

# GENERAL AGREEMENT ON

RESTRICTED

## TARIFFS AND TRADE

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### Group on Environmental Measures and International Trade

#### REPORT OF THE MEETING HELD ON 9-10 JULY 1992

##### Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its fifth meeting on 9 and 10 July 1992 under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and relevant documentation were contained in GATT/AIR/3331.
2. The Chairman noted that since the last meeting, the Secretariat had prepared an addendum to document TRE/W/1 which related to multilateral fisheries agreements, and an additional document L/6892/Add.3 which completed the series of Secretariat reports on the meetings of the United Nations Conference on Environment and Development. He recalled that the present meeting would initially focus on agenda items two and three, and then on item one in the time remaining.
3. The representative of the European Communities considered that in the Communities, as well as in other contracting parties, packaging and labelling requirements were important elements of domestic environmental policies. New types of instruments and requirements were continually evolving, and the Group should better familiarize itself with their trade implications. A basic principle in this regard was that the level of environmental protection was for each contracting party to set and not for GATT review; GATT should be concerned with ensuring that its basic principles, such as national treatment, most-favoured-nation, and transparency, were respected. It should also be concerned with ensuring that trade measures to achieve an environmental goal were necessary, and did not go beyond what was needed to achieve that goal. This, however, did not imply that a country was required to lower its level of environmental protection.
4. A number of packaging measures had been enacted by several member states, and the Communities were also in the early stages of considering such legislation. The fundamental environmental challenge and objective of this legislation was to reduce or eliminate the flow of waste for disposal through reuse or recovery operations. Some different types of instruments which had been adopted in this area included: bans on the use of certain packaging material; regulations requiring that packaging be recovered or reused after the marketing stage; deposit refund requirements, applied independently or in combination with regulatory measures, to guarantee the return of packages; taxes applied to certain types of packages or varied depending on the environmental impact of each type; voluntary agreements by industry concluded independently or within the framework of domestic regulations or economic instruments; and PPM measures. The latter could relate to the final characteristics of the package or to the manufacturing process through, for instance the amount of recycling material to be incorporated into packages.

5. The types of approaches to packaging and labelling requirements also raised important issues for domestic legislators to consider. One issue related to the contrast between a selective approach, which focused on certain types of packaging materials or products, and a more comprehensive approach which aimed for a more consistent policy towards all types of packaging materials and products. He noted there was an historical evolution from the more selective approach to a more comprehensive one. Another issue related to whether any priority should be given either to reusing packages or recycling them.

6. On labelling, he described three types of schemes. The first was labelling systems introduced on a non-governmental basis by private organizations. The second was systems for which governments introduced a number of criteria and regulations governing the granting of eco-labels. The Community had adopted legislation to ensure that eco-labelling was granted on a non-discriminatory and transparent basis. The third scheme involved mandatory labelling requirements normally linked to the enforcement of environmental regulations.

7. On the future work, he suggested that, in order to have a more focused and useful exchange of views on packaging and labelling requirements and to enable the Group to have a much better understanding of the trade implications of these measures, the Secretariat prepare a document, similar to the one produced for agenda item one, containing a generic typology of instruments which had been used in the areas of packaging and labelling. Delegations should communicate to the Secretariat all such regulations and measures, including those adopted at the sub-federal and regional levels of government, regardless of whether there was a GATT notification obligation for each measure. He noted that the Community was ready to communicate fully measures adopted at the Community level and those adopted by the member states; he hoped that other delegations would do the same.

8. The representative of Malaysia, on behalf of the ASEAN countries, focused on the third agenda item. He considered that the increasing number and complexity of mandatory packaging and labelling regulations, being adopted by countries in Europe and America as a result of pressures by "green lobbies", would create new problems in international trade. These regulations provided for a variety of "reuse" or "recycle" requirements to dramatically reduce the overall consumption of packaging material. Such measures included incentives and penalties, deposit requirements, taxes, and bans on the use of particular packaging materials.

9. He believed that the trade effects of these regulations would need careful examination, particularly since the requirements varied among countries and both domestic and imported products would have to conform to them. This implied that an exporting industry would have to change the packaging material for its products if the use of such material was banned or subject to higher deposits or taxes. A report on export packaging prepared by the International Trade Center, entitled "The Potential Impact of Environmental Legislation on Export Packaging from Developing Countries", indicated that new German regulations would ban the use of all packaging materials which could not be "reused, recycled or, as a secondary option, incinerated for energy recovery".

10. He added that since the German regulations applied not only to packaging of consumer products but also to transportation or transit packaging, and to outer or secondary packaging, they would have implications not only for trade in final products but also for producers of packaging material. For example, these regulations could result in a ban on wood packaging being used even as outer packaging for transporting goods. This would result in wooden crates, in which over sixty per cent of fruit and vegetables coming from developing countries arrived, being declared illegal, since their incineration would be prohibited and their recycling problematic. Those countries which used wooden packaging material might be compelled to change over to other packaging materials for their exports to Germany and other European Communities countries if the Community regulations were harmonized on the basis of the German regulations.

11. The implications of eco-labelling systems also needed to be carefully examined. These systems might focus on the environmental qualities of the product and/or indicate whether the product was produced in an environmentally-friendly way. In the former case, the information provided by the label may help consumers to make conscious decisions on whether to buy the product. The latter case raised more complex issues since certifying authorities would have to be satisfied that the product was produced in an ecologically sound way on the basis of all the elements and operations relating to the manufacture of the product. One issue was whether producers in countries where pollution or emission standards were different could qualify for the eco-label, and if not, whether the inability to qualify would put them at a disadvantage in selling their products as compared with industries which had been able to obtain the authority to use the eco-label.

12. His delegation was particularly concerned with present discussions relating to the elaboration of an eco-labelling system for textiles. According to present indications, the textile manufacturing units in Germany could obtain an eco-label if, after verification, the certifying authorities were satisfied that the textile products were, through their entire life-cycle, produced by following environmental protection requirements. This "life-cycle" approach would cover primary fibre production (e.g. cotton plant), textile processing (spinning, weaving, finishing), making-up (additions, sewing), distribution (wrapping) and eventual sale of the textile product.

13. The proposed scheme would be voluntary and non-governmental, and he assumed would be open for participation by textile industries in other countries. However, as most of the textile units from outside countries, particularly developing countries, would not be able to qualify for the eco-label, he considered that the adoption of the system would result in a new non-tariff barrier against imports.

14. Systems for eco-labelling existed and were also being developed in other countries. Systems in Canada and Japan were government sponsored, and the United States government was examining the feasibility of adopting a nationwide eco-label scheme. He concluded that unless the criteria and standards used were elaborated in a way that adequately took into account the production and processing methods in outside countries, such systems might discriminate against imports, particularly from developing countries.

15. The representative of Sweden, on behalf of the Nordic countries, considered that the ultimate purpose of transparency in the trade field was to prevent or handle trade barriers. A timely flow of information could help to forestall trade disputes by making the actions or intended actions of governments known to their trading partners at a sufficiently early stage so that critical reactions could be taken into account before a measure was implemented. GATT had a number of rules in the area of transparency which were both active (notification systems provided a basis for dialogue about forthcoming measures), and passive (enquiry points were designated to provide information upon demand).

16. The basic transparency obligations were in Article X of the GATT and in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance. There were also obligations in several other Articles and in many of the Tokyo Round Codes. He suggested that document MTN.GNG/NG14/W/18, prepared for the FOGs negotiating group, contained a good overview of these obligations.

17. As for the future, his delegation believed that the draft Decision on Sanitary and Phytosanitary Measures (SPS), the revised Agreement on Technical Barriers to Trade (TBT), the FOGs and Services text in the Uruguay Round package contained new rules of interest in this area. He added that since active notification measures were usually triggered by measures having or expected to have a significant impact on trade, many types of environmental measures of interest in the trade/environment context could be covered. He raised, some questions, however, for the Group's consideration.

18. One concerned Article XX of the GATT which seemed to exempt measures taken under it from all other GATT obligations, except those contained in the text of Article XX itself. Thus Article X would not necessarily apply to measures taken under Article XX. The only transparency obligation then would be under Article XX itself and was the requirement that measures did not constitute disguised barriers to trade. This had been interpreted by some panels to mean that national publication was required, however, this would not noticeably enhance multilateral transparency. On the other hand, the requirements contained in the 1979 Understanding seemed to also apply to measures taken under Article XX; measures that fell under the TBT Agreement were subject to notification obligations in each case.

19. He believed that it would be worthwhile for the Group to assess whether sufficient transparency was provided in the field of environmental measures, and the suggestion by the representative of the European Communities for a Secretariat study would help in this regard. His delegation believed that it might show that there was scope for improvement.

20. There was also the separate but related issue of whether the timing of notifications was always adequate to forestall disputes. The 1979 Understanding provided for ex-post notification, in advance of implementation. This was not as satisfactory as the arrangement in the TBT Agreement whereby ex-ante notification, with a period of time for comments, could resolve problems at an early stage. This approach could be introduced for environmental measures falling outside the TBT Agreement's coverage.

21. Another issue was how well existing mechanisms were observed in practice. The Secretariat compilation of notifications in the environmental field indicated that contracting parties interpreted the transparency obligations in widely different fashions. This was not satisfactory and was a much broader topic than the trade and environment issue. It might be worthwhile for the Group to place particular emphasis on environmental measures in the review of notification mechanisms called for in the FOGs text of the Final Act; transparency was doubly important in this area, since environmental measures did not fit neatly into the structure of the present GATT.

22. Examples of measures that were not adequately covered under the present GATT text or Tokyo Round Agreements included local government measures; domestic waste handling requirements which were a part of the packaging and labelling issue; regulations on process and production methods; and measures linked to economic incentives. The latter was part of a broader issue of the extent to which GATT covered economic instruments used in the environmental area. This topic also had a transparency dimension.

23. His delegation had no firm positions on these examples but believed that this agenda item deserved deeper examination. The results of the Uruguay Round would improve the situation, however the Group must continue to accept a major responsibility for transparency in the context of environmental measures and that, after a proper discussion of this item, it would be appropriate for the Secretariat to prepare a document as a basis for further discussion.

24. The representative of New Zealand believed that the new obligations envisaged in the draft Uruguay Round agreements would significantly improve the coverage of notifications although, as pointed out by the Nordic countries, a number of possible gaps might require future consideration. Regarding fulfilment of existing obligations, document TBT/W/156, forwarded to the Group by the TBT Committee, could cast some light.

25. His delegation had previously observed that transparency was related to agenda item one through transparency of national regulations pursuant to an MEA; to agenda item three through transparency of national labelling and packaging regulations with trade effects; and to itself through the remainder of national environmental regulations likely to have trade effects. It was perhaps instructive to examine the statistics in TBT/W/156 particularly in relation to measures pursuant to agenda items one and three. Regarding the latter, the Group's deliberations might indicate the extent to which existing notification requirements were being used as intended; his delegation would not be opposed to a transparency exercise in the Group. The suggestion by Sweden for a jurisprudential exercise was interesting and further examination might provide an extension to the database for deliberation under the other agenda items.

26. It was evident from delegations' statements that a number of countries were introducing new packaging and labelling regulations which had effects on trade. However, the Group still had not addressed the question of how it should proceed on this item. A case study approach, as suggested by some delegations, could be instructive but presupposed the

existence of sufficient information or that delegations would be prepared to provide information on their governments' specific measures. Given the discussion under agenda item two, it was doubtful that the Group had access to such information; and delegations might, in fact, be reluctant to engage in further transparency for such an exercise.

27. His delegation believed that a useful way for the Group to proceed in this area might be to engage in a generic analysis, similar to that proposed by Canada and the Nordic countries for agenda item one. This analysis of the direct and indirect practical effects of measures could be based on a characterization of measures according to their type, purpose and context. The characterization could be generically compiled by the Secretariat from publicly available information similar to the exercise begun for TRE/W/1 or from information provided by delegations, as suggested by the representative from the European Communities. He believed that this type of substantive analysis would usefully inform any subsequent consideration of generic issues and the implications of existing or envisaged GATT or MTO provisions. His delegation considered that such a program of substantive, structured and sequential activity would greatly facilitate the work of the Group.

