GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

TRE/8
5 January 1993

Special Distribution

Group on Environmental Measures and International Trade

REPORT OF THE MEETING HELD ON 19 NOVEMBER 1992

Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its seventh meeting on 19 November 1992, under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and references to relevant documentation were contained in GATT/AIR/3369 and Add.1.

2. The Chairman said that in order to respond to a general desire that the Group focus on specific issues under agenda item one, he was proposing that delegations attempt to focus on, although not limit themselves to, two issues: non-parties to multilateral environmental agreements (MEAs) and extra-territoriality. He invited thoughts on how agenda items two and three could be focused in a similar manner.

Agenda Item 1

3. The representative of the European Communities introduced a paper that his delegation had prepared through close consultation and co-operation between trade and environmental officials in the Community (TRE/W/7). It was based on the conviction that there should not be a contradiction between upholding the values of the multilateral trading system and acting individually or collectively for the protection of the environment. His delegation believed that there had been two important landmarks in the trade and environment discussion. The first was the tuna panel report which his delegation fully supported and which, it believed, introduced essential clarifications on the scope of Articles III and XX of the GATT, and in no way contradicted the objectives of environmental protection.

4. The second landmark was the UNCED conclusions, of which he highlighted three points. First, the aim should be to make trade and environmental policies mutually supportive in the pursuit of sustainable development. This implied that the development perspective needed to be fully integrated into the Group's discussions. Second, the UNCED conclusions supported fully the tuna panel report. Third, there was a need to clarify the rôle of GATT in dealing with trade and environment issues. This was important in order to dispel uncertainty and create greater predictability in international trade relations, and to correct the view that the GATT was inimical to the objective of environmental protection.

5. The EC paper contained four basic policy orientations which he hoped were shared by other delegations. First, that trade liberalization and the protection of the environment should not be considered mutually conflicting policies; they should both aim to promote sustainable development. Two

important policy implications flowed from this: protection of the environment should not be misused as an argument for halting or reversing trade liberalization, and the expansion of trade needed to be supported by sound environmental policies.

6. The second orientation was that GATT was not competent to set environmental standards nor to review environmental priorities chosen by individual countries. The GATT was not an obstacle to measures to protect the environment; its rules offered considerable scope for sound environmental policies that were in conformity with basic principles such as MFN and national treatment, and least trade-restrictiveness.

7. Thirdly, his delegation supported the rule that a country should not unilaterally restrict imports on the basis of environmental damage that did not impact its territory. Unilateral trade restrictions of an extra-jurisdictional nature raised fundamental equity issues, which formed a basic argument against their use. Environmental issues of common concern required discussion of priorities and commitments among countries, as well as an equitable sharing of the cost of environmental protection, so as to take into account the common but differentiated responsibilities of countries at different levels of development.

8. The fourth orientation was that GATT had to recognize clearly the importance of the international environmental agenda to ensure a mutually supportive relationship with MEAs. This formed the basis for the second section of the paper, which attempted to contribute to the analysis of issues raised regarding the rôle of trade provisions in MEAs and their relationship to Article XX. His delegation believed that collective interpretation of Article XX was the best means to clarify the relationship between the GATT and trade provisions in MEAs.

9. It was necessary to separate clearly in the analysis those trade measures which applied among countries that were parties to both the GATT and an MEA from trade measures which applied to countries that were parties to the GATT but not to an MEA. The Group should begin with a clarification of how principles of public international law related to such cases.

10. He warned against the use of the free-rider argument to justify the application of trade measures to non-parties to an MEA. The rationale for trade measures in all existing MEAs had been to ensure the effectiveness of commitments to protect the environment. The free-rider argument would significantly broaden the basis for the use of trade measures and it was not the right direction for discussions to proceed in. The separate and different issue of how far environmental commitments incorporated into an MEA might be nullified or diminished through non-parties' actions called for close examination of the use of trade provisions in relation to their environmental justification.

11. He considered that historical reasons lay behind the fact that the word "environment" had not been included in Article XX, and that Article XX(b) and (g) were nevertheless broad enough to cover the objectives of environmental protection. This issue should be subject to

collective interpretation in a careful manner so as not to open the door to unilateral, extra-jurisdictional trade restrictions.

12. The tuna panel report circumscribed unilateral trade restrictions for the protection of health, life or resources outside a country's jurisdiction. However, extra-jurisdictional protection was acceptable in cases where the international community had agreed on the need for action to address a common environmental problem. Criteria should be developed based on an interpretation of Article XX to clarify the scope for applying trade measures to non-parties in MEAs and to ensure that such measures did not go beyond what was necessary to achieve the environmental goals of an MEA. The criteria of an MEA should also be elaborated so as to ensure trade measures were used only in cases where environmental protection commitments had been established through a genuine multilateral process.

13. The EC paper presented ideas for further discussion, including the concepts of "non-discrimination", "disguised restriction on international trade", "necessity", and what constituted an MEA. Regarding the latter, his delegation did not believe that the GATT was competent to define an MEA, but that it should clarify what type of MEA would be covered by an interpretation of Article XX. Otherwise there would be a risk that a limited number of countries could set extra-jurisdictional environmental standards that would need to be met as a condition for access to their markets. To avoid this risk, the paper emphasized some ideas such as open negotiations and accession, and the level of participation in the MEA.

14. The representative of Brazil said that the EC paper was an important contribution which organised logically many points that had been discussed. His delegation sympathized with the idea of a collective interpretation of Article XX as a way of avoiding two pitfalls: the public view that GATT did not address the environment, and that Article XX covered any measure in the name of environment. This also related to UNCED's call for clarification of the relationship between GATT and some of the multilateral measures adopted in the environmental area.

15. His delegation welcomed the way the EC sought to clarify how Article XX could be enlarged to incorporate the environment, but also be limited to avoid the application of unilateral criteria or extra-jurisdictional measures. It agreed that the reasoning of the tuna panel was the key to understanding the problem of extra-territoriality from the GATT point of view. Adopting such measures in this field could put GATT in a difficult situation; in trying to defend themselves, countries would involuntarily contribute to the greater discredit of GATT in terms of the environment. Therefore countries should refrain from unilateral action for extra-territorial environmental protection.

16. His delegation agreed generally with the way the EC paper discussed the relation between Article XX and MEAs. However, some of its definitive statements, such as accepting without qualification the idea that extra-jurisdictional protection was not relevant in cases where the international community had agreed on the need for action to address a common environmental problem, deserved closer examination. There was some

logic in the argument that when such a problem was covered by an MEA extra-jurisdictionality did not exist, but this also required examination.

17. He welcomed the emphasis in the paper on the need for a co-operative approach to the environment; punitive trade measures would not improve environmental standards in any country, especially developing countries. The EC paper presented some interesting criteria for defining an MEA, particularly that an MEA should be negotiated under the aegis of the United Nations or a specialised agency, that negotiations should be open to all, and that accession by any GATT member should be as equitable as possible. He also agreed that regional agreements could not justify applying extra-jurisdictional trade measures to countries outside the region.

18. His delegation shared the EC view regarding non-parties to MEAs. Measures taken vis-à-vis non-parties should deal, if at all, with real environmental questions; trade measures or sanctions should not be used to coerce non-parties to join an MEA. This would be contrary to the spirit of the UNCED.

19. The representative of New Zealand welcomed the new focus of discussions, particularly the technique of circulating sub-items in advance of the meeting, and considered the two sub-items identified were core issues under agenda item one. Focused and sequential analytical investigation of identified issues was the best way of furthering work in the Group; policy could not be constructed on simple assertion or articles of faith. He suggested that the Chairman and the Secretariat together distil a list of the issues which had been commonly raised in previous meetings. This list, which would be open-ended and evolutionary in nature, could prove useful in identifying sub-items to be taken up after the current items had been thoroughly explored.

20. He expressed appreciation for the EC paper, and said he would forward it to his authorities and revert back to it at a later meeting. It touched on many issues which had emerged in initial discussions in the Group.

21. With respect to the two sub-items that the Chairman had proposed should be the focus of discussion under agenda item one, he said that two broad possibilities existed for the use of trade provisions in an MEA designed to address a transboundary or global environmental problem (as opposed to an MEA to determine a common approach to deal with a widespread domestic environmental issue): (i) MFN application to non-parties of trade measures between parties; and (ii) discriminatory application to non-parties of measures not in force among parties, or non-application to non-parties of measures in force among parties.

22. Several delegations had pointed to the potential that might exist in certain circumstances for the actions of non-parties to undermine the actions of parties in attempting to mitigate an environmental problem. In such circumstances, it would seem logical that parties to an MEA might seek to influence or determine the behaviour of non-parties. MFN extension of measures to non-parties raised questions primarily of extra-territoriality, which was a subject that his delegation would address at a future meeting.

For the purposes of the discussion on discrimination, it would simply be assumed that the only alternative to the use of discriminatory trade measures was their application on an MFN basis; he would not be addressing the appropriateness of using trade measures per se.

23. In relation to the use of discriminatory measures, two questions seemed to be central to his delegation: did discrimination make trade measures imposed on non-parties more effective? And following from this, in what circumstances might it be necessary to impose discriminatory measures on non-parties? Those questions could be explored in a variety of contexts, for example regarding a man-made substance that was harmful to the global environment. Parties to an MEA would presumably be interested in reducing global use of this substance. This would involve disciplines, where relevant, on domestic production and consumption in each of the parties. Since trade was the difference between domestic production and consumption, such disciplines would impact on trade flows.

24. The simplest case was a ban on domestic production and consumption in each party. Trade, in this case, was zero both between parties and between parties and non-parties. What amounted to MFN application of the trade measure on non-parties would accomplish all that could be expected in terms of the environmental objective through the imposition of a trade measure on the substance.

25. Alternatively, production and consumption in relevant parties might be controlled at non-zero levels. In that case the aggregate level of activity within the parties to the MEA would also be controlled. If such measures were applied on an MFN basis, the parameters for interaction with non-parties were also set. The upper limit on net trade flows with non-parties was the level of parties' production if there was no domestic consumption in parties, or the level of their consumption if there was no domestic production. In either case, or as was more likely in some mixture of the two, by setting their aggregate level of activity the parties had made their contribution to the achievement of the environmental objective; a contribution which would seem not to be affected by any associated trade flows. An interesting intermediate case was if controlled levels of domestic production and consumption in all parties were set at the same amount; then, net trade flows with non-parties would be zero.

26. The alternative to MFN application was discriminatory treatment of non-parties; an example was application of controlled and balanced levels of trade among parties accompanied by a ban on trade with non-parties. He asked what such discrimination could achieve, in terms of the environmental objective, over and above what could be achieved through MFN application, and outlined five cases as examples on which to base further discussion.

27. The first case was where parties produced and consumed the majority of the substance. In this case, the behaviour of non-parties would be of only marginal impact and there would be little purpose in adopting discriminatory trade measures.

28. The second case was where non-parties were major sources of production and consumption of the substance. Then, net trade flows between parties and non-parties were likely to be small, and trade measures, whether discriminatory or not, were again unlikely to have much affect. Even if flows were initially substantial, non-parties were likely to have the potential for collective self-sufficiency, thus minimizing the impact of discriminatory trade measures.

29. The third case was where non-parties were included as major sources of consumption only. Discriminatory trade measures, which could otherwise close off sources of supply before substitute products were available, might provide an "incentive" for non-parties to join the MEA. But would the effect on the environment of such non-party consumption taking place within the MEA be any different from outside the MEA under the MFN imposition of parties' trade measures? Given that supply side limitations on parties' production would largely determine global consumption potential, the difference was not immediately apparent.

30. Rather than providing an incentive for non-parties to join the MEA, discriminatory measures might have the effect of impelling non-parties to establish domestic production facilities and become self-sufficient so as not to rely on imports. This could tend to undermine the environmental objective by frustrating subsequent efforts by parties to supply non-parties with more environmentally friendly (but more expensive) substitutes.

31. The fourth case was where non-parties were included as major sources of production and were likely be net exporters to parties also. Discriminatory trade measures would be effective in undermining the viability of such production and thus might be thought to be effective in achieving the environmental objective. But would discriminatory measures be any more effective than measures applied on an MFN basis? Demand-side restrictions in parties applied on an MFN basis would establish the viable level of global production. If discriminatory measures were applied, however, from where would parties obtain their consumption needs during the transition phase before substitute products were available? Would new production facilities have to be established in parties or existing production expanded to supply this market? If so, the question was again to what extent the environmental objective in a global problem was affected by the location of production facilities?

