GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

TRE/5
4 June 1992

Special Distribution

Group on Environmental Measures and International Trade

REPORT OF THE MEETING HELD ON 4-5 MAY 1992

Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its fourth meeting on 4 and 5 May 1992 under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and relevant documentation were contained in GATT/AIR/3315.

2. The Chairman brought to the Group's attention two additional relevant documents. The first document (TBT/W/156) was prepared by the Secretariat at the request of the Committee on Technical Barriers to Trade, which subsequently requested its Chairman to transmit the document to him for the interest of the Group.

3. The second document (TRE/W/1) was also prepared by the Secretariat at the request of this Group. It was the result of a general desire on the part of delegations for a factual review of trade provisions contained in all relevant MEAs[1]; the idea being that such a factual review could serve as background information for a generic discussion of types of measures included in these provisions rather than of the specific provisions themselves. The Chairman said that he understood from delegations that they did not wish to enter into any judgmental exercise regarding MEAs, but rather to examine various trade measures generally used to pursue environmental objectives, using as a starting point those drawn from existing MEAs.

4. He recalled that at the last meeting, substantive discussion on the three agenda items had continued with a particular emphasis on agenda item one. Several delegations had made use of the issues and questions listed in the addendum to the reports of the Group's second and third meetings, as points of reference in their interventions; delegations could continue to do so if they wished. He suggested that the present meeting focus on the first agenda item. Rather than guide the Group's discussions given that there was no consensus on how to structure the debate, he suggested that delegations be guided by their own structures.

5. The representative of Canada believed it was time for the Group to begin a substantive, focused discussion on many of these issues. The Group's most important task was an educational process to replace assumptions with a frank and focused examination of the underlying issues. A balance should be sought that would allow advances on environmental

[1] Throughout this report, "MEA" refers to multilateral environmental agreement.

protection as well as the preservation and promotion of an open, liberal and stable international trading system. He did not believe that there was an inherent conflict between environmental and trade policies, in fact there was a growing recognition that economic advancement and prosperity through increased international trade was one of the keys to improved environmental protection.

6. He did not believe that it made sense to violate the international trade rules and countries' trading rights through GATT-inconsistent trade measures that were ineffective in achieving the environmental objective and meaningful environmental benefits. Certain types of trade measures could even have the perverse effect of working against environmental objectives by retarding the economic advancement that would enable countries to pay for better environmental protection. Some could also interfere with the co-operation essential to the achievement of international environmental objectives.

7. This suggested that the eventual goal of discussions under agenda item one should be to identify approaches that would contribute positively to the advancement of the environmental agenda without unnecessary and unjustifiable resort to trade restrictive measures. Two key questions should guide the Group's discussions: what was the likely effectiveness of various types of trade measures in achieving environmental objectives? And what are the implications of these various measures for the international trading system and the fundamental GATT principles such as necessity, proportionality, least trade restrictiveness and non-discrimination? Against this background, he outlined a preliminary conceptual framework which broadly categorized types of trade measures based on their purpose or rationale. Against this framework, a more detailed analysis could subsequently be undertaken on their implementation or administration.

8. The categories of trade measures were: (A) trade measures which were an extension of measures taken within domestic jurisdiction to control or eliminate the production, consumption or use of environmentally damaging goods or substances or to conserve domestic natural resources (in these cases imports and exports were controlled in conjunction with and in support of the domestic measures); (B) trade restrictions aimed at conserving natural resources not present in or under the jurisdiction of the country applying the measures; (C) trade restrictions intended to press other countries to accept particular environmental standards or join an MEA; (D) trade restrictions aimed at "equalizing" differences in the cost of environmental protection between the home and foreign markets in response to concerns about competitiveness; and (E) trade restrictions directed against products made or obtained in an environmentally unfriendly manner (this was the approach of targeting process and production methods). He noted that this last category was an important horizontal issue which could also arise in categories B, C and D.

9. He noted that the first category included a wide range of trade measures already frequently used in many countries. Some were applied at the border in support of corresponding domestic environmental measures and

regulations, either taken by a country alone for a purely domestic environmental problem or with other countries, including in the context of an MEA. In both cases, if production and consumption of a substance was banned domestically, imports and exports of that substance may also be banned; if production and consumption was controlled or subject to phased elimination, imports could be similarly controlled or phased-out; and if regulations were imposed limiting the use of or introducing labelling requirements for domestic goods, they could be imposed on imported goods as well. He concluded that the key point was that the trade measures flowed from and complemented domestic action.

10. Referring to the two guiding questions he stated earlier, he believed that measures in this first category were likely to be effective in realizing its environmental goal. In cases where domestic production of an environmentally harmful good or substance was controlled or prohibited, continued uncontrolled imports of that substance would undermine the success of the domestic measure. Even in cases where controls on domestic consumption would, in principle, catch imported as well as domestically-produced goods, controls at the border could facilitate administration of the domestic measure and contribute to its effective implementation and enforcement. If domestic production and consumption was being phased-out over time, the rôle of corresponding import measures was even more clear.

11. He added that although the structure and administration as well as the utility of measures in this category could be questionable, as a general principle trade measures that were an extension of domestic measures were likely to contribute meaningfully to the environmental program being pursued. These types of measures were relevant not only for strictly domestic programs addressing domestic environmental problems but also in the context of MEAs addressing transboundary or global issues involving trade. In effect, commitments in MEAs were implemented nationally through domestic measures and were thus no different from other domestic initiatives.

12. Regarding the second guiding question, depending on how such measures were designed and implemented, problems of conflict or inconsistency with international trade principles and GATT provisions could likely be avoided. If the measures were in conjunction with domestic action, aimed primarily at the environmental objective and applied on an MFN basis, it should be possible to remain consistent with international trade principles. Although the application of GATT rules would be addressed in detail at a later stage, he believed that there was no inherent conflict between the GATT and the effective pursuit of a legitimate environmental program in this first category of measures. Indeed, there was wide scope within existing GATT rules to take environment-related trade measures.

13. Regarding the suggestion that Article XX is too narrow and rigid to accommodate environmental issues, he believed that the Group must first clarify the basic rationale and purpose of Article XX. It would need to consider carefully the checks and balances in Article XX which were

intended to prevent abuse because these safeguards were as potentially important to the environmental agenda as they were to the trading system. In the past, the environment had been used to cover other motivations; if this increased, the credibility of legitimate environmental initiatives could be seriously undermined along with the international trading system. Environment should not be used as a pretext for protectionist measures.

14. He added that the concepts behind the criteria and conditions in Article XX were relatively straightforward. If the measures were arbitrarily discriminatory, not necessary to the achievement of the stated purpose or went beyond domestic action, they would be difficult to justify. If they were a disguised restriction on trade, they would not in fact be serving the stated purpose. Regarding environmental purposes, the same basic concepts should still apply. If the Article XX criteria could be met, GATT disciplines would not stand in the way of using a wide range of trade measures. If the criteria could not be met, it was likely that better, less trade-restrictive means of pursuing the environmental goal could be found, or that the trade measures were more suited for other purposes than the ostensible environmental objective. In the latter case, the criteria would not frustrate the environmental agenda but would protect the trading system against abuse.

15. The representative of Sweden, on behalf of the Nordic countries, affirmed his support for the approach outlined at the last meeting, namely an identification of different types of trade provisions in MEAs with an analysis of their purpose and the way in which they operated to fulfil that purpose; and an identification of relevant GATT provisions and how they operated in this context.

16. He noted that some of the questions and issues in the addendum fell outside of this approach; they could be grouped into three categories to be dealt with at a later stage. The first category related to any gaps or questions concerning the way present GATT rules treated trade measures in MEAs. The second related to the legal relationship between GATT and MEAs including the problem of how to handle disputes involving both; and the third related to the rôle of GATT in the drafting of future MEAs.

17. He believed that the Secretariat note would be useful, and that national contributions could complement it. The Group needed to consider how best to use such information. He believed that in order to assess the operation of GATT Articles on trade measures, types of trade measures in the note should be considered as one of four elements which would allow for a generic discussion of agenda item one. The other three were the purpose of a given measure; the formula used to make the measures more or less binding or discretionary; and the setting for a measure in terms of whether the MEA of which it was a part was regional or multilateral.

