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INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN  
INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR  
THE APPLICATION OF THE PRIOR INFORMED CONSENT  
PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND  
PESTICIDES IN INTERNATIONAL TRADE

First session  
Brussels, 11-15 March 1996

TRADE-RELATED ISSUES

Note by the Secretariat

1. The present note aims to indicate some aspects of trade-related issues which might be considered during the preparation of an international legally binding instrument for the application of the prior informed consent (PIC) procedure for certain hazardous chemicals and pesticides in international trade (hereinafter referred to as the PIC instrument).

TRADE-RELATED PRINCIPLES IDENTIFIED IN AGENDA 21

2. Agenda 21, in its chapters 2 and 39, identified the need to give due consideration to the linkage between international environmental agreements and international trade rules. Making international trade and environment policies mutually supportive, in favour of sustainable development, is one of the objectives identified in chapter 2 of Agenda 21 (paragraph 2.21(a)). For the consideration of such a linkage, particular attention may be given to the following principles identified in Agenda 21 (paragraphs 2.22(i) and 39.3.(d)):

- (a) Principle of non-discrimination;
- (b) Principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives;

(c) Obligation to ensure transparency in the use of trade measures related to the environment and to provide adequate notification of national regulations;

(d) Need to give consideration to the special conditions and developmental requirements of developing countries as they move towards internationally agreed environmental objectives.

3. In addition, it was recognized that environmental policies should deal with the root causes of environmental degradation, thus preventing environmental measures from resulting in unnecessary restrictions to trade (paragraphs 2.22(d) and 39.3.(d)).

RELEVANT GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)/WORLD TRADE ORGANIZATION (WTO) RULES

4. Agenda 21 identified the need for developing more precision, where necessary, and clarify the relationship between the provisions of GATT and some of the multilateral measures adopted in the field of the environment (paragraph 2.22(j)). In this regard, the following may be considered during the elaboration of the provisions of the PIC instrument.

**GATT/WTO rules**

5. GATT sets out obligations for its members to act in a non-discriminatory manner in their trading relations. The principle of non-discrimination is embodied in its Articles I and III. Article I states that "... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Article III sets out the obligation concerning national treatment. In general, the obligation concerning national treatment requires WTO members to treat foreign products no less favourably than domestically manufactured products.

6. GATT, in its Article XI, relies on tariff as the only acceptable means to regulate trade among its Parties. Thus, prohibition or quantitative restrictions on imports or on exports are, in principle, prohibited.

7. Exceptions to the GATT obligations above are contained in Article XX. Article XX, paragraphs (b) and (g) provides exceptions to these obligation for environmental purposes under certain circumstances. The preamble to Article XX states that the exceptions contained in the Article may 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. Under Article XX, paragraph (b), a member may take measures that are "necessary" to preserve or protect human, plant or animal life or health. Under Article XX, paragraph (g), a member may take trade measures that are related to the conservation of exhaustible natural resources, as long as the measures are imposed in

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conjunction with domestic restrictions on the production and consumption of the resources.

8. In addition, consideration may also be given to the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). The TBT, on the basis of the principle of non-discrimination, sets out obligations for WTO members to ensure that technical regulations are not prepared, adopted or applied with a view to, or with the effect of creating unnecessary obstacles to international trade and, for that purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, including the protection of human health or safety, animal or plant life or health or the environment (TBT Article 2, paragraphs 1-2). The SPS, recognizing the members' rights to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, obligates the WTO members to ensure that such measures do not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail and such measures shall not be applied in a manner that would constitute a disguised restriction on international trade (SPS Article 2, paragraphs 1-3).

#### **Amended London Guidelines for the Exchange of Information on Chemicals in International Trade**

9. Taking into account the relevant GATT rules, the amended London Guidelines set out the following provisions:

"States taking measures to regulate chemicals with a view to protecting human, animal or plant life or health, or the environment, should ensure that regulations and standards for this purpose do not create unnecessary obstacles to international trade" (Part I, paragraph 2 (c)).

"States should ensure that governmental control measures or actions taken with regard to an imported chemical for which information has been received in implementation of the guidelines are not more restrictive than those applied to the same chemical produced for domestic use or imported from a State other than the one that supplied the information" (paragraph 2 (d)).

"... It should be the function of designated national authorities, with regard to imports of banned or severely restricted chemicals...To ensure that decisions apply uniformly to all sources of import and to domestic production of chemicals for domestic use" (Part II, paragraph 12 (b)(vi)).