32. The fifth case concerned non-parties who had the potential to be net exporters to parties, regardless of whether they currently produced the problematic substance. This case embodied elements of cases one, three and four above, but might also be relevant in situations where, prior to the MEA, there was no production or consumption activity in a country or group of countries. Adjustment to lower levels of production and consumption in parties might be achieved through the price mechanism with accompanying non-market, supply-side restrictions. Any bidding up of the price of the substance would make production in non-parties more attractive and tend to encourage new entrants into the industry. Application of MFN measures therefore might not prevent some migration of production facilities to

non-parties whereas discriminatory measures would. But again the same question arose: in the case of a substance which caused a global environmental problem, was the environmental objective more concerned with the aggregate global level of production and consumption or its location?

33. In situations of real global environmental problems where local environmental conditions were a second order consideration, questions of location came down to questions of economics. Who was to be granted rights to the economic rents to be obtained from supplying the declining markets in parties? This seemed akin to the "free-rider" argument that discriminatory measures were necessary to prevent non-parties from gaining commercial advantage.

34. He noted that several participants in the Group had rejected this argument as a basis for discrimination. Presumably, one reason was that the distribution of profits between parties and non-parties was not related to achievement of the environmental objective. Some proponents of the "free-rider" argument had suggested that this might not be the case; it was suggested that the possible competitive advantage to be gained from non-party status could also contribute to nullifying the environmental objective.

35. It was not clear how this would happen. It might be argued that the profits from declining markets in parties needed to be kept within parties in order to finance research and development of environmentally-friendly substitutes. This would not seem to be the case where the substance itself or the technology required to produce it was under patent to producers of parties to the MEA. In that case the rents would still accrue to the patent holder regardless of the location of production.

36. Conceivably, a situation might occur in which a substance which was either off-patent or shortly to go off-patent became the subject of an MEA. There could well be some migration of production to new or unrelated facilities in non-parties resulting in reductions of producers' profits within parties. The extent of such migration and of the profit reducing effect would, inter alia, depend on the degree of price movement engendered by restrictions on consumption, the characteristics of production technology, including whether substantial capital investment was required, and the length of transition to substitute substances. In other words the degree to which possible migration of production to non-parties, under the MFN imposition of trade measures, might undermine the environmental objective could only be determined through a thorough consideration of the particular circumstances including the availability of other sources of finance for research and development of substitutes.

37. Analysis of this type could also be applied where the substance or product could be used as a component of other products. In such circumstances, measures might also extend to products containing the environmentally damaging substance. Similar questions could be explored to determine what might be achieved in terms of the environmental objective through use of discriminatory measures beyond what might be achieved through measures applied on an MFN basis.

38. He said that the questions raised in his analysis were not intended to be exhaustive; there were doubtless many forms of discrimination other than the simple type he had considered. His analysis did suggest, however, that in the context of measures applied to a substance or product the effects of discrimination were not obvious and might not act to further the environmental objective of an MEA.

39. The representative of Argentina shared many of the views expressed in the EC paper. One important point was that measures taken for the protection of the environment must not be inconsistent with the GATT. Trade liberalization and its contribution to improving the utilization of resources could be achieved concurrently with protection of the environment which, however, should not be used to impose protectionist measures.

40. He agreed with the EC paper on the competence of the GATT; the work of the Group could only deal with commercial trade measures. He emphasized that a better interpretation and definition of the application of trade measures for environmental reasons through the general exceptions allowed under Article XX was needed. Article XX(b) and (g) and the Agreement on Sanitary and Phytosanitary Measures (SPS) provided for the use of trade measures to protect the environment, but such measures, even if applied collectively, had to be consistent with those provisions. Collectively, contracting parties should determine what kind of multilateral agreement could be arrived at on trade measures applied for environmental reasons, or any other aspect linked to harmonization of the rules, and on how to interpret consistency of national measures with the GATT.

41. With regard to extra-territoriality, he said that the issue of unilateral application of trade measures, which differences in environmental standards were supposed to justify, went beyond the Group's agenda although it had been raised repeatedly at meetings. His delegation agreed fully with the tuna panel that the GATT did not authorize extra-jurisdictional imposition of environmental policies and standards on other contracting parties. He quoted from the panel's report that otherwise "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations".

42. The issue of extra-territoriality arose also in the context of measures applied to non-parties to an MEA. To analyze possible inconsistencies with the GATT, MEAs should be classified into three groups: those protecting wildlife, those protecting the environment of a country from imports of harmful organisms or substances, and those protecting the global commons.

43. CITES was the best example of the first type. Its trade provisions were stricter when applied to non-parties: imports from non-parties of species threatened by extinction were conditional upon the grant of an import license, which was only to be issued when the competent authority

had determined that importation would not be prejudicial to the survival of the species. He believed that this would infringe Article XI:1 and would be difficult to justify by means of Article XX. As for export restrictions, his delegation did not believe these posed difficulties since they could be justified under Article XX(b) or (g). Another type of inconsistency with the GATT arose when an MEA contained restrictions on the transit of protected species through the territory of member countries, as in the case of the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. This represented a possible violation of Article V:2 on freedom of transit.

44. The second type of MEA could also involve the discriminatory application of trade restrictions against non-parties and constitute a violation of Article I, XI:1 and XIII that could not be justified by Article XX. This was the case of the Basel and Bamako Conventions, which required parties to prohibit imports of hazardous wastes from non-parties but not from other parties. He added that it could perhaps be argued that in countries that were not parties to these Conventions "the same conditions did not prevail", within the meaning of the chapeau to Article XX, and that therefore the conditions of this Article were met.

45. The third type of MEA raised the same kind of problem, as for example in the Montreal Protocol which provided for trade restrictions against non-parties but not against parties. Again, it might be argued that non-parties to the Protocol avoided the surcharge in production costs, and were therefore not countries in which the same conditions prevailed.

46. Regarding the section of the EC paper that dealt with products produced using controlled substances, GATT had always been consistent in disallowing discrimination on the basis of production processes. If such restrictions were accepted, it should be clearly understood that it was the importing country which must provide evidence of the use of controlled substances in the production process. It was necessary to ensure that this type of investigation did not become a form of harassment, like anti-dumping or countervailing actions, where it had been established that the mere fact of initiating an investigation had a harmful effect on trade.

47. He concluded that trade restrictions against non-parties to MEAs were not adequately covered by the present GATT Articles. Therefore his delegation shared the EC view that there was a need to interpret Article XX as regards trade restrictions adopted for environmental reasons. These measures were not provided for by the GATT, and therefore had to be interpreted under Article XX, in the form of general exceptions. He believed that a precedent in this field was the Uruguay Round SPS Agreement which took account of the criteria of non-discrimination, necessity and ensuring that SPS measures were not disguised barriers to trade. Those criteria would be central to an interpretation of Article XX in the context of the trade provisions contained in MEAs, and his delegation agreed with the EC on the substantive and formal criteria that must guide this work. He also referred to the work in the GATT on domestically prohibited goods, and said this would also have to be taken into account.

48. The representative of Hong Kong said the EC paper would help the Group focus on a number of important issues. However, the trade and environment interface was not limited to MEAs and Article XX, which the EC paper seemed to emphasize. Article XX was an exception to the GATT rules and it was not sufficient to rely upon it to provide all the guidance in this area.

49. His delegation agreed that trade and the environment converged in sustainable development, which should guide the efforts of the Group. It agreed also that GATT had no competence to set environmental standards or priorities. However, it might be necessary to address the trade effects of those standards, even if they were the same domestically and for imported products. This was particularly important where the standards were not related to products but to how products were produced and how production methods impacted on the environment.

50. He agreed that the burden of proof regarding damage to a country's environment should always be on the country taking the measure. Regarding the question of extra-jurisdictional measures, equity alone probably did not provide sufficient safeguards. He added that it was important to recognize differentiated responsibility of countries at different levels of development, and that differences in technological and financial abilities of countries should also be taken into account.

51. He added that it was important to avoid giving the impression that GATT jeopardized environmental initiatives, or that GATT was unable to accommodate any environmental initiatives that had a trade effect. His delegation would be very interested in looking further into the five scenarios described by New Zealand. He agreed that trade measures should not be used to force countries to sign MEAs, nor to punish "free-rider" behaviour. There should always be a commitment to respect multilateral trade rules while using trade measures for environmental purposes.

52. He said that adding the word "environment" in Article XX might imply broadening the scope for using unilateral, extra-jurisdictional trade restrictions. Regarding non-discrimination, he believed the two criteria suggested in the EC paper to determine whether a non-party should be treated the same as parties were good in theory, but in practice it might be difficult for the GATT to determine whether countries had similar environmental commitments or applied equivalent environmental guarantees.

53. He added that often the problem with standards was their trade effects, as amply demonstrated by a recent case before the GATT Council of labelling requirements for tropical timber. It was not sufficient to say that standards were uniform or that the requirement was the same for domestic products, because the trade effects were not always the same. Regarding MEAs, the concept of international consensus was important. Measures should not be taken to influence the environmental situation outside a country's jurisdiction, unless there was an international consensus. Questions such as what was the adequate level of consensus did arise and were addressed in the EC paper. However, it was necessary to be more comprehensive. The interests of parties outside the agreement had to be considered. For example, discrimination might arise if preferential

market access was given to signatories or if there were indirect adverse effects from trade measures taken under these agreements.

54. Other issues related to what criteria should be met by an MEA; who would decide and what would be the forum in which to achieve international consensus? The GATT provided a mechanism to achieve or to affirm international consensus in positive manner under Article XX(h) with respect to commodity agreements. He concluded that the EC paper seemed to envisage a passive rôle for the GATT and he believed it important that the GATT did not respond to trade measures in MEAs in a passive or mechanical sense. The central theme was that there should be a trade-off between the use of trade measures for environmental purpose, and a commitment to respect the rules of the GATT in a positive sense.

55. The representative of Venezuela drew the conclusion from the Group's discussions over the past year that the importance of environmental conservation was not in dispute. All delegations attached high priority to protecting the environment. The question, however, was how contracting parties achieved that objective in relation to their GATT obligations. Many delegations had stressed that the GATT must continue to be interpreted in such a way as not to authorize a contracting party to take unilateral trade measures in pursuit of environmental goals, unless such an interpretation was made narrowly. Too wide an interpretation of the GATT principles could seriously threaten such goals and, even worse, cause a rift in international co-operation on the environment.

56. Empirical evidence showed that world prosperity increased through the steady expansion of trade. To underpin this prosperity, GATT rules set strict conditions on the ability of parties to restrict their imports and exports. This, together with the obligation that trade restrictions must be transparent, arose out of the implicit assumption that there were or could be multilateral channels for attaining environmental objectives; GATT members should work to curb unilateralism. His delegation considered it inefficient to sacrifice GATT rules and principles in order to ensure achievement of environmental targets. It shared the opinion voiced by a majority of delegations that trade was not a threat to environmental conservation but, on the contrary, could increase capacity to invest in this field and improve the environment.

57. He noted that the issue of extra-territoriality had been raised on many occasions in connection with the implementation of Article XX. The tuna panel findings were encouraging in this regard. He recalled that the United States had argued that the embargo on tuna exports form Mexico could be justified under Article XX(b) because the Marine Mammal Protection Act (MMPA) served solely the purpose of protecting dolphins and its provisions were "necessary" within the meaning of Article XX(b) because there was no alternative measure reasonably available to the United States to protect dolphins outside its jurisdiction.

58. The Panel had not considered the factual question of whether dolphin life or health was threatened in the Eastern Tropical Pacific Ocean. It had concluded that even under the hypothesis that there was evidence of

such a threat, Article XX(b) did not justify the trade embargo because nothing in the GATT justified the use of trade restrictions to protect life and health of animals, persons or plants whose habitat lay outside the territory of the importing country. His delegation agreed with the panel that it would be risky to accept such an interpretation of Article XX(b) in that sense. It would be tantamount to accepting that GATT members could impose all kinds of trade barriers in order to attain specific environmental goals unilaterally, which would constitute an enormous derogation from GATT disciplines. For example, if a country could restrict tuna imports in order to protect dolphins living outside its territorial waters, could it equally prohibit the import of pillows from countries whose population consumed the meat of "rare" species of birds that were protected in the importing country? An endless list of such possibilities could be drawn up, but it was clear that such a restriction would not be allowed under Article XX(b).

