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Group on Environmental Measures and International Trade

REPORT OF THE MEETING HELD ON 1-2 OCTOBER 1992

Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its sixth meeting on 1 and 2 October 1992 under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and relevant documentation were contained in GATT/AIR/3350.

2. The Chairman noted that the Secretariat had prepared two background notes, TRE/W/2 on transparency, and TRE/W/3 on packaging and labelling requirements. Also the Nordic delegation had submitted two non-papers, one on agenda items two and three, and one on agenda item one. He added that the present meeting would initially focus on agenda item one, and then on items two and three. In the absence of an agreed structure, he invited delegations to be guided by their own views, keeping in mind the necessity of focus.

3. The representative of Sweden, on behalf of the Nordic countries, presented a non-paper containing initial views on the relationship between some GATT articles and MEAs. Its point of departure, which was confirmed at the UNCED, was that environmental considerations should be an integral aspect of all human activities, and that sustainable development was the overriding objective. At the same time, a number of conditions were necessary in order for trade provisions in MEAs to be compatible with the GATT.

4. The paper observed that there did not seem to be a generally accepted hierarchy among MEAs dealing with different areas. Although international law could be nebulous and was constantly evolving, general principles, such as a more recent agreement would supersede an earlier one and a more specific agreement would take precedence over a more general one, did not give sufficient guidance when comparing a framework of general trade rules with an environmental agreement. These rules were primarily intended to apply to agreements dealing with the same or related subject matter. In addition, the GATT was hard to date since it was continually evolving through negotiations.

5. Further, he considered that Article I of the GATT did not, in itself, leave any scope for discrimination of products that they came from non-parties to an MEA. Concerning the issue of "like product" in Article III, his delegation believed that "like product" referred to

product characteristics and not to circumstances pertaining to its production, unless these were directly reflected in the characteristics of the end product. Thus, requirements on processes and production methods (PPM), introduced to deal with environmental externalities of a production process, should not normally be applied to imported products, however there could be cases where what at first glance was a PPM requirement was actually a product requirement. An example was imposing requirements during the production of pressure vessels rather than testing each local or imported vessel for its ability to withstand required pressure without exploding.

6. His delegation believed that Article XX left considerable scope for justifying many types of environmental and conservation measures. Article XX(b) obviously covered measures to tackle national problems, but global or transboundary environmental problems, insofar as they had an impact at the national level, could also be grounds to invoke Article XX. It was unclear, however, how to view global problems that did not have an immediate national impact. In-depth analysis was also needed to determine whether Article XX or other GATT rules could accommodate the "precautionary principle", endorsed in a number of international fora. It was an important principle, but could be misused for protectionist purposes. Elaboration of a model to handle risks, utilizing the negotiations on sanitary and phytosanitary measures, could be useful.

7. An issue, not in the non-paper but in need of clarification, was whether the phrases in the chapeau to Article XX, "countries where the same conditions prevail" and "arbitrary or unjustifiable", allowed for any discrimination, when necessary, against free riders. The term "free rider" should not be used loosely; non-participation in an MEA could be for several reasons. Countries could find the scientific evidence for the MEA unconvincing; give the environmental problem a low priority; disagree with the proposed method for resolution; or attempt to improve their competitive positions. He believed that the free rider concept was relevant when countries, by refraining from joining an MEA, actually countervailed that effort. Non-participation, in some cases, could be desired by parties in order to raise their environmental ambitions.

8. Finally, he referred to the relationship between the GATT dispute settlement procedures and the settlement of disputes relating to the implementation of MEAs. The issue depended on whether the disputing parties were signatories to the MEA and/or contracting parties to the GATT, but there was a need to prevent "forum shopping". Although he did not wish to imply that governments participating in an MEA should be prevented from resolving conflicts under those MEAs, it could be difficult to define under which legal instrument a controversy actually belonged. Any situation where GATT panels had to interpret or pass judgement on provisions in MEAs should be avoided.

9. The representative of Mexico considered that the provisions of Article XX constituted a balanced approach to deal with environmental problems and to avoid indiscriminate abuse of exceptions for protectionist objectives. Indeed Principle 12 of the Rio Declaration, representing the broadest international consensus on the treatment of environmental issues, confirmed the necessity of complying with the principles of GATT, in particular non-discrimination and those in Article XX, when applying environmental measures. This would preserve a predictable international trading system which would contribute towards sustainable development.

10. Compliance with Principle 12 also implied the observance of certain GATT disciplines including complementarity, which ensured that the trade measure was consistent with a legitimate environmental aim and accompanied by corresponding restrictions on domestic production and consumption; necessity, which related to the measure's effectiveness in achieving its environmental objective, demonstration that it was the least trade-distorting measure, that no more appropriate alternative was available, and that it was based on scientific evidence; proportionality of the measure with the scale of the environmental problem addressed; and transparency in the measure's application.

11. GATT also authorized the application of trade-restrictive measures, whether based on national policy or in the context of an MEA, to protect exhaustible natural resources and goods within the jurisdiction of the imposing country. Given this, she asked why the GATT was viewed as anti-environment. She considered that it was because some believed that tackling serious environmental problems required the use of discriminatory and/or extra-jurisdictional measures, which were contrary to GATT rules and principles and negatively viewed in the UNCED.

12. Principle 11 of the Rio Declaration suggested the necessity of taking into account that countries had different environmental preferences and hence would pursue different types of environmental policies varying in severity, emphasis, time-frame, and implementation, and would carry them out in varying environmental conditions. But the Rio Declaration rejected unilateral action and supported measures based on international consensus to address transboundary or global environmental problems.

13. It was not clear, however, whether discriminatory and/or extra-jurisdictional measures became legitimate merely because they were backed by an international consensus, and what constituted such a consensus. This was most relevant for non-parties to an MEA because parties had considered such measures necessary and adapted to their own ecosystems, and had therefore consented to them. She asked if a group of countries met and made certain decisions regarding specific resources, they had the right to impose discriminatory measures and/or standards on other countries to punish them for not participating? Was

penalization actually a viable means to achieve wider participation in an MEA, or was it "big stick" diplomacy?

14. Some delegations had referred to this point as a problem of "free riders". However, it should be recalled that there may be numerous legitimate reasons why a country would not participate in an MEA. Some would not be able to bear the economic cost of being party because it would have a counterproductive effect on their own environment. The creation of incentives such as greater flexibility in the acceding time or with applying and/or being subject to a measure, as well as through providing technological and financial assistance would be more effective.

15. It was not clear what constituted an international consensus but the participation of countries in terms of adequate geographical coverage taking due account of levels of development, and involvement in the environmental problem, could serve as guides. The main problem was to find effective means of encouraging countries to join such a consensus in order to make it viable.

16. Finally, she believed that in pursuing environmental protection, countries should be consistent in their actions. This meant that in a specific environmental area, a country had to employ the same measures domestically as abroad, and it could not arbitrarily choose such areas where the cost of protection fell on other countries, without showing any genuine commitment to cooperate in areas more important to them.

17. The representative of Canada considered that, in addressing agenda item one, the Group should focus on the trade provisions in MEAs in order to establish the necessary basis for subsequent examination of GATT provisions. He therefore reverted to the conceptual framework of five categories of trade measures in MEAs that his delegation had presented earlier. His previous intervention had focused on the first category which consisted of trade measures that were an extension of measures taken within domestic jurisdiction to control or eliminate the production, consumption or use of environmentally damaging goods or substances, or to conserve domestic natural resources.

18. He repeated that the GATT already provided wide scope for these types of measures whether in the context of an MEA or a country acting alone. The imposition of import bans, import quotas, fixed or declining, equivalent export measures, border taxes, labelling schemes, etc. was provided for, as long as the measures met certain basic criteria such as consistency with domestic action, non-discrimination, and relationship to the environmental objective.

19. It would be helpful to clarify GATT rules and exceptions as they applied to these types of measures and their implementation, but many agreed that the GATT already offered broad scope and support for their use in the pursuit of environmental goals and agreements. As they were

often applied by different countries on the basis of varying standards, clearer disciplines and explore opportunities for harmonization should be explored. Greater international cooperation on environmental policies and approaches, facilitated by a clearer understanding of GATT rules, would help alleviate these concerns.

20. He believed that concern that the GATT did not adequately address environmental issues or was anti-environment was often related to proposals for the use of discriminatory and/or extra-jurisdictional trade restrictions to extend environmental policies and regulations to other countries or to impose the provisions of certain MEAs on non-parties. The second and third categories of his framework addressed these issues.

21. The second category consisted of trade restrictions for environmental objectives, including the conservation of natural resources, that were outside the jurisdiction of the country applying the measure. The issue of extraterritoriality emerged prominently in this area. The third category included trade measures intended to act as leverage on other countries to press for acceptance of particular environmental standards or membership in an MEA; extraterritoriality was also involved here.