28. The representative of Canada shared the opinion that this important and complex issue held significant impact in the areas of the Group's interest. On the one hand, packaging and labelling requirements could be trade-friendly and therefore should be encouraged; on the other hand, he understood and shared the concern that they could inadvertently influence trade. The Group should approach this issue in a similar fashion as agenda item one: first educating and familiarizing itself with the issue and all its aspects, and then arriving at some consensus as to what it was attempting to address. It should then view this through the existing provisions and principles of the GATT to agree on what was adequately covered and then could move to those aspects, if any, that were not covered. This would narrow the focus of subsequent work.

29. He added that this issue was very complicated and important in that it was an attempt by governments to address environmental concerns in a market oriented way. His government sponsored voluntary packaging and labelling programs, as well as packaging regulations which it had notified under the TBT Agreement. Nevertheless, because his delegation fully supported the importance of transparency in this area and because of the increased importance of voluntary programs, his delegation would be prepared to submit to the Secretariat its government's approaches in order to assist the Group's familiarization process.

30. His delegation had also examined some underlying questions in this area. First he asked if there could be a legitimate case for applying a mandatory labelling requirement on a particular production or process method unrelated to product characteristics on imported goods. His delegation considered that such measures would not be under the purview of the present or envisaged TBT Agreement, and would be inconsistent with Article III. It would be necessary to ask what national treatment meant in this area, and how Article IX applied to these types of mandatory labelling requirements.

31. Another question related to the variety of environmental objectives which a product would have to satisfy in order to obtain a label. Labelling programs were elaborated to address several environmental issues, not simply one. For example, it could be imagined that in granting a label based on a life-cycle approach, it would be necessary to know how the production, use and disposal of that good affected, for example, water pollution, climate change, ozone depletion and soil erosion. This question exemplified the interaction between science, technical questions and value judgements, related to risk assessment versus risk aversion or acceptance that was addressed in the SPS Decision which imposed or called for the test of consistency. He wondered how this might apply to labelling programs.

32. His delegation believed that governments could encourage international co-operation on scientific and technical questions related to individual packaging and labelling programs, however, questions of values were within the purview of individual contracting parties and should not be harmonized or converged. Each country was free to weigh its range of environmental objectives on the basis of the importance of the particular problem and political situation in that country. A country with the same technical information, the same product and the same environmental objective could weigh a product differently. Therefore, because of political value judgements, it was legitimate that a same product could obtain a label in one country and not in another. Although a country did not have to subject its value judgements to scrutiny, transparency would be helpful so that production processes could be changed on the basis of such information.

33. International co-operation in this area was of fundamental importance, particularly since the Group was at the early stages of developing these approaches. The TBT Agreement called for countries to develop international standards where none existed, and the ISO had begun to address the eco-labelling question as part of its environmental work; perhaps the Group could encourage this in the area of packaging. Rather than see the evolution of inconsistent programs and labels, it would be helpful if the Group could use the approaches of TBT Agreement such as convergence equivalence, mutual recognition and cross-accreditation of technical organizations.

34. The representative of Austria supported the proposal for a generic study by the Secretariat that would assist the Group in better understanding the complex issues involving packaging and labelling. He noted that environmental packaging legislation was designed to reduce waste through reduction, reuse, and recycling. During the product's life-cycle, packaging protected it as well as the consumer; it contributed to avoiding the loss of resources from spoilage; and carried information to the consumer. Thus packaging was necessary, particularly for international trade, although its reduction, reuse and recycling should be policy aims. Problems in international trade arose primarily because of differences in national packaging requirements and levels of regulations.

35. He considered that in national as well as international discussions on packaging policy, packaging was increasingly classified according to its function and, to a lesser degree, to the material used. These distinctions, although not always clearly distinguishable, were essential

for removal obligations or for the various national collection systems and included primary packaging which made a product transportable, secondary packaging was used to bring a product into the distribution network, and tertiary packaging for bulk transport. Other distinctions were transport/transit packaging to prevent damage and which the distributor would have to remove, outer/secondary packaging for self-service, theft reduction, and advertising, and sales/consumer packaging for consumer transport and storage of the product until its use.

36. Since these distinctions effected the removal obligations of the importer, wholesaler or retailer, it was worthwhile to base them on the materials used, such as paper/paperboard, glass, plastics, metal and wood. Each had different degrees of renewability, energy consumption, and energy production when incinerated.

37. He considered that another important element of packaging policy was the setting of national waste reduction targets by governments. Although implementation at the international trade level was usually voluntary, there was the threat of regulatory or coercive action by governments, which, as governmentally applied measures, would enter the realm of GATT.

38. Product charges were another form of regulation. These were output taxes in the form of a surcharge on the price of a packaging product. The surcharge was related to the likely waste disposal and consequent pollution impact. Therefore either products or packaging derived fully from recycled material or which used reusable packaging material such as refillable containers, should either be free of the tax or have a lower rate. The practical implementation of such a system was of great importance because if the surcharge was levied at the producer level, imported goods would have an advantage over domestic ones and an equivalent levy at the border might be envisaged. If, however, the surcharge was imposed at the wholesale and not producer level, domestic and imported goods would be treated equally.

39. Waste disposal charges and deposit refund systems (DRS) had a similar potential to discriminate against foreign suppliers. Therefore, a common approach would help to avoid competitive disadvantages and negative impacts on trade flows. Policy measures would be based on an environmental risk assessment which should draw on criteria such as environmental effectiveness, economic efficiency, equity, administrative feasibility, public acceptability, and compatibility with the existing domestic and international legal framework.

40. On eco-labelling, he considered that such schemes were normally based on the life-cycle of a product (cradle-to-grave approach). This took into account scarce use of primary products, preferably of recycled materials; environmentally-friendly production processes meaning fewer emissions into the air, water and soil, less noise or limited waste; limited use of energy in the production process; and ease in disposal at the end of the life-cycle, resulting in little or no waste or reusable and recyclable materials.



41. An eco-label would function as information for environmentally-minded consumers; a reward for producers who respected the requirements for obtaining the label and would bear the eventual additional production and testing costs for obtaining the label; and a medium term competitive advantage in the market for such producers. Problems could arise in relation to the objectivity of the scientific criteria, and access to national labelling systems which were not transparent.

42. He noted that UNCED had demonstrated the growing importance of eco-labelling systems. Two examples were Chapter 9 of Agenda 21 which called for labelling programs for products to provide decision makers and consumers with information on energy efficiency opportunities; and Chapter 19 which called for elaboration of a harmonized classification and compatible labelling system for chemicals, which should not lead to the imposition of unjustified trade barriers.

43. The representative of Sweden, on behalf of the Nordic countries, considered that packaging and labelling requirements resulted from a broadening of focus from production processes to products. After initially concentrating on curbing pollution created during production processes, i.e. smokestacks and sewage pipes, a greater emphasis was now being placed on pollution caused by individual products, both during their use and later as waste. The pollution effects of products taken together could be at least as serious as those caused by production processes.

44. He added that in many countries, the awareness of the environmental implications of products had been further reinforced by serious waste management problems which, to manage, required a life-cycle approach to product pollution. Hence, new product requirements were now being set up specifically targeting product packaging and waste handling systems. Since pollution was caused not only by production facilities but also by individual products, the consumer was now considered to be an important part of the solution to pollution problems. More and better information to the final consumer on the environmental effects of products and how to use and dispose of them in an environmentally-friendly manner was increasingly being emphasized. In order to transmit this information to consumers, various labelling requirements had become increasingly important.

45. This evolution was important in order to understand the environmental legitimacy of these new types of product and handling requirements which could, however, have negative effects on trade. He considered that the exceptions to the GATT Articles attempted to balance trade interests and other policy goals by trying to ensure that measures taken for the other reasons were not more restrictive to trade than necessary. This Group should try to answer whether existing GATT rules were sufficient to maintain that balance, given the rapid proliferation of new types of packaging and labelling requirements, each of which, he believed, posed quite different problems and should be treated as a different set of issues.

46. Regarding packaging, one issue was how to interpret the term "like product", used to define discrimination. Under the TBT Agreement, it was clear that packaging and labelling were subject to the same disciplines as products and no explicit guidance was given on how to separate the two. A

restriction at the border on packaging may be interpreted as a restriction on the product itself, since GATT made no clear distinction between a product and a package. Thus the question arose as to whether a pair of shoes in one type of package was a "like product" to the same pair of shoes in another type of package. His delegation would answer yes, unless the importing country could show that there was an environmental problem clearly linked to the packaging, and that there were negative environmental effects associated with importing one combination of package and product as opposed to the other.

47. Justification of measures under Article XX tended to depend heavily on scientific evidence. In the environmental area, as in the packaging field, probabilities, uncertainties and problems of quantifications were common. Perhaps special consideration was needed in this area. Environmental policies were also complex in that inter-linked measures may be necessary to tackle a problem. His delegation was not certain if present GATT rules gave sufficient guidance on measures which, in themselves, might show limited environmental benefits, but which were part of a broad effort to tackle a problem.

48. He added that one way of tackling the waste problems associated with products was through systems requiring recycling of materials or reuse of packaging. Both types of systems might require that packaging be adapted in design or substance - the trade implications of this were obvious. In many cases package design for product marketing was important and requirements concerning such packaging may have an effect on the marketing competitiveness of an imported product.

49. Waste handling systems requiring reuse or recycling might also impose barriers to trade. If exports were small, the cost of participation in a domestic system may be too high and the exporter would find it difficult to establish a presence or to remain in a market. Even if the volume of exports was large the system could be designed in such a way that access was difficult for imported products, resulting in the possible creation of monopolies or oligopolies. The kind of requirements that were associated with waste handling systems may impact particularly on distant sources of import.

50. It was not easy to coherently assess where the GATT stood on these issues. Requirements concerning the physical properties of packaging seemed to be well covered by present GATT rules, especially the TBT Agreement. But waste handling systems needed to be examined beginning with Article III which set up non-discrimination requirements for internal measures. But since handling systems were normally non-discriminatory, the negative trade effects just described did not appear to be addressed. Without taking any position on what sort of discipline would appropriately strike a balance between environmental concerns and trade concerns, the Nordic countries believed that clearer rules would benefit both environmental and trade policy-makers.

51. Recycling systems had, in some cases, been made effective by requiring that recycled raw material be included in a specified proportion of the package concerned. Such requirements could have a considerable effect on imports, if, for instance, recycled raw materials were not

readily available in other countries, the price of such materials was higher, or the mere inclusion of such materials required a major investment in production technology or the plant. If the exporting producer had only a small stake in the market, a requirement such as this might mean a complete withdrawal, affecting the competitive situation of the market in question. It seemed appropriate for the Group to study more closely, for instance, the mixing requirements in Article III, to determine whether they addressed this question in a satisfactory manner.

52. He also flagged the topic of economic instruments used or contemplated to tackle packaging problems. The Group should study further this broader issue which cut across all three agenda items, although definite results might be difficult to reach in only one of the areas, such as packaging or labelling.

53. Labelling was an area recognized in the GATT as having a potential for trade restrictive effects since they normally meant extra costs for imported goods. For example, a producer would have to modify his product to adapt to specific labelling requirements of a country, which would be further complicated if, in addition, different countries had different labelling requirements for the product. There were also problems of measurement and evaluation of the different environmental effects. This could mean that a labelling requirement not only implied additional costs but could also act as a direct barrier to the exchange of goods. Article IX of the GATT generally recommended restraint in the imposition of labelling requirements, however, it seemed primarily to be addressing marks of origin. Other GATT Articles applied to general labelling but these gave little guidance on how to treat different forms of labelling requirements that might effect market access.

54. Negative labelling, used to alert consumers of environmentally damaging properties could, in many ways, be considered a less trade-restrictive alternative to direct regulation on a product's access to a market. As such, it fulfilled an important criteria in Article XX, and should be considered, where appropriate. If, however, there were information requirements that were difficult for a producer in another country to fulfil, it would not be a more desirable alternative to product regulation.

55. Conditions of access to an eco-labelling system could be constructed so as to act as a barrier to foreign producers, and product criteria could be designed in a way with which it was difficult for foreign producers to comply. There were also requirements related to the production process which were relevant for domestically manufactured products but not for foreign products whose production process did not effect the environment of the importing country. While no one could deny that a consumer had the right to care about the environment outside the borders of his/her own country, as long as systems were voluntary, there were no grounds for tackling them through the GATT. A particular concern on which the Group could focus was the concept of voluntary, as opposed to mandatory systems. There was a grey zone between the two extremes in which most eco-labelling systems would fit. The Group could discuss how such grey zone eco-labelling systems were to be treated under the GATT.