59. He considered that for a measure to be considered "necessary" within the meaning of Article XX, it must be the least-restrictive measure available to achieve the desired goal. It would be hard to assert that import restrictions were the least-restrictive means available to an importing country to protect the life and health of animals and plants. For example, in the tuna case multilateral measures adopted by the Inter-American Tropical Tuna Commission, of which the United States was an active member, would cause far less trade distortion than unilateral measures imposed under the US MMPA; other multilateral arrangements could likewise be used effectively to attain the goal of natural resource conservation.

60. He also considered that GATT Article XX(g) should not be interpreted in such a way as to enable a country to restrict international trade by imposing outside its own territory its domestic practices relating to resource conservation. To accept any other interpretation could be extremely dangerous in that it could allow, for example, country A to prohibit imports from country B when country B did not have a "suitable" programme of energy conservation in the opinion of country A; or country A to impose market access restrictions on products such as glass, paper or aluminium from country B when the latter did not have a compulsory programme for recycling such products within its territory.

61. If GATT permitted such restrictions, its fundamental goals would be jeopardized. These include maximizing trade flows among countries and rendering existing international trade barriers transparent for all parties. Fortunately, his delegation did not think it was necessary for GATT to be imperilled in this way in order to achieve contracting parties' environmental targets, however ambitious they were.

62. In conclusion, he paraphrazed what was said by the ASEAN countries at the Council meeting on 4 November 1992 concerning Austria's legislation on the labelling of tropical wood and tropical wood products (L/7110) because his delegation strongly agreed with this statement. He said it was a well-established and accepted principle in GATT, as well as the UNCED, that trade policy measures for environmental purposes should not constitute a

means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental issues outside the jurisdiction of the importing country should be avoided and environmental measures addressing global environmental problems should, as far as possible, be based on international consensus. He added that it was through multilateral efforts and agreements that nations must work together to develop the appropriate instruments for the protection of natural resources, thus avoiding unnecessary disruptions of world trade flows.

63. The representative of the Philippines, on behalf of the ASEAN contracting parties, considered the EC paper to be a useful contribution to the Group's work and gave preliminary comments on it in relation to the two sub-issues identified under agenda item one. He believed that the four basic orientations listed on pages 2 and 3 of the EC paper were perhaps the cornerstones of the Group's further deliberations under this agenda item. It was essential to dispel the misunderstanding that the GATT was unfriendly to the environment and impeded efforts to address environmental problems. The Group's collective task was to contribute to the overall aim of making international trade and environment policies mutually supportive in favour of sustainable development, as was agreed in the UNCED.

64. His delegation also firmly supported the conclusions of the tuna panel report. While it agreed with the EC that unilateralism and extra-territorial application were untenable courses of action, as agreed in Chapter 2 of Agenda 21, he believed that the Group would need to clearly define what was meant by the EC statement "if production abroad is unrelated to environmental damage caused in the country of importation." A loose interpretation could be made by stating that environmental problems were global in nature and solutions knew no boundaries.

65. His delegation would need to study further the points made in the EC paper on Article XX. He reiterated the ASEAN view that GATT rules already contained provisions relating to the treatment of environmental concerns in trade and trade-related matters. The Group should be cautious in any exercise aimed at extending these provisions so that it did not unwittingly end up with provisions which worked against the expansion of trade.

66. Such pointers also raised additional questions regarding the relationship between Article XX and trade measures taken vis-à-vis non-parties. For example, how much of the differences between the environmental protection commitments applied by parties and non-parties were real differences? There might be quantitative differences. but the same conditions might prevail qualitatively between parties and non-parties. Another question was who determined such differences? ASEAN contracting parties believed that the party applying the trade measure could not unilaterally determine the differences. With the lack of multilaterally agreed criteria, the non-party should have the flexibility to determine such differences in conditions, if they existed.

67. He noted that paragraph 2.22(i) of Chapter 2 of Agenda 21 cited certain principles that should apply if trade measures were deemed

necessary for the enforcement of environmental policies. The EC's ideas on "non-discrimination", "disguised restriction on international trade", and "necessity" could serve a useful purpose in stimulating discussions. Paragraph 2.22(i) also called for consideration of the special conditions and development requirements of developing countries. While the EC submission recognized this as a basic orientation, the ASEAN delegations hoped that it would pervade future discussions on Article XX.

68. The ASEAN delegations believed that there was a thin line between the actions of non-parties that would impede the effectiveness of controls agreed by parties and the so-called "free-rider" problem. There was no safeguard against non-parties being carelessly labelled as "free-riders". He recalled Canada had indicated at the last meeting that countries may decide not to join an MEA for legitimate and practical reasons. He believed that the EC definition of a non-party would benefit from serious consideration of the reasons for which countries decided to be non-parties. He said the EC attempt to clarify the concept of an MEA was useful and was another area that might require further discussions.

69. The representative of Canada said that his delegation would study the EC paper and welcomed its focus on unilateral action. He looked forward to discussing it further, particularly with regard to production and process methods (PPMs) and non-parties to MEAs.

70. He believed the two issues selected for focused attention at this meeting were central to the debate, and would themselves give rise to additional issues for discussion. His delegation would support further efforts to focus the Group's work.

71. He said that the context for discussion of the two points was MEAs. The prominent theme that had emerged in international discussion on environmental issues was that, particularly with regard to transboundary and global environmental problems, a multilateral approach should be pursued in which all nations co-operated to find co-ordinated solutions. This was what UNCED had been about, and it was the main challenge in the UNCED follow-up.

72. He stated that virtually all delegations had endorsed the message from UNCED and other fora that unilateralism was not the effective way to deal with the international environmental agenda; the multilateral approach was the way forward. The most challenging questions with regard to transboundary or global issues arose when countries sought to pursue environmental problems outside their jurisdiction. This was true whether the problems related to circumstances or resources under another country's jurisdiction or in the global commons. He recalled Canada's view that it was legitimate for countries to pursue higher levels of environmental protection within and also beyond domestic jurisdiction, since all countries had a stake in the world environment. He did not believe it could be disputed that environmental issues extending beyond national borders could and should be a shared concern.

73. The issue was not whether but how an effective and co-operative approach to environmental problems of a transboundary of global nature could be achieved? What types of measures were necessary and most effective in the negotiation and implementation of MEAs? A first step would be to define clearly the concepts of extra-territorial trade restrictions and the treatment of non-parties under MEAs. He believed that there was a common understanding of what was meant by unilateral trade restrictions applied by one country in an effort to impose domestic environmental standards or regulations on others. This had been addressed well by the tuna panel. However, what did the concept mean in the context of MEAs, and where did the key issues arise including with respect to possible conflicts with GATT obligations? Also, what were the real issues concerning the treatment of non-parties?

74. He considered that the two issues overlapped with the issue of extra-territoriality, and represented a sub-set of the non-party issue. He said that he was using the term extra-territoriality in the more general sense it was used in the trade and environment debate and in the tuna panel report, i.e. the use of trade restrictions against other countries with a view to imposing on them environmental standards or programmes.

75. He suggested that potential problems and conflicts with the GATT with regard to MEAs did not arise in cases where trade restrictions were used as an extension of controls applied domestically by participants on environmentally damaging goods or substances within their domestic jurisdictions. Under such circumstances, if the measures were applied on an MFN and national treatment basis against other parties and non-parties as well, they would not be extra-territorial in the sense used here. However, they could have significant extra-territorial effects since the resulting controls on imports inevitably would have an impact on other countries, including potentially on their production and use of the goods or substances in question.

76. This could be a central factor in the achievement of the objectives of broadly-based environmental agreements. If there was wide participation in such agreements, the actions of participants would impact importantly on world markets and set the stage on which all, including non-parties, would have to act. However, measures having this type of effect could be designed and implemented in a GATT-consistent manner.

77. In such circumstances, and for a range of environmental issues and agreements, there did not appear to be serious problems of extra-territoriality or unavoidable conflicts with GATT rules. The main issues of extra-territoriality arose in situations where measures were aimed at environmental protection or conservation outside the jurisdiction of countries taking the measures, or at other countries' PPMs, as opposed to environmentally damaging goods or substances themselves. Where then did the key problems arise in the context of MEAs?

78. He had previously argued that there would be no issue of extra-territoriality among parties to an MEA, even if the agreement provided for trade restrictions relating to environmental protection or

conservation issues under other parties' jurisdiction or to other parties' PPMs. The reason was that parties to the agreement would have accepted the programmes or standards involved and agreed to their application, thereby adopting them as domestic policy and practice. The situation was not one of some parties seeking to impose environmental standards or programmes on others. CITES was a good example of this type of situation and one that had not given rise to challenges based on extra-territoriality or GATT inconsistency.

79. He believed, therefore, that analysis narrowed down the issue of extra-territoriality under MEAs to situations in which parties to the MEA took trade-restrictive actions against non-parties with the aim of applying standards or programmes to matters within the latters' jurisdiction or in the global commons. If the non-parties affected did not accept the standards in question, concerns about both extra-territoriality and violations of GATT rights could arise. This was where issues of extra-territoriality and treatment of non-parties under MEAs came together.

80. With regard to PPMs and resource conservation, the key problem was on what basis a group of countries could impose regulations on others who did not accept the standards involved. This included issues that might arise when inaction in one country affected the environment of other countries. But what if non-parties to the MEA had not adopted the standards in question for reasons they believed to be legitimate? What about situations in which non-parties had genuine misgivings about the scientific basis for the regulations or the level or type of protection called for? What if they were pursuing other environmental priorities and could not absorb the costs of the requirements under another MEA?

81. These questions were especially pertinent when the environmental measures concerned carried significant costs or commercial benefits, and they were closely related to the issue of so-called "free-riders". In answering them it was important to bear in mind three basic situations: one in which actions of a non-party could affect human, animal or plant life and health or resources under the jurisdiction of a party to an MEA; the second where the impact was on the environment or resources outside the jurisdiction of both parties and non-parties, e.g. on the high seas; the third where the impact was on the environment or resources within the jurisdiction of the non-party. How extra-territorial measures were viewed might depend on which of these situations was at issue.

82. He added that the same questions applied to the issue of the treatment of non-parties under MEAs. There was also the key issue of the use of discriminatory trade restrictions, which gave rise most often to questions about GATT consistency. His delegation had observed previously that much could be done in MEAs with wide participation through non-discriminatory trade measures, applied to both parties and non-parties, to implement effective environmental controls on both domestic production as well as on imports of environmentally damaging goods or substances. Such measures could be made consistent with GATT rules. Moreover, there was also scope under the rules to proceed with discriminatory measures if certain basic criteria to prevent abuse were met.

83. He gave the example of treating imports of a product from certain countries more restrictively than imports of the same product from other countries. This might be necessary and defensible under GATT if the former did not meet defined standards of environmental health or safety for the product itself while the latter did, and on that basis, were admitted to the domestic market. If an MEA in the phytosanitary area, for example, required parties to certify that their products met specified health and safety requirements, but non-parties to the MEA did not meet and could not certify compliance with those requirements, it could be permissible to allow imports from the former but not from the latter.

84. Beyond differential treatment of non-parties in this type of situation, he asked under what circumstances would discriminatory restrictions be required and justifiable? He had noted previously that one of the main reasons cited in public debate and in proposals made by the environmental community was to use punitive measures to exert leverage on non-parties in an effort to obtain their participation in an MEA. In addition, the objective of imposing standards or programmes relating to PPMs or resource conservation on non-parties could also be involved.

85. He believed that deeper analysis of these issues was necessary. He reiterated that his delegation had been a strong opponent of extra-territoriality and trade discrimination. Two primary considerations underlay this position.

86. The first was a fundamental belief in the sovereign right of nations to administer their internal affairs according to their own particular circumstances, priorities and values. His government had affirmed this belief with regard to environmental matters at UNCED. It would not welcome other governments attempting to impose their policies or regulatory practices on it, and in return respected the right of other nations to be treated in the same manner.

87. The second was recognition that the pursuit of such approaches would tend to permit larger and less trade-dependent countries to have an undue influence on the values and internal policies of smaller and more trade-dependent ones. There was always the risk of protectionist motives becoming a factor. A country might easily say, in the context of MEAs, that there would be no problems with the use of discriminatory trade restrictions against non-parties as long as it was a party itself to the MEA. But what country would wish to be on the receiving end of such measures and would any contracting party give up its GATT rights?