22. He did not believe that GATT clearly provided for the use of such trade restrictions. GATT's fundamental purpose had always been to discourage and remove trade restrictions and to ensure that the international trade system was fair, non-discriminatory and predictable. The successive rounds of multilateral trade negotiations had been aimed at reducing trade barriers and establishing rules to prevent the erection of new barriers. The use of discriminatory and/or extraterritorial trade measures as political tools to pursue other policy agenda had not been an objective of the multilateral trade rules.

23. Indeed, there had been a long-standing consensus among contracting parties that GATT should not serve as a forum for political decision-making. Article XXI provided that nothing in the GATT shall prevent contracting parties from taking action pursuant to their obligations under the United Nations Charter, which would include decisions on the use of trade sanctions. GATT, however, did not take the decisions to authorize such use of trade measures. Similarly, the imposition of coercive extraterritorial trade measures was beyond GATT's provisions as was made clear by the recent tuna panel.

24. It followed that the use of discriminatory and/or extra-jurisdictional measures to extend environmental standards to other countries, or to impose the terms of MEAs on non-parties was not provided for in the GATT. Such measures introduced significant new dimensions into the international trading system which, in the GATT context, should be examined closely as regards their rationale, likely effectiveness and specific implications for the trading system.

25. His delegation had endorsed the tuna panel findings and believed that the extra-jurisdictional imposition of environmental policies and standards on other contracting parties was not permissible under the GATT. Although it was difficult to argue against the proposition that environmental issues extending beyond national borders could be a shared concern among countries, and that a country should pursue a better global environment outside its domestic jurisdiction, the issue was how it should be pursued.

26. Such shared concern had increasingly been bringing countries together to cooperate internationally. Extra-jurisdictional effects arising from such agreed courses of action would generally not pose problems since all parties would have consented to those effects. CITES was a good example since it was considered to involve significant extraterritoriality in that the trade measures were aimed at the management of other countries' resources which often did not even exist in the country imposing import controls. Some had questioned the defensibility of those trade restrictions.

27. The key to CITES, however, was that affected parties had agreed to and were cooperating in the conservation programme, including its trade regime. Although they might have reservations about the fairness or necessity of the treatment under the agreement of specific species, they had agreed to accept and incorporate such measures into their own domestic policy and regulations. In fact, the use of trade measures in MEAs like CITES and the Basel Convention could help parties to enforce their own domestic policies and regulations. This was different from trade restrictions used to impose standards on other countries.

28. The real issue of extraterritoriality concerned the basis on which a country or group of countries could impose their environmental or conservation policies on others who did not agree, whether the resources were within the jurisdiction of the other countries or shared in the global commons. The question was especially pertinent when policies carried significant costs or commercial benefits. Given that the participants in UNCED undertook to address problems more cooperatively, who was to decide on the measures that would apply and on what basis? How should costs and benefits be shared? These underlying issues needed to be addressed in some forum before the Group could respond to how GATT rules did or should relate to the use of such measures.

29. He highlighted several issues related to the third category of measures. One commonly mentioned reason for exerting pressure on non-parties to an MEA was to deal with the so-called "free rider" problem, a term often used but not clearly defined. He considered that the term did not include countries that for objective reasons did not accept the science and risk assessment behind, or objectives or provisions of, the MEA in question. Scientific evidence could take a long time to develop and may not always be definitive, resulting in the possibility for legitimate differences of view on the extent and

implications of the problem and the most balanced and effective way to deal with it. Differences of view could be legitimate reasons not to participate in a particular MEA.

30. Similarly, countries that had genuinely different environmental priorities and were elected or were forced by more limited means to concentrate their resources in other areas of environmental protection should not be called free riders. Every country had to make its own choices in pursuing better environmental protection. Although countries may try to persuade others to pursue their priorities and offer assistance to this end, those that had problems they considered more pressing or who could not absorb the costs of an MEA should not be called free riders.

31. In trying to define this term, he recalled a definition, put forward by the representative of the United States at an earlier meeting, which suggested that free riders were those who declined to assume the obligations of an MEA in order to avoid the economic costs that might be involved while still benefiting from the environmental improvements being made. This definition assumed non-parties would obtain commercial or competitive advantage over other countries. But he asked on what basis would economic or commercial interest be determined when other reasons for not participating could be identified? What if the economic concerns of a country, whether developed or developing, were legitimate impediments preventing it from pursuing an environmental programme more aggressively? How should the legitimacy and weight of different countries' motivations be judged?

32. He noted that the representative of the EEC had suggested instead of the US definition, that free riders were non-parties in an MEA, whose actions could undermine parties' efforts to tackle a global problem. Even this approach raised a number of questions. For example, was there broad and representative international support behind an MEA? Arguments that discriminatory trade restrictions were justifiable to press non-parties to join an MEA were based on the premise that the breadth and representative international support for the MEA would justify such measures. But could broad international support be claimed if countries contributing significantly to the problem, and whose actions could undermine the success of the agreement, did not participate?

33. A situation could occur where one or a few countries that contributed significantly to an environmental problem resisted an international effort to combat the problem and the international community decided, subject to certain criteria, to employ trade restrictions or sanctions to force compliance. He suggested that only strong and representative international agreement that an environmental problem was sufficiently critical would warrant such serious measures. But the question of what would constitute such a consensus would still need to be addressed. Also, as a minimum, it would need to be established that a country was refusing to participate for reasons other

than the legitimate ones mentioned; measures were necessary because the non-parties would undermine achievement of the environmental objective; other ways to obtain cooperation had been exhausted and the trade measures would be effective in that regard.

34. The point was that although a case for discriminatory trade restrictions could be made under the above circumstances, it seemed unlikely to be a frequent event. What then would be the best way to deal with such circumstances? Was the GATT the right forum to address this type of situation or should it be dealt with in another international forum? He hoped to discuss these questions in the Group.

35. The representative of the Republic of Korea agreed that classifying trade measures with environmental implications was a useful approach. It led to the observation that trade-related environmental measures were often extraterritorial in nature, could operate as disguised trade restrictions, and, when applied unilaterally, might contravene GATT principles and provisions. Therefore, as had been agreed in the Group, a multilateral approach should be taken.

36. Defining MEAs, however, would not be an easy task. The representative of Mexico and other countries had suggested relevant criteria. There was also a need to differentiate environmental measures that affected trade as domestic or international in scope. His delegation wanted the Group to explore the possibility of creating a mechanism by which GATT could establish guidelines to assist in drafting GATT-consistent MEAs, however this work should await conclusion of the Uruguay Round.

37. He considered that Article XX was vague and subject to abuse. To preserve its workability and to prevent its abuse, the conditions for invocation and a precise and narrow interpretation of Article XX must be emphasized. His delegation believed that the section of the headnote that prohibited arbitrary and unjustifiable discrimination between countries where the same conditions prevailed, stood for MFN, while the section that prohibited disguised restrictions on international trade stood for national treatment.

38. His delegation also saw merit in the Canadian suggestion that the term "disguised" in Article XX be interpreted in light of the GATT principle of appropriateness. This would limit unnecessary restrictions on trade for domestic protection. The word "necessary" in Article XX(b) could also be interpreted in light of the GATT principle of "least trade restrictiveness". This would imply that measures taken for the protection of human or animal life should be formulated so as not to be overly trade restrictive.

39. Regarding the future structure of the Group's discussions, his delegation agreed that more structured discussions might lead to greater progress. In addition, it could be helpful if the Chairman provided

guidance at the end of every meeting on the topics for discussion at the next meeting.

40. The representative of Singapore, on behalf of the ASEAN contracting parties, believed that the Nordic non-paper presented advanced thinking on the first agenda item. His delegation would examine it from the perspective of developing countries, and give a more detailed statement at a later time. His delegation was particularly concerned with the issue of the technology required to respond to environmental problems and with the differences between developed and developing countries which must be reflected in any reworking of GATT rules and processes that might be necessary.

41. He highlighted two issues raised in the non-paper. The first dealt with the principle of national treatment in Article III.4. As developing countries, ASEAN was most concerned that this rule should not be used as an excuse to impose arduous conditions on grounds of environmental requirements. Second, the concept of "free rider" should be handled with caution as it was a subjective term. Countries should not be labelled as free riders if, even with the most goodwill, owing to economic or other circumstances, they may not be in a position to agree to conform to internationally or generally accepted rules and conditions.

42. Finally, he believed that at this early phase of the debate on trade and the environment, care must be taken to include the concerns of all countries. Otherwise a trend could arise that would work against the process. He agreed with many of the Canadian comments, in particular that GATT rules already contained provisions for treating environmental concerns, and that that any expansion should proceed cautiously.

43. The representative of New Zealand would also address the Nordic non-paper in more detail later. He noticed, however that it was directed towards an analysis of GATT provisions which might be relevant to MEAs. This was important work but could best be taken into account once the detail and scope of the issues on which GATT provisions were to be discussed had been properly and adequately defined through analytical work to understand the rationale and reasons for use of trade measures in MEAs.