56. As the representative of Canada had pointed out, harmonization of these product related requirements, in many respects, appeared desirable. Developing countries' interest in access to the industrialized world could be well served by an increase in harmonization. However, from an environmental point of view, harmonization was not self evident. Since environmental conditions differed widely among countries, there were limits on the extent to which a harmonized measure would remain appropriate for a country. Nevertheless, the considerable scope for further harmonization should be studied with care in order to lessen trade problems in this manner.

57. His delegation had called for a case study approach to move forward, as they believed there was a need for more concretion in this area. However, now there appeared to be less of a lack of concrete information than imagined earlier, and in particular he noted the Malaysian statement which included concrete examples; the generic study suggested by the representative of the European Communities and supported by others was the more appropriate way forward. However, the EC suggestion that such a generic paper be based on a comprehensive notification from each contracting party, which would have to be collected and processed, would prove to be a very large and time-consuming task for the Secretariat. While this would be an ideal way to gain information in this field, a slightly less ambitious approach might be better.

58. The representative of the European Communities considered that the Secretariat could start working on the type of document that he had suggested without necessarily waiting for all the communications from contracting parties. There was a lot of available material to which the Secretariat could have access and information from delegations, within a reasonable delay, on all the legislation which they had adopted in relation to labelling and packaging requirements, regardless whether there was an obligation to notify the legislation, would complement this work.

59. The representative of Brazil noted the importance of Agenda 21, one of the outcomes of the United Nations Conference on Environment and Development, for establishing principles to guide the discussions. His delegation believed that since internationally agreed standards and rules should be the basis of national action, international efforts to arrive at mutually agreed environmental standards should be strengthened.

60. The present TBT Agreement covered marking, packaging and labelling, and, upon conclusion of the Uruguay Round, would be applicable to all MTO members. Thus an obligation to base technical regulations on international standards and to notify those not so based would exist. Governments would further have to ensure that technical regulations did not create unnecessary obstacles to trade and those with an objective considered legitimate (such as environmental protection), based on relevant international standards, were presumed not to do so.

61. He outlined some principles and "strategies" which should be emphasized when dealing with environment-related marking, packaging and labelling. The first was that packaging rules and eco-labelling, especially when mandatory, should always be based on solid scientific evidence, although this was sometimes difficult. Second, measures to be

introduced should allow an adequate adaptation period for producers in other countries, particularly from developing countries.

62. Third, international ecological standardization in the area of packaging and labelling should be stimulated, while technical co-operation programs for developing countries would have to be instituted. Ecological packaging (i.e. recycling) might require new or emerging technology not available to developing countries, and certification schemes might require tests that would depend on improved laboratory or administrative capabilities. Adequate international co-operation to this effect was in accordance with Agenda 21 programs in that efforts towards sustainable development by developing countries would have to be supported by transfers of environmentally sound technologies.

63. Fourth, in the packaging area, not only standards, but also market incentive or disincentive measures, such as taxation on environmentally harmful or less friendly packaging should be considered by the Group. In assessing these measures and their impact on trade and the environment, not only the effect of the package itself, but their total effect, such as costs associated with transportation and energy use, as well as possible restrictions to market access should be taken into account.

64. He considered that a study could be prepared by the Secretariat along the lines proposed by the representative of the European Communities. It could examine the trade value covered by the measures under consideration, especially if they were mandatory, and would probably require a notification effort by the countries imposing such measures. The sectors more subject to application of these measures could then be identified and, more speculatively, the Group could discuss how GATT could help improve the use of environmentally-friendly products in the area of packaging through trade liberalization efforts. One example could be natural fibres which were bio-degradable and still faced important trade barriers in some markets.

65. Regarding notification, he noted that the TBT and SPS Agreements contained basic notification disciplines, the former explicitly covering environmental measures, related to Article XX exceptions. The focus on mandatory technical specifications in the TBT Agreement was appropriate since it concentrated notification efforts on those regulations that had a greater trade effect. The question of voluntary measures would also need study since they can also constitute barriers to trade. Along with Article X of the GATT and the 1979 Understanding, they provided GATT with sufficient notification provisions to ensure transparency. There were, nevertheless, implementation problems.

66. Notification was a precondition to an adequate analysis of the effects of environmental measures on trade. Although it would not be appropriate to impose greater notification obligations on environmental measures as opposed to other trade-related measures, it would be useful if all countries could notify basic environmental measures that affected trade in order for the Group to make a complete assessment of the situation. This could be made in conjunction with UNCTAD's work on the Trade Control Measures Information System and in accordance with activity 2.15 of Agenda 21.

67. The representative of Japan considered that packaging requirements not only protected products contained in the package, but also enhanced environmental protection by facilitating the reuse or recycling of packages and thereby reducing waste; these were recognized as legitimate objectives.

68. Requirements aimed at reducing waste through incentives and penalties, such as credits, taxes, deposits and other mandatory or voluntary restraints, had already been introduced by some countries, and more were likely. Although packaging requirements could have considerable trade impacts, the full scope of this complex issue had not been grasped. There was growing concern that these packaging requirements could discriminate against foreign products or have unintended restrictive effects on market access.

69. Many of the packaging requirements had been applied inside, not at the border. Under Article III of the GATT a wide range of domestic measures for environmental purposes could be taken if applied on a non-discriminatory basis. However, in order to avoid discrimination or unnecessary restriction, the packaging requirement should be carefully arranged and administered with a full understanding of the significance and potential of implications to trade.

70. His delegation was concerned that many aspects of the newer packaging issue had not been fully understood because the types of measures were so diverse. There were various types of packaging measures which had trade implications. They included restrictions on materials destined for packaging, mandatory collection or removal of packaging, mandatory deposit of non-reusable containers, and mandatory recycling of packaging waste.

71. His delegation agreed that it would be useful for the Group to generically analyze the various types of measures in order to deepen its understanding of the potential trade impact of each type. The study would not address actual cases which identified countries or regions, but should be concrete enough to provide the Group with precise ideas about real issues. It would facilitate understanding of the issues and focus the Group's discussion.

72. His delegation considered that labelling requirements were not trade measures as such, but that they could have an impact on consumer patterns and behaviour and thus become potential barriers to trade. It was important to ensure, for manufacturers, equal opportunity to the labelling scheme of an importing country. It was particularly important to ensure the non-discriminatory treatment of imported products regarding the application and acquisition of labelling. He noted also that when a labelling requirement was linked with other environmental protection measures such as recycling and collection requirements, the trade impact would be more significant and require careful examination. Recognizing these points, his delegation believed that an approach similar to that for packaging, would be useful to push the Group's work ahead.

73. Regarding transparency he recalled that at the first substantive discussions on this issue at the March meeting, the view was generally shared that an increase of multilateral transparency of national environmental regulations, with both actual or potential implications on trade, was important to avoid unnecessary trade friction. In considering to how to enhance such transparency, his delegation supported the suggestion the most should be made of the existing GATT notification procedures. There were various notification procedures such as under Article XVI on subsidies, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance which covered quantitative restrictions and non-tariff measures, and those in the TBT Agreement.

74. After recognizing the utility of these existing mechanisms, the Group should examine whether they could amply capture national environmental regulations with trade effects, and then identify measures and national environmental regulations which had fallen outside of them. This approach would give direction and focus to the Group's work. In this context, he appreciated the analysis by the representative of Sweden at the March and present meetings, who had pointed out that the existing notification procedures contained gaps in the coverage, particularly measures taken under Article III and Article XX, which deserved full examination.

75. In this review full account should be taken of the improvements to the notification mechanisms that would be made possible from the successful outcome of the Uruguay Round negotiations. The revised TBT Agreement would cover production methods relating to product characteristics and certain local government measures, and new procedures would be elaborated under the SPS and FOGs agreements. Through examining the coverage of existing GATT notification mechanisms, as well as the gaps and types of measures falling outside, the Group can determine how to enhance transparency of environmental regulations in the future.

76. The representative of India hoped that discussion of agenda items two and three would enable the Group to better understand the issues involved and indicate conclusions or recommendations. He considered that packaging and labelling requirements were designed to address countries' legitimate environmental concerns, however they could result in unintended restrictive effects on international trade. They were covered by the TBT Agreement which stipulated that international standards should be used wherever they existed, and if used, such requirements shall be presumed not to create unnecessary or unjustified obstacles to trade. Given that there were no international standards in the area of packaging and labelling, the TBT Agreement stipulated that countries could formulate their own standards and technical regulations, based on scientific criteria and evidence, and following certain procedures, to address certain domestic political and social environmental perceptions. These perceptions, although possibly the same in different countries, could result in a variety of such regulations, implemented by different countries in a haphazard and ad hoc way.

77. Barriers and restrictions on international trade could be created by the development of requirements and standards which might be quite different in their effects. It had been observed that while these

requirements and regulations were being put in place, the formal procedures of prior consultations in the TBT Agreement were not normally adhered to. This resulted in short lead times, after the implementation of the measures, for exporters to take account of them, and inadequate phase-in periods which could result in impediments to trade. Such requirements could also entail high compliance costs, particularly for foreign firms. Further reflection was needed as to whether the requirements of non-discrimination were adequate to address exporters' concerns, particularly regarding packaging requirements which could result in changing conditions of competition in the importing market.

78. Although applied on a non-discriminatory basis, packaging requirements could result in high adjustment costs particularly for developing countries. Exporters would be required to make appropriate changes in production lines and the requirements on recyclable and recoverable products could have far-reaching effects on their competitiveness. A number of examples had been mentioned by Malaysia. Other problems, regarding the use of recoverable products, related to freight, transport and the necessary infrastructure could prove to be detrimental to the interests of exporters, particularly those from developing countries, who would have more difficulty adjusting to the new requirements which could be time-consuming and costly.

79. There were also no international standards, at present, relating to labelling requirements. Eco-labelling requirements had been adopted in some countries without prior consultation or discussion, potentially creating unintended trade barriers. Other problems such as difficult access to eco-labels and different requirements in different markets affected the ability of exporting firms to retain markets. Another problem was that labelling requirements not only related to final imported products but, in several cases, also dealt with the manner in which they had been produced. This caused concern because labelling requirements in a particular market might be intended to address some particular environmental concerns which might not be relevant in the country of production. The Group should consider whether equivalence should be pursued in this area or differences in rules could be permitted.

80. Since there were no international standards in the area of packaging and labelling, his delegation believed that a multilateral effort to develop them would go a long way towards removing unintended barriers or restrictions to trade. His delegation recognized, however, the complexity of the issues involved and that the formulation of such standards was in its incipient stages. His delegation also believed that the suggestion by the European Communities to conduct a generic study in order to improve the understanding of the issues involved would be helpful in moving the process forward.

81. On transparency, his delegation agreed that there were extensive transparency requirements in the GATT including Article X, the 1979 Understanding, and the notification provisions in the Agreement on Technical Barriers to Trade. In addition the implementation of the Uruguay Round results, in particular in the area of FOGs and the extension of the obligations of the TBT Agreement to all the contracting parties,



would further enhance the transparency of trade measures taken for environmental reasons, which had a significant impact on international trade.

82. The implementation of these notification requirements, however, could be considerably improved, although this would also be addressed by the envisaged Registry of Notifications under the Uruguay Round results. Further work on this particular aspect would help in providing further detail and in clarifying what further contribution the Group could make in this regard.

83. The representative of Tanzania stated that his delegation fully supported the Malaysian and Brazilian statements. He added that, given his country's stage of development as well as other countries in a comparable stage of development, adequate assistance in the context of the important issues under discussion was necessary. Attention should be paid so that these countries' abilities to trade would not be further marginalized by the activities undertaken and recommended in the context of this work.

84. Already a number of issues such as non-tariff barriers and the need for new technology had been discussed. These, as well as other issues, needed to be fully addressed in order to avoid marginalizing small developing countries, and to put, at this stage, developing countries' concerns at the centre of the Group's work.