18. Regarding the first element, he believed that all the MEAs listed at the end of the Secretariat note had a legitimate environment- or health-linked purpose. But the exact setting of the trade provisions described or, in other words, how they interacted with other environmental

measures that were also a part of the MEAs, was missing. He believed that it should be feasible to examine how different GATT Articles operated on a specific trade measure, using a combination of the four elements outlined, and then checking how conclusions changed if one or another element was modified. Since some of the combinations of the four elements would be unrealistic, only a limited number would need to be discussed.

19. In order to begin this approach, a generic description of a given trade measure's purpose, or what he termed its setting, was needed. A description of possible settings for a trade measure included three specific aspects. The first was the type of environmental problem. The operation of present GATT rules could be affected by whether the problem was global - or transborder - in nature, or purely national.

20. The second was the competition aspect which was the direct link to other types of environmental measures taken under an MEA. Trade measures could be designed to discourage relocation of an industry, to protect industry during the sensitive changeover phase to a new but more expensive technology, or to redistribute some of the costs of a global MEA to non-parties, who would benefit whether they participated or not.

21. The third was the enforcement aspect. Trade measures could be included to enforce obligations among parties, although he had not seen any examples of this in the MEAs examined. He had seen trade measures that operated on non-parties, as a means of encouraging them to join an agreement or at least apply similar measures. He concluded that these three aspects might influence how trade measures were treated under present GATT rules. Variations in these respects must therefore also be taken into consideration when evaluating how GATT rules operated.

22. The representative of Mexico reaffirmed her delegation's belief that the relationship between trade and the environment need not be a conflictual one since trade, as a major source of resources, contributed to raising both the environmental aspirations as well as investment in environmental improvement and conservation. Trade liberalization also enhanced productive efficiency at the global level because the products needed could be supplied from nearer and more direct sources, thus reducing the energy required and the pollution resulting from long transport routes.

23. At the same time, however, advocates of free trade were interested in protecting both their national and global environment. She did not believe that GATT represented a threat to the environment; indeed the opposite was true. However this did not mean that there were not serious risks such as the possibility of misuse of the GATT rules or extending them for protectionist goals, inherent in the relationship between trade and environmental protection. Thus environmental problems of a transboundary or global nature must be tackled and resolved through internationally agreed consensus based on scientific foundations. Unilateral measures based on arbitrary or subjective judgements could not be considered legitimate.

24. She believed that GATT was sufficiently flexible to deal with such measures and to resolve any conflicts resulting from their application. She agreed that the Group's initial aim should be to identify and properly understand the scope both of trade measures contained in MEAs and of GATT provisions that may cover environmental concerns. She believed that an inventory of such measures across MEAs should be drawn up, so as not to focus on the agreements themselves.

25. She noted that none of the trade measures in MEAs were absolute prohibitions. Of the three listed in the agenda, CITES contained a kind of prohibition, while control in the others was exercised through quantitative restrictions. The requirement to issue import and export permits under specified conditions was common both to CITES and the Basel Convention, and the latter also provided for transit restrictions through parties. Further, she noted that all three provided for import and export measures applicable to non-parties. The Montreal Protocol applied such measures exclusively to non-parties, covering trade not only in controlled substances but also in products which contained and those possibly produced with these substances.

26. A place to start examining how far these measures were compatible with the GATT was Article XI:1 which prohibited the imposition of quantitative measures, although some may be justified under Article XI:2(a) or under Article XX, subject to conditions. In this regard, criteria must be established for defining the terms "essential", "necessary" and "renewable natural resources" in those Articles to allow the legitimate objectives of MEAs while ensuring that these measures were not misused. It must also be clarified as to who would ensure and how that such measures "were not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" - as stipulated in Article XX, and supplemented by the provisions of Article XIII - as well as the treatment of PPMs, which were not covered by Article XX.

27. In addition, the problem of extraterritoriality required the Group's attention, specifically how it would deal with the fact that the three agreements under consideration contained restrictions designed to protect the environment outside the jurisdiction of the country applying them, and even to non-parties. Conflicts could arise in relation to the latter which posed a danger of breaching the principle of non-discrimination. Although international law was of limited use in establishing the precedence of the GATT over other agreements given that Article 30 of the Vienna Convention referred to treaties relating to the same subject matter, rules relating to the treatment of third parties were clear.

28. Article 34 of the Vienna Convention stated that a treaty did not create obligations or rights for a third State without its consent. The question to consider then was how lawful were the trade measures of MEAs when they affected non-parties. In trying to answer this, account should perhaps be taken of the nature of the MEA, particularly whether or not it was multilaterally agreed and its scope, i.e. whether it addressed national or world concerns.

29. Although it was too early to reach any conclusions on this debate, she recalled several points. First, trade measures aimed at other countries (extraterritorial measures) should not in any way be considered legitimate when they had not been multilaterally agreed or when the country applying them had not taken the same measures at the domestic level by, for example, controlling consumption and production of the resources and substances involved. Second, the term "multilateral" should be defined not only by the number of participating countries but also by their diversity, in particular developmental, in relation to the scale of the problem concerned. Thirdly, no measure should be considered "necessary" if a similar level of protection could have been obtained by a less trade-distorting measure.

30. Fourth, scientific criteria must be used with regard to MEAs dealing with global problems, to prove that a problem called for collective action. This would assist in determining whether discrimination between parties and non-parties was neither "arbitrary" nor "unjustifiable". In this regard, she did not believe it helped the Group's endeavours that some countries which had concluded far-reaching agreements in areas where their technology and economic situation enabled them to do so sought to oblige others to do the same, were reluctant to co-operate in resolving other equally or even more pressing and vast problems, for fear that their industries might be affected.

31. Fifth, the argument that applying coercive trade measures would attract the participation of the greatest number of countries in an MEA was shaky and risky. A distinction should be made between positive and punitive measures since incentives or benefits from "good behaviour" instead of sanctions would increase the incentive to participate in MEAs. A related sixth point was agreement that the allocation of financial resources, technological and administrative assistance would be more effective incentives to attract countries, particularly developing countries, to participate in MEAs.

32. Finally, thought might be given to an arrangement providing for some kind of compensation to contracting parties, parties to an MEA, when some of their rights accruing under the GATT were undermined by that MEA. A possible way of tackling this problem in relation to contracting parties that were non-parties to an MEA could also be explored.

33. The representative of the Republic of Korea believed that GATT did not stand in the way of environmental progress; trade and environmental interests could be reconciled with an open-minded approach. This meant that the GATT must be responsive to public opinion but careful not to abandon its basic philosophy of free trade. He recommended that the Group approach the problem from three perspectives, each of which required the Group to operate as much as possible within the terms of the GATT with an increased awareness of the future.

34. The first perspective was GATT's relationship to MEAs. His delegation strongly believed that multilateralism was necessary to avoid discrimination resulting from unilateral trade measures disguised as

environmental measures. He did not believe that the general principles of law answered the legal question of this relationship entirely; a case-by-case evaluation was necessary. The nature of the problem illustrated that GATT should have some rôle, although limited, in the formation of MEAs and the Group could perhaps develop guidelines in this regard.

35. In this context, GATT was not a forum to establish or harmonize standards. However, in order to minimize trade distorting measures in MEAs, GATT would need to signal its position on the trade provisions of these agreements. This should also ensure that GATT principles were incorporated wherever possible into MEAs. He suggested that in order to increase membership in such agreements and to minimize the free-rider problem, provisions encouraging manpower training, technology transfer, and financial support should be included in future agreements as opposed to the introduction of harsh restriction and punitive trade measures.

36. The second perspective related to Article XX. Particular attention should be paid to Article XX since it was the only GATT Article that allowed room for environmental considerations. The legal aspects arising from Article XX were extensive but should be attended to so that GATT's position was clear vis-à-vis other MEAs. Article XX(b) seemed to be the most meaningful exception, but also offered the greatest scope for interpretation. Past GATT practice had been to minimize these exceptions pursuant to the principles of proportionality, non-discrimination, and transparency; a restrictive interpretation was the only way to prevent trade barriers and other trade distorting activities and to eliminate any possibility of extraterritorial interpretation. He believed that if the GATT was to include MEAs under Article XX(h), the concept of what constituted a multilateral agreement would have to be carefully defined.

37. Finally, the third perspective related to the dispute settlement mechanism. He believed that the GATT dispute settlement should not be weakened by other systems or agreements. He acknowledged, however, that it was very difficult to clearly draw the line between disputes that should be dealt with in the GATT and disputes that were outside its system. The Group could develop definite guidelines concerning management of environmentally related disputes which could avoid conflicts regarding dispute provisions in future MEAs. Many aspects of GATT dispute settlement systems seemed well suited for use in MEAs; drafters of future agreements should borrow GATT provisions where appropriate.