44. In this regard, he welcomed the Canadian statement as an example of the focused analytical work in which the Group needed to engage and as a point of departure for such analytical discussions. Issues, such as the "free rider" concept and extraterritoriality, should be considered in a thorough analytical manner. A central issue behind the Canadian statement was if there were circumstances in which the use of discriminatory trade measures might be necessary to achieve the environmental objective(s) of an MEA, and to what extent they were necessary. Such discrimination might include measures against "free

riders", whose actions might otherwise nullify the actions of parties, or those within an MEA with extraterritorial effect on non-parties. These were the sorts of issues and questions which the Group must confront.

45. Analysis must begin with consideration of the effects and effectiveness of such measures, for which the Group had laid a broad framework under each of the agenda items. One way to proceed would be for delegations to be requested in advance to concentrate on particular issues within an MEA; they should not be wary of engaging in such work which should be approached without preconceptions.

46. He added that GATT had always worked through a consensus which had proven to be pragmatic and capable of responding to new challenges as conditions have evolved. In this Group, as in all other areas of the GATT, detailed analysis was required to reveal the issues and problems, if any, on which consensus on an appropriate course of action could be built. Convincing arguments were also necessary to explain to and convince wider audiences of the conclusions the Group would reach. He cautioned that short-circuiting the process and attempting "quick fixes" would not only risk damaging the consensual operation of the GATT system, but would also be unlikely to solve underlying problems.

47. The representative of Tanzania stated that his delegation had endorsed the UNCED conclusions, thus sharing the international community's environmental concerns. He noted that there was a great deal of developmental work to do which required urgent attention. He also stated that he would discuss the Nordic non-paper in more detail at a later time.

48. He pointed out that countries such as his own, needed to establish manageable environmental regimes including surveillance instruments, without placing constraints on critically needed economic goals. He considered that within a measurable period of time, the international community would no longer be able to exploit the environment; at some point, the environment would demand production and trade disciplines. Legislation alone would not suffice, but more was needed which would take time.

49. He noted that the UNCED process had analyzed the causes and sources of the problem which were not going to disappear. Developing countries would be learning a great deal in the years ahead, but lasting environment-friendly production and trade regimes would be impossible without relevant technology being made available to those developing countries which could least afford to pay for it.

50. The representative of Austria suggested that one problem was that everybody had their own perception of what was meant by the environment, and that discussions in the GATT required a multilaterally acceptable definition. The GATT text contained no definition or description,

although environmental considerations and issues were not absent. Article XX(b) and (g) circumscribed environmental issues with the words "to protect human, animal or plant life or health" and "the conservation of exhaustible natural resources". Measures taken for these two objectives were by their very nature to protect the environment.

51. Various international agreements offered some common features of the term "environment. Environment included the human, animal and plant life or health, but also air, water, and soil. The landscape and even cultural heritage were found in definitions. Thus, "environment" was not limited to nature and natural resources but also included human-made creations. As the destruction of the environment may influence or even destroy the social fabric or grown habitats, the social dimension of the environment would deserve more attention in the future.

52. These concepts were not alien to the GATT. The preamble said that GATT should contribute to "raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods". In today's understanding achievement of a sound and sustainable environment was necessary to raise the standard of living and was part of the broader concept of sustainable development. Free trade was a means to realize this goal, but not as an end in itself.

53. These common elements should be born in mind when considering how the concepts used in GATT Article XX(b) and (g) related to the term "environment" in general. It seemed that "environment" was generally gaining a broader meaning, however in the context of the exceptions in Article XX, it should be interpreted narrowly to avoid misuse. Considerable efforts would have to be devoted to finding a practicable solution to solve the dilemma of a broadening concept in the face of a need for a narrow interpretation of Article XX. An historical interpretation would not be useful because the "environment" was not on the minds of the original drafters of the GATT.

54. Principle 21 of the Stockholm Declaration of 1972, which was reaffirmed in Principle 2 of the Rio Declaration, made clear, especially if read in connection with Principle 12 of the Rio Declaration, that protection of the environment should not be a pretext for unjustified and unnecessary unilateral action. Paragraph 2.22(i) of Agenda 21 set out the parameters which should apply when the necessity of unilateral action for the enforcement of environmental policies was considered, without leading to unjustified restrictions on trade. This related to states' rights to protect their own environment.

55. Common experience showed that any industrial, commercial or private activity influenced the environment in different intensity. If the effects on the environment were only felt locally or nationally, it was up to the local and national authorities to deal with it as

appropriate. A different approach had to be taken if activities had spillover effects on the environment of other States or areas beyond the national jurisdiction, either regionally or globally.

56. Spillover effects had either a direct impact on the territory of another State, or an indirect impact, for example the depletion of the ozone layer. In the first case, the affected State would seek redress under the existing rules of international law, but the latter case was more complicated. It applied particularly where indirect effects were caused by goods traded or services rendered internationally. In this case, a State may restrict or ban the import of such a good or service into its territory if the product or the service itself caused damage in the territory of the State. However, if the negative impact on its territory was not caused by the product itself but by its production process, the indirect link caused problems in establishing the international responsibility. This was aggravated if the damage was not inflicted on the territory of a precise State but on the global commons.

57. It was clear that international effects on the environment asked for international cooperation to limit, prevent or redress damage to the international environment. As a general rule, extraterritorial application of national regulations, or unilateral actions based on such national standards were not the solution, especially not under the auspices of the GATT.

58. The obligation of States to cooperate was a basic principle of international law, also to be applied in the area of international trade. States were obliged to prevent activities occurring on "their" territory from impacting the environment of other States. This had not only been enshrined in the Stockholm and Rio Declaration but had already been established as a principle of international law by the International Court of Justice in the Corfu Channel Case. Thus, States were bound to establish rules in international law which would apply these principles to international trade. Unilateral action had always been the last resort, also in the domain of international trade.

59. There could only be room for unilateral action, if according to the rules of international law, the responsibility of a State had been clearly established. In all other cases consultation and cooperation flowed from the obligation to prevent damage, originating in its territory, of the environment of any other state. It was also useful to reiterate that environmental problems could be best solved by measures directly aimed at the source of the problem, i.e. by environmental measures and not trade measures. The latter could be justified - as had been demonstrated in the Group's discussions - primarily in the context of an MEA, if they were to ensure that commitments undertaken by parties to an agreement were fulfilled, and/or to make sure that so-called free riders did not profit to the detriment of parties by not playing according to the rules and thereby rendering the agreement ineffective.

60. In this respect, the categorization of trade measures as proposed by the representative of Canada, and supplemented by Sweden and Mexico, was clearly useful. In this context a common understanding of what specifically the term MEA encompassed was necessary, and might be different depending on the case. A regional agreement, if most or all states in that region participated, might be an MEA if it dealt with a problem occurring primarily in that region. Third parties could find themselves in the position of accepting these regional rules although they had not participated in their elaboration. In this context, a common understanding of the term "environment" was important.

61. Another issue was how the national dimension of the environment could be internationalized. If environmental regulations were embodied in internationally traded goods or services, claims of "fair" or "unfair" trade, or problems of competition or competitiveness, could begin. This consideration had to start from the premise that there were no internationally accepted rules of competition law, although there were encouraging developments in this regard, and no internationally agreed standards for products or production rules. Thus there was an urgent need to search for international cooperation in the field of competition, based on an international consensus, and within GATT.

62. Principle 12 of the Rio Declaration was clear in that respect. All efforts should be made to reach an international consensus to address global environmental problems. This goal could only be reached if environmental rules and international trade law were mutually supportive.

63. The representative of Switzerland stated that the regulation of unilateral measures was very delicate. If the measure was part of national policies, it would be difficult to adapt to the particular situation in each country. Another approach would only set common objectives and define the effects which would justify action by third countries and effective modalities to treat these reactions. Her delegation agreed with the multilateral approach to solve international problems when the problems were not strictly local or regional, but it had to be determined first whether a country could take unilateral action which would have extra-territorial effects, on global commons. Article XX extended national legislation to imported goods and allowed measures to protect human, animal or plant life or health and the conservation of resources if such measures were jointly applied with restrictions to national consumption or production.

64. The measures must, however, not be applied in a way that would establish arbitrary discrimination between countries where the conditions are prevailed, and be a restriction to international trade. The other principles of the GATT remained applicable, particularly the national treatment provision. Until now, Article XX had rarely been invoked in the environmental context.

65. There were some areas that needed further clarity. Non-discrimination meant that the measures should not be applied so as to constitute arbitrary, unjustified discrimination between countries where the same conditions prevailed, however this latter term was not sufficiently precise. Criteria needed to be established, which would categorize the conditions in the various countries, not only on an economic, but also on a social, economic, and ecological basis. The "same conditions" would be valid only where the arguments by the contracting parties would have the same starting point.

