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Group on Environmental Measures and International Trade

Report of the Meeting Held on 4-5 February 1993

Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its eighth meeting on 4-5 February 1993 under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and relevant documentation were contained in GATT/AIR/3390 and 3390/Add.1.

2. The Chairman noted that, in addition to the sub-issues suggested under agenda item 1, he had suggested, after informal consultations, that the Group attempt to focus on, although not necessarily limit itself to, the issues outlined in GATT/AIR/3390/Add.1 under agenda items 2 and 3.

Agenda Item One

3. The representative of Sweden, on behalf of the Nordic countries, stated that his delegation, after careful analysis of the EC paper (TRE/W/5), also favoured an approach that considered that some form of collective interpretation of Article XX provided the best means of clarifying the relationship between GATT and trade measures taken pursuant to an MEA. His delegation had been reflecting on the best way to create an opening in the GATT for measures directed at global, transboundary, and regional environmental concerns. While not wishing to abandon the analytical mode of work, his delegation saw merit in the Group having an idea of which track to pursue.

4. He explained that his delegation had considered but discarded the waiver approach as an alternative. Article XXV of the GATT contained the rules for waivers, an ad hoc discipline used on a case by case basis. His delegation could imagine an approach whereby signatories of an MEA, as a group, would be given clearance, under this Article, so that measures taken to implement the MEA would be considered compatible with the GATT.

5. He noted in particular the language in paragraph 5(i) of Article XXV which stated that the CONTRACTING PARTIES may define exceptional circumstances where voting requirements other than those normally applied for waivers - two-thirds of the votes cast comprising more than half of the contracting parties - could apply for a waiver. Furthermore, subparagraph (ii) indicated that the CONTRACTING PARTIES may prescribe such criteria as may be necessary for the application of the paragraph.

6. Although having an obvious potential to deal with the variations found among different MEAs, his delegation found a number of factors against this approach. First, it was a case by case approach that would come into

action after negotiation of an MEA. The approach could be time-consuming, depending on whether or not the procedures offered by the subparagraph 5(ii) were utilised, and time-limited, which was made explicit in the Uruguay Round Draft Final Act. Finally, a formal denial of a request for a waiver by the Council would put contracting parties in the position of passing judgement on environmental policies agreed among governments and conflicting with obligations in different international fora, both of which were sought to avoid.

7. His delegation concluded that the ad hoc character of the waiver generated an uncertainty that contradicted the purpose of creating clearer rules for trade measures taken pursuant to MEAs, which should provide guidance to negotiators of future MEAs. For several reasons, his delegation preferred an approach based on Article XX whereby under certain conditions its scope would be extended to cover trade measures taken within the framework of MEAs. Such an approach would provide predictability; give guidance to MEA negotiators; not exclude the possibility of future amendments to other rules of the GATT; and could be implemented relatively soon, if desired. The latter should be seen in relation to recent experience in trying to formally amend the GATT, which had proven difficult and often impossible.

8. It was not necessary to decide how an interpretation of Article XX would be formalised because a considerable amount of further analysis was needed, and this fell outside the competence of this Group. He added that a collective interpretation raised a number of important issues which would have to be dealt with in order to be of practical benefit. He considered the four issues highlighted by the representative of the EC to be relevant and, among other issues, in need of future analysis for sufficient understanding of the conditions that should be attached to an MEA exception under Article XX. Analysis should start with the issues of non-discrimination and necessity, then move to the other two, "disguised restrictions on international trade" and the question of what constituted an MEA.

9. On the issue of extraterritoriality, his delegation was not sure that a general definition was necessary and, by using the approach of a collective interpretation of Article XX, the issue need not be tackled explicitly. However the issue of treatment of non-parties remained a significant issue of which the point of departure was the principle of non-discrimination. If this principle was respected there would normally be no need to invoke Article XX; there was already wide scope in the GATT for a range of trade measures to be used to achieve environmental objectives of an MEA, as long as the MFN and national treatment rules were respected.

10. The issue of non-parties boiled down to when discriminatory measures against them should be accepted. This must be decided on the basis of the environmental concern at hand and how best to deal with it. His delegation had no clear answer yet as to when such situations would arise but at the

last meeting, the Group entered, for the first time, into such a discussion. He recalled in particular the attempt of the New Zealand delegation to categorise different situations of non-participation from the viewpoint of geographic production and consumption patterns. The five categories described were thought provoking and underlined that discrimination would not normally be necessary to achieve the objectives of an MEA, and that treating non-parties the same way as signatories could achieve the same end.

11. However, an analysis of non-participation could not be confined to only the consumption and production of products and how this related to possible circumvention. Other factors could also be relevant to an analysis of whether to treat non-parties differently from parties, and he posed several questions in this regard: was the New Zealand analysis always applicable to process and production methods (PPMs) introduced to deal with global and transboundary environmental problems; would MFN treatment lead to such administrative control problems for the signatories that the environmental objective was defeated; did MFN treatment of non-parties substantially increase the cost associated with the environmental programme; and did non-discrimination lead to substantial economic gains by non-parties in a way that would undermine the signatories' attempt to deal with a global or transboundary environmental concern?

12. He concluded that at a later date his delegation would like to address, inter alia, the concept of regional MEAs to deal with regional concerns, and questions associated with defining the concept of MEAs. His delegation believed that under the appropriate conditions there was a need to allow Article XX exceptions only between contracting parties within the region for such agreements.

13. The representative of Hungary stated that her delegation shared many of the views expressed in the EC's paper, and considered several issues especially important. One was that trade liberalisation and the protection of the environment should not be considered as mutually conflicting policies, but rather aimed at achieving the common goal of promoting sustainable development. General trade liberalization resulted in an evolvement of the trading nations' respective comparative advantages, enabling increased exports in the most efficient sectors. Increased export earnings could generate additional economic growth and release additional resources for the introduction of environmentally friendly technologies and production methods. More liberal trade policies and a more open and liberal international trading system could therefore positively contribute to more sound and more responsible environmental policies.

14. Her delegation agreed with the EC position concerning the competences of the GATT; it had the competence to clarify the scope of using trade measures. 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 its basic principles such as MFN and national treatment, legitimacy of objectives, and least-trade-restrictiveness.