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### **International Code of Conduct on the Distribution and Use of Chemicals**

10. The Code of Conduct sets out the following trade-related provisions:

"Governments of importing countries participating in the PIC procedure, when advised by FAO of control action within this procedure, should....

ensure that governmental measures or actions taken with regard to an imported pesticide for which information has been received are not more restrictive than those applied to the same pesticide produced domestically or imported from a country other than the one that supplied the information (Article 9.10.2);

ensure that such a decision is not used inconsistently with the provisions of the General Agreement on Tariffs and Trade (GATT) (Article 9.10.3)".

11. The possible elements for the PIC instrument identified by the Ad Hoc Working Group of Experts on the Implementation of the Amended London Guidelines state that trade-related provisions may be incorporated on the basis of the relevant provisions of the amended London Guidelines and the Code of Conduct. The possible elements for the PIC instrument concerning the trade provisions may be found in paragraph 69 of the annex to the Report of the Ad Hoc Working Group of Experts on the Work of its Fourth Session, document UNEP/PIC/WG.1/4/5.

12. In March 1995, UNEP convened a meeting of the Expert Group on International Environmental Agreement and Trade in New York. The meeting considered the relationship between trade-related measures which may be included in the PIC instrument and international trade rules contained in GATT and other related trade agreements. The meeting identified a number of issues which may usefully be taken into account during the deliberation of trade-related provisions of the PIC instrument (see UNEP/Trade/IEA/1/7). Those issues may be found in the annex to the present document.

#### **MEASURES TO ENSURE EFFECTIVENESS OF THE PIC INSTRUMENT**

13. As the PIC procedure itself is a measure addressing international trade in chemicals, various measures for ensuring effectiveness of the PIC instrument may have trade implications. Such measures might include those on compliance, international cooperation for customs control, national regulatory measures and technical assistance. During deliberations on such provisions of the PIC instrument, the relevance of such provisions to international trade rules may need to be taken into account.

14. The possible elements of the PIC instrument address the issue of control of trade with non-parties (UNEP/PIC/WG.1/4/5, annex, paragraphs 71 and 72). During consideration of the issue, legal commitment under the PIC instrument, the relevant provisions of Agenda 21 and the GATT/WTO rules may be taken into consideration.

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ANNEX

ISSUES IDENTIFIED BY A  
MEETING OF THE EXPERT GROUP ON INTERNATIONAL ENVIRONMENTAL AGREEMENT AND  
TRADE, NEW YORK, 30-31 MARCH 1995 (see UNEP/Trade/IEA/1/7, paragraph 13)

(a) Trade and environmental policies can and should be mutually supportive. The case of the amended London Guidelines and FAO Code of Conduct which may lead to a PIC convention is a good example of such arrangement.

(b) During discussions of a PIC convention, the compatibility of provisions of the convention with provisions of GATT 1994 and related WTO agreements such as the Technical Barriers to Trade Agreement and the Sanitary and Phytosanitary Agreement, should be adequately considered.

(c) Experience in implementing the voluntary PIC procedure and trade-related provisions of existing international environmental agreements should be taken into account in the development of trade-related provisions which may be included in a PIC convention.

(d) Trade measures used in the existing voluntary PIC procedure are an element contributing to informed decision-making by importing countries and cooperation between exporting countries and importing countries.

(e) In particular, the principles contained in subparagraphs (c) and (d) of paragraph 2 and subparagraph 12 (b)(vi) of the amended London Guidelines should be reflected in a PIC convention.

(f) Trade measures may be used, among other instruments, to improve compliance with the provisions of a convention.

(g) Non-parties who are in compliance with the substantive provisions of a convention should, as far as the application of trade measures is concerned, be treated on an equal basis with parties who are in compliance.

(h) If consideration is given to any proposal for a ban on the export of domestically prohibited chemicals, the following factors, inter alia, should be taken into consideration:

(i) the ban's compatibility with GATT 1994;

(ii) the ban's effect on exports from countries which have not banned or severely restricted such chemicals;

(iii) the ban's impact on production and consumption of such chemicals;

(iv) the utility of such chemicals in other countries; and

(v) the responsibility of importing countries to make decisions on their own consumption of such chemicals.

(i) As regards enhancing the effectiveness of conventions, there may be a role for, inter alia, capacity building, technical assistance, transfer of technology and financial resources and trade measures. In this context, special consideration should be given to the concerns of countries without adequate chemical management systems.

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