38. The representative of Tanzania stated that GATT's competence was in the field of trade and it should not be held responsible for the fact that environment, per se, may be subordinated to some extent by trade facilitation. There were specific environmental concerns for which public opinion had sufficiently asserted itself to require well-defined commitments on trade. Indeed the Secretariat note showed that fourteen of the eighteen MEAs related to items which public opinion might have considered important. He added that there had been an evolution and extension of concern in a short time period . This underlined the significance of technological dimensions which compelled the need to

concede that the lines between trade and the mode of production of the traded output become significant. He cautioned that the Group may be accelerating on a track without giving full opportunity to the UNCED to consider the totality of the issues. He believed that the GATT mechanisms would be rather imperfect, inadequate and perhaps to some extent tendentious in dealing with some of these problems, although his delegation would continue to educate itself on these matters.

39. The representative of Japan illustrated some of the important notions it believed worth taking into consideration in future deliberations. First, discussion in the Group had been helpful in educating environmental and trade policy makers. Second, GATT was flexible and did not impose any obligations or constraints on setting appropriate domestic policies concerning the environment. Third, the Group should avoid passing judgement on MEAs; it should carry out further work without going into specifics, to enhance understanding of the issues. Fourth, trade measures should be used only when necessary and be consistent with GATT rules and principles. In dealing with environmental problems, especially those of a global nature, the multilateral approach was far more desirable than the unilateral approach. He added, however, that it was not his intention to oversimplify discussions.

40. He referred to the suggestion by the Hong Kong delegation at the last meeting to organize the issues and questions in the addendum to TRE/3 into two groups. As a preliminary remark on the second group which related to how GATT rules and disciplines dealt with trade measures in MEAs, he noted that Article XX(h), although limited in scope, set out an aspect of this relationship and therefore required a careful examination of its applicability to MEAs. In this context, it would be useful to consider which criteria should be used to determine what constituted an MEA. He agreed with other delegations that universality of membership and its geographical coverage should be taken into account. However, the question remained as to what extent was the legitimacy of trade measures contained in MEAs affected in both a legal and practical sense by the number of members to a certain MEA.

41. On the legal aspect of this question, he considered that applying general principles of international law to the relationship between the GATT and MEAs was too generalized and risky of an approach and required great prudence. He noted that Article 30 of the Vienna Convention stipulated that only when the same subject matter was dealt with by the two agreements and the parties to the earlier agreement were also parties to the latter agreement, would the earlier agreement apply only to the extent that its provisions were compatible with the latter agreement. Determining whether or not the particular provisions of the GATT and MEAs covered the same subject matter would be a complicated and difficult question.

42. On the practical aspect, several points summed up why multilateralism was preferred to unilateralism. First, since environmental problems were increasingly becoming global or transboundary nature, it was inevitable that the international community would be asked to deal with them. Second, rationality, objectivity and appropriateness of trade measures taken under

MEAs could be enhanced, if not ensured, through the examination process inherent in drafting agreements, where it was important to retain fair and stable rules of trade. The current GATT provisions permitted its members to deviate from these rules in certain exceptional situations as stipulated in certain Articles such as Article XX or with a waiver granted by a two-thirds majority. In this context this number was significant, however, derogations from GATT obligations could not always be legitimized even when they had the endorsement of a multilateral consensus.

43. The representative of Switzerland concentrated on questions raised at the last meeting which were contained in the addendum to TRE/4. Question 2, related to question 5[2] asked what the competent forum would be to address a dispute between two parties to an MEA if a trade provision was involved. She considered that since parties were free to decide, by mutual consent, on a derogation for specific reasons such as protection of the environment, it was unlikely that the parties would complain about trade measures or environmental measures that they had signed within the context of an MEA. A dispute could arise, however, if implementation of trade measures was interpreted in different ways. The two signatories might be tempted to raise the problem in GATT since it had an effective dispute settlement mechanism. However, settling a case such as this was more a matter of interpreting an MEA rather than interpreting the GATT, and GATT's mandate on this was doubtful.

44. Question 3[3] asked how GATT would bring parties of an MEA to reconsider contentious provisions in the event of a conflict, when, according to public international law, there was no hierarchy of agreements. She was unable to reply to this question. Question 4[4] related to whether GATT should consider global or case-by-case approval of MEAs.

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[2]**Question 2** from 10-11 March 1992: To what extent do trade disputes between signatories to an international environmental agreement, incorporating trade provisions, belong in the GATT, where there is a well established procedure for dispute settlement using criteria that trade policy makers have accepted, or in the agreement where the criteria for dispute settlement are related primarily to the environmental problem being addressed?

Question 5 from 10-11 March 1992: Would GATT dispute settlement procedures apply to multilateral agreements if a conflict arose, or would such a conflict be settled in another forum?

[3]**Question 3** from 10-11 March 1992: If a conflict with a multilateral agreement exists, would GATT accommodate the agreement or would it expect the agreement to be renegotiated?

[4]**Question 4** from 10-11 March 1992: Would a blessing on a multilateral agreement apply to the agreement as a whole, i.e. not imply renegotiation of the provision in conflict, or would the blessing apply only to an individual application of the trade measures as written in the multilateral agreement?

If the latter was the correct approach, would each contracting party that wished to take a measure that might conflict with GATT provisions under an MEA have to ask for an Article XXV:5 waiver. Preliminarily, she indicated some shortcomings with this approach. First, because the waiver required a vote for each derogation, it would be cumbersome in the case of agreements that had many participants. Additionally, there was uncertainty linked with the granting of the waiver, and potential problems of equity if, in similar circumstances, one claimant might be granted a waiver and another might not. Thirdly, waivers were granted for a specific time period which was not suitable to deal with MEAs which addressed the long term. For these reasons, her delegation would seek a more global solution that did not create obstacles to legitimate environmental purposes, without, however, justifying measures that were impelled by protectionist rather than environmental considerations.

45. The representative of Brazil stated that in many MEAs, it had been considered useful to include trade provisions as an instrument to achieve specified environmental objectives. Since the GATT also included provisions which allowed departures from its main clauses to, inter alia, protect the environment, there was some convergence. Thus, in principle, nothing in the GATT would prevent MEAs from providing trade restrictions considered necessary to achieve the legitimate purpose for which they were drafted. But when the necessity of the trade provision for the purpose of the MEA was questioned, or the manner in which they were drafted, contracting parties might have a say.

46. The legitimacy of the environmental objective and the need for the use of trade measures could cause disputes from the GATT point of view. The history of GATT dispute settlement showed examples where it had been possible to distinguish between legitimate environmental objectives and disguised protectionism, however, this had been limited to the review of national legislation. It was not clear whether the available GATT principles and provisions could be as successfully applied to MEAs although nothing would preclude contracting parties from such an application.

47. He considered that it was of limited utility to identify different types of MEAs, which might create GATT standards with which to judge such agreements from a trade point of view. He did not see a strong reason to differentiate between national environmental measures with trade effects and bilateral, plurilateral, and multilateral ones for the purpose of ascertaining consistency with GATT rules, however, his delegation was open to examine concrete proposals that would convince them otherwise.

48. The representative of India noted that he shared a large number of points made by the Canadian delegation, although he would have to examine all statements to respond fully. He agreed that this process was useful, that the environment should not be used for protectionist reasons and that global environmental concerns should not be settled through unilateral means but through MEAs, negotiated with the participation of all interested countries. He added that a number of issues and questions raised at earlier meetings went beyond the Group's agenda, and it should not be the Group's priority to answer all of them, although many could serve to guide the discussions forward.

49. On question 3[5], he stated preliminarily that his delegation viewed the relationship between GATT and MEAs as being one of co-operation and conciliation, at least in the manner in which they should be negotiated and implemented. On questions 5 and 6[6] his delegation believed that trade restrictions were inappropriate as instruments of environmental policy, except where they may be an integral element of an MEA, such as in CITES or the Montreal Protocol. As far as possible, governments should resist using trade restrictions to enforce environmental policy. With respect to question 6, his delegation could envisage MEAs where global concerns were addressed, however, the action should not necessarily be in the form of trade measures. There was no justification for individual action to address global environmental concerns.