15. Her delegation also believed that a collective interpretation of Article XX would provide the best means of clarifying the relationship between the GATT and trade measures taken pursuant to an MEA. It would set clear criteria for using trade measures under the MEA, if such measures appeared necessary to achieve the environmental goals of the MEA. Clarification of the concepts of non-discrimination, disguised restriction on international trade, and necessity were the key elements to such an interpretation.

16. She added that the two issues, extraterritoriality and the treatment of non-parties were linked. The first would exist as long as there were no multilaterally agreed rules. It was inconsistent with the GATT which generally did not allow different standards for domestic and imported products, nor the imposition of process and production standards on another country. Therefore GATT contracting parties should refrain from unilateral action for extraterritorial environmental protection. Trade measures addressing global environmental problems should be based on international consensus, and where trade measures appeared necessary to achieve the environmental goals of an MEA, the fact that they would have been negotiated and multilaterally agreed was the best guarantee against protectionist abuses or the introduction of unnecessary trade restrictions.

17. She considered that the basic condition for preventing disputes with non-parties was the existence of commonly agreed rules, and if a non-party was a contracting party to the GATT, its GATT rights could be invoked. Discriminatory measures would have to be justified under one of GATT's exceptions, most likely Article XX. Criteria should be developed, based on interpretation of Article XX, to clarify the scope for applying trade measures to non-parties of an MEA, and to ensure that such measures did not go beyond what was necessary to achieve the environmental goals of the MEA.

18. Clarification was needed on how the provisions of Article XX related to trade measures applied to non-parties of the MEA. In particular an agreed interpretation of the headnote, which provided that measures were not to be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevailed, was necessary. Trade measures or sanctions should not be used to force non-parties to join an MEA. She added that criteria for MEAs should also be elaborated to ensure that trade measures were used in cases where environmental protection commitments had been established through a multilateral process. Wide participation and openness of access to negotiations were particularly relevant in this respect.

19. The representative of Japan considered that the suggestion in the EEC paper for a collective interpretation of Article XX would affect existing GATT rights and obligations, and that this and other issues it raised needed careful analysis. His delegation would comment on this paper at an appropriate stage, after examination in its capital.

20. He considered that the two sub-issues were closely related. If a country took trade-restrictive measures as an extension of domestic measures to address its own environmental problems on the basis of MFN and

national treatment, it would be unlikely that their legitimacy would be legally or substantively challenged. However, the main issue for the Group's deliberations arose when measures were aimed at environmental protection or conservation outside the jurisdiction of the countries taking the measures. How were these problems to be addressed within the framework of the multilateral trading system?

21. Related to the sub-issue of non-parties, the Group should examine the sub-issue of extraterritoriality by evaluating circumstances where one country, both a party to the GATT as well as to an MEA, took trade measures based on the MEA in order to make another country, a party to the GATT but not to the MEA, apply a certain environmental policy, standard or programme to deal with matters within that non-party's jurisdiction.

22. He added that a country would not have incentive to take measures to address environmental problems outside its jurisdiction if the problems did not affect the country. In such cases, if trade measures were taken other countries would have legitimate concerns that they were aimed at problems other than environmental protection. It would be, however, difficult to define environment-related problems in which a country was interested, and to judge the legitimacy of its concerns.

23. If, for example, air or water within the jurisdiction of a country was physically affected, the country had a clear and legitimate interest in addressing them. In situations where a problem did not physically affect the country, if the country considered the problem an "environmental problem", how could and should it address the problem without causing unnecessary and unjustifiable frictions? This issue was related to the complicated issues of how to define the term "environment", and how to understand the phrases "outside a country's jurisdiction" and "within a country's jurisdiction". These issues cannot be ignored, considering the role that the GATT should play as the law of international trade.

24. It should be borne in mind that there were no fixed definitions or concepts regarding 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. Annex III of the Secretariat document L/6896 contained over 150 international treaties and agreements on "environment", which widely varied in subject matter. If each of these subjects was regarded as an "environmental problem" in the context of the Group's deliberations, and if these deliberations developed beyond the initial analytical stage without setting parameters, it might be difficult to develop a shared understanding.

25. He mentioned some points in the EC paper that needed clarification. In order to have a shared understanding of the legitimacy of the objectives of trade measures to justify exemptions from obligations under the trading system, it was important to have a clearer and shared perception about the scope of the objectives. If, by using the term "environment" in Article XX, a derogation from GATT obligations was permitted, how would effective implementation of the multilateral disciplines be maintained and

ensured? Certain conditions in Article XX, such as "necessity" may not be sufficient to set the limits on the scope of derogations. Since the Group was still in the analytical phase, much remained to be considered.

26. He also considered that the issue of what exactly constituted the term "multilateral" should be carefully dealt with, based on full reflection of the general principles of international law. There was no doubt that the GATT was a trading regime based on recognition of the importance of multilateralism. If, being multilateral, the majority of countries, including a qualified majority such as two-thirds or four-fifths, were able to justify all derogations, how could the rights of the minority effectively be ensured? The EC paper said that "the fact that such measures had been discussed and agreed multilaterally is the best guarantee against the risk of protectionist abuses". He asked to what extent was this argument persuasive to non-parties of an MEA?

27. He added that the same question arose regarding the issue of "necessity" or "disguised restrictions". If a majority of countries in a certain region joined together and unilaterally set a standard for environmental protection as part of a regional agreement, and if that standard affected the products from outside that region, could this be considered a genuinely multilateral approach?

28. Finally, he considered the New Zealand approach useful in dealing with one of the main issues of the Group's analysis: regarding the necessity and efficacy of trade measures. It would be useful for the Group to pursue this matter in a broader scope, and his delegation would return to this issue.

29. The representative of Canada considered the two sub-issues identified central to this agenda item and in need of further analysis and debate. He recalled that his remarks at the last meeting were primarily aimed at the issue of extraterritoriality and had emphasised Canada's traditional opposition to extraterritoriality as well as trade discrimination. This was based on a fundamental belief in the sovereign right of nations to administer their internal affairs according to their own circumstances, priorities and values, and on the recognition that the pursuit of extraterritorial and discriminatory approaches would permit larger and less trade dependent countries to have an undue influence on the values and internal policies of smaller and more trade dependent nations.

30. He considered that the comments by New Zealand at the last meeting were a significant contribution to the issue of non-parties, as was the intervention by the EC. The key issue, and where GATT conflict was most likely to arise, related to the use of discriminatory trade restrictions against non-parties. He had previously highlighted some of the questions that could come up regarding the justification for this approach. The other critical consideration was whether discrimination was necessary and effective to achieve the environmental objectives of an MEA.