85. The representative of the United States stated that eco-packaging and labelling standards and requirements were critical elements in the development of strategies to conserve resources and reduce and recycle major components of the waste stream, both domestically and globally. Over the past twenty years eco-packaging and labelling programs, implemented and proposed more extensively, had emerged in several of the major trading nations to achieve improved resource conservation. The approaches undertaken thus far reflected a variety of design and implementation factors and were premised, at least in part, on differing determinations of societal and cultural valuation of environmental preservation and conservation; the financial resources available to design and implement such programs; and the unique infrastructure needed to implement the programs.

86. Two Secretariat studies had tried to look at how measures in the areas of packaging and labelling were affecting trade: TBT document TBT/W/156, and the factual note on trade and environment, L/6896. These had been helpful, although they covered labelling and packaging only partially for various reasons. First, they were drawn from contracting parties' notifications, and many of these had been made under the TBT Agreement, of which not all members of this Group were members. Second, there was mixed experience with the TBT notification obligations, and third, these obligations did not provide for notification and examination of the type of measures employed for packaging and labelling.

87. Her delegation believed that the Group's work could be facilitated if delegations reviewed the existing list of environmental measures compiled by the Secretariat that applied to packaging and labelling and supplement it with any additional measures not yet notified. Where this was

cumbersome, the members of the Group could send a representative sample of their major packaging and labelling programs.

88. The objective of this exercise was two-fold. First, this inventory would improve transparency since, as each country developed and implemented unique eco-labelling and packaging programs, new and complex requirements and symbols might confuse both domestic and foreign companies and consumers. Maintaining transparency of such national and sub-national programs was critical to reducing their potentially trade-distorting impact. Countries should thus be aware and prepare for the potentially enormous demand for information and assistance when implementing them.

89. Second, an inventory would provide important information so that the Group could have a better understanding of the existing programs. In this regard her delegation supported the suggestion that the Secretariat attempt to develop an analytical framework that would assist the Group with its work. In undertaking this analysis the Secretariat could draw on efforts in other international fora, for example, the July 1991 OECD report on environmental labelling in OECD countries, which provided an excellent assessment of the status of environmental labelling schemes throughout the OECD countries, and useful information on the structure of government programs.

90. Information was also available through the International Standards Organization (ISO), which had recently established the Strategic Advisory Group on Environment (SAGE) to bring together technical, environmental and economic experts to assist in the development of strategies to address international environmental standards. Under the ISO this Group was discussing a broad range of categories including eco-labelling, life-cycle analysis and updating existing international standards to include environmental aspects.

91. Her delegation believed that the wide variety of packaging and labelling measures reinforced the need for a Secretariat analytical study. She favoured the use of a typology in order to analyze how these measures, taken for environmental purposes, related to the existing GATT and to the rules to be adopted under the Uruguay Round.

92. The representative of Australia was pleased that the Group was discussing transparency because it was an important element for the prevention of trade disputes. He emphasized that within the GATT there existed a highly developed notification system for multilateral transparency which included Article X, the TBT Agreement and the 1979 Understanding. There were some gaps in this system, but he believed a large number of them would be filled through the results of the Uruguay Round. The Group might need to examine this more closely.

93. The discussion of transparency revealed some complexities in understanding what was and was not being notified. They might become increasingly complex and require more study as more national measures were adopted pursuant to international agreements which moved away from traditional types of pollution issues towards natural resource management issues. The Climate Change and Biodiversity Conventions, for example,

might have more diverse and widespread effects than waste management and air pollution agreements, and the valuation of these and their trade impact may be difficult to assess.

94. In order to clarify what should be notified, the meaning of the term "environment" should be examined. Any ambiguity characterizing the goal for which a trade measure was taken should be clarified.

95. Packaging and labelling requirements were a response to environmental problems such as waste disposal. GATT allowed each country the right to establish high environmental standards such as for packaging and labelling, provided that certain basic principles, such as non-discrimination, transparency, national treatment, and avoidance of unnecessary obstacles to trade, were respected.

96. In theory, as long as the same packaging requirements were adhered to for all products, whether imported or domestic, packaging and labelling requirements would be consistent with Article III, and if such requirements applied equally to all sources of supply then they would be consistent with Article I. In practice, however, national packaging and labelling requirements needed to be designed and applied carefully, otherwise problems such as unintended trade effects, trade discrimination, restrictive market access and other practical problems related to reduced transparency would arise. One solution to this problem might be harmonization, to the extent it was possible.

97. He listed three other problems that might arise. The first related to the situation where producers largely supplying the domestic market had an advantage over importers in being able to change their production techniques to comply with new requirements. Importers, supplying a smaller proportion of their total production in the market would not be able to change techniques as easily. Second, importers may have difficulties in taking part in domestic systems, and their products usually had more packaging which disadvantaged them by imposing relatively greater costs compared to domestic producers who did not need to package their products to the same degree. If this was the case, it may be relevant to look at Article III, paragraph 4. Finally, linked with the issue of transparency, was the question of the time period before requirements come into force. If it was relatively short, then importers may not have time to purchase recyclable or reusable packaging material.

98. His delegation supported a generic analysis by the Secretariat and endorsed the New Zealand suggestion for a review of the purpose and context. He agreed that the Group should not be over-ambitious in terms of the wealth of material inflicted on itself or the Secretariat. It may be difficult to aim for comprehensive notifications from all contracting parties, not necessarily because of lack of willingness but because of time constraints. The Secretariat should begin work on the analysis based on available information which should provide enough material for the type of analysis suggested.

99. The representative of Argentina believed that the discussion reflected a good measure of convergence regarding the importance of

securing the fullest transparency of national measures in order to avoid disputes. Article X of the GATT, as well as the 1979 Understanding provided substantial knowledge at national levels. The Uruguay Round negotiations, particularly the revised TBT Agreement which covered technical standards of sub-national entities including non-governmental bodies, and the SPS Agreement, would compliment existing notification procedures to provide an appropriate measure of transparency.

100. He highlighted counter-notification, which was considered in the 1979 Understanding, as well as in the improved TBT and SPS Agreements. These were important to secure national environmental measures having an impact on international trade. Article XX contained exceptions for human, animal or plant life or health and the preservation of natural resources, but the environment, which could include other measures to be interpreted by the contracting parties and this Group, was not specifically within the GATT. Any such interpreted measures should appear among the exceptions covered by Article XX.

101. On packaging and labelling his delegation supported the suggestion for a generic approach to the Secretariat's work. It may also be necessary to study how to compliment existing notification procedures and he agreed with Brazil and other delegations that it may be necessary to extend notifications to include environmental measures having an impact on trade. This might be achieved not by a compulsory exercise, but rather by a Group decision to continue its work in the best possible way.

102. He noted the EC referral to a party's autonomous decision to adopt measures which should not go beyond what was necessary to comply with environmental objectives. The GATT stipulated that implementation of exceptional measures should not set up disguised restrictions to trade. National treatment of measures such as those under Article III of the GATT were not the only concern, the issue of non-compliance under Article II, without necessarily violating the national treatment principle, could also be of concern. This could be, for example, the result of autonomous measures which were not consistent with requirements under the SPS Agreement.

103. Fundamental compliance with national standards must be secured. Such standards should emanate from the relevant bodies, and in the case of the SPS Agreement, they have been identified. He noted that in a panel report not yet adopted by the GATT Council, there was a recommendation, or note was taken of the fact that contracting parties may collectively interpret exceptions relating to the environment. Where international standards did not prevail there was a requirement to produce scientific evidence, which could be challenged, as a substitute. If the scientific evidence was not considered definitive by other parties, there could be an annulment or infringement.

104. These aspects were important and must be taken into account in the Group's work, particularly on labelling and packaging. The adoption of an understanding or agreement by this Group extending the present coverage of notifications under TBT and other GATT provisions may facilitate understanding of these measures' impact on trade. This was a topic which

deserved further analysis to ensure that the Group's work will be solidly rooted in identifying measures which have impacts on trade.

105. The representative of Mexico stated that transparency was a fundamental and essential element in dealing with environmental measures. Measures taken for environmental objectives could constitute obstacles to trade and, as a result, surprise exporters or importers when their access to another country's market was blocked. Transparency measures could be significant for resolving and avoiding problems between trade and the environment and could clarify the interpretation of the conditions in Article XX of the GATT by avoiding any measure appearing as a disguised restriction.

106. GATT's dispute settlement history confirmed this interpretation. The 1982 Panel on US prohibitions of imports of tuna found that since the restrictions were adopted as a trade measure and publicly proclaimed as such they should not be considered disguised. The 1983 Panel on US imports of certain automobile components found that what had to be examined was not "the trade measure as such, but its application". Thus, since the restrictive order had been published and based on a patent, infringement of which had been clearly defined and established, the measure was not disguised.

107. His delegation did not believe that a new mechanism was necessary to confront the transparency problem in the GATT system. There were already suitable instruments to deal with this such as Article X of the GATT, as well as the 1979 Understanding. Further the Uruguay Round outcome would undoubtedly contribute to strengthening existing legislation in this field. The TBT and SPS Agreements contained procedures relating to publication, notification and other useful elements that could apply to the environment. The basic difficulty related to the implementation and enforcement of these disciplines; perhaps the Group should consider some type of compulsory obligation to comply with these provisions.

108. One problem was that in a number of countries measures and systems relating to the environment were not only at the central government level but also at local and municipal levels. Some systems, particularly relating to labelling and packaging standards, emanated from independent organizations and industry which made them not transparent and difficult to predict and control. Transparency at all government levels had to be secured and extended to measures and prescriptions arbitrarily created with no scientific basis.

109. His delegation agreed that a generic stocktaking of notified measures should be prepared which would cover two types of measures: national measures adopted under multilateral agreements and mandatory or voluntary packaging and labelling measures. Co-operation among countries, by informing each other about measures that are in force in their territories, would be essential for the Group to progress on this agenda item.

110. The area of packaging and labelling showed the clearest trade problems. In a number of countries the application of systems was based on quite arbitrary criteria which was not effective for protecting the

environment. These systems could have an important impact on consumer choice and become a significant obstacle to foreign imports. They could be a violation of Article III, which indicated that imports should not receive treatment less favourable than that granted to products of national origin as regards laws, regulations or prescriptions affecting sales, offer for sales, purchase, transport, distribution and the use of the products on the national market.

111. Legislation concerning packaging and labelling in industrial countries tended to be based on ad hoc criteria, which responded to industry pressures, and often created a means of promoting certain materials incorrectly perceived as more environmentally preferable than others. Developing countries, in particular, are encountering growing difficulties in adapting to excessively rigid packaging requirements which add unnecessary costs and limitations; some types of recycling were even damaging to the environment.

112. Unilaterally decided, arbitrary labelling systems were also worrisome. Even if voluntary, eco-labelling produced in a haphazard fashion by associations, companies or industries should be avoided. The proliferation of symbols and the lack of criteria for their selection can add to the confusion and misinformation for consumers. Additionally foreign producers could have more difficulty in accessing markets and the testing procedures could constitute a significant obstacle to imports.

113. Packaging and labelling should be examined on the basis of discernment between legal measures and voluntary measures which did not enjoy government or legal support. Mandatory measures were easier to deal with since they could be taken as technical standards or regulations; their application required compliance with national treatment, non-discrimination and transparency. Voluntary or non-mandatory measures were more difficult since they enjoyed partial or no legal support and created a new competitive imbalance by affecting consumer choice. He asked how it could be ensured that these measures would comply with certain basic parameters and limitations so as not to become obstacles to trade. Presumably government intervention would be necessary to secure sufficient international co-ordination.

114. The experience provided by the negotiation of the TBT Agreement revealed the impossibility of standardizing or achieving uniform standards because of differing environmental conditions and national circumstances. Obligations could, however, be established so that parties would use international standards as a basis for creating national standards and guidelines. When these did not exist the measure should comply with criteria of need and reasonableness in its application. For this purpose, solid scientific criteria would be necessary to establish and assess the difficulties of developing countries in adapting to systems and in their need for technology transfer.

115. A generic compilation of these measures, both voluntary and mandatory, perhaps as proposed by the European Community and other delegations should be carried out in order to assess their compatibility with provisions of the GATT and the TBT Agreement.

116. The representative of Malaysia, on behalf of the ASEAN countries, considered that the existing notification obligations under the GATT and its subsidiary agreements were generally adequate and comprehensive in requiring countries to notify regulations taken in environmental fields that were likely to have significant trade impacts. In this context the provisions in the TBT Agreement regarding notification of the objectives and products covered in any new regulations were particularly important. Such notifications, to be made sufficiently in advance of the final adoption of the regulations, were to provide an opportunity for comments by countries which had trade interests in the products and which considered that adoption may adversely affect their exports.