50. In reference to the suggestion that Article XX(h) could be used as an exception from GATT rules for MEAs, his delegation believed that Article XX(h) dealt only with actions undertaken in pursuance of inter-governmental commodity agreements which conformed to criteria submitted to the contracting parties. Ad Article XX(h) further specified that this sub-paragraph extended to commodity agreements which conformed to the principles approved by the ECOSOC in its Resolution of 28 March 1947. It would therefore be difficult to conceive of blanket criteria for such exceptions, and there could be no justification for departing from the basic GATT principles of MFN and national treatment, even in respect of such exceptions.

51. Further, his delegation did not believe that GATT rules provided scope for trade reciprocity to deal with the free-rider problem. This problem was complicated and could provoke debate over who was really responsible for pollution of the environment in terms of either depletion of the ozone layer or generation of carbon dioxide. His delegation envisaged that MEAs would adequately address the so-called free-rider problem which need not be the focus of the Group's attention.

52. Regarding questions relating to Article XX(b), he believed that no environmental conditionality or non-tariff barriers should be created for trade flows, except on the basis of the effect on the plant, animal and human life and health in the territory of the country taking the measure.

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[5]**Question 3** from 21 January 1992: What is the relationship between obligations under the GATT and obligations under multilateral environmental treaties, and how does this relationship change, if at all, in respect of the various kinds of environment treaties (e.g. treaties which apply trade measures to non-parties to the treat; treaties which apply trade measures in order to preserve the global environment or environment outside each parties' jurisdiction)?

[6]**Question 5** from 21 January 1992: Are trade restrictions used as instrument of environmental policy necessary, adequate, and appropriate and are they the least distorting means of achieving an objective or could the same objective be obtained by better means?

Question 6 from 21 January 1992: Are parties to various environmental agreements entitled to act on abstract concepts such as "global" concerns; and who will determine which concepts are priorities?

International standards should be used where they existed and GATT had a special responsibility to ensure that measures to deal with environmental pollution did not result in the creation of additional or disguised barriers to trade.

53. His delegation agreed with the representative of Canada that although Article XX did not refer to measures taken to protect the environment specifically, the principle remained the same. It was not the intention of GATT to prevent the adoption or enforcement of such measures by any contracting party provided they did not constitute a means of arbitrary or unjustifiable discrimination between countries. This point had been made very cogently in the Secretariat report on trade and environment.

54. The TBT Code recognized that the potential for technical standards or regulations to create barriers to international trade would be reduced if parties used internationally accepted standards. It layed down the obligation on parties to use relevant international standards where they existed or where their completion was imminent as the basis for national regulations and specifications. Where national standards did not conform to international norms, it would have to be ensured that they were essential to fulfil the purpose and that they met the criteria of reasonableness and proportionality. In the case of multilaterally negotiated standards, however, there was a presumption that the conditions of essentiality, reasonableness and proportionality had already been taken into consideration when these standards were evolved.

55. Regarding question 7[7], his delegation believed that MEAs should satisfy either of the following: they should be negotiated under the aegis of the United Nations or one of its specialized agencies; or they should be negotiated between a representative number of countries at various stages of development and belonging to different geographic regions.

56. His delegation would, to a large extent, agree with the representative of Switzerland on questions 2 and 5[8], although if there were trade provisions in MEAs, they would need to be compatible and consistent with the trade provisions of the GATT. If a trade dispute arose, it should be resolved in the GATT. The question of interpretation of a provision in an MEA would have to be discussed in the forum of the particular MEA as GATT would have no competence in such a case.

57. On questions 3 and 4[9], his delegation found it difficult to provide specific answers relevant for all MEAs in all circumstances. Further, it would be difficult to provide purely technical responses to these questions which might have to be considered on a case-by-case basis, depending upon the nature of the agreement, its membership and the nature of the conflict between the provisions of these agreements and the GATT.

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[7]**Question 7** from 21 January 1992: What criteria should be used to determine what constitutes a multilateral agreement and where do regional agreements fit in?

[8]See footnote 2.

[9]See footnotes 4 and 5.

58. As preliminary comments on the Canadian delegation's categorization of trade measures, he asked in which MEAs were trade measures under categories D and E - those relating to trade restrictions aimed at equalizing differences in the cost of environmental protection in the home, as opposed to foreign markets in response to concerns about competitiveness, and trade restrictions directed against products on the basis of process and production methods - to be found. He believed the Group should limit itself to the three MEAs specified in the agenda because they were purely multilateral in nature; and, since it was the Group's intention to have focused discussions, it would help to see what were types of trade provisions with which it was dealing.

59. Regarding the categorization put forth by the representative of Sweden, he believed it would be more useful to have a categorization of trade provisions rather than by the type of environmental problem, the competitivity or enforcement issues. His delegation considered that the Group would need to focus on issues relating to treatment of non-signatories, to the operation of the licensing systems which were contained in some of the MEAs, and to control of production and consumption envisaged in a particular MEA and which would influence the regulation of international trade.

60. The representative of Chile stated that the situation envisioned in the first part of the Nordic countries' question 2[10] on page 22 of TRE/4 should be examined in a general context. It questioned whether GATT had primacy over other agreements when they contained trade provisions. The United Nations Charter noted that if an instrument was of a constitutional nature every treaty should be subordinated to its norms. The GATT at present did not have norms or rules of this kind; the Group would have to look carefully at the implications of any such norms or regulations with regard to both GATT and MEAs.

61. On question 5[11], he noted that it had been demonstrated that trade measures were not necessarily the most appropriate instrument to carry out certain environmental regulations. They could be counterproductive and a barrier to the administration of the protected resource. For these reasons his delegation considered that trade measures should be avoided as a general rule. On question 13[12], his delegation considered that exceptions to GATT obligations could only apply for a limited period of time. Thus Article XX could not really serve as a basis for exceptions from GATT rules nor as a justification for MEAs because they were normally of an indefinite duration.

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[10] See footnote 2.

[11] See footnote 6.

[12] **Question 13** from 21 January 1992: Is Article XX(h) a possible means of providing an exception to GATT obligations for contracting parties who are members of a multilateral agreement?

62. The representative of Australia considered that the Group approach its task in a forward looking manner with a view to eventually providing useful directions for the future drafters of MEAs. His delegation believed that if an MEA had universal membership, it was unlikely to present practical difficulties for GATT obligations. However, theoretical difficulties should be discussed to explore how potential difficulties could be overcome in the future.

63. His delegation did not believe that the Group could declare with any confidence or certainty that any individual MEA was entirely GATT-consistent. Potential conflicts with international trade rules could emerge from the manner in which the measures were implemented or administered as well as from the drafting of the MEA itself. His delegation saw five general categories of trade measures: import and export bans, labelling requirements, production restrictions, consumption restrictions, and documentation restrictions.

64. He noted that import and export bans were often accompanied by other provisions. Some permitted trade with non-parties if the non-party complied with certain essential requirements under the agreement. He considered that although a ban or restriction on trade seemed to be prima facie discriminatory, the effect of these corollary provisions which permitted trade in certain circumstances went some way to reducing the trade distortion effect.

65. He noted that there seemed to be different ways of implementing provisions relating to production restrictions, for example a quota system could be used. He considered that if consumption restrictions associated with reducing or eliminating pollution were applied equally to imported as well as domestic products there would be no particular problems with conformity to international trade rules.

66. He suggested that some trade measures that might appear in MEAs were somewhat clearer, such as non-discriminatory labelling schemes. He agreed with the representative of Canada that trade measures that did conflict with international trade rules should be questioned as to whether they were the most efficient way of achieving the objective of the particular MEA. The GATT could not pronounce on an international consensus that viewed such measures as necessary, but could balance its multilateral interests in respect of trade and environmental objectives by looking at ways to accommodate MEAs in the GATT. He hoped that discussion in this forum would result at least in future negotiators being more informed when considering incorporating trade measures in future MEAs.

67. The representative of the European Communities noted that the intention of his delegation in this discussion was to engage in a generic discussion of the trade provisions in MEAs to better understand the rationale of such trade measures. In this respect, the Secretariat note would be a useful analytical tool, although he agreed with some other delegations who considered that a purely instrumental classification did not necessarily capture all the nuances or elements which were necessary to understand the rationale of trade provisions.

68. He suggested looking at the types of functions that international co-operation played in different types of MEAs containing trade provisions. This did not necessarily imply that an MEA would be based exclusively on one or the other model; indeed, different models and different types of trade provisions may be combined. The first type of international co-operation, as noted by the Swedish delegation, was primarily aimed at assisting individual countries in the enforcement of domestic environmental legislation. In this type of MEA, the responsibility for taking any trade measure fell fully within the individual party to the MEA, although other countries may undertake some co-operative action in order to further this individual responsibility.