31. He recalled that New Zealand had provided an economic analysis of the effects of using discriminatory, as opposed to MFN, trade measures in a

range of scenarios that could occur under an MEA addressing a transboundary or global environmental problem. It identified as the underlying issue the potential for the actions of non-parties to MEAs to undermine the actions of parties in addressing an environmental problem. It noted that "in such circumstances it would seem logical that parties might seek to influence or determine the behaviour of non-parties".

32. The analysis then tested this hypothesis by considering five cases which illustrated the various combinations of production and consumption of the controlled substance in parties and non-parties and possible trade patterns between them. It recognised circumstances in which control or elimination of trade would be an integral and effective part of parties' actions and achievement of the objectives of an MEA. It also demonstrated, however, that nothing indicated that discriminatory restrictions would be any more effective than an MFN approach for controlling trade. Indeed it identified situations in which discrimination could undermine achievement of the environmental goal.

33. He added that the fifth case recognised the possibility that the use of MFN measures may not prevent some migration of production facilities to non-parties during a transition period, depending on the market and price effects resulting from the controls on the product or substance in question. In this case, however, New Zealand properly observed that this was a matter of location of production and that, "... questions of location seemed to rapidly come down to questions of economics. Who is to be granted the rights to the economic rents (profits) to be obtained from supplying the declining consumption markets in parties?" Here the issue was who would get profit, not overall achievement of the environmental objective, which would occur regardless. He added that other implications which would have to be addressed later included PPMs.

34. He considered that one implication of the New Zealand analysis was that it was generally not necessary nor effective to use discriminatory trade restrictions against non-parties in order to fulfil the environmental objectives of an MEA which reflected broad consensus on and participation in a programme to address a global environmental problem. This may not take full account of whether discriminatory trade restrictions should be used against non-parties as a lever to obtain their participation in or acceptance of an MEA, and the link between this and the environmental objective of the MEA, to which the Group would have to return.

35. If this implication was valid, then the question arose of whether it was therefore necessary to make special provision in the GATT to generally allow for this approach. In this regard he referred to the EC paper, in which his delegation agreed with a number of the underlying principles enunciated at the outset. These included that trade liberalization and environmental protection should not be considered as conflicting policies but rather mutually supportive; the competences of GATT; that multilateral cooperation was required to address problems of common concern; and that there was a need to dispel the uninformed view that the GATT treated all measures for the protection of the environment as

exceptions to its rules. These should be the basic principles underlying GATT's work on trade and the environment.

36. Some of the EC's specific concepts and background regarding the criteria in Article XX stimulated further discussion. He questioned the presumption of "necessity" regarding the use of otherwise GATT inconsistent trade measures against non-parties if parties agreed to apply such measures, particularly given the implication of the New Zealand analysis that there was no clear evidence that discriminatory trade restrictions would be necessary to fulfil the objectives of the type of broadly-based MEA described in the EC paper. If the EC did not offer such evidence, was it appropriate to make general provision for such necessity?

37. He did not wish to suggest that no circumstance would ever arise in which the use of discriminatory trade restrictions would meet the necessity test. However, in the absence of clear evidence that this would generally be the case, wouldn't it be more appropriate to consider the individual merits of situations as they arose rather than pursuing concepts of general application especially if they carried other problems with them?

38. On this latter point, he added that there were also some practical and legal considerations not reflected in the EC paper. In addressing the treatment of non-parties and the interface between MEAs and the GATT, the essential issue was that GATT contracting parties, not parties to an MEA, retained their GATT rights which they might wish to use in cases where they believed there was unfair or unnecessary trade discrimination. Provisions of an MEA and judgements of parties to an MEA did not override non-parties' rights under other international treaties. On what basis would contracting parties that joined an MEA wish to allow their GATT rights to be made conditional on judgements by parties to that MEA? Why should parties not have to make their case if challenged under the GATT?

39. In support of this concept the EC referred to the TBT Agreement, specifically that "... measures conforming to international standards shall be deemed to fulfil the necessity test", in terms of an MEA being equivalent to international standards. His delegation considered that the TBT provision actually indicated that a measure based on an international standard was "rebuttably presumed to not create an unnecessary obstacle to international trade". This meant that countries could in fact be called upon to justify those measures. Secondly, the TBT provisions were not there to provide for discriminatory trade restrictions; MFN and national treatment still applied.

40. Another basic point related to the reference to GATT's competences which suggested that the application of GATT rules and procedures should not involve judgements about or interference with the environmental polices or choices of contracting parties. He asked how this related to the idea that the Article XX criteria disallowing discrimination between countries "where the same conditions prevailed", would be based on whether contracting parties, non-parties to an MEA, nevertheless accepted and applied the environmental standards or programmes it contained. This approach indicated that the GATT would not be neutral regarding contracting

parties' environmental policies and choices, rather it would be judging a priori in favour of the policies of contracting parties who were parties to an MEA versus those who were not. It would make GATT rights of the latter conditional on acceptance of an environmental policy or programme.

41. As the representative of Hong Kong pointed out at the last meeting, this would involve subjectively assessing the environmental commitments of non-parties compared to parties. How and who would measure and judge the environmental performance of a non-party? What about situations where a non-party had elected to pursue a different but equally valid approach to the environmental problem? Weren't these the types of environmental policy judgements with which the Group agreed GATT should not deal?

42. Further analysis was needed on this issue as well as on extraterritoriality to which he turned. His delegation agreed that aspects of the tuna panel report were relevant to the Group's work on the two sub-issues. The EEC paper stated that "the concept of unilateral extrajurisdictional protection is of no relevance in those cases in which the international community had agreed on the need to take action to address an environmental problem of common concern". The representatives of Brazil and the United States stated at the last meeting that they were not convinced that this was a valid conclusion, and the latter added that Article XX contained no textual basis on which to accord different treatment to measures taken in connection or not in connection with an MEA.

43. The tuna panel report indicated that the United States could have pursued alternative approaches, such as negotiating an MEA, rather than implementing the unilateral extrajurisdictional measures in question. It did not state that, had these same extrajurisdictional measures been implemented pursuant to an MEA, they would have been consistent with GATT rights and obligations. His delegation did not believe that the panel report could be read to condone the use of extrajurisdictional measures under the cover of an MEA. The situation could be different regarding the use of such measures between parties to an MEA.