66. Discrimination also appeared in other forms; lack of transparency was one such form unless the measures were published. Unilateral discriminatory measures would be arbitrary if a country was not informed of them. Regarding disguised restrictions to international trade, where not only the measure but its impact could be disguised, the idea that if a country announced a measure, it would not be considered disguised should be clarified in Article XX to avoid any abuse. The purpose of conservation measures must be for the conservation of resources. But if such a measure was an economic mechanism, governments implementing them, although interested essentially in conservation, would not take them if the profit of such measures was lower than the cost.

67. The condition of extending measures to national production and consumption may facilitate certain national programmes, but problems could arise where there was no production or consumption of them. Article XX, as formulated today, would cover a number of measures if it were given an extensive interpretation, however there would be no legal basis to ensure uniformity of judgement. The judgement would be a point of orientation that might lead to a better understanding of the problem since environmental problems would become more and more difficult and such measures would become more common. Article XX should cover discriminatory measures for environmental protection in countries where the same conditions did not prevail. Countries should not be prevented from taking appropriate measures to protect their environment, and an extensive interpretation of Article XX could not substitute for the need to define international environmental standards. It would also be useful to examine the economic impact of environmental measures in the institutions dealing with it. This covered only a limited percentage of international trade.

68. The representative of the European Economic Communities noted that, by the next meeting, his delegation would present, in writing, their reflections particularly on the issue of how a clarification of concepts in Article XX could provide the best basis to address, in a balanced manner, the interface between the GATT and the trade provisions of MEAs. He therefore refrained from detailed comments today and would reflect on the non-papers for future comments.

69. His delegation believed that the discussion should focus around key concepts and referred to three general considerations. First, his

delegation believed that the Group's work on agenda item one was essentially a clarification of the interface between GATT and trade provisions of MEAs which should be based on two broad parameters: GATT should not be seen as an obstacle for the implementation of genuine MEAs for environmental protection and GATT must address the application of trade measures vis-à-vis countries which were not members of MEAs to ensure conformity with GATT principles. These two parameters were not contradictory. His delegation's experience with MEAs, particularly the three listed in the agenda, illustrated how the two parameters could be reconciled.

70. Secondly, the limits of GATT competence should be kept in mind. There was general agreement that the GATT was not a forum for reviewing MEAs and the Group would be going beyond its competence if it tried to address environmental issues per se, and tried to develop its own classification of different types of environmental problems that may be addressed in MEAs. Its work should focus on the use of trade measures.

71. He noted three advantages implicit in MEAs. First, through an open process of negotiations in which all countries participated, and through broad participation of the agreement, balanced solutions would be assured. Second, in such negotiations the use of trade measures could be considered carefully so that the risk of constituting a disguised restriction on international trade or unnecessary obstacles to trade could be largely minimized. For this reason GATT, in several contexts, had considered that measures conforming to internationally agreed standards should be deemed GATT consistent.

72. Third, MEAs provided equitable and effective alternatives to unilateral measures which had been correctly condemned in the tuna panel report. Discussion on the rationale for trade measures under MEAs had focused on the issue of free riders and his delegation believed that the use of this concept could give rise to misunderstandings, risk legitimizing certain uses of trade measures going beyond what had been foreseen in MEAs, and have implications for measures which were not part of MEAs. When considering the use of trade provisions in MEAs, it was not the benefits derived from non-participation that should be considered, but different from the concept of free rider, was whether actions taken by non-parties would nullify or impair actions taken by parties representing a broad consensus. Linked to this was whether trade measures should be used to encourage or force participation in MEAs. His delegation did not believe that this justification had been used in MEAs because in no case were trade measures applied under MEAs simply because a country was not party. Moreover, if this rationale for the use of trade provisions was accepted, there would be no limit to the type of trade measures that could be used vis-a-vis a non-party.

73. In MEAs, care had been taken to ensure, as far as possible, that trade measures did not go beyond what was necessary to achieve an environmental goal. This had implied a careful choice of the product to

which measures would be applied. Third, there was even less justification for using trade measures in MEAs to equalize the costs of environmental protection to address competitive concerns. If such an argument was used, serious implications, not limited themselves to MEAs would arise.

74. The representative of Australia noted that many issues had been raised in the Group's discussions. On those relating to GATT Articles, the lack of jurisprudence in GATT on Article XX, as it related to measures taken under MEAs should be noted. His delegation looked forward to detailed consideration of this and other issues, such as the rationale and purpose of particular measures, the free rider question, the criteria for MEAs, and the definition of "environment", in future meetings.

75. On procedure, he noted that it would be useful to have more structure and certainty on which items might be discussed in forthcoming meetings. Among the issues raised, many delegations had still to clarify their priorities, and the relationships of the issues to each other. The Group should start to consider whether some specific areas could be foreshadowed for future discussion. Delegations and experts in capitals would thus be able to focus and deal with matters in more detail and more effectively.

76. The representative of India prefaced his intervention with fundamental premises on which any discussion of agenda item one should take place. One was that liberalization of trade through the generation of additional wealth, or increase in the standard of living, and efficient resource utilization would contribute to better environmental protection. This was an idea in which many developing countries believed, and to which his delegation attached importance. Second, MEAs, as opposed to unilateral action, were preferred and desired to deal with global environmental problems. Third, GATT's competence did not extend to setting up environmental standards. Fourth, GATT did not place any constraints on governments to pursue policies to protect the domestic environment. Non-discriminatory domestic policies offered the most efficient approach of dealing with nearly all environmental problems; interference with trade was almost never the best way to achieve a particular environmental objective.

77. His delegation emphatically rejected the use of discriminatory and/or extraterritorial trade measures to pursue environmental objectives. The UNCED provided abundant proof that MEAs were possible, and the concept of extraterritoriality should be replaced by the concept of multilateralism. The question was how this could be accomplished. International peer pressure and persuasion would work in some cases, in others financial assistance and transfer of technology would be the answer. The use of extraterritorial trade measures was not the best way and could be counter-productive to achieving environmental objectives.

78. He added that the issue of free riders should be approached with caution. It was a subjective concept that could be based on dubious assumptions. One interpretation he offered was that developed countries with tremendous emissions of carbon dioxide and CFCs were "free riding" on the shoulders of developing countries. Another concept to be examined was the taking of competitive and cost advantage. The Group should examine these concepts to understand the exact definition but was a long way from using them. He reiterated that a number of questions had been raised and his delegation would examine them in more detail along with the non-papers and revert to them at a later stage.

79. The representative of Sweden, on behalf of the Nordic countries, presented a second non-paper on trade and environment in the Uruguay Round instruments on Technical Barriers to Trade and Sanitary and Phytosanitary Measures. He believed it fell somewhere between agenda items two and three, but was not intended to be an interpretation of these two instruments, and did not represent an official view. His delegation tabled the paper because the SPS Decision had a clear reference to Article XX, and the updated TBT text was an implicit interpretation of it. These instruments presented interesting ideas and perhaps models for further analytical work under the Group's three agenda items.

80. The representative of Japan, on agenda item two, recalled that certain notification mechanisms existed in the present GATT and would be added to in the Uruguay Round in order to reduce the potential friction among contracting parties. Through these mechanisms, technical regulations could be adjusted to meet the concerns of trading partners, however, environmental regulations may require broader consideration because they often reflected particular value judgements of individual nations or strong political pressures. For these reasons, they may be more difficult to adjust than pure technical regulations. Given this particular nature of environmental regulations, the Group might, at an appropriate time, reflect on how to tackle this issue with a view to making transparency mechanisms for environmental regulations more useful.

81. The representative of Sweden, on behalf of the Nordic countries, endorsed the importance that the GATT transparency rules played in ensuring a proper functioning of the multilateral trading system. He highlighted some points in document TRE/W/2. First he believed it important to note that the words "emission standards" on page 3 referred only to emission standards of products. Second, his delegation wished to add to the list under item 11 emission standards and other regulations related to processes and production methods. They were only partly addressed in the revised TBT text and thus represented a significant gap in transparency. Third, he did not find the first gap mentioned under item 11 problematic, since the main purpose of international standards was to diminish trade barriers and thus enhance

free trade. The measures referred to in the first indent would have significant trade distorting effects.

82. With regard to timing of notifications, most of the transparency provisions in the GATT were for already adopted regulations. Only the TBT notification procedures provided means for assessing trade effects prior to the adoption of a measure. Since one of the ultimate goals of transparency provisions within the GATT was to prevent trade disputes from arising, it would be worthwhile to study to what extent the ex ante approach could be used more widely in the GATT.

83. Regarding possible gaps in the coverage of the existing requirements, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, and the new FOGS text seemed to ensure transparency of all measures which had an impact on trade. However, the lack of clarity and specificity in the transparency rules made them too general to be effective. A first listing of possible gaps was compiled in TRE/W/2. The next course of action was to study each of these gaps in order to comment on them from the point of view of the GATT provisions involved and, to the extent possible, to provide a better understanding of their practical relevance. Various departments of the Secretariat had the required expertise to help in this regard. A paper analyzing the issues identified in the previous interventions was also needed.