69. A second type of increasingly important co-operation in the environment field was based on joint responsibility of the importing and exporting country in order to tackle an environmental problem of common concern. In such cases, the MEA was likely to specify countries' obligations including use of trade measures on both the importing and exporting side. He believed that CITES and the Basel Convention fell under this category. These agreements may also allow the possibility of adopting stricter trade measures than those which had been contractually agreed.

70. A third type of international co-operation was based on the concept that collective action was a condition sine qua non for the achievement of a certain environmental goal. In this type of MEA there would likely be both greater specificity as to the type of environmental commitments to be assumed and particular consideration about the rôle which trade measures may play. He noted that the issue raised by Sweden regarding binding or implied discretionary trade provisions in MEAs was an important element regarding how trade measures should be addressed.

71. He also considered that an important issue was the relationship between domestic controls on the production and consumption and the use of trade measures. This appeared to be an important issue for reflection since some statements had implied that when there was a combination of the two elements the GATT was not likely to pose any significant problem for the enforcement for such measures. He considered that the distinction in the note between Models I and II may need to be nuanced to take into account all the circumstances which related to individual MEAs such as the type of environmental objective being pursued, the scope of the agreement, how far the agreement was qualified to regulate certain types of domestic measures, and how the agreement was implemented by individual contracting parties.

72. Model III of the note raised a number of important issues regarding the relationship between commitments assumed by countries on domestic production and consumption control and the use of trade measures. This particular agreement included highly specific commitments regarding the targets to be achieved for the reduction of domestic production and domestic consumption; indeed much more specific than in many other environmental agreements. It was obvious that there were a number of trade controls which flowed naturally from the domestic production and consumption controls.

73. The effect of production and consumption of countries which had not assumed these commitments was an important issue. This was sometimes referred to as the free-rider issue, but it was a question of much higher complexity. The place where production or consumption took place was quite irrelevant for the achievement of the particular environmental goal but production and consumption in countries which had not assumed certain commitments might nullify the commitments assumed by parties to the MEA. This issue required further consideration.

74. Another important issue was the application of trade measures to non-member countries. At first glance, with perhaps one or two exceptions, all the MEAs referred to in the Secretariat note did not limit themselves to applying trade measures among parties, but also applied them to non-parties to the MEA. This appeared logical since in most cases, to achieve an environmental goal, all origins and destinations should be controlled. The issue arising in a number of MEAs was how far non-participation should effect the type of trade measure which may be applied.

75. In that respect, he noted that under no MEA mentioned was non-participation, as such, considered a reason for the application of trade restrictions of a different nature. What these MEAs envisaged under different models was the need to verify whether the conditions in countries which were non-parties were comparable to those of parties. Indeed there were different models to address that issue. In one particular case, there was a need to verify that comparable documentation was submitted, in another case there was a reference to the need to enter into bilateral or plurilateral agreements which did not derogate from the environmental standards established under it. In another case, there was a reference to the need to have a decision by the parties which verified that certain specific commitments had been assumed. His delegation would like to return to these issues later.

76. He recalled his suggestion from the previous meeting to have a generic discussion of the trade provisions of MEAs to better understand their rationale and, at a later stage, a generic discussion of a number of GATT provisions relevant for the consideration of an MEA. He suggested that it would be useful to have some clarification of this second point. Finally, he underlined that his delegation continued to believe in the importance of a comprehensive approach; indeed the number of MEAs referred to in the Secretariat note reinforced that impression. This approach should aim at clarification and should be based on a positive recognition in the GATT of the crucial rôle of multilateral co-operation to address a number of environmental problems.

77. The representative of the United States stated that the analysis leading to a categorization of trade measures must involve existing MEAs that contained trade provisions because they had wide membership and used trade measures efficiently to accomplish environmental aims. Countries had chosen to incorporate trade provisions in MEAs to achieve the environmental objective of the MEA; to encourage states to join the MEA; or to mitigate the free-rider problem. In some cases they were also used to address the special concerns of developing countries. Often a single trade provisions may meet several of these goals at the same time.

78. With respect to the first reason, control of international trade might be the central feature of an MEA and indeed these MEAs would be as much trade agreements as environmental agreements. One examples was CITES where trade restrictions were central to the protection of listed species of animals and plants. Their objective was to reduce or stop the taking of these species by reducing or eliminating the international market and thus reducing the economic incentive for taking the species. She noted that the parties to CITES recognized in the preamble that "international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade".

79. The environmental objective of the Montreal Protocol was to control and ultimately eliminate substances identified as depleting the ozone layer. Similarly, the environmental objective in the Basel Convention was to regulate trade in hazardous wastes by providing a system of prior informed consent and environmentally sound management of wastes. Trade provisions might also serve to encourage countries to become parties to MEAs or to comply substantially with their terms by providing real benefits if they became members.

80. Trade provisions might also serve to mitigate the free-rider problem. In addition, trade provisions vis-à-vis non-parties to the MEAs might be imposed to ensure that potential non-party exports did not have a competitive price advantage because of costs borne by industries in participating states. They also reinforced the achievement of the environmental goals of an MEA by discouraging circumvention. Certain provisions in the MEAs encourage developing countries in particular to enter into the MEA. For example, Article 10A of the Montreal Protocol provided that each party would take every practical step to ensure that transfers of certain technologies identified in the Protocol to developing countries should occur under "fair and most favourable conditions".

81. She added that other provisions included those which would allow developing countries to delay for ten years compliance with control measures under the Montreal Protocol (Article 5.1) and at the same time enjoy the benefits of party status, for example no ban on trade with parties. These examples showed that the trade provisions of the MEAs had been carefully crafted, worked well and played a vital rôle in ensuring that environmental objectives were achieved.

82. By entering into co-operative agreements for environmental protection, states had implicitly recognized that environmental degradation was a common concern. To conserve certain species, parties to CITES banned or regulated trade in species. It was important to note that in most cases there was an extraterritorial reach because the products banned or regulated were not found within their own jurisdictions. From a pollution perspective, parties to the Basel Convention might prohibit the export of waste to non-parties, even where the management of such waste in the country of destination might have no demonstratively adverse effect on the country of origin.

83. Her delegation understood that at the next meeting, countries would come prepared to discuss the different GATT Articles and their relationship to the environment. The Group's challenge was to find the link between the GATT and the existing MEAs. Merely stating that a country could take trade measures to protect its own domestic environment, while important, did not address this larger issue, which was part of the mandate of the Group. She concluded that her delegation was willing to discuss categories of trade measures as outlined by the representative of Canada and Sweden.

84. The representative of Hong Kong reiterated his delegation's belief that the GATT rules were flexible enough to accommodate most trade measures taken for environmental objectives. If friction did arise, it did not necessarily mean that there was an inadequacy in the GATT but that the trade measure in question would need to be examined critically. Many of the trade measures in MEAs could be considered GATT-consistent. For example, the representative of Canada noted that it was permissible to apply an import restriction on an environmentally damaging product where such restrictions were matched by comparable domestic production and consumption restrictions. In this case GATT did not constrain the environmental objectives but supported them by ensuring that the domestic measure was not frustrated by imports.

85. He added that it was even possible for trade restrictions in an MEA to be applied in a discriminatory manner against non-parties to that MEA, and still be GATT permissible. In some MEAs, membership provided certain guarantees that, for example, exports would be packed and transported in an environmentally sound manner. If a non-party of that MEA could not give the same kind of guarantee, under the narrow exceptions to the GATT, it could subject the products being exported from that party to more stringent import procedures. This suggested considerable flexibility in the GATT and that the constraints that were imposed were more to guarantee fair trade, rather than to question genuine environmental objectives. Provided that trade measures in an MEA were applied in a non-discriminatory manner and were designed to fulfil an objective which had some domestic impact, GATT did not question them. In addition, within certain bounds, differential treatment to different participants was possible, provided that these were demonstrated as necessary.

86. He acknowledged, however, that a number of trade measures found in MEAs could fall foul of the GATT. Typical ones were those that were more onerous on non-parties or trade restrictions on unrelated products of non-parties to force them to join the MEA or to punish their environmentally unsound behaviour. Broadly speaking, such provisions in MEAs ran the same risks as when they were applied unilaterally and the same test and disciplines should apply. The only real difference was that in these cases it was a group of countries not one country which was seeking to impose its standard upon another country to force it to change its behaviour.