88. He concluded that a recurrent theme in the Group's discussions had been the idea that a strong international consensus reflected in an MEA with wide participation and geographic representation may provide the basis for extending standards or programmes considered essential by the world community to non-parties. This approach would require close examination, including the circumstances of different agreements. However, there was still a range of underlying questions as to the justification for and implications and effectiveness of the types of trade measures being used in that context. These questions would also need to be addressed.

89. The representative of Mexico welcomed the EC paper and made preliminary comments on it. His delegation supported the unambiguous rejection in the paper of extra-territorial, unilateral measures. It believed that extra-territoriality lost its relevance when measures were based on MEAs. It supported the EC concept of "equity considerations", and believed it was related to the concept of sustainable development. The EC had also clarified aptly that not all measures taken to protect the environment were per se exceptions to GATT rules.

90. He agreed with the EC paper that the type of product concerned was an important factor, and required more reflection. Regarding the question of MEAs, it would be necessary to examine the criteria that might be used to define an international environmental consensus. His delegation believed that the last criterion cited in the EC paper, the level of participation, was particularly relevant, and would like to devote more thought to the question of open accession as a criterion.

91. On the question of extra-territoriality, he referred to the types of extra-territorial measures identified in the relevant MEAs. One included restrictions or prohibitions on trade in controlled products among the parties. In some cases the objective was to protect animal or plant species that were threatened with extinction, in others it was to avoid the movement of hazardous wastes. These were implemented through the issuance of import and export permits and certificates. Another type included restrictions or prohibitions on the import of controlled products or substances from non-parties, as well as the export of technology for the production of such products or substances. In general these were linked to measures to control domestic production and consumption in the parties applying them; in some cases they were applied exclusively to non-parties.

92. He considered that in order to analyze the relationship between such measures and the GATT it was necessary to review the concept of extra-territoriality, which he believed was condemned by international law. From the point of view of the environment, a government which unilaterally assumed the right to determine action to protect the environment of another country, by imposing standards and restrictions on the latter's trade and activities, would be violating international law as well as jeopardizing the possibilities for sustainable development in the country subjected to these measures, and hence environmental conservation itself.

93. Principle 11 of the Rio Declaration recognized that, from the standpoint of sustainability of development, it was desirable to preserve differences in environmental standards and conditions so that efficient international specialization may take place from the environmental standpoint too. Likewise, Principle 12 of the Declaration, as well as Chapter 2 of Agenda 21, paragraph 2.22(i), explicitly rejected unilateral actions to deal with environmental challenges outside the importing country. Both documents established a commitment to address transboundary or global environmental problems on the basis of international consensus. It was clear that unilateral legislation which did not respect these principles would be welcomed by protectionist interests.

94. On the concept of extra-territoriality, he noted that since the GATT was a contractual instrument derived from international law, its provisions referred to the rights and obligations of contracting parties among themselves with respect to trade measures they decided to apply within or on the basis of their jurisdiction. No party was empowered to adopt measures that impaired the rights of others under the GATT unless such measures had been agreed to first, nor measures which subordinated the jurisdiction of one party to that of another.

95. The GATT did not prohibit the use of extra-jurisdictional measures when these had been agreed to under an MEA on an exceptional basis, but such measures would have to be examined in the light of Article XX. His delegation had already presented its ideas on the interpretation of the head-note language in Article XX, and it agreed with some ideas put forward by other delegations, in particular Canada, in this regard. In his delegation's view, the term "arbitrary" referred to the trade measure and not to the standard chosen by a country. In the context of extra-territoriality, arbitrariness would arise where the measures in question represented the imposition of an environmental standard or priority of one country or a small group of countries on another, without the latter's agreement. The term "unjustifiable" was linked to this, and involved as well other elements such as the scientific basis on which to justify the measure and the proportionality of the measure with respect to the scale of the environmental problem addressed.

96. Transferring these two elements to the trade measures under consideration, it was obvious that neither trade restrictions nor trade prohibitions could be considered arbitrary when they were applied among parties to an MEA. The fact that the parties had consented to be subject to such measures, perhaps accepting limitations on rights acquired in the trade field, rendered them legitimate. The problem of arbitrary discrimination among parties could arise when the measures were non-mandatory by nature, or when the administration of quantitative restrictions left too much to the discretion of national authorities, for example in issuing import certificates or permits. However, it should be observed that so far no conflicts in this respect had occurred.

97. He added that "arbitrariness" would have another connotation in the case of non-parties to an MEA. The legitimacy of a measure might depend, among other factors, on the multilateral consensus supporting it as well as the actual nature of the measure in question. Positive measures, such as technological and financial incentives, would certainly be different from punitive measures. The "justification" of measures contained in MEAs should be based on their scientific underpinning. The three MEAs under consideration, as well as others, in particular those negotiated in the framework of the UNCED, took these scientific foundations into account.

98. The term "disguised restriction" was not only linked to transparency. The measures in question should directly address the products involved in the environmental challenge. With regard to this issue, as well as that of PPMs, deeper reflection was needed given that it was one of the most important issues in the field. Experience had shown that applying measures

based on PPMs on the pretext of protecting the environment tended to involve protectionist elements.

99. An example was a group of countries which decided to protect butterflies which had been shown to be under threat in certain agricultural producing countries owing to overuse of pesticides and fertilisers. Even with supporting scientific evidence, he asked if it would be correct and effective to impose restrictions, or measures such as labelling requirements, on agricultural products from those countries. That could pave the way to the use of disguised restrictions, and it would be better to find remedies directly related to the preservation of the species.

100. Regarding the MEAs under consideration, the measures they contained dealt directly with the species identified as threatened, as well as with products and substances that harmed directly the environment. Measures applicable to products manufactured by processes using such substances constituted an exception. Nevertheless, they were applicable solely to non-parties, a case which his delegation would examine in detail later.

101. Regarding Article XX(b), he considered it important to analyze the concept of "necessity". It was linked to the effectiveness of measures to achieve the environmental objective, to the demonstration that they were the least trade-distorting and that there was no more appropriate alternative available, and also to scientific foundations.

102. It would also be useful to clarify what was meant by "protection of life or health" in the context of extra-territoriality. He asked if this referred to the life and health of all living beings, as an entire population, or to a species that was suffering particular harm or was in danger of extinction. The first case would mean that countries had finally become aware of their shared responsibility for the protection of the life and health of all inhabitants of the Earth, and that the pressing need was to curb extreme poverty and relieve the hunger and health problems of a large percentage of the world's population. These problems were in themselves the cause of the environmental problems of many countries, as was confirmed in the UNCED. One form of action to address those problems, for importing countries, would be to provide access and to improve prices for products from those countries. For exporting countries, it would mean that no contracting party should have the right to export products whose sale was prohibited on the domestic market, since what was dangerous for the life of its own nationals was likewise dangerous for non-nationals. Global concerns could not then be spoken of if these elements were not taken into account.

103. He said that "global" could not be used to describe any set of circumstances to justify extra-territorial action. The term would once again have to be based on such scientific evidence as existed, for example for problems such as ozone depletion, climate change, biodegradation, or the movement of hazardous wastes, which by their nature had to be addressed by multilateral co-operation. Protection of specific species of living beings could be considered a global problem when it was scientifically

established that there was a threat of extinction and an international consensus considered them part of mankind's heritage.

104. Linked to this was the term "exhaustible" in Article XX(g) which applied to natural resources, and the condition that the measures be made effective "in conjunction with restrictions on domestic production or consumption". He believed that by definition, exhaustible natural resources were those which could not be renewed after having been extracted or utilized, such as uranium or petroleum. His delegation had already stated that conservation per se of such resources was not an environmental imperative; what was important was the impact of their use, depending on whether it was "dirty" or "clean".

105. Since all living beings could reproduce, they did not in principle fall within the definition of "exhaustible" unless there was explicit agreement that they should. The fact that living beings could become extinct as a population or a species was a separate issue from their being "exhaustible" in the above sense. Thus, measures aimed at the conservation of living beings fell within paragraph (b) of Article XX, where it was the "necessity" of the measures which mattered.

106. The idea of necessity was relevant in the context of the protection of animal life and health, since conservation per se without necessity might justify countless actions of a protectionist nature. For example, would it authorize the imposition of restrictions on imports of beef or other edible meat? What was the difference between a cow and a blue whale? The difference lay in whether or not the species was threatened.

107. The term "in conjunction with" suggested the implementation of complementary restrictions on domestic production and/or consumption in the country applying the measures. In the case of the measures under consideration, it was those aimed at non-parties that satisfied this condition. In the case of measures applied among parties, it might be inferred that the issuance of export certificates and/or permits ensured that the exporting country was satisfying minimum environmental protection standards at the domestic level too. Nevertheless, in the case of importers this was not clear, especially when the aim was to protect species not present, or to control the movement of products not produced in the importing country's jurisdiction. Perhaps the fact that exporters had agreed to be subject to the measure waived this condition.

108. He repeated his delegation's view that the concept of complementarity was only the vertical element of a bigger principle that had to be satisfied, namely the principle of consistency. The horizontal element of this principle was that in protecting the environment a country or group of countries could not simply choose environmental areas in which they had decided to act, where by chance the major cost of such protection fell on others and especially when the measures in question deliberately discriminated against products from specific geographical areas, in the absence of any genuine commitment to co-operate in other areas that were perhaps more important for the preservation of the ecosystem. It was essential that countries shoulder fairly the costs of this major

undertaking in order to protect the environment effectively and ensure sustainable development, the latter being the higher goal.

109. His delegation considered that the problem of extra-territoriality existed only in conjunction with unilateralism. Measures which had such a background could not be considered legitimate. The problem of extra-territoriality disappeared or became secondary when based on agreement among the parties concerned. Thus, the case of measures applicable among parties to an MEA which addressed problems outside the parties' jurisdiction might be described as co-operation rather than extra-territoriality, and that of measures aimed at non-parties as multilateralism. Pending further clarification, the presence of these two elements in environmental protection would ensure the absence of trade conflicts, and hence compliance with international law.

110. The representative of Poland said that his delegation understood extra-territorial measures to mean trade policy measures aimed at environmental objectives, like conservation of natural resources, that were not under the jurisdiction of the country applying the measures. It shared the view that all trade measures were in general only second best solutions to environmental problems, and that it was better to aim at the root of the problem directly.

111. His delegation also shared the view of the Canadian delegation put forward in their non-paper of 1 October and repeated at this meeting. It believed that the use of discriminatory and/or extra-jurisdictional measures to extend environmental standards to other countries or to impose the terms of certain MEAs to non-parties was not foreseen under the GATT. Also the extra-jurisdictional imposition of environmental policies and standards was not permissible under the GATT, as had been demonstrated in the findings of the tuna panel report.

112. He added that in order to avoid threats of discriminatory policies, his delegation supported the idea of elaborating clear guidelines for environmentally-related trade policies. They should be multilaterally discussed with the view to arriving at conclusions as to the future course of action. Basic principles should first be well defined; the list put forward by the Nordic countries in their non-paper seemed useful, and needed further clarification. It included the principles of transparency, justification, non-discrimination, and least damaging impact on trade. The relationship between the second and fourth principles and the concept of "necessity" included in Article XX(b) were especially in need of clarification and had been discussed in the EC paper.

113. His delegation also supported a deepening of the discussion on the concept of an MEA and added that the insights provided in the EC paper were useful in this regard. It would express later in a more precise manner its expectations and intentions in this new field of GATT activities.

114. Finally he corrected an error in the record of the last meeting (TRE/7). His delegation had said that it was in favour of further studies of Articles III and XX of the GATT.

115. The representative of the United States stated that, in reviewing the discussions and non-papers presented on MEAs and Article XX, there were a number of statements which were useful and with which his delegation agreed. For example, it agreed that the GATT's rôle in the area of trade and the environment was not to review countries' environmental priorities or objectives, including those were reflected in MEAs. The GATT must recognize that other fora had developed an analytical framework for the environment that took into account the complexity of the impact on the environment of particular actions, that this was not GATT's area of competence, and that GATT must defer to those with competence in this area.

116. His delegation also agreed that the fact that country was not a party to an MEA did not, by itself, mean that the same conditions did not prevail in that country compared to countries party to MEAs, and he said that all three of the MEAs under specific discussion recognized that non-parties might nevertheless be implementing equivalent environmental measures.

117. His delegation also agreed that further clarification of the rules in the area of trade and the environment was necessary. However it was also important that in the discussion of MEAs the Group not lose sight of the fact that MEAs were not the whole picture in the trade and environment area; a holistic approach to trade and environment issues was necessary.