117. These provisions applied also to regulations adopted to achieve environmental objectives. It did not appear from document L/6896, however, that parties to the TBT Agreement were notifying the draft regulations that they proposed to adopt for environmental reasons. Measures notified included imposition of import or export barriers on harmful products, adoption of emission and other such standards, recycling requirements and packaging and labelling requirements. Such notification provisions were expected to be strengthened when the Uruguay Round was accepted and implemented.

118. The acceptance of the concept of single undertaking would broaden the number of countries required to notify. His delegation viewed the SPS and FOGs Agreements as relevant to the future work of the Group, in particular the former would compliment the notification obligations in the TBT Agreement. It was possible that, although existing provisions were comprehensive and would be strengthened under the Uruguay Round, implementation problems might still exist.

119. In this context he noted that the draft FOGs text provided for the establishment of a Working Group on Notification Procedures immediately after the conclusion of the Round. One of its important tasks would be to examine how compliance of the notification obligations could be further improved bearing in mind the overall objective of improving the transparency of national trade policies and effectiveness of surveillance.

120. The representative of Hong Kong stated that his delegation also recognized that environmental packaging and labelling requirements were an increasingly important means of addressing environmental problems and were therefore welcomed. They could, however, have unintended trade effects or impede market access and therefore needed to be introduced and applied with the utmost care.

121. On packaging the possible trade effects appeared numerous. The introduction of reuse, recycling or deposit and return schemes, even when clearly non-discriminatory, could, in practice, disadvantage exporters who had to cope with the greater transportation costs involved in reclaiming used packaging or who may lack the infrastructure needed to carry out reclamation or recycling in the importing country. It was far from evident if the GATT provided either disciplines or guidance to redress such disadvantages, or how such disadvantage to exporters could be removed without interfering with the workings of comparative advantage, whereby distance or proximity to markets was a competitiveness factor.





122. He added that the requirements to use environmentally-friendly packaging could and did create difficulties for exporters who may not be able to obtain or afford such packaging material, or who may be forced to use less environmentally-friendly material in order to protect and preserve their products during transportation and storage. Adapting production to new packaging requirements could also be costly, especially where different importing countries imposed differing standards. Some form of harmonization would appear to be the optimum way of reducing these difficulties.

123. His delegation considered that some of the more recent kinds of environmental labelling had at least the potential to create impediments to trade. Several delegations had referred to the various eco-labelling schemes becoming popular in countries where consumers were particularly aware of environmental issues. Of particular interest are the non-governmental, voluntary eco-labelling schemes, which are consumer driven or introduced as part of a domestic industry's marketing strategy.

124. His delegation lauded market forces and consumer choice in taking the lead over government intervention, but noted that special care was needed to ensure that such schemes did not raise unintended obstacles to trade. The first potential impediment concerned transparency; exporters had difficulties knowing about voluntary eco-labelling schemes, given that many were not supported or introduced by governments and thus less likely to have been notified to the GATT.

125. A second was that exporters might have difficulty gaining access to such schemes because it was less easy for them to demonstrate conformity with the requirements. This problem could perhaps be reduced by the greater use of equivalency procedures, mutual recognition arrangements or unilateral declarations of conformity. A third potential trade problem was that some eco-labelling schemes might be based on environmental preferences which lacked universal acceptance. Exporters may also find that the same product was subject to quite different labelling requirements in each individual export market.

126. A fourth issue, was the emergence of eco-labelling schemes which judged whether the product was produced in an environmentally-sound way. This raised the question of whether an importing country should judge the exporting country's production methods by the same standards that were applied domestically. There would seem to be a case for making a clear distinction between imported and domestic products in such circumstances.

127. He concluded by noting his delegation's support for a Secretariat paper describing different kinds of packaging and labelling requirements, and that there was some merit in delegations sharing, on a voluntary basis, information about their own domestic packaging or labelling schemes.

128. The representative of Chile stated that his delegation also attached importance to the need for environmental protection, which should be made compatible with the objective of free trade. In order to achieve a balance between these two objectives the Group should spell out the specific way in which free trade and environmental protection could be conjugated;

labelling and packaging was undoubtedly a central aspect which deserved the Group's immediate consideration.

129. It was important to distinguish packaging from labelling. Labelling for environmental considerations would tend to add costs to the aggregate of production, transport and the elimination of waste in the final stage. Packaging as well as labelling requirements meant higher costs for both exporters and importers which would tend to generate unemployment in the exporting country, since further investment would be required to adapt to the new requirements. If this was indeed the case, some equitable distribution of the higher costs between the importer and the exporter should be elaborated through a multilateral agreement.

130. Decisions about the environmental acceptability of packaging would have to be based on available scientific evidence. Were this not to be the case, there would be a serious risk that packaging requirements would be used to restrict imports of certain products and open the door to endless political debate and negotiation. Also the changes that were decided upon would have to allow sufficient time for exporters to adjust to the cost of adapting to the new circumstances.

131. His delegation also believed it essential that there be no discrimination between trade and domestic production and there be consistency in the requirements on products. There would have to be symmetry between products having similar packaging and components. A situation to be avoided was exemplified by a country exporting electronic equipment packed in plastic while forbidding the import of fruit packed in plastic.

132. His delegation noted the issue of identical requirements regarding processes or production methods not taking into consideration the different countries or areas in which the product was being manufactured. For example, is it just as ecologically damaging for a factory emitting "x" pollution in Hamburg or in Atakama desert? This required careful consideration both by the countries themselves and by the Secretariat. He concluded that the Secretariat and delegations should progressively collate environmental standards in order to continue this work.

133. The representative of Colombia stated that his delegation believed that the most suitable place for transparency of national and environmental standards with trade effects was in the GATT, particularly Article X, the 1979 Understanding, Article XVI and Technical Barriers to Trade Agreement. Further, the coverage and practical functioning would be improved when the Uruguay Round results started to take effect; national government standards would be covered as well as the rationalization of production matters. There would be an Agreement on Sanitary and Phytosanitary measures and the creation of a central notification registry under the FOGs text. However, non-governmental, voluntary measures may constitute barriers to trade, affect the competitiveness of imports to exports, or artificially create comparative advantage in the flow of trade. In light of the growing proliferation of such voluntary measures, this topic, which went beyond transparency, required more thorough analysis.

134. The present GATT called for transparency for measures related to trade. His delegation believed that each country had the autonomy to determine its level of environmental protection consistent with international standards. However, when national standards affected trade there was a clear mandate in the multilateral system regarding transparency. Another mechanism for dissemination of information on trade measures, which complimented the notification system within GATT, and was supported in Cartagena and Rio, was the computer system of information on control measures, presently deployed by the UNCTAD Secretariat.

135. Regarding the trade impact of new packaging and labelling requirements designed to protect the environment, his delegation reaffirmed its concern regarding the adoption of such measures in some markets without due regard to GATT provisions. He added that a starting point for discussion was the principle that countries preserved their autonomy to define the level of environmental protection they desired, keeping in mind international standards. Despite the lack of international standards on labelling and packaging, The TBT Agreement established procedures to smooth the functioning of such requirements.

136. His delegation agreed that the best way to structure a debate and analysis in the Group on this topic was for the Secretariat to prepare a note as proposed by the European Communities. It should not only take into consideration national or sub-national labelling and packaging standards but also voluntary schemes and those established by industry or producer organizations. A logical starting point would be an inventory of measures including a definition of what constituted environmental labelling, such as labels to encourage products which are considered to be environmentally safe and those associated with environmental policies and practices directly related to trade, such as the dolphin-safe label for tuna in the US market. Similarly the study should draw attention to the experience of exporters with labelling and packaging.

137. On the basis of this analysis the Group should discuss the impact of these measures on trade and not yield to the temptation of working towards standardization in this field; there were suitable organizations for that activity. The debate should examine the impact of packaging and labelling on imports and exports and on competitiveness and production, taking into consideration the situation of developing countries, particularly the discrepancies in technological development which could hinder the adaptation of production processes in these countries.

138. The representative of Canada, on agenda item one, thought it important to clarify that GATT did not interfere with the setting of domestic or international environmental objectives and standards, and that it already provided considerable scope and flexibility for the application of trade measures as part of an environmental program. He highlighted two relevant points in this regard.

139. First, as long as measures were implemented for a demonstrable environmental purpose GATT could not render judgement on environmental standards involved or the environmental policies and priorities of contracting parties. Under the TBT and SPS Agreements negotiated in the Uruguay Round, contracting parties had agreed that, in some instances,

reference to available scientific evidence as well as existing international standards was relevant for standards that would affect imports. However, the discussions under these Agreements, as well as the approaches taken by GATT panels that had examined measures under other GATT provisions, had underlined that making environmental policy was not within GATT's mandate.

140. Second, subject to the fulfilment of certain conditions, GATT did not prevent the use of trade measures to extend domestic environmental laws and regulations on goods and exhaustible natural resources within a country's jurisdiction to imports or exports of like products. This was true regardless of whether the measures were unilaterally imposed for domestic reasons or in the context of a MEA addressing a transboundary or global environmental problem. In the latter case the measures could be applied to both signatories and non-signatories to the MEA.

141. Thus, it could be demonstrated that the GATT did not impede development of domestic or international environmental standards, and provided for the use of a wide range of trade measures for their support. He noted that between 1980 and 1991 contracting parties sent 246 notifications of trade measures taken for environmental reasons, and none had been challenged or found inconsistent.

142. He considered that the main reason public debate on trade and the environment often suggested that the GATT did not adequately address environmental concerns was because such suggestions often addressed the use of discriminatory and/or extra-jurisdictional trade measures as tools for enforcing or extending environmental policies or regulations, or certain environmental agreements of a transboundary or global nature. This new rôle for trade measures was central to the Group's work, and not previously contemplated under GATT.

143. However, GATT currently contained principles and provisions relevant to agenda item one, particularly Articles I, III and XX. The fact that nothing in the GATT would prevent the use of trade measures to extend to imports or exports domestic laws and regulations on environmentally-harmful goods and substances or exhaustible natural resources within a country's jurisdiction, was subject to certain conditions, one of the most important being non-discrimination. This key principle was reflected most prominently in Articles I and III which required most-favoured-nation and national treatment, two cornerstones of the GATT, the strict enforcement of which his delegation attached great importance; only by fulfilling the obligation not to discriminate would the benefits of the trade concessions and disciplines negotiated over the years be available to all in a predictable and relatively secure international environment.

144. However, departures from this and other GATT requirements, such as the prohibition on quantitative restrictions in Article XI, were allowed in certain cases under Article XX. An important part of the Group's work was to attempt a common view on the basic rationale for and interpretation of Article XX. He cautioned, however, that the Group could not function as a panel, in that the application of Article XX in any specific case was beyond its scope, however it could clarify the parameters of Article XX.

145. He confirmed his delegation's view that although the word "environment" did not appear in Article XX, the language "human, animal or plant life or health" in Article XX(b) and "the conservation of exhaustible natural resources" in XX(g) would cover any environmental purpose including fisheries conservation.

146. Regarding the headnote to Article XX, the general GATT interpretation was that it contained two separate tests, both of which must be met for a measure to qualify under the exception. First the measure must not be applied in a manner which would constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevailed. Second, the measure must not be applied in a manner that would constitute a disguised restriction on trade.

147. On the first test, his delegation believed that the phrase "countries where the same conditions prevail" provided the best guidance for interpretation. Practical meaning could be given to this concept, and it also offered the best basis for interpreting the terms "arbitrary and unjustifiable", which would be difficult to define in isolation.

148. While there was little jurisprudence in this area it seemed reasonable that if a measure was applied to exports of some countries but not to others, the country invoking Article XX basically would be required to show that the contracting parties exempted from the measure had different conditions than those to which the measure applied; that the conditions in question were substantially different and were the reason for which it was considered necessary to apply the measure; and that all other contracting parties with the same conditions were being treated equally.

149. The key point was the need to demonstrate that a specific condition, related directly to the products and import measures involved, existed and was different in countries subject to the discriminatory trade measure compared to the corresponding conditions in countries not subject to the measure. He added that it would be useful to explore possible examples of such specific conditions, with the understanding that more general conditions would not meet the threshold. For example, referring back to earlier discussions in the Group, Canada did not consider that lack of membership in an international environmental agreement nor the fact that a discriminatory measure was mandatory under an MEA to be, in themselves, sufficient to meet the test.