87. He noted the suggestion that sometimes certain kinds of discriminatory or extraterritorial trade measures were the only means to prevent free-riding, or the undermining of the objectives of an MEA through continued exports. In each case, however, several questions should be

asked: how universally accepted was the environmental standard being imposed upon the non-member; were the discriminatory measures really to enhance the environmental objective of the MEA or to iron out the competitive advantage enjoyed by the non-party who may have different environmental priorities; was non-compliance by a particular party truly a sign of its egregious behaviour or simply a result of a lack of resources to comply with the level of obligations imposed by that MEA; and what was the explanation for parties choosing not to join or belong to a particular agreement. It could be that economic or trade self-interest deterred parties from becoming members but also the objectives of that agreement may be based on scientific claims or evidence or assumption which were not generally shared.

88. A final form of GATT inconsistent trade measures which might appear in certain MEAs were those taken against a product because that product was regarded as having been produced in an environmentally unacceptable way. Key issues were whether such measures were more legitimate if they were part of an MEA, rather than unilaterally imposed and whether and under what circumstances could countries justifiably impose their process and production standards on other countries through MEAs.

89. He concluded that his delegation agreed with much of what was said by the representative of Canada and supported his suggested analytical approach. He added that it was difficult to justify imposing more onerous or discriminatory requirements upon non-parties to an MEA. His delegation clearly believed that proposals to use trade measures in MEAs, particularly those that were aimed at curbing allegedly poor environmental practices, should be evaluated very critically against a number of criteria, be tested for their GATT consistency, be evaluated as to their effectiveness and be considered on a case-by-case basis.

90. The representative of Hungary stated that the relationship between trade and the environment was an inherently complex one. Trade liberalization and environmental protection were complementary policies although with often contradictory objectives. General liberalization would enhance trading nations' respective comparative advantages, thus increasing exports in their most efficient sectors. Increased export earnings would generate additional economic growth and result in releasing additional resources necessary for the introduction of environmentally-friendly technologies and production methods.

91. From GATT's point of view, the core issue was to ensure that environmental measures were not used as a pretext for additional trade barriers, did not lead to disguised forms of protectionism nor to unnecessary and unjustified trade restrictions. Her delegation shared the view that unilateral and arbitrary measures should be avoided, and that multilaterally agreed solutions should take precedence over unilateral ones in this area. She added that, within its parameters of non-discrimination, transparency, extraterritorial application, and proportionality, GATT was a competent and flexible enough instrument to take into account any multilateral efforts to deal with environmental problems.

92. Her delegation considered that the approach to the first agenda item must be based on a clear and positive interface between trade provisions of MEAs and the GATT. It must also be comprehensive because the global dimensions of environmental problems were growing and becoming high political priorities. The Group should approach this subject with a focus on the future because its deliberations could have consequences on the many such agreements presently being negotiated. It would therefore be desirable and appropriate for future drafters of MEAs to have a clear understanding of the rules and principles of the GATT. Her delegation fully shared the views of the representative of Japan who stated that as a first step in this regard, better co-ordination among government agencies which have a responsibility for trade and the environment was needed.

93. The representative of New Zealand noted that at the last meeting his delegation supported a more focused approach to the work of the Group. He recalled that he had suggested that a thematic structuring of the questions in the addendum to TRE/3 could be a way forward. He considered that on reflection, the generic discussion upon which the Group had embarked encompassed both ideas. The first part of the EC suggestion, namely a generic analysis of the rationale for the use of trade measures in MEAs, could pick up aspects of questions 5, 9, and 10[13] posed at the 21 January 1992 meeting. The second stage, the generic examination of relevant GATT provisions, could pick up a further set of questions, and others could be discussed at a later stage.

94. He considered that an adequate framework was needed on which to base the current analysis. The Secretariat paper, TRE/W/1, provided a valuable component of such a framework, but as the representatives of Canada, Sweden and others commented, there were other relevant factors which could be added. A matrix of criteria could be useful to classify trade measures. One aspect which was provided in the Secretariat's paper would be to include the type of measure. Another was the purpose of the measure for which the representative of Canada provided some interesting ideas. A third aspect was the context or setting of the measures as the representative of Sweden described, however specificity on this might be difficult given the generic nature of the investigation. Perhaps some further material from the Secretariat or non-papers from delegations on the second aspect could be useful.

95. On the basis of this framework the Group could begin the necessary analytical work. One interesting question which the Group would need to take up was the question which the representative of Canada noted of how trade measures could work in practice. This would assist in the process of

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[13] See footnote 6;

Question 9 from 21 January 1992: What are the differences between binding versus discretionary trade measures taken pursuant to multilateral agreements?

Question 10 from 21 January 1992: What are the purported objectives of using trade measures, to deal with the "free-rider" problem or other objectives?

education and confidence building through, as the Canadian representative put it, providing clarity about the real issues and the actual effects of trade measures in MEAs. He also believed that GATT could make a useful contribution to understanding the workings and implications of the trading system through which some light may be cast on how the trade measures might work in practice. Useful work on this had already started and was reflected in the GATT's annual report.

96. He saw a number of contexts in which the Group could examine the effects of trade measures. One case could be where trade itself was the cause of an environmental problem. It would then be logical that restricting that trade could be a solution. Another situation might be where trade facilitated a greater level of production and consumption of a product with attendant environmental damage than would otherwise be the case. He recalled that the starting point of analysis should be that the relationship between trade and the environment was not a zero-sum game. It had been widely shown that in general, trade facilitated enhanced environmental protection through promotion of economic growth. Also trade and hence trade liberalization promoted efficiency, so for any given level of activity, the greater the extent of trade, the fewer the resources necessary to generate that level of activity, through the efficiency gains of trade.

97. Thus, he concluded that a useful approach for the Group to follow would be to consider both the direct and indirect impacts of trade measures, and as the representative of Canada noted, the indirect effects of trade measures could often be more significant than the apparent direct effects.

98. The representative of Venezuela agreed that the relationship between the GATT rules and environmental issues was complex. The provisions of the GATT could not and fortunately had not been interpreted in practice as imposing limits on a nation's ability to implement national environmental protection measures considered necessary for internal protection and to control the consumption of domestic or imported products. His delegation fully believed that the expansion of world trade was one of the most important means to solve environmental problems.

99. He noted that his delegation had, on other occasions, stated that the task of mutually strengthening growth in trade and protection of the environment could be reaffirmed by carrying out a detailed review of the GATT so as to expressly introduce any improvements or clarifications considered necessary. However, GATT principles, in particular those which referred to non-discrimination and national treatment, should be preserved. This would avoid as far as possible any protectionist trade measures disguised as environmental protection measures.

100. Equally important was a reaffirmation in GATT that a contracting party may not apply extraterritorial domestic measures. The contrary could have quite negative implications. He gave an example of a country restricting imports of feather pillows simply because the exporting country did not provide measures to protect exotic birds. Likewise, the GATT stated that a country may, on a non-discriminatory basis, prohibit the sale

of domestic or imported goods if these goods harmed the environment of the country. However, allowing a country to prohibit either domestic or imported goods because they were produced in a manner incompatible with the environmental standards of the importing country would mean waving some of the GATT disciplines. This could imply that GATT would then have to accept prohibition of an imported or exported product because it was produced in a factory where labour standards were different from those of the importing country.

101. These examples pointed to the difficulties in trying to solve conflicting situations between environment and trade simply by changing the GATT. He believed it would be more appropriate to promote international co-operation and trade to face the threat represented by unilateralism. Alternative means to the imposition of facile solutions which would allow a balance between preservation of the environment and development needs must be found.

102. The representative of Argentina believed that the issue of environment and trade was particularly important, given that there was no related legislation nor provisions in the GATT. He considered that global problems related to the environment generated an interdependency at the national level which had to be envisaged at the multilateral level through MEAs. Generally his delegation supported the Secretariat report which was sent to the UNCED. It set an important precedent for the way with which the relationship between environment and trade should be dealt. One point that his delegation felt was particularly important in this report was that the allocation of resources based on efficiency would contribute to the protection of the environment. It should not be an obstacle to the conservation of resources or the protection of environment.

103. With regard to some of the questions in the addendum to the reports of the previous meetings, his delegation believed that the GATT dispute settlement mechanism should deal with trade issues and in relation to specific agreements, unless of course the latter was covered by a waiver or approval by the contracting parties. Both Article XX as well as Article XXV of the GATT should allow its provisions generally to deal with the environment. In this way the Group's work should, in the long-run, lead us to adopt provisions or possibly specific agreements on issues such as the environment, conservation and protection of natural resources, or agree to use waivers as was the case in the Uruguay Round with regard to sanitary and phytosanitary measures.