118. He considered that the argument in the EC paper that the concept of extra-jurisdictional protection was "of no relevance" in those cases where an MEA existed, and that where genuine international consensus existed on action to address an environmental problem of common concern the extra-jurisdictional problem did not arise, was not so clear cut as the EC implied. Article XX contained no basis on which to accord different treatment to measures undertaken in connection with an MEA than that accorded to measures not related to an MEA. Nowhere in the Article did the term "international agreement" appear.

119. Under the EC's approach, the existence of an MEA was used as a means to help determine that the conditions of Article XX were met with respect to a particular measure. For example, the fact that a measure was undertaken pursuant to an MEA was argued to be a basis for finding it to be "necessary" to protect human, animal or plant life or health since there was international agreement on the measure. Similarly, the fact that a measure was undertaken pursuant to an MEA was proposed as a basis for finding a measure not to be "arbitrarily or unjustifiably discriminatory" or a "disguised restriction on trade" since international agreement on the measure must mean that there was no trade protectionist intent behind it.

120. In each of these cases, the MEA was viewed as creating some presumption in favour of the measure. The presumption appeared to vary depending on the connection of the measure to the MEA and the degree of specificity of the MEA regarding the measure (that is, the more specifically the MEA provided for the measure, the stronger the presumption in favour of the measure). In examining the presumptive impact of an MEA, the EC approach looked at the formal characteristics of the MEA itself in

terms of membership -- for example, how broad-based was the membership and how open was it to membership by any of the GATT contracting parties?

121. He raised several questions on this approach. He asked with respect to analyzing MEAs in light of various criteria, how did the proposed criteria take into account the fact that there was a broad spectrum of MEAs with different types of obligations and provisions regarding entry into force? For example, CITES, the Basel Convention and the Montreal Protocol all differed in the number of parties and conditions for entry into force; the first required one party, the second two, and the third eleven parties representing at least two-thirds of estimated 1986 global consumption of controlled substances, plus entry into force of the Vienna Convention which itself required two parties.

122. Also, how would this approach address the extra-jurisdictional limitation on Article XX measures propounded by many delegations? For example, the EC dismissed this problem by simply asserting that the concept of "extra-jurisdiction" was irrelevant to situations involving MEAs, but there was nothing in the EC paper explaining why this was so. There was also the question as to how the term "extra-territorial" or "extra-jurisdictional" was to be understood. Furthermore, he asked why should an MEA differ from cases where there was general international agreement in support of an environmental objective and a country took trade-related measures to promote this agreed objective? Would that agreement not also create similar presumptions?

123. He asked if this interpretation applied to all international agreements, environmental or otherwise, in which case why was there a separate Article XX(h)? How did this approach recognize the fact that some countries had not agreed to the MEA and consequently may not agree, for example, that the measures were necessary or not a disguised restriction on trade? Would this affect a country's position regarding a dispute under the GATT? Would the presumption be affected depending on the number of countries not party to, or the value of trade not covered by, the MEA?

124. He concluded that although he had raised several questions on the EC's proposed approach to the application of GATT principles to MEAs, his delegation concurred with the EC on the importance of international co-operation for dealing with environmental problems of common concern. What his questions reflected was that there was still significant divergence of views on this agenda item, while to date there had been no compelling approach on it presented to the Group. The work so far had been useful, but it may be that the Group would find that it had been operating on some faulty premises and that entirely new approaches were needed. His delegation looked forward to the future work ahead.

125. The representative of Japan considered that the EC paper touched on several substantive issues and deserved in-depth study, and he said that his delegation would present more views on it at a later time. He agreed with the paper that the Group was in an analytical phase of its work and that the generic discussions had been useful and he believed that the Group should continue on this path for the time being.

126. On the two sub-issues, he noted that the Canadian delegation had made useful contributions to agenda item one. It had referred to the so-called free-rider issue which related to the question of non-parties to MEAs, and to the issue of extra-territoriality. He considered these two issues important in the analytical work of the Group and welcomed the suggestion by the Chairman to focus the discussions on them.

127. He added that the two issues, if taken in the context of MEAs, were closely related to each other and should be taken up together. Among various means of international co-operation to deal with environmental protection outside a country's jurisdiction, or to deal with transboundary environmental problems, the desirable option was international co-operation through MEAs. When a country was a non-party to an MEA and did not participate in such international co-operation, a typical question which arose was how best to deal with the situation where discriminatory trade measures were not an available option since parties were committed to uphold the general principles of non-discrimination under the GATT?

128. Before discussing this subject, it was important to clarify the meaning of the basic concept with some degree of precision in order to prevent complications. As the Austrian delegation had pointed out, there were no fixed definitions or concepts on the scope and nature of the term "environment". If this term was to influence the actual interpretation and application of GATT provisions, it was important to clearly define its scope and nature and it should be further examined at an appropriate stage of the Group's future work. In addition, a clearer understanding was needed of the phrases "within a country's jurisdiction" and "outside a country's jurisdiction".

129. He recalled a widely-shared view that the GATT already provided wide scope for trade measures that were an extension of measures taken within domestic jurisdiction to control or eliminate production, consumption or other action, whether the measure had been taken unilaterally or under MEAs, as long as they met certain criteria such as non-discrimination. In this case, the legitimacy of the trade measures would not require a definition of the term "environment" since, as long as the measures were an extension of those taken to control or eliminate production or consumption domestically, they would be legitimate under Article III. This would need to be further elaborated to take into account the issues of discriminatory measures to non-parties or the issue of PPMs.

130. Regarding environmental problems outside a country's jurisdiction, if they did not have any impact on a country's domestic environment the country would not have much incentive to address them. However, the assessment of the impact of environmental problems in a country was closely related to the scope and the nature of the term "environment", and the former could be different depending on how it was defined.

131. He added that since there could be many specific occasions where a country might take trade measures to tackle environmental problems outside its jurisdiction, the reason and the usefulness of the trade measures would vary on each occasion. Also, there were various categories of trade

measures to deal with each occasion. Examples included trade restrictions on fishing products to protect fishery resources on the high seas, or to promote the preservation of animals and plants existing within another country's jurisdiction. Other examples included trade restrictions to regulate transboundary movements of hazardous wastes in order to regulate their disposal within another country's jurisdiction, or to regulate the production or consumption of hazardous substances to address global issues such as depletion of the ozone layer. In this context, discussion on the use of trade measures to deal with extra-territorial environmental problems should be based on specific cases.

132. His delegation believed it essential to undertake further analytical work on the efficacy and necessity of trade measures to achieve goals of extra-territorial environmental problems. Another question deserving discussion was whether different rules should be applied depending on whether the environmental problems existed within another country's jurisdiction or within the areas which did not belong to any country's jurisdiction, such as the high seas. Finally, he believed it was important to bear in mind in the analytical work on extra-territoriality, that the tuna panel provided useful guidance as to the interpretation of Article XX. He concluded by supporting the suggestion of New Zealand to formulate a list of issues to guide the future work of the Group.

133. The representative of Sweden, on behalf of the Nordic countries, welcomed the focus on specific sub-items under agenda item one as it would encourage all delegations to address the same issues. He also supported New Zealand's suggestion for an open-ended list of sub-items, beginning with the two suggested for this meeting. He said that his remarks on the EC paper would be preliminary, and that his delegation would revert back to it at a later stage after more careful study.

134. His delegation had not taken any final position on what legal approach should be followed in the GATT regarding the future handling of matters concerning the interface between trade and the environment. It found the EC argument, that measures taken in compliance with MEAs would be covered by a collective interpretation of Article XX, interesting, but at this stage it did not wish to exclude other ways to address these issues.

135. His delegation subscribed fully to some of the points raised in the EC paper including the following four: 1) recognition that both environmental policies and trade liberalization could and should be aimed at the common goal of promoting sustainable development; 2) the GATT did not prevent necessary environmental measures; 3) environmental problems of common concern required genuine multilateral solutions, and a country should not unilaterally restrict imports on the basis of environmental damage that did not impact on its territory; and 4) each country should be free to establish its level of environmental protection. GATT did not have the competence to set environmental standards and should limit itself to clarifying the scope for using trade measures.

136. He did not believe it obvious, however, that the fact that a measure had been discussed and agreed multilaterally was the best guarantee against

the risk of protectionist abuses or the introduction of unnecessary trade restriction in an MEA. The assumption that trade policy aspects would be adequately taken into account when negotiating MEAs presupposed a large degree of co-ordination of trade and environmental policies. The EC paper also assumed that trade policy consequences of an environmental instrument were sufficiently clear already at the negotiating stage, and stated that the legitimacy of trade measures taken pursuant to an MEA had not been questioned in the GATT. This latter point was correct, but there was no guarantee that it could not happen in the future.

137. He believed that the existence of an MEA was a necessary but not sufficient condition because other qualifications than the mere existence of an MEA might be called for. The EC seemed to be of the same opinion when it underlined later in the paper the crucial criterion of necessity used in Article XX. He added that it was not clear the interpretation of this criterion as well as others in Article XX were entirely relevant in the environmental context. An important outcome of the work in the Group would be a better understanding among contracting parties of how to interpret the criteria in Article XX. His delegation had introduced a discussion paper which dealt mainly with this issue.

138. He considered that the most important criterion in Article XX was the concept of necessity. He agreed with the EC interpretation that this concept meant, inter alia, "least trade-restrictive" in the context of MEAs. His delegation's paper emphasized that when interpreting "necessity" in the GATT an environmental judgement should not be attempted. Also, the term "necessary" did not imply a strict test of proportionality in which the level of the environmental goal was also open to question. The issue that had to be tackled by future GATT panels was what was the least trade-restrictive route to reach a given environmental goal?

139. He added that it was also important to consider the link between the MEA and the individual measure taken by a signatory. He asked when a measure could be said to be taken in compliance with an MEA? Although it would be impractical for negotiators of MEAs to prescribe specifically what measures signatories must undertake in order to implement their obligations, some degree of linkage or comparability would seem to be called for between the MEA and individual national measures. He concluded that much remained to be done in enhancing understanding of how to interpret Article XX and how to define MEAs.

140. Turning to the sub-issue of non-parties, he recalled that there could be several different reasons for countries not to participate in an MEA and that the term "free-rider", which had a distinctly pejorative ring to it, was not always appropriate. He tentatively concluded that a case-by-case analysis was necessary before attempting to characterize the exact nature of non-parties in a particular MEA. He added that a situation where the term might be appropriate would be when non-parties actively countervailed the common effort. This was a very general statement and he appreciated the detailed analysis of different cases of non-parties presented by the representative of New Zealand.

141. Another question on this issue was whether a distinction should be made between complying and non-complying parties, on the one hand, and complying non-parties, on the other. Relations between parties to MEAs should be dealt with within the MEA. The question was whether non-parties complying with an MEA should be treated differently from other non-parties. This issue basically belonged to the drafters of an MEA. However, it could be argued that if the GATT were called to settle a dispute emanating from an MEA and involving a non-party that was a GATT contracting party, the GATT could interpret the trade measure differently if the non-party was complying with the basic obligations of the MEA than if it was not. The question was how parties to MEAs acted vis-à-vis non-parties, which raised other questions dealing with discrimination, PPMs, etc. which his delegation would come back to at a later meeting.

142. He considered that the sub-issue of extra-territoriality was not a very clear concept, and could have different meanings in different contexts. He agreed with those delegations who stated that the key issue was how it related to the environmental problem. In this context, two concepts were often referred to: the concept of transboundary environmental problems, and the concept of global environmental problems. He agreed with the Austrian representative that the Group could discuss these concepts in order to achieve a better understanding among trade experts of what they mean. This did not mean that GATT should define these concepts but a discussion would be educational. The ultimate answer might be the one provided by the EC paper, that a problem was global by virtue of the international recognition it gained through an MEA.

143. The representative of Austria gave preliminary comments on the EC paper. He considered that the EC view that outlawing unilateral trade restrictions in combination with the condition that such actions were unjustified if production abroad was unrelated to environmental damage caused in the country of importation was consistent with international law which gave states the right to act if damage was caused to their territory. In this regard he quoted from Principle 2 of the Rio Declaration the responsibility of states to ensure that activities within their jurisdiction or control did not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.

144. A question closely linked to this obligation was what to do if the damage was not within an identifiable jurisdiction but befell the global commons or, as the EC put it, "environmental problems of common concern". The answer seemed to be international co-operative arrangements. However, they were only possible if a large number of states were willing to negotiate in good faith with the aim of reaching a consensus. Principle 12 of the Rio Declaration advocated this: "environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus".