84. Transparency was also important to the private sector and there were a number of NGOs interested in getting more information on the environmental measures affecting trade. It was in the interest of the trade community to provide such information in order to broaden their perspective. His delegation thus proposed that thought be given as to how the notification systems could be made effectively transparent to a wider audience without upsetting confidentiality, or being too cumbersome or extraneous. NGOs should not be swamped with more information than they could handle or with information that was of no relevance to them. If and when a central registry of notifications was established, it should not be too difficult to agree upon rules and practices for which notified information would be provided to non-government users.

85. On the implementation of existing transparency rules, his delegation believed that there were considerable discrepancies in the way contracting parties fulfilled their obligations for measures with trade implications in the environmental field. One way to approach this problem could be to include a review of notification practices in the Trade Policy Review Mechanism, however it would and should not, become a key issue in these reviews. Nevertheless a short chapter in the TPRM reports dealing with notifications would help to improve the status of the GATT transparency provisions in capitals.

86. The representative of the Republic of Korea stated that strengthening transparency through appropriate notification requirements would limit the negative effects of certain trade-related environmental measures, and abuse of Article XX. His delegation believed that the publication duty in Article X was not sufficient because environment-related trade measures were generally very technical, complicated and variable in nature. Moreover, measures taken under Article XX remained outside the sphere of Article XX, and the 1979 Understanding seemed devoid of means for compulsory implementation.

87. Despite the on-going efforts in the Uruguay Round negotiations to strengthen the overall notification system, satisfactory, comprehensive transparency in environment-related trade measures might not be easy to achieve. As the representative of Mexico pointed out, no independent mechanism other than the GATT was really necessary to handle the trade-related aspects of environmental agreements, however, the study of ways to enhance transparency of environmentally-related trade measures in an overall review of the notification system, perhaps with the goal of implementing a temporary notification system in the context of the Uruguay Round negotiations might be useful.

88. The representative of the European Economic Communities agreed that transparency was important for the GATT system but alone could not resolve real conflicts of interest. GATT already included, especially if the Uruguay Round improvements were taken into account, broad transparency requirements relevant for a number of measures adopted for environmental reasons. However, this did not mean that improvements in the transparency mechanism should not be part of the Group's work.

89. Three considerations were important in undertaking these improvements. One, any transparency mechanism which might be introduced should be administratively manageable. Two, duplication of transparency requirements should be avoided; it was particularly important to identify the gaps that might exist in the current system. Three, the Group should not aim at introducing transparency requirements for environmental measures which were broader than those which applied to measures which may be adopted for other policy reasons.

90. A useful exercise would be to identify the types of measures for environmental purposes which might impact trade so as to consider how these would relate to transparency requirements. He suggested six types of measures. First there were measures adopted for the protection of the environment which had no impact, or only a minimal impact, on trade. These should not be of concern. In this context, he added that in examining the scope of coverage of PPMs under the GATT, it should be remembered that there were certain types of PPMs which should not be applied to imported products and that they, in principle, were not candidates for a transparency requirement. The important issue to clarify was which PPMs may be legitimately applied to imported products;

Article III and the TBT Agreement were important reference points for this.

91. A second type of measure covered most, environmental measures taking the form of internal regulations or taxes which were equally applied to imported products and, in some cases, to exports. Many regulatory measures were covered by the TBT Agreement which included very broad transparency requirements. The relationship of some of these, such as requirements which related to the recovery or the re-use of products after the marketing stage, to the GATT, however, was not clear. There was no notification requirement for taxes under the GATT, apart from provisions related to the notification of border tax adjustments for which there was considerable uncertainty about what exactly they implied in relation to taxes applied for environmental measures.

92. A third category covered voluntary measures implemented by industry. It was not clear whether GATT rules were relevant to those measures and which transparency requirements, if any, applied. The relationship between those voluntary measures and government regulations needed to be examined. A fourth category covered trade measures taken for the implementation of MEAs. Specific notification requirements in the TBT or SPS Agreements, if they were relevant, did not necessarily apply when these measures were on the basis of an MEA. There was also a need to examine which transparency requirements existed under those agreements.

93. A fifth category covered measures which may require justification under Article XX. His delegation believed that the reference in Article XX that such measures should not constitute a disguised restriction on trade should not be limited in interpretation to a transparency requirement. There were sufficient indications in the drafting history of Article XX to indicate that Article XX was not a derogation from the publication requirements of Article X. But the latter related to publication and not notification as such. In principle, the 1979 Understanding would also apply to measures covered by Article XX, although it was phrased as a best endeavour undertaking. This should be discussed during a discussion of Article XX.

94. The final category covered measures related to subsidies. The GATT contained notification requirements for them but not related to the objectives of the subsidy. He added that there had to be a clear understanding of the type of measure which needed to be notified, and sufficient clarity about the underlying rules which applied to those measures. Transparency was most effective if there was a body to which notifications could be addressed and eventually discussed. Some of the measures taken for environmental purposes fell under the jurisdiction of specific bodies in the GATT, others did not, because in certain areas, there was an overlap or combination of instruments to achieve a certain environmental goal; packaging was an example in that respect.

95. The most effective way to proceed with further work would be to continue the voluntary exercise which the Group had undertaken on packaging and labelling, which had an important educative purpose. His delegation would not be opposed, if the Group agreed, to enlarge this exercise to include measures taken under MEAs.

96. Another area for further work, in paragraph 17 of TRE/W/2, was to study parameters in order to identify national environmental measures that should be notified to other contracting parties. A possible way to begin this work would be for the Secretariat to prepare a tentative list of measures taken for environmental reasons which could be considered to have an impact on trade. This could be the basis for a discussion about how these measures may relate to the transparency requirements in the GATT. This note should limit itself to identifying the type of measures but could contain a summary description of the measures. It was valid for the Group to see how the transparency requirements of the GATT related to the different types of measures.

97. The representative of the United States noted the particular importance of transparency in this area in order to avoid disputes. Her delegation agreed that transparency of national environmental measures would be improved after the conclusion of the Uruguay Round as a result of several new provisions, in particular the proposed establishment of the central registry of notifications under the FOGS text and the transparency provisions in the TBT and SPS texts. One important issue, presented in TRE/W/2, was whether there were GATT provisions for transparency of packaging regulations. Such programmes could significantly impact international trade, therefore improving transparency of these regulations should be taken seriously in this Group. She suggested that the Secretariat attempt to determine how this gap could be addressed.

98. Regarding future work on this issue, her delegation supported improving the transparency of all domestic, trade-related measures used for environmental protection. In response to the specific suggestion for a GATT registry for trade measures in the MEAs, she considered that the trade effect of such measures was not evident until a nation adopted an implementing measure. Therefore, assessment of whether or not to notify the GATT of such measures was not possible until nations had developed domestic legislation to enact the trade provisions of the MEA. Thus her delegation did not believe that a GATT registry for trade measures in the MEAs would be useful.

99. She suggested that the Secretariat could survey through questionnaires the contracting parties to determine how and when each made the decision to notify the GATT of trade measures for environmental purposes. If the results of the survey indicated that there were widespread differences among contracting parties with respect to their notification obligations for such measures, it would be useful to focus on the parameters which contracting parties used to make such decisions.

This approach would be constructive in the Group's efforts to analyze how effective existing transparency provisions were, and to what extent contracting parties had a common understanding of their requirements for these trade measures.

100. She added that up-dating documents TBT/W/156 and L/6896 would not yield significantly new information and engaging in an inventory of national environmental measures notified to the GATT over the last decade would not be an efficient use of time. She added that her delegation considered that contracting parties may invoke Article XX as an exception to particular obligations. It did not, however, automatically relieve a contracting party of all of its GATT obligations, including publication and notification obligations, as was suggested in paragraph 10 of TRE/W/2.

101. The representative of Canada considered that the Group now had a well-established work programme that it could usefully convey publicly. She noted that a number of similar concerns had been expressed regarding the potential trade impact of packaging and labelling measures and the important role that improved transparency must play in addressing and hopefully preventing such impact. Translating the discussion into an examination of specific information in cases in point would help the Group get at some of the detail and complexity that underlaid these subjects.

102. Her delegation endorsed and sought the Group's support for the suggestions for further work in paragraphs 16 and 17 of TRE/W/2 which would be a logical next step and should begin as soon as possible. She also supported the suggestion in paragraph 18 regarding the notification exercise, and her delegation was prepared to contribute to it once agreement was reached on the types of measures to be included.

103. She added that more detail and further work on the additional dimensions of the transparency issues raised by the Nordic delegation were also important. Transparency should be an early warning system to head off problems. In this context increasing importance was being attached not only to what the provisions for notification were and how they were actually functioning, but also to the gaps in the system for which more empirical information from the Secretariat would be valuable.