104. He highlighted the importance of joint action by contracting parties, and noted that his delegation had referred to the importance of the panel report on U.S. restrictions on imports of tuna, which unfortunately had not been adopted by the Council as yet. He noted that important material also existed concerning the sovereignty of states to make decisions on environmental measures for which joint action was always the preferred path as opposed to individual action.

105. His delegation believed that GATT contracting parties should be given fundamental rights regarding the efficient allocation of resources throughout the world, the conservation and protection of natural resources

while, at the same time, bearing in mind that any decision taken must ensure protection of all parties' interests and the avoidance therefore of unilateral, bilateral and plurilateral attitudes. Contracting parties must act jointly in taking any type of decisions and interpreting existing or any new provisions. He concluded that his delegation was open to adopting an overall approach to environmental issues and the protection of natural resources, given the provisions of the GATT.

106. The representative of Canada suggested, for the sake of completeness in the Group's analysis, that MEAs which addressed the resource conservation of fish on the high seas should be added to the Group's work. He noted several reasons for this suggestion. First, the objective of these agreements was rather similar to some already included in the note. Second, some of these agreements did have trade measures in them. Third, given their nature and their objective of establishing rules on the high seas, they had an extraterritorial aspect. In addition, some of these agreements directly addressed the question of production and processing methods which was of interest to the Group. Finally, he imagined that if any trade measures contained in these agreements were challenged, the debate would be taken up under the auspices of Article XX.

107. The representative of Sweden, on behalf of the Nordic countries, believed that the representative of Canada advanced good arguments for MEAs dealing with fisheries into consideration in the Group's work. He added further that resource conservation of fisheries was part of the larger issue of the preservation of bio-diversity which should not be neglect. He asked why no fisheries agreements were included in TRE/W/1 since the longer list of 152 MEAs in document L/6896, from which the shorter list in TRE/W/1 came, included fisheries agreements. He asked if this implied that none of those fisheries agreements had, in fact, any trade measures in them.

108. The Secretariat responded in the affirmative, adding that it had been unable to find amongst quite a large number of fisheries agreements which were in the longer list in document L/6896, any which contained trade provisions. The Secretariat was open to receiving information from the Canadian delegation on any MEAs it considered relevant.

109. With regard to the ideas advanced in the first intervention by the representative of Canada, the representative of Mexico commented on the category comprising trade measures which were an extension of measures taken within domestic jurisdiction (category A). She stated that while in principle, her delegation could concur with the idea that a trade measure should complement domestic measures, the scope of such a category should be questioned, given that there could be cases where the party applying the trade measure did not have the resources or did not produce the product(s) that was the object of the measure.

110. The basic issue was whether the application of the principle of national treatment was sufficient to justify the utilization of trade measures for environmental protection, or whether it would be necessary to go further in order to ensure that the measures concerned did not represent a disguised restriction on international trade. She pointed out that Article XX stated that the exceptions to the GATT rules may be applied subject to the requirement that the measures did not constitute a means of

arbitrary or unjustifiable discrimination between countries where the same conditions prevailed. However, their application was not clear in the case of countries where the same conditions did not prevail, as would be the case if a substance or product did not exist in a country.

111. It followed that legitimacy should not be granted simply because a trade measure was an extension of a measure taken within domestic jurisdiction. The condition should rather be that an MEA existed that justified the need to take such a measure. Even those measures falling within this category, that were based on unilateral decisions and criteria could not be considered legitimate. She repeated that no measure should be considered as "necessary" if a similar level of protection could have been achieved by a less trade-distorting action.

112. Regarding the category of trade restrictions aimed at the conservation of natural resources that were not present in or under the jurisdiction of the country applying them (category B), she asked if the focus was on natural resources as such or on the environmental impact of the use of such resources. This question arose bearing in mind that there were, firstly, renewable and non-renewable natural resources and, secondly, natural resources whose utilization was "clean", meaning they did not have an adverse impact on the environment, and others whose utilization was not so clean. She gave the example of petroleum which was a non-renewable natural resource. It could be used either as a fuel or as an input for the production of animal-feed proteins. In the first case, the "burning" of the resource would have an impact on the environment, but in the second case it would not.

113. Under these circumstances, could a trade measure be justifiable because the country applying it wished to conserve natural resources that were outside its jurisdiction, when the environmental impact, in certain cases, was not linked to the conservation of those resources but rather to the way in which they were used.

114. With regard to this category, animals, which were "renewable" natural resources since they reproduced, presented another case. She asked to what extent could the application of trade restrictions on the grounds of conserving animals be justified. This was linked to the definition of "necessity" because the species in question was threatened with extinction. If that was not the case, this second category argument would then serve for applying measures that concealed protectionist objectives. It was therefore important that the use of trade measures in this category be agreed under internationally approved criteria and in no way on the basis of unilateral criteria or judgements. Further, there were perhaps more effective means of protecting natural resources, such as more efficient administration of such resources through a sustainable development policy.

115. With regard to the category of trade restrictions aimed at "acting as leverage" to induce other countries to accept a particular standard or membership in an MEA (category C), she recalled the obvious lopsidedness that existed among countries, not only with regard to their environmental problems but also with regard to the way they perceived these problems and

their ability to cope with them. Moreover, with regard to this category, the distinction between transboundary or global issues and internal matters was particularly important; it was hard to see the logic of adopting measures or MEAs for the latter beyond the exchange of experience and technology.

116. It followed that, with regard to problems that were legitimately of international concern, it was unrealistic to talk about harmonization of standards. It might be possible to put forward ideas based on a least common denominator which was internationally agreed on the basis of scientific justification. In this context, it would not be permissible for a country arbitrarily to oblige another to equal its own standards simply because the former had decided to implement or raise them unilaterally.

117. Her delegation had noted earlier that coercive trade measures were risky and a distinction must be made between positive and punitive measures. The allocation of financial resources and technological and administrative assistance would be more effective incentives to attract countries, in particular developing ones, to participate in MEAs. She considered that these comments applied to the category of "enforcement aspects" proposed by the representative of Sweden.

118. With regard to the category relating to trade restrictions aimed at "equalizing" differences in the cost of environmental protection at home as opposed to foreign markets in response to concerns about competitiveness (category D), she considered that no MEA existed that contained measures of this kind. This observation applied to the category of "competition aspects" proposed by the representative of Sweden.

119. Finally, with regard to the category comprising restrictions directed against products made or obtained in a manner harmful to the environment (category E), she believed this was a horizontal issue that needed to be examined, taking into account the total contribution that a given production process made towards environmental deterioration rather than the contribution per unit, in other words, on a weighted basis. For example, it must be asked which country would contribute more to the deterioration of the environment, one which possessed three machines emitting three units of carbon dioxide, or another which had ten machines emitting one unit of carbon dioxide?

120. She did not believe that the Group should discuss the environment as a whole; the issues were too complex and should be left to experts in this field. The Group should focus exclusively on trade-related matters and confine itself to studying the trade measures contained in existing MEAs, beginning with those in the agenda. In order to avoid making hasty interpretations or conclusions at this stage, study could focus on the provisions contained in those MEAs that explicitly mention the goal of the trade measure involved. On the basis of an inventory of measures rather than of their objectives, the Group could examine whether or not they were covered by the basic GATT principles. She recalled that she had already made a number of points in this connection in her previous statement.

121. The representative of Canada, in response to the delegation of Mexico, noted that the intent of his categorization was to try to categorize in a short list all possible types of trade measures. Identification of categories was an attempt to establish which types of trade measures taken for environmental reasons could everyone agree were GATT consistent and thereby establish a platform for the subsequent deliberations of this Group. Regarding the point the Mexican delegate made about a country protecting products which did not exist in its domestic environment, he agreed it would be wise to be suspicious as to the real intent of such actions. For that reason his delegation carefully separated those cases where the consumption, production, or use damaged the environment of the party taking the measure or that the party taking the measures was conserving domestic natural resources, from situations where the natural resource being protected was not present in the country taking the action. Actions taken for the former reason were included in category A; actions taken for the latter were included in category B. His delegation's intervention addressed only cases falling under category A where the situation raised by Mexico would not arise.