145. He considered that the phrase "as far as possible" indicated that the drafters had serious doubts that such international consensus could be reached every time. The Group should consider what to do if no consensus emerged. Was there room for unilateral or joint action by states who

wanted to act? An international consensus would also be helpful in avoiding the "free-rider" problem which the EC paper referred to. He added that while the rationale of trade measures should not be to punish "free-riders", states should ideally not refuse to join an emerging international consensus to secure unilateral advantages to the detriment of the global environment.

146. On the scope of Article XX, the EC paper proposed a collective interpretation which his delegation believed was one possibility for reaching agreement in the Group. His delegation was not sure whether the inclusion of the term "environment" in Article XX(b) would broaden the scope for unilateral action, especially if a collective interpretation would confirm that environmental protection fell within the range of objectives covered by Article XX. The conditions in the head-note to that Article would apply equally to the term if it was included. Furthermore, the term "environment" was already included in the TBT Agreement.

147. This issue was also linked to the understanding of the term "environment" to which his delegation had devoted a considerable amount of time and to which other delegations had also referred. He added that the EC paper referred to cross-retaliation in the context of the concept of necessity when discussing the hypothetical case in which an MEA would provide for the application of trade measures vis-à-vis non-parties on products which had no connection with the environmental damage. While in agreement, his delegation considered that this principle would also apply outside an MEA among contracting parties. Finally, he recalled that his delegation had made an extensive intervention at the March 1992 meeting on the issue of MEAs, in which it had stated that it regarded an MEA as a higher category of multilateral and bilateral agreements.

148. The representative of Australia made preliminary comments on the EC paper and said he would return to it in more detail at a later time. He considered it valuable in assisting in identifying the range of issues on which the Group needed to focus. In this regard, he considered the comments by the Nordic representative useful. However a great deal more analytical work was required. As the Hong Kong representative suggested, one of the Group's major objectives was confidence building. His delegation supported the New Zealand proposal for an evolving list of issues suggested by delegations for future work.

149. He considered that the EC paper offered useful insights in a number of areas and he agreed that there was a need for the GATT to focus on those issues which arose at UNCED that fell within its sphere of competence. His delegation also endorsed the thrust of the four basic orientations in the EC paper, including the notion that trade liberalization and protection of the environment should not be seen as mutually conflicting and that a supportive relationship between the GATT and MEAs should be ensured. The EC paper identified a number of areas for further work on Article XX, on MEAs and on the treatment of non-parties to MEAs. His delegation agreed with Mexico that the important connections highlighted in the paper between necessity and least trade-restrictiveness needed further exploration.

150. On the issue of non-parties, he considered that the application of trade measures to deal with non-parties might not pose real problems, especially if MEAs were designed, where possible, with the following considerations in mind: to minimize any possible trade impact (for instance, non-parties to MEAs might not be subject to trade measures); to incorporate trade principles such as legitimacy and transparency; the MEA had "global" acceptance, and appropriate derogations were obtained for provisions applied to non-parties to MEAs which might be inconsistent with GATT; and non-parties were not members of the GATT. In determining what was meant by "global" acceptance of an MEA, he agreed with the EC paper that openness of access to negotiations was an important criterion. Further consideration might be needed for regional agreements.

151. He considered it more likely that parties to MEAs might seek to apply measures on a discriminatory basis which, under certain circumstances, could be inconsistent with GATT. For example, where a key player in the environmental field which was also a GATT contracting party decided either not to accede to an MEA or did not apply its specific provisions, the use of trade discriminatory measures as a means of either enforcing MEAs or dealing with "free-riders" could pose significant problems under the GATT. GATT articles limited considerably the extent to which discriminatory action could be taken against non-parties to an MEA.

152. Actions taken under MEAs (including discriminatory treatment of non-parties to MEAs) were not explicitly covered by present GATT rules, in particular any of the Article XX provisions. The real issue was that discriminatory treatment of non-parties to an MEA might in certain circumstances be inconsistent with certain GATT Articles, especially in view of the importance in the GATT of preventing discrimination.

153. Article XX allowed a country to discriminate under certain conditions, provided that the measures taken did not arbitrarily or unjustifiably discriminate between foreign suppliers; did not constitute a disguised restriction on international trade; were necessary; and were the least trade-restrictive of a range of several possible measures. In respect of Article XX(g), all components of the exception must be satisfied in order for its use to be GATT consistent.

154. He added that a further issue which needed clarification was the point at which trade measures were applied in respect of MEAs. His delegation would have reservations about any provisions in MEAs which provided automatically for trade sanctions against non-parties, but would envisage that such actions would be taken only as a last resort, once all other forms of persuasion and consultation aimed at achieving the environmental objective had been exhausted. In this respect, he considered the New Zealand intervention useful because it focused attention on the limited effectiveness of discriminatory trade provisions in dealing with environmental problems.

155. He considered that extra-territoriality seemed inconsistent with the GATT because the GATT generally did not allow one country to apply different standards to domestic and imported products, or to impose

production process standards upon another country. However, in limited respects the principle of extra-territoriality could be considered consistent with the GATT; GATT Articles allowed member countries to undertake actions relating to product standards of imported goods, provided the same criteria were also applied to domestic products. Interpretations of Article XX concluded that this Article did not apply to unilateral environmental measures taken in one country to conserve the human, plant or animal life or health of second countries or to global resources, but it did apply to environmental measures taken in one country to conserve the plant or animal life of that country. His delegation agreed that this matter needed further consideration.

156. The representative of Switzerland considered that the two sub-issues were closely linked. In her view, the problem of extra-territoriality would exist as long as there were not multilaterally agreed rules which would serve for a common international approach. However this was often difficult because each country had its own preferences concerning environmental objectives. The objectives enunciated in the GATT were to raise living standards, real income, effective demand and full employment, and to develop the full use of the resources of the world and expand the production and exchange of goods. There was no conflict between environmental objectives at the local level and those of the GATT.

157. She added, however, that a healthy environment was the prerequisite for sustained economic growth. There was naturally a difference in the sensitivity that each country attached in its policy framework to the economic and ecological situation, reflecting differences in priorities attached to different objectives. The problem arising in connection with extra-territorial application of laws and regulations had therefore a close link to the priorities of each country. Potential tensions and conflicts about extra-territorial application arose where divergences about policy objectives existed.

158. Different policy objectives and priorities were often a source of conflicts at the national level, and even more so at the international level. A country might apply a certain law with extra-territorial effect as a policy objective on the one side but reject the extra-territorial application of environmental measures on the other. This behaviour appeared contradictory and inconsistent, but it reflected different priorities among public policy choices. Policy preferences were a question of national sovereignty.

159. The problem of extra-territoriality did not arise as long as trade measures were agreed to by parties having the same structure of policy preferences. The problem arose when such measures were extended to parties that had not agreed to such measures, i.e. non-parties to MEAs. Furthermore, a distinction had to be made between extra-jurisdictional effect and imposition of environmental policies. The three main MEAs under discussion contained restrictions designed to protect the environment outside the jurisdiction of the country applying them, including in non-parties. In this case, the extra-territorial effect of a measure was based on a co-operative and multilateral approach.

160. On the other hand, a unilaterally taken trade measure for environmental purposes might also have an extra-jurisdictional impact on a third party. In this context, a number of questions arose: when might a unilateral approach be appropriate to solve an environmental problem which was not strictly local but of a transboundary or global nature? Was there any possible justification to apply unilateral measures to confront global or transboundary environmental problems? Was it necessary to apply on an unconditional basis trade provisions in MEAs also to non-parties in order to achieve the commonly agreed goal of an MEA?

161. Her delegation believed that the extra-territorial application of any law or regulation was to be judged by a common standard in international law: was it conceivable that a country or several countries on a common agreed basis could impose obligations on a third country not consenting to that obligation? What was the nature of any such obligation for the non-consenting party? Was it a strictly legally binding obligation? What would be the consequences if this legal concept would be applied in several policy fields? And, what should be the criteria for a possible justification of such a breach with a common standard of international law? These question would have to discussed in more detail.

162. On the issue of non-parties, one important condition for dispute prevention was the existence of commonly agreed rules. By definition there were no agreed rules between parties and non-parties to an MEA and it seemed, therefore, that dispute prevention would be ruled out. Dispute prevention nevertheless had an important rôle to play in eliminating tensions among countries. In the absence of commonly agreed rules, were there means of dispute prevention among parties and non-parties and what would be their nature? This required more consideration.

163. Dispute settlement, on the other hand, was the consequence of the failure of dispute prevention. As there was no recognized superior dispute settlement body which was responsible for settling disputes in the area of trade and environment, the potential for the GATT to settle disputes lay especially in the interpretation of Article XX. The principle of non-discrimination was a key element in this regard. If a non-party to an MEA was a party to the GATT, its GATT rights could be invoked. When discrimination occurred, the measures taken had to be justified under one of GATT's exceptions. Article XX was probably the most likely justification in most cases. But clarification was needed on how its provisions were related to trade measures applied to non-parties of MEAs, especially the head-note which provided that measures should not be applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevailed.

164. Article XV of the GATT captured the general problem of the treatment of non-parties. This problem had existed when the GATT was founded in 1947 and the objective of the Article was to guarantee broad co-ordination between both international bodies, the GATT and the IMF. This Article had to be recognized and followed by non-signatories of the IMF.

165. She believed that the Group might have to consider where the problem of non-parties was really located. What kind of environmental problems were relevant for the analysis of non-parties' relations? On the one hand, a distinction was needed between three categories of environmental problems: global commons, transboundary, and domestic environmental problems. On the other hand, the Group was dealing with trade measures, trade-related measures and others that were not trade-related. The problem of non-parties might be situated mainly in the field of global and also transboundary problems, and trade and trade-related measures. The question was why certain parties did not participate in such MEAs? Her delegation believed an examination of various constellations which resulted from the matrix of global commons, transboundary and domestic environmental problems on the one hand, and trade measures, trade-related measures and other measures on the other, would illustrate sensitive areas and contribute to a common basis of discussion.

166. The representative of Chile agreed with the EC paper that a balance was possible between trade liberalization and environmental protection, both directed towards promoting sustainable development. He also agreed that unilateral approaches were not the best way to solve environmental problems; multilateral approaches were. A joint attempt to interpret Article XX would be useful to clarify the relationship between GATT and measures taken under MEAs, but there was a need to define what an MEA meant. The EC paper offered criteria in this regard, as well as criteria on trade measures in MEAs and their relation to Article XX, all of which could be taken into consideration. Finally, on extra-territoriality, his delegation supported the conclusions and adoption of the tuna panel.

167. The representative of India said that his delegation would carefully examine the EC paper and make more detailed comments at a later stage. As a preliminary reaction, his delegation saw merit in the basic orientations guiding the EC position which, along with other specific issues, could form a useful basis for future work. He wished to address the two sub-issues in the context of trade measures taken to address environmental concerns. He believed it would be useful to look into the reasons for using extra-territorial measures, which appeared to be two-fold: to protect the domestic environment from adverse affects, or to address global environmental concerns which could include the conservation of endangered plant and animal species.

168. Whatever the reasons, his delegation believed that unilateral action to deal with environmental challenges outside the jurisdiction of the importing country were out of place because it implied imposition of one country's standards, notions, and ideas on others, which was unjustifiable in all circumstances. Also, the objective was unlikely to be achieved. The key issue was whether a country or group of countries had the right to dictate through extra-territorial trade measures the environmental policy within another country's jurisdiction. His delegation believed that the answer was no and that the alternative was multilateral agreements based on international consensus.

169. He added that the issue of non-parties was seen by some as an issue of "free-riders". Two different views had been expressed on this concept so far: that "free-riders" were non-parties to an MEA whose actions could undermine the efforts of parties to tackle a global problem; or that they 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 by others. The latter involved the notion of non-parties obtaining commercial advantage vis-à-vis others, which was the classic definition of a free-rider.

170. His delegation believed that these views merited further in-depth discussion in the Group, and it had not formulated conclusions thus far. However, in order to label non-parties as free-riders, there would have to be conclusive evidence that they were contributing significantly to the environmental problem. It was also important not to characterize as free-riders those countries who for objective reasons did not accept the science and risk assessment behind or the objectives of the MEA, those that had genuinely different environmental priorities and those that simply could not absorb the costs of an environmental programme or agreement. It was for these reasons that his delegation had reservations about the notion of free-riders merely as non-parties whose actions could undermine the efforts being made by participants to tackle a global problem.