104. She noted that her delegation had submitted to the Secretariat information on packaging and labelling programmes at the federal, provincial and municipal levels, including voluntary initiatives supported by the Government. Finally, she clarified a comment regarding labelling issues made by the Canadian delegation at the July meeting, as reflected in the report on that meeting. Her delegation believed that in a situation in which two products, one imported and one domestic, achieved the same level of environmental performance against criteria applied of an importing country's labelling programme, those two products should have the same access and treatment in the granting of an

eco-label. It would not be acceptable for an objectively equivalent imported product to be treated differently than a domestic product, however the fact that labelling could be based on a product's PPMs as well as performance criteria raised questions. For example, if the manufacture of an imported product had little or no impact on the environment of the importing country, should eligibility for an eco-label be affected? These were issues that the Group would address in its future work.

105. The representative of India considered that there were extensive transparency requirements in the GATT, including Article XX, the 1979 Understanding and the TBT Agreement. The implementation of the Uruguay Round results, especially in the area of FOGS and the extension of the TBT Agreement to all contracting parties would considerably enhance the transparency of trade measures taken for environmental objectives. His delegation believed that there was more need to ensure that the implementation of the existing notification and transparency requirements were being adhered to meticulously rather than set up new transparency mechanisms.

106. He added that the importance of transparency with respect to trade provisions contained in MEAs cannot be over-emphasized. His delegation did not believe that the U.S. representative's argument as to why her delegation did not favour a compilation of trade-related measures of MEAs should necessarily stand in the way of the Secretariat compiling such a list. Although his delegation would consider more carefully the U.S. argument, it favoured the idea of this which could begin looking at trade provisions contained in MEAs and those which would have a significant effect on trade, rather than just trade-related measures, since this might be arduous and make the list unwieldy. He added that this agenda item was closely related to agenda item three which his delegation would comment on later.

107. The representative of New Zealand stated that his delegation would be interested in exploring the Nordic non-paper on the basis of the Nordic representative's emphasis that it was not intended as an interpretation of the draft TBT and SPS Agreements, but was an illustration of how the drafters of those Agreements had taken account of issues which may be relevant to the broader debate in the Group.

108. His delegation was a strong supporter of maximum transparency to build confidence in, and prevent disruption to, the international trading system. There were clear benefits to encouraging greater disclosure of national environmental measures which may have significant trade effects whether they were purely domestic or taken pursuant to an MEA. The Group would need to consider to what degree such disclosure could be achieved through greater application of existing and envisaged transparency obligations and where additional initiatives might be required. In this regard, he was interested in the U.S. suggestion for a survey of contracting parties' practices regarding MEA-related trade

measures. His delegation was currently compiling information on packaging and labelling to provide in the near future.

109. The representative of Australia considered that the suggestions for further work in TRE/W/2 should be accepted. His delegation also agreed to an informal exercise on national environmental measures if the Group agreed and was currently attempting to prepare a contribution on packaging and labelling as well as on the broader question of national environmental measures.

110. The representative of Singapore, on behalf of the ASEAN contracting parties, also believed that the issue of transparency was one of the most critical issues in the entire GATT process. The Secretariat studies and the suggestions it had put forward would provide a valuable basis for further work.

111. The representative of the United States stated that she did not wish to leave the impression that her delegation believed that transparency of measures taken in MEAs was not important. Her delegation, in fact, checked with the relevant national authorities and found that these measures were already being reported, as domestic measures, under existing provisions in the GATT. For this reason, she believed such notification would not be the most interesting use of time, but it would not be problematic for her delegation to do so, if the Group so decided.

112. The representative of Switzerland emphasized that transparency was one of the pillars of the multilateral system but it was not necessary to replace the existing GATT system. Transparency was an instrument, not an end in itself, which subjected measures which had an impact on trade to notification. Going beyond these measures, would submerge GATT in too many notifications which would be counter-productive in the long run. The system could be amended and the information improved, in order to have an overall view of trade effects of certain agreements on the overall environment, through, for example, the TPRM mechanism.

113. The representative of India, on agenda item three, noted that while packaging and labelling requirements were designed to address countries' legitimate environmental concerns, they could result in unintended restrictive effects on international trade. The TBT Agreement stipulated that countries could formulate their own standards and technical regulations based on scientific evidence. However this had led and could lead in the future to a variety of regulations, implemented by countries in a haphazard and ad hoc manner.

114. The procedures of prior consultations in the TBT Agreement were often not adhered to, leading to short lead times and inadequate phase-in periods resulting in impediments to trade. For foreign firms, these often entailed high compliance costs. Also, although packaging and labelling requirements may be applied on a non-discriminatory basis,

they may entail high adjustment costs, particularly for developing countries.

115. He considered that the section on industry experience with other countries' packaging legislation, on page 21 of TRE/W/3, was of great interest. Many problems had been noted by industry in encountering packaging legislation of other countries which often became barriers to trade. Also, on page 25, the trade aspects related to labelling were of great interest. He noted that in regard to the last sentence on that page referring to international harmonization and the need for an international institution, efforts were being made in the International Standards Organization to arrive at international standards on packaging and labelling requirements. Once arrived at and widely accepted, they might diminish some of the trade-related concerns in this area.

116. The representative of the Republic of Korea also considered that the strengthening of packaging and labelling requirements might lead to serious restrictions on the exports of developing countries, who were likely to face difficulties in properly responding to the demands of importing countries. New requirements for packaging and labelling should be in accordance with the basic GATT principles of MFN and national treatment so as not to create unnecessary trade barriers. It might also be necessary to develop a notification system for packaging and labelling requirements in the GATT.

117. His delegation also shared the concerns regarding the life-cycle approach to labelling. Each country was free to set its own level of environmental protection, however, bearing in mind that different levels could result in de facto discrimination against other countries, mainly developing countries. The GATT should arrange concrete ways of harmonizing criteria from different countries when governments were directly or indirectly involved in the regulations' management. Agenda 21 provided that standards valid in the most advanced countries could be inappropriate and of unwarranted social cost in most developing countries. His delegation supported the earlier suggestion by Brazil that special considerations, such as a sufficient adaptation period and technical and financial cooperation, be given to developing countries.

118. He added that international efforts to standardize packaging and labelling requirements were needed so as to avoid trade-restrictive effects. Once set up, they could not only serve as a basis to set up national standards on a least trade-restrictive basis, but could act as criteria by which the legitimacy of national requirements could be measured. However difficult, his delegation believed that efforts should be directed as much as possible towards international standardization because its absence might force many countries, especially developing countries, to abandon markets in which their share was relatively small, and eventually result in unintended trade restrictions.

119. The representative of the United States explained that efforts to develop and implement environmental packaging and labelling programmes were on-going in federal and state governments, non-profit organizations, private industry and trade associations. Because her delegation considered these efforts important to trade, it had submitted a paper to the Secretariat, following the Chairman's request, which described several such programmes currently underway. The paper described federal actions in this area including the statutory authorities and agencies that had to monitor and regulate packaging and labelling programmes. To prepare the paper, her delegation had requested information and had interviewed government agencies, environmental groups, independent certifying groups, industry, and state governments and state environmental organizations. Her delegation would provide a version of this paper to the Group at the next meeting and was eager to learn more about other countries' programmes at that time.

120. This exercise showed the emergence of several different programmes in the U.S. which were in their infancy and which would continue to evolve. This was similar to developments at the global level where several different programmes were developing in individual nations. While this could lead to innovative programmes, the existence of different programmes, both domestically and globally, could weaken the potential trade and environment benefits envisioned by the programmes.

121. For example, her delegation learned from U.S. industry of the potential difficulty in tailoring products to meet different packaging and labelling programmes in U.S. States and in other countries. They had also raised awareness of the potential problems in the future if companies wishing to export to overseas markets found that their products had to have several different eco-labels or symbols to gain acceptance. From the environmental and consumer perspective, her delegation learned that too many different and complex symbols, terms and schemes for labelling and packaging could lead to consumer confusion which could quickly lead to distrust of the meaning and intent of such markings.

122. The development of international voluntary guidelines aimed at making labelling and packaging requirements more compatible could address these concerns. Existing international standard-setting organizations such as the ISO were currently exploring appropriate avenues to strengthen and make more compatible these standards, both among and within countries. Her delegation was pleased that the Secretariat was keeping abreast of these activities since they should yield useful information for discussions in the area of packaging and labelling. From the trade perspective, appropriate guidelines in this area could help countries to improve protection of the environment without compromising their sovereign right to institute national programmes.

123. The concept of justification was defined on pages 3 and 4 of the Nordic non-paper in terms of determining whether a particular standard was effective in achieving its purpose. She asked where this concept was included in the TBT and SPS Agreements. In the drafting of standards disagreement over what would or would not be an effective approach was not uncommon. In environment, this was made more complex when the precautionary approach was used. It was not, however, the Group's impression that the TBT and SPS texts were written with a view to second-guessing the efficacy of standards, but rather on the effects of such measures on trade.