122. The representative of Colombia acknowledged the complexity of the subject and how early it was to elaborate on more detailed models for dealing with this subject. He noted that Colombia had committed itself to the strengthening of the multilateral trading system. It also identified with and acted with the international community in seeking timely and effective solutions to environmental problems. Given the need and urgency to remedy problems of environmental degradation and assure the preservation of vital resources, it was valid that the international community make use of economic and trade policy tools to reach environmental objectives. However, when these measures had trade consequences, they should be in conformity with current multilateral agreements and in no way constitute concealed measures to protect trade or local industries.

123. His delegation could not accept recourse to unilateralism either through the extension of domestic environmental standards or through the imposition on others of restrictions not included in domestic legislation. Likewise, the Group should not endorse or legitimize the adoption of measures outside the jurisdiction of the imposing country, much less, if these were not multilaterally agreed and/or were not also applicable at the domestic level.

124. In this respect, his delegation supported the conclusions of the panel on U.S. restrictions of yellow-fin tuna from Mexico. The panel report led to the recognition of the flexibility available in the multilateral trade system for the design of environmental measures and policies seeking to tackle the roots of environmental problems, and avoiding unnecessary, disproportionate and unjustified restrictions to trade flows. By associating the development and economic growth dimension to the environment and trade relationship, the trade system could be safeguarded from distortions onerous to the developing world. His delegation believed that it was important to respect the principles of the GATT in the design and implementation of trade actions, and pay special attention to those market intervention measures which generated indirect effects on trade.

125. His delegation favoured collective action in the search for solutions to international environmental problems. Multilateral co-operation should take precedence over coercive methods, whether through the implementation or the adoption of trade measures to deal with non-parties to MEAs such as those described by the representative of Canada and others. In this sense, positive actions rather than punitive actions to deal with the free-rider problem were preferred.

126. His delegation believed that the process initiated in the GATT should proceed cautiously, allowing governments to thoroughly digest the range of issues simultaneously being debated in other fora. The Group should focus on areas of GATT's competence, i.e. the effect on the international trading system of the use of trade policy instruments with environmental aims. It should not judge MEAs nor question the ability of governments to use trade and economic instruments with environmental objectives.

127. The Group should also operate within the context dictated by the political need to seek environmental and trade rules and policies which were mutually supportive. He urged the Group to introduce into the debate a generic analysis of the relevant provisions of the GATT beginning with the relationship between Article XXXVIII and the MEAs listed.

128. Finally he reaffirmed his delegation's willingness to support legitimate initiatives for environmental protection as well as efforts oriented towards consensus-building for the adoption of multilateral trade measures in contrast to unilateral, discriminatory and protectionist practices.

129. The representative of the European Communities noted that the Group had focused on a generic discussion of the trade provisions of multilateral agreements with a view to better understanding their rationale. This was an important part of the Group's work and several delegations had suggested additional criteria to better understand the rationale. As a practical way to proceed, he suggested that rather than trying to revise the Secretariat note to incorporate those criteria, delegations should integrate those elements which they considered to be particularly relevant in their interventions on this particular issue.

130. He added that it was also important to undertake a generic discussion of GATT provisions relevant to the trade provisions in MEAs. Some delegations had already touched on this subject and it would be useful to have a focused discussion on this aspect at the next meeting. He wished to preliminarily flag some issues which his delegation viewed as particularly relevant.

131. The first point was that a significant number of actions could be taken in order to protect the environment which need not necessarily be considered as exceptions to GATT rules. They could be fully in conformity with the normal provisions of the GATT. In this respect, clarification was needed on the link between the application of trade measures and controls on the domestic production and consumption; he wished to come back to this issue at the next meeting.

132. It was clear, however, that a country could not actually apply a restriction on a product on the basis of the method in which it was produced, if such a method had no impact on the final characteristics of the product. This was an important principle of GATT law underlined in the tuna panel report on which to build.

133. Second, under Article XX a number of trade measures related to environmental objectives could be considered particularly in the context of MEAs. Several issues merited further discussion, for instance the meaning of the phrase "such measures should not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in the chapeau to Article XX. He noted that in none of the MEAs examined, was there any indication that trade measures would be applied vis-à-vis non-parties simply because they are non-parties. There was an effort to verify how far non-parties were subject to conditions which were similar to those which applied to parties.

134. A third issue concerned the meaning of the word "necessary" in Article XX(b) and how this related to MEAs dealing with certain conservation standards. Clarification was needed as to the exact level of international agreement, i.e. did the agreement actually specify the obligations of members as regards the trade measures to be taken or did it introduce an element of discretionary application by members.

135. The question of production methods also needed further examination. Article III held that no distinction could be introduced on the basis of the way in which a product had been manufactured. The Group would have to consider how this issue, if at all, could be addressed on the basis of Article XX. He posed several questions in this regard. Should the Group look at those cases in which there is a clear transfrontier or global effect? Should it consider the setting in which such a question had been considered, in particular, the context of an MEA? How could it identify with sufficient precision the link between certain products and the way in which they had been manufactured? He flagged these issues and would elaborate further on them at the next meeting of the Group.

136. The representative of Argentina noted that his delegation was open to suggestions as to how to effectively progress in the Group's work. He considered that any environmental protection measure with an effect on trade did not fall within the regular disciplines or provisions of the GATT. The provisions of Article III applied to products once these products had been imported. Less favourable treatment than that given to the local product could not be applied. Restrictions to trade would have to fall within the provisions, for example, of Article XI which established a prohibition on the application of quantitative restrictions with the exception of these concerning agricultural production. Thus preliminarily, his delegation saw no other possibility to reach a solution on environmental questions than either through Article XX or Article XXV.

137. He pointed out that there were some important precedents on production and process methods already in the TBT Agreement as well as in the discussions that should not be ignored on sanitary and phytosanitary

agreement. The measures adopted should not be discriminatory nor unjustified or disguised barriers to trade. The sanitary and phytosanitary draft agreement didn't specifically identify this, but it indicated that contracting parties applying the international standards adopted for example, by the Codex Alimentarius or by the International Office of Epizootics, or by the International Office for the Protection of Plants would, in principle, be considered in conformity with the provisions of the GATT Articles, and, in particular, with the provisions of Article XX.

138. As a preliminary position, his delegation believed that any progress made in considering an interpretation of these environmental issues, either through Article XX or XXV, would have to be on the basis of collective action by contracting parties with a clear identification of MEAs and with sufficient specification as to how respective conformity would be determined. He added that there were also panel findings although some had not yet been adopted by the contracting parties.

139. The representative of the European Communities stated that in trying to simplify the discussion, he did not intend to ignore the important contributions of the TBT Code and the phytosanitary agreement. He agreed that these were elements that should be brought into our discussion as well as the question of the relationship between Article III and Article XI which was also an issue which needed further discussion.

140. The representative of Sweden, on behalf of the Nordic countries, noted that his delegation was interested in pursuing work on agenda items two and three in the not too distant future, so that an imbalance in the amount of progress made on the different agenda items did not arise.

141. The Chairman took note of the statements made. He recalled that many delegations had referred to the issues and questions listed in the addendum to reports of the previous meetings, and in that sense they had been useful to focus attention. The fact that the Group had not attempted to answer all the questions allowed it to move forward in its work. Talk of matrices, structures and focuses ran a small risk of attempting overperfection, which was one of the reasons he had suggested, at the outset of the meeting, that delegations follow their own structure and focus in the debate, which he noted had happened.

142. Regarding the future work of the Group, he considered that it would be logical for the Group to focus more attention on the relevant GATT provisions. He noted that a number of delegations had already discussed some of the relevant GATT provisions and he suggested that delegations reflect on what had already been stated in the discussion that took place in this meeting, in an attempt to focus on the issues they raised.

143. With regard to the suggestion by the representative of Canada to include certain fisheries agreements, he suggested that the Canadian delegation contact the Secretariat informally, who, to the extent it could, should incorporate any useful inputs. He added that those delegations that had a more detailed knowledge of some of the related MEAs and their trade provisions should share their knowledge in our future discussions. He

encouraged delegations that were in a position to do so, to make contributions on points of analysis or on facts. He added that these could be made without commitments on the delegations, as private inputs to the Group's joint discussion. He considered that it would be desirable to have these contributions in sufficient advance of the meeting.

144. Finally, he noted that the Secretariat would be in touch with delegations as to the date of the next meeting, probably during the second or third week of July, which would once again be two half days in the afternoon so that delegations would have time to think through on the issues as well as to hold informal consultations. He suggested beginning the first afternoon with agenda items two and three and, time permitting, returning to agenda item one on the second afternoon.