44. Finally, he added that both in the Group and in the international community, i.e. UNCED, a strong consensus had developed on the need to cooperate in resolving environmental issues. His delegation agreed with the EC that it was beneficial, both from a trade and environmental perspective, to address transboundary and global environmental problems via MEAs. Environment and development challenges facing the world demanded cooperative solutions. In this spirit, trade sanctions, even if circumscribed directly to an environmental problem, should not be the instrument of choice to pursue environmental protection. Sustainable development required both environmental protection and economic development, and in considering measures to achieve the environmental objectives of an MEA, it was important to keep in mind the latter.

45. The representative of India stated that the EC paper was still being examined by various agencies in his capital. As a preliminary reaction, his delegation agreed with its general orientation, in particular the notion that trade liberalization and the protection of the environment

should not be considered mutually conflicting policies, and that trade liberalization will improve the allocation of resources in environmental terms. His delegation also subscribed to the view that GATT was not competent to set environmental standards and judge environmental policies and priorities.

46. His delegation also agreed that a country should not unilaterally restrict imports on the basis of environmental damage that did not impact the country's territory. However, this gave rise to doubt about whether unilateral measures would, by implication, be justified in cases where the environmental damage was not actually or perceived to be confined within the country. He was not sure that this was so because the EC paper in paragraph 3 suggested that where there was a transboundary effect, multilateral agreements should be pursued.

47. This led to the two sub-issues: extraterritoriality and discriminatory measures against non-parties to an MEA who may be contracting parties. His delegation believed that extraterritoriality in any form or under any pretext or guise was unacceptable. He shared the views of the Canadian delegation that it was a sovereign right of nations to administer their internal affairs and their internal policies. Environment in this regard was no different from any other policy issues. He asked if extraterritorial measures really solved the environmental problem. The New Zealand paper had examined this issue and, although some of the issues were technical and still under examination, by and large, it did show gaps in a generalized approach.

48. On the issue of discriminatory treatment against non-parties, his delegation had serious doubts and reservations on the general proposition underlining the EC paper. It implied that if, by the actions of non-parties, there was circumvention of the objectives of an MEA, then there would be some justification for action against non-parties. He wondered who would determine that circumvention was indeed taking place. There would be grey areas and his delegation had reservations with generally laying down a rule that circumvention justified discriminatory trade measures against non-parties. Further analysis and understanding of the implications were needed.

49. The representative of Mexico considered that the problem of extraterritoriality could arise in three cases: (i) unilateral action; (ii) among parties to an environmental agreement; and (iii) in respect of countries not party to an agreement. He considered it an accepted principle that unilateral action on matters outside the jurisdiction of the importing country was contrary to international law and should therefore be avoided.

50. The proposal by the EC in this connection appeared to be fully consistent with that interpretation since it stated that "a country should not unilaterally restrict imports on the basis of environmental damage that does not impact on a country's territory ...". However he did not understand the link which the EC made to PPMs. In particular, within what parameters or criteria would the EC allow a country unilaterally to assess

the impact of foreign PPMs on its own territory? He viewed this is as too broad and not sufficiently clear.

51. In the case of countries that were parties to an MEA, his delegation considered that the problem of extraterritoriality could be eliminated or become of secondary importance when the measures in question were based on agreement among the parties concerned; this would be a case of cooperation rather than extraterritoriality.

52. Nevertheless, it was important to consider what might happen in the event of revision and implementation of MEAs. For example, some parties to an MEA might decide to implement amendments to reinforce the trade restrictions already included in the agreement or to create new restrictions, perhaps as a way of punishing possible non-fulfilment of the agreement's provisions?

53. His delegation preferred the inclusion, as a complementary measure, of positive incentives to encourage fulfilment of the standards prescribed in MEAs, rather than punishing non-fulfilment. Although it was not within GATT's competence to take such decisions, nor was it the Group's responsibility to evaluate existing MEAs, his delegation believed that one of the Group's tasks was to define the use of trade measures within MEAs.

54. Reserving the right to return to the question of countries that were parties to an MEA in future discussions, he referred to the third category, namely, countries not parties to an MEA, which involved the question of discrimination. In this context, he considered the New Zealand contribution at the previous meeting a satisfactory approach.

55. The EC's paper assumed that the "necessity" for discriminatory measures to third parties would be proven, ignoring the danger of protectionist abuse, by the simple fact that the measure was part of a multilateral treaty. On the other hand, the New Zealand approach analysed constructively the "necessity" for discriminatory measures in terms of their effectiveness vis-à-vis the environmental objective pursued.

56. His delegation supported the reasoning resulting from this analysis, which corresponded also to the Canadian statement, because of the precedence which must be given to principles of MFN and national treatment, which alone could strengthen the effectiveness of environmental objectives without involving any extrajurisdictional action. Bearing this in mind and in terms of "effectiveness", the discriminatory measures might not be necessary. However, some consider that "necessity" might arise because such measures could be useful in "encouraging" participation in the MEA or in eliminating "free-riders".

57. His delegation had already expressed its view on the question of imposition of environmental standards and priorities by means of punitive sanctions. It did not consider that GATT was the competent forum to authorize these types of trade sanctions, particularly in the form of a general exception and including with regard to PPMs. Concerning "free-riders", the Group should reflect to what extent a country would

refuse to participate in an MEA on which there was a large measure of international consensus in order to acquire or retain trade advantages.

58. There could be many valid reasons for which a country would find it impossible to accept an environmental standard or programme; these could be the result of economic, political, social or cultural factors, the country's own scientific perception of the issue, or simply its legitimate sovereign right to decide on its own internal affairs. The proposal by the EC concerning interpretation of the words "where the same conditions prevail" in Article XX appeared, to his delegation, to be very subjective.

59. However, if the "necessity" of a measure was covered by the fact that it was contained in an MEA with a broad multilateral consensus, how was the latter to be defined? The criteria suggested by the EC did not appear adequate, particularly since they referred to procedural questions rather than elements which reflected genuine participation in an MEA.

60. He considered that many questions remained open for further detailed studies at future meetings. It was too early to enter into discussions of the legal form of the results of the Group's deliberations, especially in view of the progress made thus far.