124. The representative of Poland believed that the Nordic non-papers and the Canadian statement were important for clarifying basic issues in this field. Further studies concerning the interpretation of existing GATT provisions, especially Articles III and XX were not needed, however, his delegation shared the concern of the ASEAN countries that the lack of precision in some frequently used terms, such as free rider, could seriously damage economic interests of countries which were less advanced in terms of environmental protection. His delegation supported the careful and balanced approach presented by the Canadian delegation.

125. His delegation shared the concern of India and Korea that excessively high and non-harmonized packaging requirements may create unnecessary technical barriers to exports of some less developed countries. Future discussion in the Group should be devoted to well defined topics which would be known in advance. He proposed two such issues: the implementation of limitations on international import and export of wastes, particularly toxic and hazardous ones; and setting up a mechanism to facilitate transfer of modern, environment-friendly technologies between different countries.

126. The representative of Sweden considered it not wise at this stage to examine GATT provisions in the context of packaging and labelling. TRE/W/3 provided a good point of departure for the Group's analytical work. Regarding the U.S. query, his delegation may have erred but did not wish to comment further at this point.

127. Packaging and labelling posed quite different types of problems in their relationship to the GATT and therefore must be treated as two separate issues. Packaging was an area which was developing very rapidly in the industrialized countries and was part of a broadening of environmental policy away from production processes to the products themselves. It was important to focus on the rationale behind packaging requirements. His delegation concluded that the growing awareness of the environmental effects of products used over their total life-cycle would lead to an increasing number of new requirements on them and their packaging.

128. New categories of requirements could be added to document TRE/W/3. One was recycling, including, requirements on the degree of recycling or

the content of recycled material used in a package. Another was re-use requirements, including the degree of re-use of certain materials in packaging. He highlighted the importance of categories such as bans on either certain types of packaging or the presence in them of harmful substances, and economic instruments, such as taxes, charges or deposit systems.

129. His delegation believed that packaging and handling requirements could be important components and constructive in a total environmental strategy. At the same time, they could, directly or indirectly, act as barriers to entry into the market such as for products where packaging played an important role or where the trade volume of a product was so low that modification costs deterred importers from entering the market.

130. There was a distinction that could be made between governmental and private systems, between voluntary and non-voluntary packaging systems and between systems where the criteria were decided by the government and those where the criteria were set by a private body, for example, consisting of representatives from environmental organizations and the business sector. When considering possible GATT implications, different conclusions may be drawn depending on which system was at issue.

131. One general issue which needed further analysis as far as packaging was concerned, was the concept of like products. The requirement of non-discrimination in Articles I and III of the GATT only applied to like products. The GATT made no clear distinction between product and packaging since a requirement on packaging was treated the same as a requirement on the product inside the package. If the differences in packaging between two otherwise identical products were causing environmental problems, should the products be considered "like"?

132. A set of related issues dealt with handling systems. It wasn't clear to what extent they were covered by existing GATT rules since they were not always directed at the individual products as opposed to packaging systems. The purpose of handling systems for packaging, which exist today for paper, glass and aluminium containers, for example, may be to recover materials or to reuse the package itself. In the Nordic countries these systems function well both from an environmental and a trade point of view. It would be helpful though to have a better understanding of how they fall under the TBT rules or other GATT disciplines.

133. He considered it too early to draw specific conclusions under this agenda item, but his delegation believed that the GATT did not give clear guidance on how differences in packaging and handling requirements among countries should be viewed. Harmonizing international standards could help prevent the emergence of trade policy problems and was an approach that needed to be further explored. Each country must still

have the option of maintaining different criteria due to its specific conditions.

134. The representative of the European Economic Communities reiterated the importance of both packaging and labelling in the environmental policies of the EEC and that measures to address these environmental issues had been adopted or considered, both at the Communities level and by the Member Sates of the EEC. His delegation was compiling these requirements to submit them to the Secretariat.

135. His delegation agreed with the representative of Sweden that packaging and labelling were two different issues as regards trade implications and the nature of the questions being discussed. Environmental labelling, although in different forms, was a particular type of instrument used to achieve certain environmental objectives. Packaging was a key issue of environmental policy to achieve a number of objectives such as reducing or eliminating waste, saving raw materials and energy, or controlling the risks associated with certain types of packages. To achieve those objectives different types of instruments could be used and the discussion should take these into account.

136. He added that although the use of technical regulations in packaging, covered by the TBT Agreement, was an important aspect, there were a range of other instruments that could be used to deal with environmental problems of packaging. Some of the measures mentioned by the Swedish representative needed more detailed consideration. Regarding different measures, there were a number of cases in which there were bans on the domestic sale of certain packages which were normally related to the hazardous characteristics of certain packages or to the fact that certain types of packages were considered more environmentally damaging than others. The type of trade issues which were raised by these bans were familiar in the GATT and certainly a discussion of GATT and TBT rules could be important in this respect.

137. Another category included technical regulations that may require compliance with certain characteristics in order for packaging to be put on the market. In certain cases, in order to identify those characteristics, reference may need to be made to the way in which the packaging had been manufactured and the influence that that may have on the capacity of the package to be recycled or recovered. Other types of requirements, for instance, may require a package to have a certain content of recycled materials. The important issues here included the relationship of PPMs (those related to the characteristics of products and perhaps others) to Article III and the to TBT Agreement.

138. A third category, defined by the Swedish representative as handling requirements, did not relate to the package as such but to its recovery or reuse after the marketing stage. There was some uncertainty about the relationship between this type of requirement and the disciplines in the GATT. Another important category included economic

instruments to achieve the objectives of packaging policies; many were mentioned in TRE/W/3. One issue included here which did not relate exclusively to packaging and was an area for future discussion was the relationship between the GATT rules and different types of taxes applied for environmental purposes.

139. Finally, voluntary agreements may or may not have trade impacts and may raise questions as to how far they impact trade. They may imply in certain cases a less trade-restrictive alternative to regulations. It is also not clear which GATT disciplines would cover voluntary agreements with an impact on trade, and how far.

140. The representative of Singapore, on behalf of the ASEAN contracting parties, believed that packaging and labelling regulations should begin with voluntary recommendations to educate people and gain popular support for the envisaged measures. He considered the statement on page 26 of TRE/W/3, indicating that labelling programmes were becoming increasingly popular, too sweeping. It did not take into account the stage of such programmes in developing countries, where there were no such programmes and environmental priorities differed. He agreed that the aim of criteria setting for labelling should be the quality of the product in all its developmental stages, not its geographic origin. This was important given growing trends towards globalization. One issue was how product components, increasingly coming from various countries, would affect the process of labelling that product in its geographic country of origin?

141. The representative of Argentina stated that his delegation believed that GATT had an important role in defining the relation between trade and the environment in order to avoid the latter being used as a pretext for protectionist measures. He believed that the criticism against the GATT was due in part to ignorance. In a reply to the World Wide Fund for Nature, his delegation underlined its view that the criteria and outlook of WWF was wrong as concerns environment and instead of ensuring its preservation, their views tended to favour protectionism.

142. GATT did not allow the use of trade measures to oblige other countries to accept similar environmental standards, or to impose their values on the conservation of natural resources, nor does GATT allow for the imposition of terms of MEAs to non-parties. In this regard, the tuna panel report, although not adopted, was clear. His delegation shared the Canadian view regarding the solution to the problem of conservation of natural resources or protection of the environment. This should be done through international cooperation, where all countries of the United Nations system participated. When trade measures were applied in a framework of MEAs, there would be no problem for the participating countries since they voluntarily accepted certain trade restrictions in order to contribute to the objectives of these MEAs.

143. His delegation also shared the need to spell out under which conditions a country may be termed a free rider under an MEA. The definitions which the U.S. and the EEC had drawn up must be clarified to see whether they referred to universal agreements. From the GATT point of view, free riders would be those contracting parties who did not fulfil the MEAs or measures which had been adopted through collective action by contracting parties, such as the tuna panel report suggested. He cited as an example those countries who would no longer abide by the ban on whaling negotiated by the International Whaling Commission, if it was validated by the contracting parties.

144. It was important to recall that so far there had been no legal recourse to the GATT by contracting parties who believed they were being discriminated against through trade measures applied under an MEA. His delegation agreed with the representative of Austria, that an MEA must be clearly defined. How this was linked up to GATT should correspond to the guidelines recommended by the tuna panel report so that the measures applied unilaterally which were not in conformity with the GATT or with the interpretation of exceptions for environmental reasons could be identified. The Group should concentrate its work on this agenda item and the possible modality of parties to MEAs, negotiated under the auspices of the United Nations, containing trade provisions.

145. The interpretation of exceptions contained in Article XX, concerning the environment was, in a way, linked to transparency and international harmonization. A precedent to this could be found in the SPS text. The Nordic non-paper was useful and showed that Article XX was the only GATT provision to interpret exceptions for trade restrictions used to protect and preserve the environment. His delegation was surprised to hear of restrictions under other articles such as Article XI which contained an exception for imports of agricultural products or fisheries when there were restrictive measures for domestic production. There was no mention of environmental aspects or conservation of natural resources, which was explicitly mentioned in Article XX(g).