150. His delegation also believed that the long-standing GATT practice of interpreting exceptions narrowly was appropriate for this criterion in order to provide guidance on the reasonable application of the terms "arbitrary or unjustifiable". Taking full account of the specific conditions on a case-by-case basis, regarding products from countries to which a measure applied compared to those from countries not affected, was necessary to provide the basis for a fair determination of what was arbitrary or unjustifiable.

151. Regarding the second test in the headnote, his delegation considered the requirement that a measure must not constitute a disguised restriction on trade to mean that the measure could not be put in place for the purpose or having the effect of protecting domestic production. The 1982 panel on

US restrictions of imports of tuna found that this requirement had been met simply because the restrictions had been made public. The 1988 panel on Canadian measures affecting salmon and herring found this insufficient and applied more stringent criteria, which Canada had accepted.

152. Sub-paragraph (b) of Article XX, in addition, required that the trade measure be necessary to the stated objectives. This had been interpreted to mean that the contracting party invoking the exception must demonstrate that other measures consistent with the GATT were not reasonably available and/or that the measure being used was the least trade-restrictive to achieve the goal. As in the more recent tuna panel, the invoking country may have to demonstrate that other options, such as pursuing multilateral co-operation to address the environmental objective, had been considered and why they were not used.

153. His delegation believed this was a reasonable requirement and a basic and sensible part of the process. If such a process of considering the GATT consistency of various options and whether less trade-restrictive approaches could be used was not followed prior to the imposition of trade restrictions, unnecessary impacts on trade could result.

154. He noted that sub-paragraph (g) of Article XX contained two further tests. The first was that the measure must be related to the conservation of the exhaustible natural resource in question which had been interpreted to mean "primarily aimed at" conservation. The second was that any measure restricting imports or exports must be "in conjunction with" corresponding restrictions on domestic production or consumption. His delegation had concurred in these basic interpretations. As reflected in the 1982 tuna panel report and the 1988 salmon and herring case, it was clear that Article XX covered fisheries conservation matters. Other types of exhaustible resources had not been addressed by panels and might initially be discussed by this Group.

155. There was, however, not a lot of jurisprudence on Article XX. That was one of the reasons that his delegation found the blockage of the latest panel report on US tuna measures so disappointing and unhelpful. The panel report contained a number of important findings with respect to Article XX that had been accepted by almost all contracting parties. Although it had not come forward, he highlighted a few of the significant contributions the report made.

156. First, the panel noted that it had been made evident during its examination of the case, that "... the provisions of the General Agreement imposed few constraints on a contracting party's implementation of domestic environmental policies". His delegation agreed.

157. Second, the Panel clearly determined that the extra-jurisdictional imposition of environmental policies and standards on other contracting parties by the United States was not permissible under the GATT. The Panel found that if the broad interpretation of Article XX(b) allowing an extra-jurisdictional approach, suggested by the United States, was accepted, "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The

General Agreement would then no longer constitute the multilateral framework for trade among all contracting parties but it would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations".

158. The panel further found that "the same considerations that led the panel to reject an extra-jurisdictional application of Article XX(b) applied also to Article XX(g)". The panel observed that "Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction". The panel concluded generally that, "a contracting party may not restrict imports on a product merely because it originates in a country with environmental policies different from its own". His delegation strongly agreed with this conclusion and believed that the principle that extra-jurisdictional measures were not sanctioned under the GATT must be preserved.

159. Finally, the focus of the panel report had been on the unilateral measures taken by the United States. It had not addressed the use of extra-jurisdictional or discriminatory measures on a multilateral basis. His delegation did not believe, therefore, that the panel condoned the use of such measures under a MEA, however, it did lay down a general stricture against extra-jurisdictional measures. It also referred to "the right of the contracting parties, acting jointly, to address international environmental problems which can only be solved through measures in conflict with the present rules of the General Agreement". This reminded him of the relevance and importance of the waiver procedure.

160. The question of the use of such measures on a plurilateral or a multilateral basis was a new area which would need to be examined at length. He flagged a couple of questions for the Group's consideration that he believed would be relevant to the discussion of this issue vis-à-vis GATT principles and provisions.

161. His delegation viewed extra-jurisdictional and non-discriminatory measures as key. Article XX criteria provided important safeguards against abuse when considering exceptions to non-discrimination. Its tests need not be an impediment to the MEA situation, rather they reflected a common sense approach that could be applied when considering any use of otherwise GATT-inconsistent trade measures for environmental or other reasons.

162. He noted that there was a view that in some circumstances discriminatory measures under an MEA could be used. What those circumstances might be, as well as their relation to Article XX raised issues and questions that the Group would have to examine closely. For example, what level of membership in an agreement would be required to represent an international consensus on the environmental objectives and programs, and at what point would this level fall short of representing sufficient international consensus to justify discriminatory measures? Under what circumstances would the use of trade discrimination be necessary and justified? If there was wide participation in the MEA, could this actually reduce the necessity for discriminatory measures against a

minority of non-parties? If trade measures were called for, would or not applying them on an MFN basis consistent with what was being done domestically by parties be effective in achieving the environmental objectives of the MEA?

163. More questions included, for example, what would happen if the domestic actions by participants under a MEA with broad participation were applied on a national treatment and MFN basis to all imports and exports of the like products concerned, including from non-parties? Would MFN action and market forces combine to do the work? Would the more co-ordinated action by participants that could result from this approach also contribute to effective implementation of the MEA?

164. In closing, he stated that Article XX represented an attempt to strike a balance between the needs and the rights of contracting parties to take certain GATT-inconsistent measures for overriding policy or regulatory reasons, and the need for safeguards against abuse and unnecessary trade impacts that could arise from those derogations. Article XX presented issues for discussion and areas that would benefit from further clarification, but the important rôle that its conditions and the criteria could play should be kept in mind.

165. The representative of the United States presented her delegation's effort to marry different elements from previous interventions, particularly from the Canadian, Nordic and Australian delegations at the May meeting, in order to find a typology on which the Group could agree so that it could make some necessary observations and judgements about the interrelationships between provisions in MEAs and the GATT. The representative of Canada had alluded to some of these interrelationships.

166. Both the Nordic and the Canadian presentations had described a construct that looked at an environmental problem. Her delegation would add that some consideration be given to the origin of the environmental problem and where its impact was felt, which, in many cases, were not necessarily the same. There was the so-called domestic problem which was reflected in the Canadian statement of May. This type of problem, which was totally within a country's borders, was not likely to be the subject of a MEA but was included because it had been referred to and was the reason for which a number of trade measures were taken.

167. The other category of environmental problems were extra-jurisdictional. These included transboundary types of activity such as the questions of waste disposal, acid rain, and fisheries issues; regional activities or agreements that in themselves had not used trade measures per se, but which might use them in the future; and global agreements such as the Montreal Protocol, the Climate Change Convention and CITES. This category was included in both analyses and may be worth starting with.

168. The construct then addressed the question of what instrument or agreement was used to resolve the problem. This could include domestic law or regulation, an agreement between two parties, or a regional or multilateral agreement. An analysis of how many countries were involved in



the trade measure may be helpful in looking at the number of parties to the agreement. One question was whether the trade measures were taken only among parties or also on non-parties. Numerous delegations had attempted to define what might define these types of categorizations.

169. Next, her delegation looked at the purposes for the action that affected trade. This was related to item "C" of the Canadian intervention and number three of the Nordic intervention. Her delegation mentioned four such purposes although there could be others. The first was to achieve the environmental objective of the agreement of which CITES was an example. The second was measures to encourage other countries to join the agreement or meet its environmental objectives, such as those contained in the Montreal Protocol. The third was measures to mitigate the free-rider problem, and fourth was measures to address the special concerns of developing countries, also contained in the Montreal Protocol. The question of how developing countries would relate to MEAs was also a concern of UNCTAD.

170. She noted that the construct then incorporated the main elements of the Australian list of tools and, although these were certainly not the only types of tools, her delegation believed they provided a useful start. She added that there were two ways of looking at these tools. The first way asked if the measure was targeting the good, i.e. the imported species, controlled substance or waste, or the production or process method. The second way looked at items included in the Australian intervention such as import restrictions including bans, quotas or tariffs, export restrictions which had mainly been in the licensing area, and others which may include labelling and packaging issues that may be used in the context of environmental agreements.

171. The representative of New Zealand believed that the Group had progressed at the last meeting in establishing a useful way to engage in substantive analytical work under agenda item one. His delegation found the approach proposed by Canada and the Nordic countries for a generic but substantive analysis of the direct and indirect practical effects of trade provisions and MEAs on the basis of a categorization of such provisions by their type, purpose and context, to be a natural evolution of the previous deliberations of the Group. It focused several of the questions posed at the Group's first substantive meeting and gave effect to the first part of the sequential procedures suggested by the EC; his delegation believed it was the most sensible way to proceed.

172. Through the type of analytical investigation suggested by Canada, the Group should be able to define the detail and scope of the issues on which the relevance of GATT provisions could be subsequently discussed. He added that if such analytical work had already been done elsewhere, the Group should examine it to see if it could add any new perspectives; if the work had not been done the Group should do it. TRE/W/1 provided information for this work, but further information, particularly on purpose, context and effects of measures, would also be needed. His delegation supported the suggestion that such information be compiled by the Secretariat or by delegations, perhaps through non-papers, and looked forward to the Group beginning this work in the Autumn.

173. He added that until now he had noticed a certain reluctance to structure discussions in the Group, which perhaps was a result of a widespread feeling that, in its embryonic stages, confidence would be built if delegations could follow their own structure and focus. His delegation believed that the discussions in this meeting tended to confirm that the stage had been reached where firmer structure, which could carry greater substance, was both necessary and appropriate. He sensed that contracting parties, interested in the GATT making a contribution in the debate on trade and environment, would not fear but would welcome more structured work in the Group, for it was in this way that GATT could make a positive contribution in keeping with its expertise in the functioning of the multilateral trading system.

174. Regarding GATT provisions, much had been said at previous meetings, and many questions had been raised. The substantive contribution by Canada was of great assistance in this regard. He believed that, at this stage, some analytical work of the type that he had just proposed was necessary.

175. The representative of Mexico stated that she would focus her intervention on Article XX, since her delegation believed it was the most relevant GATT provision to the relationship between trade and the environment. The contributions made by other delegations at the May meeting, particularly Canada and Sweden, provided a sound basis for this examination, as well as the Secretariat note on various trade measures contained in MEAs.

176. She summarized four types of measures identified in the Secretariat note. The first was the prohibition of trade in controlled products between parties to an agreement. These measures appeared in only a few agreements and were almost always applied under a system of export and/or import certificates. The second was the prohibition of imports of controlled substances from third parties. These measures were generally accompanied by control measures in respect of domestic production and consumption of the parties applying them.

177. The third was restrictions (QRs) on trade in controlled products among parties to an agreement. These measures operated almost always on the basis of the requirement for import and/or export permits subject to certain conditions, the issue of such permits being in most cases at the discretion of the authorities concerned. Finally, the fourth type of measure was prohibitions or restrictions on the import of products containing or manufactured with controlled substances. These were also accompanied by control measures in respect of the domestic production and consumption of the parties applying them.

178. Two major categories, corresponding to Canadian categories A and B, could be identified when categorizing trade measures, as suggested by Canada and Sweden, according to their purpose or rationale. Category A included measures that were an extension of those 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. Category B included measures aimed at conserving natural resources not present in or under the jurisdiction of the country applying the measure. She believed the concept of "exhaustible" should be added to natural resources in category B.

179. She considered that measures related to PPMs could be included in category A since MEAs were supplementary to other domestic procedures and constituted extensions of them. The other categories proposed by Canada were not adaptable since they were not explicitly covered by any MEA. She also considered that, in terms of evaluating their compatibility with GATT provisions, all the types of trade measures to which she referred could be directly or indirectly incompatible with Articles I, III, XI or Article XIII of the GATT or with various combinations thereof, nevertheless Article XX could waive all GATT obligations in this regard, subject to certain conditions.