61. The representative of the European Communities agreed with several delegations which had stated that it was premature for the Group to decide whether or not the best approach to deal with the questions raised by this agenda item was a collective interpretation of Article XX. There was still significant analytical work to be done by the Group before such a decision could be taken. He considered, however, that discussions about the overall approach or the overall assumptions underlying this agenda item were useful because they would bring together different elements which were being raised. In this respect his delegation found useful the Nordic intervention on the reasons his delegation supported the collective interpretation and on the drawbacks to the waiver approach.

62. On Hong Kong's question whether this was too limited an approach since all measures taken for the protection of the environment, including those which may have trade effects, were not necessarily Article XX exceptions, he responded that the approach of a collective interpretation of Article XX did not imply that trade measures which required the invocation of Article XX were necessarily the only means to use trade provisions in MEAs. In most cases, MEAs would not require the use of trade measures for their enforcement, and, insofar as an assessment showed that trade measures were required in an MEA, it was preferable that they be applied on that basis. His delegation agreed that measures requiring invocation of Article XX remained exceptions.

63. From practical experience, he considered that there were circumstances in which the invocation of Article XX may be required within the context of an MEA. His delegation's paper tried to set out the criteria and the disciplines which should be applicable in those cases in which it might appear that trade measures requiring the invocation of Article XX may be included into an MEA and were applied to non-parties of the MEA. This was

not to say, however, that this type of situation should be generally available within the context of an MEA. His delegation believed that this was the only way to provide clarity and certainty to the relationship between the GATT and the trade provisions of MEAs.

64. He considered that many of the important questions being raised in relation to his delegation's paper related to the concept of extraterritoriality, including what was the rationale for extraterritoriality within MEAs, what was the concept of an MEA, and issues relating to PPMs. On the latter he recalled a sentence in his delegation's paper which read: "An important application of this rule [the rule against extraterritoriality] is that there is no justification to require by unilateral trade restrictions that imported products conform with domestic regulations related to the production method if production abroad is unrelated to environmental damage caused in the country of importation". He noted that this had been carefully worded in the negative, and was not intended to suggest that trade restrictions may be applied whenever a production method abroad caused environmental damage in the country of importation.

65. The Group should clarify the concept of extraterritoriality, including what it implied within the context of Article XX, and within the GATT. He believed that the situation where it could be clearly and directly shown that the production method abroad caused physical environmental damage within the jurisdiction of an importing country had not yet been addressed in the GATT nor in the tuna panel report. His delegation had not taken a policy position that unilateral trade restrictions were justified in such a case, and was continuing its examination. It would benefit from reflections and indications from the Group.

66. The representative of New Zealand considered that thorough and open-minded reflection of these issues was essential to continue the emerging analytical engagement and any subsequent policy debate with political dimensions. He believed that the Group needed to continue in this analytical mode.

67. His delegation did not consider its analysis presented at the last meeting exhaustive, nor an expression of a national position. It was an attempt to illustrate the sort of analytical consideration of the underlying issues in which the Group should engage itself to identify where problems and their possible solutions may exist.

68. He considered the Canadian extrapolation of his delegation's analysis quite useful and thought provoking, as well as the EC delegation's response to the Canadian critique on necessity, which said that Article XX measures should be restricted to exceptional cases. He looked forward to hearing an elaboration of the EC's thoughts on that in due course. He also considered that the the Nordic analysis of the relative merits of specific exceptions via waivers, and general ones via Article XX, was worth reflection. Finally, his delegation shared a number of questions posed by delegations seeking clarification of aspects of the EC paper which touched on the issues of non-parties and extraterritoriality.

69. The representative of Hong Kong emphasised that the Group was still in an exploratory stage, although it was useful to discuss broad approaches to set the stage for later discussion on rules and mechanisms. He considered the New Zealand analysis objective and useful although not exhaustive. He drew two points from this analysis: trade measures taken to promote a particular environmental objective were hardly the first choice instrument, and even if they were used, discriminatory measures were not any more effective than those applied under MFN treatment.

70. He endorsed most of the points that the representative of Canada had made regarding the EC paper, in particular the point regarding the presumption of GATT necessity for measures under MEAs. He considered that MEAs may provide the possibility to use trade measures but if some imposed more stringent rules than others, how could GATT be sure that the measures were the least trade-distortive, as well as necessary?

71. He considered that more discussion was needed on the waiver approach which should not be ruled out too hastily. He voiced reservations on the Nordic explanation on two levels. On the principle level, he believed that GATT should be the forum for a reaffirmation of the international consensus regarding its rights and obligations and provide a positive mechanism to satisfy that they were not undermined. In this way, there would be progress towards a compatible and mutually-reinforcing interface between trade and the environment.

72. On the more practical level, GATT's rules on waivers provided flexibility and should not discourage contracting parties if there was merit in the substance of this approach. If an MEA was truly multilateral it should assume a large degree of support and no public conflict; the minority would have to demonstrate its case. He mentioned that Article XX(h) could also provide some ideas in this regard. Finally, he considered that the trade and environment interface was broader than the question of GATT and MEAs and an interpretation of Article XX would not provide the full answer. A wider perspective to seek cooperation and encourage respect of both GATT and the environment was necessary.

73. The representative of Egypt considered that, as a matter of principle, environment and trade policies should be mutually supportive. Protection of the environment and reform programmes for trade liberalisation should not be conflicting but should contribute to achieve sustainable development. He found it difficult to accept authorisation for using discriminatory trade restrictions against non-parties to MEAs in order to achieve environmental objectives. There should be a clarification of the conditions under which trade measures applied to non-parties to MEAs could be justified. In this context, his delegation found the analytical approach by New Zealand a useful basis for further discussion.

74. He added that, as far as possible, extraterritoriality and unilateral actions to deal with environmental issues should be avoided. Measures should be based on international consensus, non-discrimination, the principle of least trade-restrictiveness, ensuring transparency, and consideration of the conditions of developing countries.

75. The representative of the United States considered the New Zealand analysis thought provoking and useful. However in looking at the kinds of questions it raised, it was important to remember that GATT was a trade body and representatives were primarily trade experts. He did not believe that the Group had the knowledge nor the mandate to try to anticipate the full range of contexts that would be faced by environmental officials as they sought to negotiate MEAs.