171. His delegation believed that the question of treatment of non-parties would have to be dealt with through international peer pressure, moral persuasion and through multilateral agreements based on international consensus because unilateral and discriminatory trade measures were unlikely to achieve any concrete results. On the contrary they could be counterproductive and lead to further environmental deterioration in the countries targeted. He also emphasized that the special conditions and developmental requirements of developing countries as they moved towards agreed international environmental objectives should be taken into account.

172. He added that a related legitimate question was what was meant by a multilateral agreement based on international consensus? The ideas contained in the EC paper were worthy of consideration, and the criteria that the agreement had to be negotiated under the aegis of the United Nations and be open for accession by any GATT member on equitable terms were unexceptionable. His delegation also added two additional criteria on participation in order to ensure MEAs were truly based on international consensus: the participating countries from a wide geographical spread and at different levels of development must be represented. This was necessary to ensure that the MEAs were truly based on international consensus.

173. The representative of the Republic of Korea welcomed the EC paper. Focusing on the sub-issues identified for this meeting, his delegation believed that the most important task of the Group was to enhance understanding of how trade and the environment could be mutually supportive; this was mandated by UNCED's Agenda 21. To accomplish this task, a definition of GATT's rôle vis-à-vis environmental goals was

warranted, so as to create greater predictability in international trade relations and to reduce the scope for unnecessary trade disputes.

174. Once GATT's rôle was established, it would be clearer to the public that the GATT was not anti-environment. Article XX(b) and (g) allowed room for trade-based discrimination provided that the conditions in the chapeau of the Article were fulfilled. Thus, the Group should demonstrate that GATT's goals were consistent with environmental concerns.

175. General misperceptions of the goals of GATT in relation to the environment could be corrected by playing a more active rôle in the formulation of trade provisions in future MEAs. GATT should make its resources and experience available to those negotiating MEAs in order to ensure that their trade provisions were consistent with the GATT. The contracting parties should be prepared to examine draft MEAs and to provide advice on how trade provisions could be drafted in conformity with the GATT's principles and provisions. He suggested that GATT adopt a multilateral approach to this issue rather than allowing individual contracting parties to take unilateral actions. UNCED undertook to address environmental problems more co-operatively and GATT should play its part to fulfil this pledge.

176. He believed that the issue of non-parties should be approached with caution, and in a co-operative spirit. He supported the Nordic suggestion that the term "free-rider" not be used loosely. Developing countries were more likely to be non-parties to MEAs, and the GATT should not question their motives in not signing certain agreements, nor approve coercive trade measures designed to compel developing countries to ratify MEAs. The Group should endorse a positive approach whereby incentives, such as well-targeted financial assistance, technology and grace periods, were made available to developing countries who chose to ratify MEAs. This approach was not only co-operative, but was fair because it recognized the historical responsibility of the developed world for the majority of present environmental problems. Co-operation between parties and non-parties was necessary to increase participation of all countries in MEAs.

177. The representative of the European Communities thanked delegations for their preliminary reactions to the EC paper and said he was encouraged by the comments and believed that the Group would have an opportunity to enter into more detailed discussion of the paper in the next meeting. He was particularly encouraged by the broad support received for the thrust of the basic policy orientations contained in the paper. He wished to clarify that his delegation did not consider the Group to be at the stage of trying to settle the issue of how to address the relationship between the GATT and the trade provisions of MEAs. It had suggested a collective interpretation of Article XX, but he recognized that there were other possible means of doing so. The Group was still in an analytical stage and he hoped that the future analytical work would incorporate issues raised in the paper.

Agenda Items 2 and 3

178. The representative of Mexico said that her delegation did not believe that transparency was an end in itself, since as a discipline it did not solve conflicts of interest. It was an indispensable means of stimulating action to prevent the environmental measures taken by one contracting party from having a significant effect on the trade of another. By making known a measure in advance, transparency could avoid the distorting effects of a measure and give countries a reasonable amount of time to adjust to it.

179. Her delegation believed that GATT already had appropriate transparency mechanisms, which would be reinforced by the results of the Uruguay Round. Before considering new mechanisms, the Group should consider the problems of implementing the existing ones. Her delegation considered the Swedish and Swiss suggestions, regarding the possibility of a procedure for reviewing notification and publication practices in the context of the TPRM, and the EC's proposal, concerning the possible creation of a body to discuss notified measures, interesting. It believed that identifying gaps in present mechanisms would yield only approximate results, since it was not possible to assess the operation of provisional Uruguay Round rules.

180. She considered that labelling and packaging was a fairly straight-forward and concrete matter. Standards were undoubtedly one of the most representative aspects of the transparency problem in the environmental context and, as recent experience had shown, labelling and packaging requirements risked becoming disguised restrictions on international trade. Her delegation found the recent Decision on Article 2.5 of the Technical Barriers to Trade Agreement, concerning labelling, clearly revealed the type of improvements that could be made in this area in the future. The Decision confirmed the interpretation of Article 2 of the Agreement which, in her view, had limitations, the most relevant of which was the fact that the notification rule covered only mandatory requirements.

181. Labelling and packaging requirements might be mandatory or voluntary, the latter primarily in the form of private sector programmes but also those supported or financed by governments. Both types of measures might affect trade. However, the Decision excluded all voluntary requirements. She suggested that contracting parties could have their government bodies dealing with consumer interests prepare lists which could be made available to other parties. Other organizations' work in this field could also be used, without duplication, as well as the possibility of cross notification.

182. One problem not sufficiently taken into account in the present rules was that both mandatory and voluntary labelling and packaging requirements were introduced not only by central governments but also at provincial and municipal levels. Another problem was how to validate the criteria for determining whether or not the application of a standard affected trade. The present margin of discretion would lead to arbitrariness. Mutual recognition mechanisms for such criteria were also essential.

183. Her delegation viewed transparency of standards as follows: notification to make the measure more readily known; the right to comment to enhance the measure; a reasonable period for adjustment; and simplified compliance procedures such as, for example, recognition of results and laboratory accreditation. A discipline might also be advisable for making known the mode of implementation of such measures which should be the least expensive and the least trade-restrictive.

184. Her delegation also agreed that the introduction of transparency requirements involving measures, instruments, or processes adopted for policy reasons other than those directly related to the environment should be avoided. The extension of such requirements to measures that did not have a direct impact on trade would doubtless prove unmanageable. The PPMs not already included in the TBT and SPS Agreements fell into this category, given that there was nothing to show whether they had a direct effect on trade. On the other hand, systems for recycling and handling packaging waste, inasmuch as they were directly related to the environment, also had a direct impact on trade.

185. She concluded that it was inadmissible to invoke Article XX to evade transparency requirements. Measures applied under the terms of this Article for environmental reasons - whether under an MEA or a national policy - should likewise not escape notification and other obligations of the transparency mechanisms. She agreed that future work should be along the lines suggested at the end of TRE/W/2.

186. The representative of the United States recalled that at the last meeting, one delegation had suggested that the Secretariat prepare a paper which discussed in greater detail some of the key gaps in transparency requirements. His delegation believed such a paper would be an extremely useful basis for discussion for the next meeting. His delegation was also particularly concerned with the issue of how consistently contracting parties fulfilled their existing notification and publication obligations in light of the fact that some contracting parties had failed to notify the TBT Committee of regulatory measures to protect the environment while the regulations were still in draft form. It was critical that other Parties had an opportunity to comment on regulations prior to their adoption and implementation. This period of review and comment was an important step in the transparency process to ensure that parties considered potential trade implications of their draft regulations.

187. At the October 1992 meeting, his delegation had suggested that the Group consider preparing a survey to assess how and when each contracting party made the decision to notify trade measures for environmental purposes. The results from such a survey could help to clarify the apparent discrepancies among contracting parties in interpreting their notification obligations.

188. He then reviewed some of the packaging and labelling legislation underway in the United States, and said he looked forward to hearing similar presentations by other contracting parties in the near future. He noted that some of the US government agencies had authority under various statutes to specify packaging and labelling to guard against hazards from

products such as pesticides or hazardous wastes. These types of labelling were not included in a report which his delegation would be making available for circulation because they were considered in other international forums.

189. In the US, efforts to develop and implement requirements and guidelines regarding environmental labelling and packaging had occurred in varying degrees at the federal and state levels, through non-profit independent organizations, and through initiatives of private industry and trade associations. At the federal level, packaging and labelling approaches, primarily in the form of developing guidelines, were being considered by the executive branch and by the Congress.

190. One agency, the Federal Trade Commission, was concerned primarily with deceptive trade practices. It had recently issued voluntary guidelines to help reduce consumer confusion and prevent the false or misleading use of environmental terms in the advertising and labelling of consumer products. They covered such terms as "ozone safe" and "ozone friendly", "combustible", "biodegradable", "recyclable", "recycled content", and "refillable".

191. Another, the Environmental Protection Agency, was currently conducting studies regarding life-cycle assessments that evaluated the environmental impacts of products, processes, and services from "cradle to grave". This analytical work was necessary for any government guidelines in this area.

192. At the state level, there had been a number of legislative and regulatory initiatives on the use of environmental marketing claims and minimum recycled content in packaging. These activities had been neither uniform nor harmonized, although a number of states had indicated a preference for national standards in order to promote harmony in the marketplace. For example, several states had passed legislation requiring minimum content in various types of packaging, such as glass containers, if they were to be considered recycled or recyclable. Also, mandatory deposit-refund systems, or "bottle bills" for beverage containers had been implemented in ten states.

193. About twenty states had enacted mandatory recycling laws which generally required households to separate newspapers and beverage and food containers from household waste for separate collection and recycling. States were also taking an active rôle in the regulation of plastic resin coding; over twenty states required that plastic products and packages be labelled as to their resin category. Also, some states were examining ways to eliminate or phase out the use of toxic substances in packaging.

194. Private initiatives were in two forms: independent organizations working on generic labelling, and industry and trade associations. Among the private organizations that had developed initiatives on labelling and packaging, he highlighted three. One was Green Seal, a non-profit organization working to establish an environmental "seal of approval" programme. The second was Scientific Certification Systems, Inc., an independent organization working on procedures to provide independent certification of environmental marketing claims by producers. The third

was the American Society for Testing and Materials, a non-profit organization working to establish standards setting methods for voluntary standards for packaging and environmental labelling.

195. He added that individual industry groups were making efforts to address environmental labelling and packaging for their industries. These included food processors and the cosmetic industry. Some industry groups favoured federal guidelines to harmonize environmental terms and had developed voluntary guidelines on the use of environmental marketing terminology.

196. The representative of Sweden, on behalf of the Nordic countries, said TRE/W/4 was a useful overview of potential trade measures that existed in the environmental field. A further categorization of the measures could be made in various ways and be more detailed. His delegation appreciated the distinction made between transparency through publication and through notification. Both were necessary although it was possible to have publication without notification, but whether this was satisfactory should be analyzed for particular trade measures.

197. Possible gaps in the present transparency system of the GATT were related to measures based on international standards, various handling requirements, measures taken by local government and by non-governmental bodies, voluntary measures such as eco-labelling schemes, and economic instruments that relied on market forces. His delegation did not believe that technical regulations or standards in accordance with international standards needed to be notified to the GATT. Although local government and non-governmental bodies were required to comply with transparency provisions of the revised TBT and SPS Agreements, the 1979 Understanding and the draft FOGs text did not contain such provisions.

198. He added that other potential gaps in transparency were sufficiently discussed in TRE/W/4. His delegation did not consider economic instruments and deposit refund schemes to be trade measures subject to notification requirements under the 1979 Understanding. Such measures might have significant trade effects and the Group ought to discuss the need for new notification requirements for them.

199. Regarding suggestions for future work in TRE/W/2, his delegation believed that the present list of measures notified as serving an environmental purpose satisfied the needs of the Group. Also satisfactory information on trade-related measures in MEAs had already been made available in L/6896. His delegation supported the proposal to prepare a study of the kinds of notification requirements which existed in MEAs; that would give useful information for further discussion in the Group. A discussion of parameters that should be used to identify national environmental measures that should be notified was premature; the analytical work should be finished first.

200. He added that the benefits of a notification exercise in the Group of national environmental measures would be marginal and the exercise itself time consuming. Priority at this stage should be given to other issues.