180. She noted that Article XX stipulated that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party" of exceptional measures provided certain conditions were observed. The first two conditions were that the measures must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevailed, or a disguised restriction on international trade. Another condition was that the measure must be necessary, as mentioned in Article XX(b) and also in sub-paragraphs (a), (d), and (i). For the conservation of exhaustible natural resources, the condition was that such measures were made effective in conjunction with restrictions on domestic production or consumption.

181. Thus, the four terms, "arbitrary", "unjustifiable", "disguised restriction" and "necessary" needed to be defined. The first two terms were similar and linked to various concepts: the existence of scientific evidence justifying discriminatory application of the measure; the unilateral or multilateral nature of the measure; the extent to which the measure was mandatory or discretionary; and transparency.

182. The first two concepts, were closely related. GATT experience in dispute settlement had shown that unilateral measures in this area had been arbitrary, and in most cases, unjustified as they were based on subjective and basically protectionist considerations. It was rare for a conflict to arise regarding a measure based on a MEA, since as they were usually based on sound scientific evidence and supported by international consensus, they were unlikely to be deemed arbitrary and unjustified. She acknowledged, however, that her analysis failed to cover cases of third parties to an MEA on whom discrimination may seem arbitrary or unjustified because of their non-participation in the consensus. Discrimination could also arise when the application of a measure was based on the discretion of the authorities concerned, as in the issuance of import or export certificates, permits or licences.

183. Lack of transparency could also render a measure arbitrary if it had not been published, although this could fall more appropriately within the area of disguised measures. She noted that one panel had found that since the measures in question "had been taken as a trade measure and publicly announced as such", they should not be considered as disguised. Another panel had decided that what should be examined was not the measure as such, but its application, and that since the restriction had been published and registered, it was not a disguised action. This term could therefore be satisfied, in certain cases, by complying with the rules on transparency, although other conditions would sometimes have to be taken into account to show that the measure was not a disguised restriction.

184. Regarding the phrase, "where the same conditions prevail", she supported the statement made by the representative of Canada at this meeting. Finally, the condition of "necessity", as in Article XX(b), was essential to prevent the application of measures that contributed little to environmental protection and those for protectionist purposes. She noted that in the Rio Declaration as well as in Agenda 21 of UNCED, participants clearly understood environmental protection should be through action and measures consistent with the principle of sustainable development. Trade liberalization had been recognized as an essential prerequisite for reactivating and accelerating such development; through international trade countries would find the necessary resources to finance the investment necessary for development and thus environmental protection.

185. It followed from the foregoing that trade measures for environmental protection were a second-hand element, and that there would almost always be alternative measures to attain this objective. The panel on Thailand's restrictions on imports and the application of domestic taxes on cigarettes confirmed this argument by concluding that Thailand could have taken other measures applicable to qualitative and quantitative control of cigarettes consumed. Other cases, such as the application of prohibitions on the import of ivory and certain woods, had shown that trade measures did not help environmental protection and that alternative measures, consistent with the principles of GATT, such as privatization of companies and sustainable management of the resources concerned, did exist. In all cases, the least-distorting measure should be selected.

186. She added that regarding natural resources, the condition of "necessity" involved not only a definition of "exhaustible" natural resources, but also the manner in which those resources were used. For the conservation of animal species, clear criteria had been identified in existing MEAs. Under these, the application of trade measures was justified only in the case of endangered species, otherwise the use of such measures was masking protectionist objectives, as evidenced in recent GATT disputes.

187. In this regard, Article XX(g) referred to measures to restrict the export of natural resources "if such measures are made effective in conjunction with restrictions on domestic production or consumption". In general, it appeared that MEAs complied with this provision.

188. She considered that PPMs would be dealt with more easily once the results of the Uruguay Round had been implemented. Such measures could be covered by the TBT and SPS Agreements. She summarized that, in general, the relationship between MEAs and the GATT was not conflictual, at least as regards the parties participating in both. They could co-exist and even strengthen each other for the benefit of the environment.

189. The real problem was the treatment of third parties to MEAs who were contracting parties to the GATT. It had to be considered whether extra-jurisdictional measures in this regard were justifiable solely because they were backed by an international consensus. Her delegation had expressed its view that, in addition to the number of participating countries, an international consensus should be considered in terms of

their geographical coverage and level of development. Also in addition to the consensus, account should be taken of whether the problem concerned domestic or global issues.

190. The other problem concerning the compatibility between GATT and MEAs concerned discretionary measures. Regarding these two problems the Group should perhaps focus on the two aspects mentioned by the representative of Sweden, namely whether the environmental problem was domestic or global, and the extent to which the measure was mandatory, or more or less discretionary.

191. She added that regarding the problem of third parties, account should be taken of the statements made by the participating countries at the UNCED, to the effect that the allocation of financial resources and technological and administrative assistance could be effective incentives to encourage countries, in particular developing countries, to participate in a growing and more integrated network of MEAs.

192. She concluded that it might be worth thinking about schemes that would allow for participation of countries when rights acquired under the GATT were impaired by a later agreement, whether or not this country was a participant of that agreement.

193. The representative of Austria noted that his government attached utmost importance to this agenda item which covered the compatibility of MEAs and the GATT; a number of these MEAs which had relevance for GATT had been identified. He considered that these agreements were not fixed but were evolving over time, and this evolution had to be closely monitored. This could be done in two ways: by continuous contact between the Secretariat of GATT and the respective Secretariats of the various MEAs, and by inviting the Secretariats of these MEAs to attend the Group's meetings as observers. He encouraged the GATT Secretariat to initiate contact with the other Secretariats, whose participation in the Group was important if a need for evidence or information arose.

194. He concluded by drawing attention to the fact that various documents emanating from the UNCED had touched on issues relevant to agenda item one. He believed that the Group would have to, at some point, scrutinize these results.

195. The representative of the Republic of Korea, in response to the statement by Canada at the last meeting, believed that category A, trade measures to eliminate production or consumption of environmentally damaging goods, was possible only in exceptional cases in accordance with GATT Article XX and the principles of appropriateness, proportionality, least-trade-restrictiveness, and non-discrimination. This was confirmed in the Rio Declaration of UNCED.

196. He considered category B, trade measures to protect resources not under that country's jurisdiction, to be extra-territorial if unilaterally applied to conserve natural resources not present in or under the jurisdiction of the country applying the measures. Likewise, it would be against GATT provisions to restrict the import of foreign goods based on the rationale of different environmental criteria.

197. Any trade measures for this purpose should be through multilateral consensus rather than unilaterally. Principle 12 of the Rio Declaration also affirmed that any unilateral measure designed to meet environmental problems not under a country's jurisdiction should be avoided, and measures to address global and transboundary environmental problems should be, as much as possible, based on a global consensus.

198. Category E trade measures, those directed against products obtained in an environmentally unfriendly manner, could be accepted under exceptional circumstances when they protected human, animal or plant life or health in accordance with Article XX(b) of GATT. On the Canadian suggestion to include resource conservation of fish in the high seas in the Group's work, his delegation did not oppose the assessment of trade provisions of already ratified agreements. It had, however, strong objection to GATT's involvement in this issue itself as the matter was pending before an international conference scheduled for next year.

199. In response to the Swedish statement from the last meeting, he considered that enforcement aspects of trade measures were possible only where there was a consensus among countries concerned. To encourage non-parties to join an agreement or to apply similar measures, it was desirable to resort to the positive approaches of financial assistance, technology transfer, manpower training, etc. rather than the negative approach of trade measures.

200. He did not agree that trade measures to counter competition aspects, were justifiable or in accordance with GATT provisions. According to the World Bank Report, it was understood that the ratio of environmental cost vis-à-vis the total cost of products was very small. Thus trade measures designed to discourage relocation of an industry had a weak basis.

201. The representative of Japan welcomed the progress on agenda item one, in particular the substantive statements by several delegations. His delegation wished to study them and, if necessary, come back to them at the next session.

202. His delegation fully supported the idea that economic development through increased trade was one of the key ingredients to improved environmental protection. This was also shared by the participants in the UNCED, and had significant implications for the Group's future work.

203. He made some initial comments on the Canadian category "A", trade measures taken to support domestic measures. His delegation shared the view that a wide range of trade measures for environmental protection could be taken without any friction with GATT Articles if they were taken in conjunction with domestic measures and on an MFN basis. As the representative of Canada noted at this meeting, a fundamental point to be carefully examined was that the application of domestic measures should be on a non-discriminatory basis.

204. His delegation shared the Canadian view on Article XX in that if the measures were arbitrary, discriminatory, not necessary for the achievement of the stated purposes, or went beyond domestic action, they would not serve the stated purposes. His delegation was not certain whether, as the

representative of Canada stated, any environmental purpose, including fisheries, would be covered by Articles XX(b) and (g). His delegation did not have any objection to taking up fisheries in the Group but careful consideration and examination concerning the related provisions in the GATT was needed. He noted that the Panel on US Restrictions on Imports of Tuna ruled that the drafting history of Article XX(b) indicated that the focus has been on sanitary measures to safeguard life or health within the jurisdiction of the importing country; his delegation would come back to this at the next meeting.

205. His delegation believed that multilateral consensus was important for category "B", trade restrictions aimed at conserving natural resources outside the jurisdiction of the country applying the measures. This view was also expressed by the report of the above-mentioned panel. If only some of the countries concerned took such measures, it would be difficult to address the extra-jurisdictional environmental problem and unnecessary friction with other countries would result.

206. The representative of Brazil commented on some aspects of the decisions taken at the UNCED. While not prejudging the hierarchy of these decisions vis-à-vis GATT provisions, he wished to remind delegations of the positions that countries had collectively accepted, at a high level, on this subject. Agenda 21 had entrusted GATT as well as other multilateral fora "to make international trade and environment policies mutually supportive in favour of sustainable development; to clarify the rôle of GATT in dealing with trade and environment related issues including, where relevant, conciliation procedure and dispute settlement; to encourage international productivity and competitiveness and encourage a constructive rôle on the part of industry in dealing with environment and development issues".

207. The work of this Group dealt directly with these issues, especially the second, which was reinforced by Activity 2.22 letter (j) of Agenda 21. It stated, "develop more precision where necessary and clarify the relationship between GATT provisions and some of the multilateral measures adopted in the environmental area". Agenda 21 established activities to be undertaken most of which should be seen as a framework for the Group's discussion.

208. His delegation believed that Article XX, complemented by the revised TBT Agreement provided an adequate and flexible basis for the application of environmental measures in a manner consistent with Agenda 21. Nevertheless, if the Group believed it necessary to be more explicit, the activities foreseen in Agenda 21 should provide important guidelines. He added that the whole issue should be considered in light of activity 2.22(d) which asked the organizations and governments to deal with the root causes of environment and development problems in a manner which avoided the adoption of environmental measures resulting in unjustified restrictions on trade.

209. An explicit recognition of the environmental measures covered by Article XX should be accompanied by general criteria that would give guidance as to the consistency of these measures with the requirements of the chapeau to Article XX, particularly that they should not be applied in

a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevailed or a disguised restriction on international trade. This text was taken up again as activity 2.22(f) of Agenda 21. Such criteria should also reinforce the relevant principles of the TBT and SPS Agreements where applicable. In this context, the Group should also address the interpretation by previous panels that disguised restrictions referred to transparency procedures and not to substantive objectives. His delegation believed that this interpretation was inappropriate and one closer to the concept of avoiding unnecessary obstacles to trade was more adequate.

210. Activity 2.22(i), and Principle 12 of the Rio Declaration, after calling for the avoidance of unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country, stated that environmental measures addressing transborder or global environmental problems should, as far as possible, be based on an international consensus. His delegation believed that new TBT Agreement, which recognized multilaterally agreed standards and measures as fulfilling GATT requirements, was the best way to translate this into GATT language. Standards which would qualify as multilaterally agreed could be either part of a MEA open for participation of at least all GATT contracting parties, or result from the work of an organization open to participation of at least all GATT members. Important considerations were also raised here by the Mexican delegation concerning the geographic coverage and level of development.

211. Activity 2.22(i) also stated that "should trade policies be found necessary for the enforcement of environmental policies, certain principles and rules should apply including, inter alia, non-discrimination, least trade-restrictiveness to achieve the objectives, transparency, and notification, consideration to special conditions and developmental requirements of developing countries as they move towards internationally agreed environmental objectives". He would add, from the TBT Agreement, proportionality and risk assessment based on available scientific evidence; revisions of measures according to changed circumstances; national treatment; the effectiveness of the measure in relation to the proposed environmental objective; and consideration of the environmental effects of the measure.