76. His delegation considered that the situations were more complex and required further analysis than provided. For example, in the first New Zealand case, it was assumed that if parties comprised the majority of production and consumption of the substance, then the behaviour of non-parties would be only of marginal impact. This did not necessarily follow. A situation could arise where parties represented 75 per cent of total production, and non-parties 25 per cent, without necessarily the latter's behaviour only of marginal impact! The 25 per cent could have significant environmental consequences. Alternatively, the parties could reduce their production to a level of only half of the production of non-parties, in which case the non-parties' behaviour would then represent the majority of the impact on the environment.

77. He added that behaviour was also not static; responses of non-parties to changes made by parties could alter the balance of environmental effects. In general, if parties controlled their production or consumption of the substance, this could create incentives for non-parties to alter their behaviour to offset these controls. Recognition of these incentives often laid behind the concept of applying measures to non-parties to ensure that the parties' efforts were not undone by non-parties, particularly where the parties had to undertake a number of significant costs to change consumption or production behaviour.

78. This analysis correctly concluded that controlling the aggregate level of production and consumption was central to addressing the global environmental objective. However, his delegation was concerned that it may underestimate the importance of location of production in considering whether discriminatory trade measures might contribute to that environmental objective. He wondered whether the market and regulatory signals perceived by producers and consumers in a country in which the substance was being controlled (phased out) would not create significantly greater incentives to move towards more environmentally acceptable substitutes. If so, restrictions on trade with non-parties would tend to strengthen incentives for substitution away from the environmentally damaging substance and thus further the achievement of the environmental objective. Were such restrictions on trade with non-parties not to exist, the incentives for substitution would presumably not be as strong and the achievement of the environmental objective would be undercut.

79. Further, this analysis was predicated on the manufacture of a man-made substance. His delegation questioned its utility when applied to trade in natural resources, and whether any conclusions relevant to this exercise could be drawn from this simple premise. Also, it questioned whether the

analysis fit well in the case of a global environmental problem whose local effects varied in nature and severity.

80. This analysis highlighted the complexities of the interface between trade and the environment, one of which was the difficulty in assessing the market adjustments which would result from an MEA. For instance, the complexity of the relationship between primary and secondary uses of an industrial product might obscure market effects. This, in turn, might affect the ability of participants to achieve the environmental objectives in the absence of trade measures on non-parties.

81. The representative of the European Communities wished to respond in more detail to the questions and comments received on his delegation's paper. He stressed that an approach based on a "collective interpretation of Article XX" did not imply that trade measures under the general exceptions of Article XX should become generally available in MEAs. Although he agreed that positive incentives could play a crucial role in ensuring that MEAs were based on broad participation, his delegation's policy approach to MEAs was based on the conviction that drafters of MEAs should carefully consider whether measures impacting on trade were necessary to achieve environmental goals and, if so, preference be given to those measures which did not require invocation of Article XX. However, the GATT could not ignore those cases in which Article XX provisions became relevant for certain types of trade measures applied to non-parties of MEAs; the challenge was to develop criteria which set the limits and conditions for their application.

82. He clarified two points regarding the approach based on a collective interpretation of Article XX. The first concerned the remark by Hong Kong that there was a need to avoid an exclusive focus on Article XX, since other GATT provisions may be equally relevant. There was no contradiction between the EC approach and Hong Kong's suggestion and this was addressed on page 5 of the paper. He asked delegations to reflect if it would be useful, at an appropriate time and in parallel with consideration of Article XX issues, to also seek clarification of which were the types of environmental protection measures which may be taken without recourse to Article XX. This could be useful for all three agenda items.

83. In drafting its paper, his delegation had carefully studied past panel decisions which offered guidance on some important and difficult issues concerning Article XX, although not clear and decisive guidance which a collective interpretation would do. In this connection, he underlined that the criteria for interpretation included in Section 2 of the paper were exclusively for trade measures taken pursuant to an MEA; there was no suggestion that the criteria would apply to any other cases. An approach of developing interpretative criteria which applied exclusively to certain types of measures was not new in GATT practice; the most recent and relevant example was the draft Uruguay Round SPS Decision.

84. He added that his delegation shared the conclusions reached by the Nordic countries on why a waiver approach was not appropriate to address the issues raised by agenda item 1. He pointed out some additional reasons

why the EC considered the waiver approach fundamentally flawed. First, under international law it was not possible to postulate a hierarchy among different, self-standing international agreements. Any option that implied that justification of certain trade measures under an MEA depended upon a GATT decision of approval or non-disapproval would raise fundamental questions of international law.

85. In this respect he noted that Article XX(h) had introduced the concept of non-disapproval by GATT contracting parties because the Havana Charter had included a specific chapter on inter-governmental commodity agreements. He also noted that Article XXV:5 was framed in terms of waiving GATT obligations imposed upon a contracting party. It was difficult to envisage how such a waiver could address, in a comprehensive and clear manner, the complex relationships that may exist between trade measures applied by a country and the trade provisions of an MEA.

86. He did not exclude the possibility that imaginative draftsmanship could find a solution to these legal objections, however, even in that case, the fundamental problem of public perception would remain. Any formulation which suggested that GATT approval or non-disapproval was required to validate trade measures under MEAs should be avoided because it would be perceived as postulating GATT priority over MEAs. His delegation considered it important to ensure that the trade and environment interface did not result in undermining public support for the GATT system, and the only way out of this dilemma was by underlining GATT's duty and responsibility to set criteria and conditions for the application of trade measures to a non-party of an MEA.

87. Finally, his delegation doubted that the waiver approach would avoid a conflictual relationship between GATT and MEAs and protect the rights of GATT contracting parties, non-parties to MEAs. Any waiver decision relating to MEAs would have a political dimension beyond any other GATT waiver decision. In these circumstances, how would the legitimate concerns of countries in the minority be assured due consideration? If a waiver was rejected or its adoption resulted in protracted discussion, how would the political implications that would undermine GATT's credibility be avoided? His delegation considered that there was a compelling case for the approach based on a collective interpretation, however he recognized that it was premature for the Group to decide on the approach it would follow.

88. He addressed the questions and comments related to the type of criteria and disciplines to apply to trade measures applied to non-parties pursuant to an MEA in connection with the two sub-items - extraterritoriality and non-parties. His delegation considered that, when assessing GATT conformity, there was a strong rationale for giving a certain presumptive value to the fact that trade measures had been clearly and specifically provided for within the context of a genuine MEA. This was because the fact that a process of open negotiation and discussion - in which countries at all levels of development participated - offered built-in guarantees that a full assessment would have been made on the justification for the measures and on the need to incorporate the interests of countries at different levels of development.