His delegation supported ex-ante notification requirements, such as those in the TBT and SPS Agreements, for all trade-related national environmental measures. That would give opportunities for comments and consultations.

201. He said that TRE/W/3 highlighted relevant trade issues involved in packaging and labelling requirements and made clear that a lot of work remained under this agenda item. He found the section dealing with industry experience interesting because it pointed at three sets of problems identified by traders which the Group would have to address. The first was the difficulty of obtaining information and explanations about packaging systems in a foreign country. The second was the short deadlines for implementation. The third was that competitiveness of companies could be affected if confidential business information was required as a condition for receiving approval to use labels, or if the determination of recyclability of particular materials was delegated to domestic industry.

202. One conclusion to be drawn from these sets of problems was that transparency was crucial in this area. Another was support for the proposition that ex-ante notification should be the norm, and a third was that competition aspects must be thoroughly considered when designing a system so that it did not unfairly impede competition. With regard to future work in this area, he suggested that a next step could be to more closely relate the types of measures described in TRE/W/3 to GATT rules and those of the Uruguay Round. He suggested that the Secretariat continue its analysis, categorizing measures and relating them to the present and post Uruguay Round rules, taking into account also relevant panel proceedings.

203. He considered that labelling requirements were treated generally as barriers to trade by the GATT. Article XI contained a recommendation to show restraint in the application of labelling requirements, as well as more detailed rules for their implementation. As was pointed out in TRE/W/3, at present trade in environmentally-labelled goods was small but potential trade-related problems could arise. However, labelling requirements were less trade-restrictive than, for instance, banning a product. Therefore his delegation would argue that environmental labelling, if considered sufficient to fulfil environmental objectives, should normally be preferred.

204. Eco-labelling systems risked, however, becoming closed systems. The conditions for obtaining the right to use a label could be formulated in such a way that access to the system was not possible for foreign companies; this was not acceptable. Harmonization of programmes was one possible means to deal with this but it raised several problems. Positive environmental labelling programmes were usually underpinned by formalized criteria concerning what was good for the environment. Since environmental conditions differed between countries it was not evident that harmonization was always possible. This needed to be looked into in more detail.

205. The representative of Canada looked forward to returning to these two agenda items in more detail at a future meeting. She considered TRE/W/3 a good compendium of measures, which could be supplemented by additional information from submissions from delegations. She believed it would be

helpful if the dimension of industry experience on page 21 of the paper could be expanded in the Group's work to give more detail on possible effects on trade and of actual experience, if available, of each type of packaging measure. Her delegation was also interested in pursuing the question of conditioning eligibility for a national eco-label for an imported product on PPMs unrelated to product characteristics.

206. She endorsed the view expressed in paragraph 21 of TRE/W/4 that the obligation to notify was in no way reduced in respect of measures taken in support of an MEA. Whether or not the TBT criteria for notification applied, the basic transparency obligation would seem to be unaffected. She said she would discuss these issues in more detail later.

207. The representative of Argentina believed that TRE/W/3 would help to focus discussions. The TBT Agreement already covered many technical standards. The Group's work should focus on detecting the types of packaging and labelling requirements that were not covered by the TBT Agreement in particular, nor the GATT in general. The main gap in present provisions related not so much to requirements on the physical properties of packaging, but those related to the handling of wastes and obligations to recycle or reutilize.

208. He said that a recent meeting of the TBT Committee gave an illustrative example. The delegation of New Zealand had inquired about a new German packaging standard which included provisions on the materials, weight, recycling, and take-back requirements. The EC had replied that the TBT Agreement did not cover take-back requirements. This created a problem. He noted that on page 16 of TRE/W/3, the German legislation was explained. It provided an obligation that transport packaging must be retrieved by the manufacturer or user of the packaging to be reutilized outside a public waste handling system. In the case of an exporter with little market share, this would mean an additional cost that might seriously impair its competitive position. This case did not seem to violate Article III. However, the packaging requirement impaired the comparative capacity of the foreign producer.

209. His delegation believed that this question should be analyzed as a potential violation of Article II, since it would be detrimental to the value of a tariff concession as a result of the modification of one of the conditions under which it was granted. This should be examined when interpreting general exceptions for environmental reasons.

210. He referred to page 13 of the document where it stated that taxes on non-reusable containers affected in particular the price of imports since imports tended to use this type of container. It might be argued that these taxes applied in a non-discriminatory fashion to national and imported products, as the delegation of Canada maintained during the panel proceedings on beer. However, this example was a case in which an environmental measure hid a protectionist measure. It was interesting to note that the Canadian tax did not apply to containers of non-alcoholic drinks, whose impact on the environment was presumably the same as those containing beer. His delegation considered this a violation of

Article III, although it recognized the difficulties that a panel would have when drafting recommendations based on the like-product argument. The question was linked to requirements on handling wastes since the exemption relating to tariffs on non-returnable or recyclable containers tended to be linked to participation in a deposit or return system, as was the system in Canada. The panel had ruled that it was compatible with Article III.2.

211. He added that, at this stage, his delegation had no clear opinion about the treatment that should be given to private-sector labelling systems. On page 25 of TRE/W/3 it stated that in future these systems might create trade-related problems. It noted that labelling programmes were generally voluntary and none referred to in the paper used different criteria for products of different origin which could produce discrimination, particularly when employing the life-cycle approach.

212. He considered that the Austrian legislation on labelling of tropical timber illustrated that trade problems existed today. The obligation to label tropical wood introduced discrimination between different types of wood, based on origin. There was no similar obligation for wood from temperate climates, and he considered it an Article I violation. There was also incompatibility with Article III since there was no obligation to label locally produced wood and the regulation altered conditions on which national and imported products competed.

213. His delegation recognized that in both these situations, as well as in the case of tariffs on products, the excuse that they were not like-products could be invoked to justify the measure. Another question in the Austrian legislation was the trademark or quality label. Although in this case it was a voluntary standard, the linkage with PPMs was worrying. As pointed out in TRE/W/3, there was a tendency to link the granting of trademarks or quality labels to a life-cycle analysis of the product. This could mean that importing country would be empowered to analyze, according to unilaterally established criteria and values, whether the production process in the exporting country was sufficiently environment-friendly as to deserve the quality label. This was an extra-territorial implementation of a standard.

214. As far as such labelling became commonplace, exporting countries would be compelled to modify their PPMs to remain competitive on the market. This would be a far more subtle form of interference in the environmental policies and practices of other countries than those that had been declared incompatible with GATT in the past. Proving the incompatibility of standards of this type with the TBT Agreement would be much more difficult as officially these would be based on voluntary compliance.

215. His delegation's observations on packaging and labelling led it to consider the interpretation of exceptions for trade measures based on environmental concerns. Obviously harmonization and equivalence which had been dealt with in the SPS context were also relevant here, particularly to avoid the use of specific measures on packaging and labelling as a disguised obstacle to trade.

216. The representative of New Zealand said that TRE/W/3 categorized clearly various types of requirements and schemes according to the administrative methods used. It provided the Group with the start it needed to begin analytical work on the relative effectiveness of various measures, their impact on trade, and how different types of measures related to commonly identified concepts such as necessity, non-discrimination, least trade-distortive, proportionality, disguised restriction on international trade, and affording protection to domestic production. His delegation would be interested in discussing further some of the observations made in the paper which went beyond the purely descriptive to consider possible trade effects of various measures.

217. Although the paper gave indications of the popularity of certain schemes, it would be difficult to determine which schemes were the most successful without comprehensive information; delegations might provide more detailed comments on their own individual schemes in their interventions. With respect to industry experience, the provision for adequate lead-time and consultation seemed to be most important if foreign suppliers were to compete effectively with local producers.

218. Problems might arise over the dissemination of information (translation, difficulties in seeking further explanatory information and clarification), over adjustment time (foreign suppliers would not be as familiar with the development of new policy and would therefore be likely to require a longer time to adjust), and from the lack of opportunity for foreign suppliers to consult with local authorities.

219. TRE/W/3 helped to identify the kinds of mechanisms through which packaging and labelling requirements were developed and thus provided indications of the aspects which needed to be covered if such requirements were to be implemented in a transparent and non-discriminatory manner. From this typology his delegation hoped the Group's attention could turn to an examination of the efficacy of various measures.

220. The Group might also wish to consider generically the extent to which there was a possible rôle for labelling systems in furthering the protection of the environment in a least trade-distorting manner. He noted that there was a relative lack of commentary on what were termed "other labelling programmes". Delegations might wish to reflect on whether this implied a general absence of such programmes or corresponded to a lack of available information on existing or envisaged schemes.

221. Finally, he considered TRE/W/4 a valuable typology for further discussion on transparency. It contained a number of issues to which his delegation would return. For example, in relation to the transparency of measures taken pursuant to the provisions of MEAs, it was instructive to look at past practice of delegations as reflected in L/6896 and TBT/W/156. As with the Nordic non-paper presented at the last meeting, his delegation understood that references in TRE/W/4 to provisions of existing and envisaged GATT instruments were not intended to interpret those provisions.

222. The representative of the European Communities said that his delegation would examine TRE/W/4 and return to it in detail. On the basis of its typology of environmental measures likely to have trade effects, the Group could have a structured discussion on transparency, both to express views about the likely trade effects of such measures and to indicate how transparency provisions in the GATT related to them. This would assist in better understanding how transparency requirements applied in the GATT and where there were gaps which needed to be filled.

223. He considered that discussions on agenda item three would proceed in a more focused manner if the two issues of packaging and labelling were separated, since different kinds of trade issues arose in each area. Also discussions would be assisted if delegation in their interventions identified the type of trade issues which they believed arose in relation to such types of requirements. There were various different types of labelling and packaging requirements. He emphasized that when discussing these issues, in particular packaging, many different types of measures with different types of trade implications were being discussed which should fit into the debate. Insofar as delegations could present in a generic manner the type of trade concerns that they had in relation to different types of measures, that would help the Group to identify how to progress on this matter.

224. Regarding the statement by the representative of Argentina, he believed in order for the Group to progress in its work it was essential to avoid entering into discussion of specific measures taken by individual contracting parties and their relationship to GATT provisions. Proceeding in such a manner would freeze the work of the Group and it would not be able to progress in identifying the types of trade concerns which it needed to address. He added that his delegation disagreed totally with the legal assessment presented by Argentina on certain German measures.

225. The representative of Austria, referring also to the Argentinian statement, recalled that in a statement of 4 October his delegation had stated that labelling requirements were not obstacles to trade. The Austrian legislation to which the representative of Argentina had referred did not impose any quantitative or qualitative restrictions and did not impose any taxes. Imports of tropical timber into Austria were duty-free. The legislation was not discriminatory in nature as it applied to all tropical timber or tropical timber products, irrespective of the country of export. He asked what could be less trade-restrictive than labelling schemes? Finally, he regretted that UNCED was not able to negotiate a legally-binding instrument on forests, but only a statement on forest principles.

226. The Chairman took note of all statements made. He added that while he recognized the difficulty of raising trade concerns in a generic manner, he believed that the Group should try to confine itself, to the extent possible, to conducting discussions on the basis of how best the Group could move forward in a positive manner. He hoped this would be followed in future meetings.

227. He recalled his earlier suggestion that delegations individually, and on a goodwill basis, submit to the Secretariat for its use information that reflected their own national experiences with packaging and labelling requirements. The invitation was still open and he welcomed indications from those delegations who stated that they would be making submissions soon. When further such submissions were received, the Secretariat would again update document TRE/W/3.

228. He considered that the present focus on two specific issues under agenda item one should be pursued at the next meeting, although not to the exclusion of other issues delegations might wish to address. He asked that delegations reflect on how best to digest the Secretariat documentation under agenda items two and three, and also how best to focus those discussions. He would try to organize informal consultations, as appropriate, in this regard. The EC had made a useful suggestion on agenda item three on which he asked delegations to reflect. He took note of the suggestion from New Zealand for an evolving list of issues and said he would consult the Secretariat to see what could be done to follow up on this suggestion.

229. He recalled that he had indicated in the November Council meeting that he planned to make a progress report on the Group's work to the CONTRACTING PARTIES Session in December. He would welcome any informal advice delegations may wish to give him, particularly as to what they may wish to be included in the progress report. He appreciated the substantive exchange at this meeting and noted that some time was necessary to digest the progress made over the year. Therefore, he suggested that the next meeting be in early February, with the possibility of adjusting the date in the light of Uruguay Round developments.