212. Special account should also be taken of technological conditions prevailing in developing countries. Restrictions on products made from old technologies should be accompanied by efficient mechanisms to transfer new or emerging technologies to developing countries. This was also consistent with activity 2.22(i) of Agenda 21.

213. The representative of Malaysia, on behalf of the ASEAN countries, noted that the agenda called on the Group to examine, "for the present" trade provisions contained in three existing MEAs vis-à-vis GATT principles and provisions. The aim was not to pass judgement on the consistency of the trade provisions in the MEAs but, as the delegation of Australia said, to have a forward looking approach with a view to ultimately providing useful directions for future drafters of MEAs.



214. He found the Canadian categorization of trade measures useful to structure the discussion, but some went beyond the present mandate of the Group, in particular category D, which referred to trade measures taken, for "equalizing differences in the cost of environmental protection between the home and foreign markets in response to concerns of competition". Discussions in the Group should be confined to the agenda items. The relationship between the GATT and trade provision in MEAs was still not clear and his delegation believed that the discussions should aim to consider ways and means to ensure that some trade provisions were incorporated to the extent necessary to achieve the legitimate environmental objectives of the MEAs, and that they did not constitute disguised barriers to trade or unjustified discrimination among countries where the same conditions prevailed.

215. His delegation considered that it would be necessary for the GATT to elaborate certain guidelines taking into account the results of the UNCED as well as work done in other international fora. Since most of the countries participating in the MEAs were contracting parties of GATT, it should be assumed that their governments would have taken into account their GATT obligations while negotiating trade provisions. The adoption of guidelines would further assist participating governments in ensuring that there was no inconsistency in future trade provisions.

216. There should therefore be a presumption that, in relation to the trade provisions incorporated in the MEAs, the conditions relating to the use of "least distorting" trade measures, their "essentiality", "reasonableness" and "proportionality" had been given adequate consideration.

217. His delegation considered, however, that any further discussion on guidelines should await the completion of the Uruguay Round, the most urgent task, since it embodied several texts of significant relevance such as in the TBT and SPS Agreements. It was premature to come to any conclusions on the modifications that were needed in Article XX or other provisions in the GATT based on the Group's examination of the trade provision in the MEAs. In this regard his delegation supported the evolutionary approach proposed by New Zealand.

218. The representative of Sweden, on behalf of the Nordic countries, believed that the discussions so far had resulted in broad areas of consensus on this item. His delegation was committed to the idea that common problems deserved common approaches and that MEAs were crucial for tackling global and transboundary problems. Trade provisions in certain cases were a necessary and sometimes essential feature of MEAs, and the GATT should allow contracting parties clear and unambiguous scope for multilaterally agreed measures to tackle global and transboundary environmental concerns.

219. Some measures were within the scope of present GATT rules; Article XX appeared to provide scope for such measures under certain fairly narrow circumstances. To the extent that an MEA was targeting a global or regional problem, whose negative effects were shown to be affecting the importing country's territory, there seemed to be scope, under Article XX(b), for either unilateral action or action based on obligations in an MEA.

220. However, further clarity and elaboration was needed, while recognizing the necessity to proceed with caution. Clearer rules for trade measures under MEAs must not give rise to increased scope for unilateral measures to address regional or global environmental problems, over and above the fairly limited scope provided by existing GATT rules. He suggested that a mechanism must guard against this misuse for environmental protection purposes and there should be no "carte blanche" for measures taken to fulfil obligations under an MEA.

221. He explained three reasons for his approach: GATT obligations could not be disregarded in relation to a contracting party that was not a party to an MEA; taking into account trade consequences might be difficult when negotiating such agreements since such consequences may be very different to predict at that stage; and individual countries might interpret their obligations under an MEA very broadly to gain possible trade advantages.

222. He offered some preliminary thoughts on technical aspects of how increased clarity and scope for measures to tackle transboundary problems could be achieved, while observing the need for caution. His delegation remained open as to where in the GATT system such an elaboration belonged and what legal form it might take; the GATT was flexible in this respect.

223. He believed that Article XX provided a suitable model for the Group to use and specified a broadly defined policy area in which exceptions were allowed, for instance, for the protection of human, animal or plant life or health. Any measure which fitted this broad description could be treated under the exception. Article XX also specified a number of obligatory trade policy criteria which provided guidance on how such measures, that may affect other contracting parties rights under the GATT, should be designed and applied: necessity; the phrase "countries where the same conditions prevail"; arbitrary or unjustifiable; disguised restrictions, etc. Some of these criteria were modified versions of the basic principles of the GATT such as non-discrimination, others were specific to the Article.

224. He believed that clearer rules for MEAs could be constructed using the same approach: a general description of the purposes of such an exception, and then the trade policy criteria to guard against protectionist misuse or unnecessarily large negative trade affects resulting from the application of measures. At this stage, it was too early to say exactly how this general exception should be formulated or what the criteria should be although he hoped delegations would be prepared to consider and discuss this.

225. As his delegation had indicated, a large number of potential criteria could be already found in the GATT text, others may need to be invented. In order to achieve the desired clarity and scope for global concerns, his delegation believed two particularly challenging issues had to be tackled: the treatment of non-signatories to an MEA and the use of measures that had a protective effect on domestic industry.

226. His delegation had looked ahead in its statement. There was a lot of work to be done by the Group in order to deepen its understanding of the elements related to this agenda item. His delegation agreed with those who

had underlined the need for a structure to guide the further discussions and considered that the Group was perhaps reaching a point where its meetings could focus around more precise themes. His delegation wished to distribute a background non-paper soon which, while not focusing specifically on any agenda items, contained elements that could be useful for delegations in their further work in the Group. His delegation hoped that others would also be able to make such contributions.

227. The representative of the European Communities noted that his delegation was working intensively on the issues raised under this agenda item and hoped, in the near future, to present to the Group, in a comprehensive manner, his delegation's views on how to define the interface between the GATT and the trade provisions of MEAs.

228. He believed that the messages from UNCED were important to the Group's work and he found the explanations by the representative of Brazil useful. He believed that the Conference had clearly supported GATT's work on trade and the environment and the intensity of the Group's work was a signal that it was fulfilling its mandate. It also had asserted, at a high political level, a number of important principles, in particular the need to avoid unilateral measures of an extra-jurisdictional nature, and, that multilateral co-operation should be pursued to tackle global environmental challenges. This fundamental principle should guide the activities of the Group.

229. Relating to the work on agenda item one, he agreed with the representative of Brazil on the relevance of program B of Chapter 2 of Agenda 21, and in particular point (j). His delegation believed that the generic discussions in the Group would lead towards a clarification of the relationship between the GATT and trade provisions of MEAs, an issue of importance to which the Group should give fully considered responses.

230. He also welcomed the focus by many delegations on the interpretation of Article XX which was a key provision to the relationship between GATT and trade provisions of MEAs, although the Group should take care to avoid implications that any measure taken for environmental purposes constituted an exception to GATT rules. He noted a number of issues which the Group should clarify in terms of Article XX.

231. The first related to the chapeau of Article XX and in particular the reference that measures should not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevailed. His delegation was not sure whether the Group should embark on a word-by-word analysis of this sentence, however, an important principle was that justification for introducing closely circumscribed departures from the non-discrimination rule had to be closely related to the conditions which prevailed in different countries. In that respect, he had previously noted that there were no cases of trade measures in MEAs which were applied to non-signatories merely because of the fact that they were non-signatories. In all cases there were provisions and reference to the need to verify where the same conditions prevailed between signatories and non-signatories.

232. Regarding the concept of "necessity", as reflected in Article XX(b), he flagged the principle recognized in the TBT Agreement and reflected in a number of panels that when a measure was based on an internationally agreed standard, there was a presumption that the measure would be in conformity with the GATT. This was an issue which should be considered as it related to the trade provisions in MEAs. There was also the distinction between binding and more discretionary types of trade measures which may be envisaged under an MEA. This could be examined in the context of the term "necessity", as well as the type of products to which a trade restriction may be applied.

233. His delegation was convinced of the need to fully endorse the findings of the 1991 tuna panel report which ruled out unilateral trade restrictions of an extra-jurisdictional nature. The question of extraterritoriality had a completely different sense when looked at in the context of an MEA where the need to address an environmental problem was recognized by the international community. This did not mean that the tuna panel report condoned any type of trade measure which might be adopted on the basis of an MEA; the Group should explore which were the criteria and the conditions for this. Hence, the definition of an MEA was of particular importance and the Group should examine which criteria to use for such a definition. His delegation would consider those referred to by the representative of Brazil.

234. Regarding the outline circulated by the US delegation, he noted the importance of carefully defining the "free-rider problem". The problem was generally viewed as one of non-signatories deriving benefits from actions undertaken by parties to MEAs, but he believed that if the rationale of MEAs were examined closely and, in particular, those that deal with the global commons, this was not really the question at stake. The real problem was that the actions undertaken by the parties to an MEA to tackle a global problem may be nullified by actions of non-signatories. This difficult situation gave rise to particular consideration of the rôle of trade measures in that context and should be examined in the right contextual framework.

235. The Chairman took note of the statements made, and made the following concluding remarks.

I believe that the Group has had a most interesting and stimulating discussion under all the agenda items. The points raised and the views expressed merit very careful examination and reflection. I will not attempt to summarize the points made, for they will be duly reflected in the Secretariat note of the meeting.

Under agenda item 1 I would like to take up a point made by the New Zealand delegation, in reference to TRE/W/1, suggesting a need for further information, particularly on the purpose, context and effects of measures, with the added suggestion that this could be done by the Secretariat or by delegations, perhaps through the use of non-papers. I would suggest that we ask the Secretariat to look into what further work they can undertake in this respect, and I would encourage delegations to utilize the availability of non-papers for this purpose.

On agenda items 2 and 3, I believe the Group will clearly benefit from returning to discuss those agenda items, as well as agenda item 1, in the next meetings in the Autumn. To assist us, and on the basis of comments that have been made by many delegations yesterday and today, I would like to make a few suggestions.

First, with reference to the question of transparency. We could ask the Secretariat to prepare a paper putting together the main issues that have been raised in the Group's discussion on agenda item 2, with regard to existing transparency provisions in the GATT, as well as those that will result from completion of the Uruguay Round negotiations. If this is acceptable to the Group I would ask that the Secretariat tries to undertake that work.

Secondly, I would suggest that we ask the Secretariat to prepare a paper on what has been termed the generic typology of packaging and labelling requirements, to assist the Group to advance conceptually towards a better understanding of what the possible trade effects of such requirements might be. We might also ask the Secretariat to highlight, amongst other things, the types of requirements that are in use and their purposes in the context in which they are applied. The Secretariat, I believe, will initially have to rely upon readily available information, and in order that this does not unduly constrain the exercise I would suggest that the Group invite delegations individually and on a good will basis to submit to the Secretariat, for its use, information that reflects their own national experiences with packaging and labelling requirements.

We could perhaps leave delegations free to choose in what form they would make their submissions. They might wish to submit representative samples of packaging and labelling requirements, along with a description of the overall structure or context in which they are used. I sense there is an interest in the Group in having the general typology cover measures broadly, taking into account the way in which they are implemented, and including those which are used at the local and State government levels and by the private sector in a voluntary context, in particular those which are sponsored by governments. Our intention, of course, would not be to have a discussion in the Group about specific measures applied in individual countries but rather to ensure that the Group is able to familiarize itself as widely as possible with different kinds of measures.

We might encourage delegations also to share with us in a general fashion the experiences which they encounter as exporters with the packaging and labelling requirements of their trading partners. That could also help us to deepen our understanding of the possible trade effects of such measures.

Some delegations have proposed that the Group engage in a more comprehensive notification exercise. This probably needs further reflection and discussion: we could come back to this once the Group

has had a chance to examine the Secretariat's paper that they propose to prepare. If this is generally acceptable to the Group I would ask that the Secretariat proceed to prepare the suggested papers and I am informed that they will be planning to circulate, at least in the English version, such papers before our next meeting.

236. The Group agreed with these remarks. The next meeting of the Group was tentatively scheduled for the afternoons of 1 and 2 October 1992. This meeting would begin with the first agenda item and proceed to the second and third items.