has laid the basis for a valuable dialogue to take place on the proposed Decision at the national level between government authorities responsible for the Montreal Protocol on the one hand and their counterparts responsible for WTO matters on the other. Continuing and further developing that dialogue would appear to be one of the best means of ensuring that any risk of entering into potentially conflicting obligations under separate international agreements is avoided.
4. Consultations among WTO Members on the request received from the Ozone Secretariat have not been completed. We will prepare a report for WTO Members on the discussions which take place at this meeting so that they are fully informed about the status of the proposal and details of it, as well as any further steps which it is proposed should be taken.
5. If the Parties to the Montreal Protocol wish to consider this issue further, we have some questions in order to clarify certain aspects of the issue. Answers to these questions would help WTO Members to continue their informal consultations. We will forward these questions to the Ozone Secretariat immediately after this meeting.

Annex to the WTO Statement

Questions on the Proposal "Dumping of Products Containing ODS and of Equipment  
Manufacturing such Products in Article 5 Countries"

- What will be the legal status of the proposal, when adopted? The record of the Eleventh Meeting of the Working Group indicated that it was still uncertain whether it would be an amendment to the Montreal Protocol or a Decision of the Parties. (UNEP/OzL.Pro/WG.1/11/10, paragraphs 177-182).
- Would the circumstances in which trade measures are to be applied (i.e., when, in relation to which Article 5 countries, and for how long) as well as the choice of trade measures and the modalities of their application be decided on by Parties to the Montreal Protocol collectively, or left to the discretion of each Party? If left to the discretion of each Party, could a decision to apply trade measures be taken independently by an Article 2 (exporting) country, or only in consultation with or at the request of an Article 5 (importing) country? The answers to those questions would help to clarify the link between the trade measures in question and the formal obligations of the Montreal Protocol, which could be a matter of importance in the context of current WTO discussions in the Committee on Trade and Environment on "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements".
- What specific trade measures are envisaged? Is the reference to "labelling requirements" in the proposal at present only illustrative?
- Would trade measures applied under the proposed Decision be notified through the Ozone Secretariat? Could the notifications be made available also to WTO Members through the WTO Secretariat?
- Given the reference in the report on the last meeting of the Open-Ended Working Group to "A number of representatives said that the proposal must conform to the rules of international trade, ...", is it envisaged to include a reference in the proposal to the WTO rights and obligations of WTO Members who are Parties to the Montreal Protocol?
- It would be useful to receive clarification of the proposal in respect of a hypothetical situation in which an Article 5 Party to the Montreal Protocol felt that export controls applied by an Article 2 Party were not necessary under the particular circumstances to avert any intended "dumping" but were denying it access to products containing ODS or equipment for manufacturing such products. In such a situation, how would a formal dispute be handled?