89. While there may be some differences regarding the situations envisaged in the TBT Agreement - and to a lesser degree the SPS Decision - there was a strong common rationale. It seemed obvious that, at least in the case of a United Nations negotiated agreement, the degree of attention that would be given to any possible trade impact on developing countries would, if anything, be greater than in the case of international standards. He noted that the concept of presumption did not necessarily imply that the country taking a measure would not be required to offer a justification; this would depend on how such presumption was defined.

90. The EC paper showed that the concept of "presumption" had been strictly limited to the minimum required to avoid or minimize undesirable conflicting situations. He illustrated this point by offering a clarification on how the EC paper addressed a number of substantive criteria of Article XX. First, the paper only introduced the concept of "presumption" in those cases in which the MEA fixed, with sufficient precision, the type of trade measure to be applied by members.

91. If the MEA envisaged the application of trade measures or even required their application, while leaving some assessment to the member applying the measure, the concept of "presumption" played no role in the EC paper. In those cases, the country taking the measure would be expected to offer full justification that the "necessity" test had been met or that the measure did not constitute a "disguised restriction on international trade". He noted, however, that related to the "necessity" test was the type of products on which a restriction may be applied. This was a crucial issue for an MEA, and particularly relevant to PPMs.

92. On PPMs, he emphasized that, even in the context of an MEA, his delegation favoured developing clear and binding rules to limit any potential for abuse. To develop such criteria on the use of PPM-related measures, his delegation suggested examining three questions: 1) were the parties to the MEA applying controls on production; 2) was it feasible to identify precisely the products directly and specifically linked to the environmental damage; and 3) were there other least-trade-restrictive means of achieving the environmental goal which did not imply recourse to PPM type of measures?

93. In addition, on page 8, point (ii) of the paper, there was an exhaustive definition of the type of products on which restrictions may be applied; trade restrictions on products which did not meet these criteria, and which therefore had no connection with the environmental damage, were ruled out. Thus, the EC paper excluded application of trade sanctions as a means to enforce MEAs.

94. In addressing the question of "non-discrimination" within the context of an interpretation of the headnote to Article XX, and in those cases in which trade measures were applied to non-parties to an MEA, the criteria suggested in the EC paper were based on whether there was an actual difference between the environmental protection commitments applied by parties and non-parties. His delegation expected that a country applying

trade measures would always be required to justify that this requirement had been respected.

95. Regarding questions on how such criteria could be assessed by GATT panels and whether such an assessment would imply a GATT judgement on the environmental policies pursued by different countries, he considered that Article XX measures inevitably implied an assessment of the complex factual issues relating to the non-trade policy objectives covered by the exception. This was not new in terms of GATT practice, and the Group could look at how issues relating to factual information had been addressed in other GATT instruments such as the SPS Decision, taking into account the particular institutional dimension raised by MEAs.

96. A second important area of work related to the concept of extraterritoriality. In the context of the trade and environment interface, and the GATT, the question of "extraterritoriality" essentially related to the scope of the exceptions provided in Article XX(b) and (g) of the GATT. In other words, did these Articles cover the protection of life, health or the conservation of exhaustible natural resources outside a country's jurisdiction? Decisive guidance was given by the tuna panel report which stated that under a broad interpretation of Article XX, "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardising their rights under the General Agreement".

97. His delegation considered the tuna panel report not contrary to the objectives of environmental protection. In this respect, the findings of the report were closely circumscribed to unilateral trade restrictions of an extra-jurisdictional nature; the panel did not address the criteria and the conditions under which a trade measure, which may go beyond the exclusive jurisdictional concerns of an individual country, may be covered under Article XX if it was adopted pursuant to the provisions of a genuine MEA. This question needed to be considered and addressed by the GATT contracting parties. His delegation did not believe that the tuna panel report condoned the use of extrajurisdictional trade measures pursuant to an MEA, and this was precisely why the EC suggested criteria and conditions for the interpretation of Article XX.

98. Regarding a comment by the United States that Article XX offered no textual basis to distinguish between unilateral trade measures and those taken pursuant to an MEA, he noted that the basis for such a distinction could be found in the tuna panel report, which carefully circumscribed its findings and reasoning to unilateral trade restrictions. Logically two options were available to interpret Article XX: that Article XX ruled out any possible application to a non-party of an MEA of a trade measure which went beyond the exclusive jurisdictional concerns of the country taking the measure; or that Article XX allowed for extrajurisdictional application of trade measures, regardless of whether they had been taken unilaterally or pursuant to an MEA. If the choice was in such terms, contracting parties would be in an invidious position; the tuna panel report allowed for more nuanced choices to be made, which his delegation's paper had followed.

99. Under his delegation's approach, there was a close connection between the concept of an MEA and how the GATT should address the issue of extraterritoriality. The criteria suggested in the EEC paper were intended to ensure that only genuine MEAs were covered by a collective interpretation of Article XX. His delegation was prepared to reflect on additional ideas, such as those presented by India at the last meeting. He was not sure whether there was a need to undertake a complex definition in the GATT of the term "environment", as suggested by Japan, however, in practice, the issue would be one of delimitation between different international agreements.

100. His delegation considered it not possible or desirable to establish criteria based on the level of participation when defining the type of MEAs that would be covered by a GATT exception. This did not mean, however, that this issue was ignored in the EC paper. On page 9 the need to reflect on the idea that "certain types of trade measures applied vis-à-vis non-participants should only benefit from the provisions of the exception if the agreement fulfils certain criteria as to a level of participation which is sufficiently representative of the producers of the specific product subject to restriction", was noted. This issue could allow development of additional safeguards regarding possible uses of trade measures in an MEA. This would give rise to particular concerns such as equity issues, which could arise if an MEA envisaged discriminatory application of trade measures based on production methods, and the MEA was not sufficiently representative of the producers of the product concerned.