146. Concentration on the first aspects would allow the Group to progress on the general outlook of this issue in the GATT so that a specific interpretation could be taken up in the future. The concerns mentioned by New Zealand and Australia on the procedures for the Group should be taken into account once agreement was reached on such a concept or outlook.

147. The representative of Japan noted the utility of the Canadian and Nordic contributions. Along with the Canadian delegation's earlier contributions on agenda item one, he believed that the Group had enough material to further develop its analytical work in a more focused and structured manner. A structure had not emerged, but there was a sound basis on which the Group could focus on issues. Members could present and develop their views on specific questions and issues tabled on the

first agenda item. This would highlight the issues of most interest to all or a majority of the Group.

148. He believed that it would be meaningful to continue the discussion without losing momentum based on existing and future information, in order that a clear structure could emerge. He gave examples of issues such as extra-jurisdictionality, and free riders which contained various aspects and elements that, in his view, would provide the Group with useful material to develop the analytical work within the Group.

149. On the issue of free riders, the Group had some general and vague ideas, but no shared definition. The common denominator for a definition would be a country which neither participated in a MEA nor shared the cost of environmental protection. As the Canadian, Nordic, Singapore, and Mexican delegations noted, various reasons, some legitimate, existed why countries did not participate in an MEA and share responsibility.

150. It was difficult to pass judgement on the "motivation" for which a country did not participate in an MEA. Define the term "free rider", would run a risk of subjectivity. The criteria of legitimacy would be another difficult issue to tackle. A case-by-case examination may reduce the risk of subjective judgement, however, in this manner, a true multilateral consensus could hardly be reached. The definition of the term "multilateral" had been raised in connection with the issue of what constituted a consensus. As some delegations had pointed out, it could be safely said that a trade measure could be more balanced if it was screened through a process of multilateral negotiations and adopted in an MEA. However, this did not guarantee that the trade measure was legally consistent with the GATT.

151. He concluded that the Group was in the analytical phase of its work. He shared the view expressed by the Ambassador of New Zealand that it was not constructive to have preconceived notions and that hasty work would not serve the objectives of the Group.

152. The representative of the United States believed it important to recall what exactly the Group was discussing under agenda item one: the trade provisions contained in existing MEAs such as the Montreal Protocol, CITES, and the Basel Convention, vis-a-vis GATT principles and provisions. She believed that the Group had reached a point where it had abstracted too far, and was breaking up these MEAs so that when compared to the GATT, problems were found with isolated provisions or particular obligations. The Group had lost sight of the agreements as a whole. She noted that governments, including many represented at this meeting, had made binding commitments to these MEAs, and had agreed that in these instances trade measures were necessary and appropriate, in part because the environmental problem was a trade problem.

153. She stated that the Group was not convened to reverse these decisions and pick these MEAs apart based on the GATT. One of its purposes was to show that the GATT was not anti-environmental; it would not advance that purpose by failing to accord due recognition to the MEAs. Accordingly, it was important to examine the goals, environmental objectives, and reasons for trade measures in these MEAs. A common understanding of these agreements was needed for the Group to draw upon in its analysis.

154. Her delegation believed the analysis would be helped by inviting relevant experts from each delegation to provide the Group with their perspective on the background of the negotiation of each of these MEAs and the benefits resulting from them for their respective countries. In particular, they should address what the environmental problems addressed by those MEAs, and the circumstances that led to their negotiation were, how the negotiators arrived at the particular provisions of the MEAs, why they contained trade measures, and why they contained the particular trade measures in the particular form in which they appeared.

155. She reiterated her delegation's belief that multilateral, bilateral or regional approaches, as appropriate, were the preferred, most effective and lasting means to address international environmental concerns. At the same time, there were some real, practical limitations on multilateral solutions. For example, obtaining an MEA took time, and there could be difficulty reaching agreement on the particular multilateral approach. Realistically environmental problems did not wait for every country involved to join an MEA and a lack of participation could undercut an MEA's environmental goals.

156. Further, it was important to accept that there was a spectrum of trade and environment measures. It was not possible to understand MEAs out of context, nor was it possible to ignore other parts of the spectrum. The Group seemed to have moved beyond an examination of just MEAs, which was fine. For example, some of the interventions on the interpretation of the GATT as it related to the environment and the Nordic non-paper raised issues that went far beyond MEAs, and in fact went beyond the environment.

157. For example, interpretations of Article III did not involve only environmental measures but could affect all internal measures. This reinforced the need to look at the MEAs in a broader context. The Nordic non-paper raised a number of questions to stimulate discussion. There were many questions to examine, however, her delegation did not necessarily agree with those raised or the conclusions in the non-paper. Her delegation would like to make a presentation on the whole spectrum, however it did not believe that the time was yet right since the Group had not finished its analytical work.

158. She sensed frustration on the part of other delegations as well, and the reasons for that were that the Group had not laid a good, solid foundation for its analytical work to develop a common understanding of the three cited MEAs. She suggested reconciling the frameworks presented by her delegation, the Canadian and the Nordic delegations in, perhaps a Secretariat paper. The interventions at this meeting identified a number of other areas that needed work. For example, what was meant by "the environment". Also, the Group could pursue a discussion of concepts such as internalizing costs, risk assessment, and risk management. A comprehensive list of other concepts could be developed to usefully explore how to proceed with the work.

159. Another representative from the United States, who was involved in the negotiation of the Montreal Protocol for the United States made a preliminary intervention on the background of those negotiations. He stated that, in 1987, the world was facing a serious environmental problem involving substances that were destroying the stratospheric ozone layer and resulting in a serious risk to human health and to ecosystems, including aquatic ecosystems, that had been recognized for several years. His country, in fact, had already eliminated the non-essential uses of CFCs in the late 1970's.

160. The CFCs and other chemicals, collectively known as "controlled substances" were implicated in this depletion of the ozone layer; there was a need to control their emissions from human activities. These substances were used in many products throughout the economy and they and the products that contained them were widely traded around the world. Clearly, the most effective and readily feasible means of controlling emissions was to control the supply of the substances; by controlling their production, i.e. the total supply, and their consumption, defined as production plus imports minus exports, an equitable destruction of the available fixed supply could be assured.

161. Production was concentrated in a relatively few countries whereas the CFCs themselves were widely used. Therefore controlling trade among parties through the consumption formula assured that each party would in principle share the burden of the reduction and consumption of these products equitably. It was critical to the effectiveness of the control system of fixed supply and consumption among the parties to ban trade in the controlled substances with non-parties because they had no restrictions on either production or consumption of the chemicals.

162. Trade in a limited number of products containing the controlled substances had also been banned because, based on an analysis of the likely available substitutes of the controlled substances, it was concluded that the unrestricted imports of the products containing the controlled substances would inhibit the penetration of substitute technologies into the market place of the parties, and thereby nullify or impair the efforts of the parties to achieve the environmental objective of the Protocol.

163. It was important to recognize that each MEA was unique and dealt with a specific environmental problem likely to evolve over time, depending on continuing scientific assessments of that environmental problem, the impacts of the problem of an ecological nature, the technological aspects, and the economic aspects. Other factors to take into account included the environmental situation changing over time with respect to various problems, more and more countries would join the MEA, new technology would be developed to respond to the problem, and the economic factors effecting existing and new technologies to respond to the problem would change over time.

164. It was difficult to see the particular way trade was approached in any particular agreement in a uniform way. It was handled in this way in 1987 in the Montreal Protocol. How it would be handled in the future in the Montreal Protocol or in another MEA remained to be seen.

165. The Chairman took note of the statements made. He recalled that specific procedural suggestions had been made in this meeting, and he believed that there was general agreement that better focus was needed in the pursuit of deliberations. He considered that the Group was beginning to have enough focus on the issues as well as on procedures, and he would welcome suggestions from delegations in this regard so that he could be in a position to make some suggestions for the coming meetings.

166. On another matter, he stated that the Group had had six sessions, and perhaps have seven before the CONTRACTING PARTIES Session in December. He considered that it was time that the Group report to either the Council or the CONTRACTING PARTIES. The time elements were such that he did not believe that he would enough confidence to report to the Council first, so he planned to inform the Council, at its next meeting, that he would make a progress report to the coming Session of the CONTRACTING PARTIES in his capacity as Chairman of the Group, and on his own responsibility.

167. The Group had existed for one year and it was not only fair but appropriate to draw the attention of the CONTRACTING PARTIES to the considerable ground covered, and the very constructive spirit in which the Group had been able to conduct its deliberations. He would not attempt to draw any substantive conclusions because he believed it was premature. He had some points on which he believed he could highlight the report but he would wish to be guided by delegations' advice and would welcome informal contacts in this regard. He would also consult informally, as appropriate, in order to assure himself that he had not overlooked anything of importance.

168. The next meeting of the Group was tentatively scheduled for the week beginning 16 November 1992, depending on developments in the Uruguay Round negotiations.