101. He had tried to show that the criteria suggested in the EEC paper, if considered as a whole, provided adequate guarantees that drafters of MEAs would give careful consideration to the use of trade measures and that trade measures involving the invocation of Article XX would remain exceptional in nature. Further elaboration and discussion of the criteria was necessary. He concluded that his delegation was actively engaged in convincing public opinion that the GATT was not against the objectives of environmental protection. Hope and expectation were put on the work of the Group and he believed therefore that ultimate success was conditional on being able to show convincingly that the legitimate concerns of the environmental community had been seriously addressed and that the GATT had approached the trade and environment subject with a balanced perspective.

Agenda Item Two

102. The representative of the United States, in commenting on the Secretariat document TRE/W/4, noted that the two categories of environmental measures in the paper, economic instruments and regulatory instruments, represented only one way of dividing measures. His delegation suggested that the Group consider other ways to categorize and organize information regarding environmental measures and transparency, and his delegation would suggest alternative frameworks in the future.

103. Also, he noted that the Group should be clear as to what it meant by transparency, which came in many forms including ex-poste and ex-ante

publication and notification. In looking for "gaps" in transparency the Group should look both at whether transparency in any form existed as well as whether the form was appropriate.

104. His delegation considered that Article X was potentially broad enough to cover many economic instruments. He wondered, however, to what extent government officials outside of the trade community were aware of these publication obligations. Also, the paper indicated that many of these economic instruments were covered under the 1979 Understanding, however, the 1979 Understanding covered trade measures and many governments would not readily identify economic instruments as trade measures and therefore treat them as covered by the Understanding.

105. He noted, in practice, there was a lack of comprehensive compliance with these notification requirements for economic instruments, and with existing transparency provisions for all measures, not just those taken for environmental reasons. His delegation believed that the Group's discussion on transparency could be enhanced by a better understanding of the issues surrounding compliance with existing transparency provisions in the GATT and the TBT Agreement.

106. His delegation considered that determining the potential trade impact of a particular instrument or measure was clearly a complicated task and one which the Secretariat could not be expected to undertake without the assistance of country input and further analytical work. Therefore, it was incumbent upon delegations to assist in this effort by bringing such information to the Secretariat's attention.

107. He considered that an incorrect statement appeared in paragraph 8 of the paper discussing voluntary eco-labelling, where the Secretariat suggested that these labelling schemes did not appear to be covered by the GATT and were therefore exempt from transparency requirements. Article 4 of the current TBT Agreement contained obligations concerning standard-making activities by non-governmental bodies, which could include eco-labelling activities.

108. The obligation was for governments (signatories) to take reasonable measures to ensure that private bodies complied with the provisions of the Agreement, except the obligation to notify. While there was no requirement to notify private sector schemes, other transparency provisions did apply, such as publishing them in advance for public comment; making available draft copies upon request and on non-discriminatory terms; and taking into account comments.

109. He added that the description of PPMs and their coverage under the GATT and the Uruguay Round in section two of the paper was somewhat confusing. In the TBT Agreement, the definition of technical regulations and standards referred only to the characteristics of a product; PPMs were not included in the definition and therefore were not subject to transparency requirements. However, under the Uruguay Round revision of the TBT Agreement, the definition of both technical regulations and standards had been expanded to make reference to PPMs.

110. In addition, in TRE/W/4, the Secretariat appeared to be interpreting GATT obligations as they related to PPMs; his delegation believed that such determination should be left to the GATT contracting parties. Finally, he reiterated a suggestion his delegation had made previously: that the Secretariat prepare a paper providing an open ended list of areas that delegations had identified as potential gaps in transparency provisions in the GATT and in the Uruguay Round. Several had already been identified in TRE/W/2. Delegations should consider how best to assist in compiling information for such a paper.

111. The representative of Sweden, on behalf of the Nordic countries, appreciated the description of possible trade effects from various product-specific measures and PPMs in TRE/W/4, but suggested more detailed study of these effects. At the previous meeting his delegation had remarked that certain economic instruments and deposit refund schemes were not normally considered to be trade measures and hence were not subject to notification requirements under the 1979 Understanding. These types of measures, however, were significant to trade and thus constituted a major gap, both in the present transparency system of the GATT and in the system resulting from the Uruguay Round.

112. His delegation agreed with the view that trade effects of voluntary eco-labelling schemes depended, inter alia, on whether imported products had access to national schemes on the same terms as domestically produced goods, which was essential. Such equal access should exist both in the formal and practical sense.

113. For example, foreign producers must be informed about voluntary eco-labelling schemes in sufficient advance of their implementation. TRE/W/4 stated that voluntary eco-labelling schemes may be covered, at least in part, by the Code of Good Conduct annexed to the proposed new TBT Agreement. He asked for clarification as to what degree eco-labelling schemes were covered by transparency provisions in the Code, and to what degree notification was required under Article XVI:1 of the GATT for product-specific subsidies for environmental purposes.

114. In paragraph 10 of TRE/W/4 resource-use quotas on products were described as being, inter alia, fisheries and forestry quotas, as well as requirements to use recycled products such as newsprint, packaging or specific containers. His delegation found the use of the term "resource-use quotas" confusing. "Resource quotas" were understood to mean quantitative restrictions on the amount of a resource allowed to be hunted, cut, caught, mined or otherwise gathered, which according to TRE/W/4 seemed to be subject to transparency rules under Article X and the 1979 Understanding. However his delegation did not believe that fisheries and forestry quotas were subject to transparency provisions in the GATT. On the other hand, requirements to use recycled products were technical requirements with trade effects subject to transparency provisions in the TBT Code.

115. His delegation supported the suggestion in TRE/W/2 that the Secretariat compile a list of trade-related measures found in MEAs and,

also a study of the kinds of notification requirements which existed in them. His delegation believed that such information would be of interest and would be useful in attempting, as the Group should, to clarify whether these measures were covered by transparency provisions in the GATT, or whether they constituted gaps in the transparency system.

116. The representative of Argentina believed that focusing on the detection of gaps did not detract from the importance his delegation attached to compliance with existing notification requirements. There would be environmental measures with trade implications that contracting parties did not feel obliged to notify. This was due to the fact that the legal instruments in force, or agreed to under the Uruguay Round, dealing either with publication (Article X) or with notification (1979 Understanding, Draft Decision on FOGS) always referred to notification requirements of trade-specific regulations, they did not encompass non-trade economic instruments or regulations that could affect trade, with which the Group was concerned.

117. TRE/W/2 and TRE/W/4 assisted the Group in detecting gaps. Regarding economic instruments, taxes on pollutants did not seem to be covered. Although they were applicable equally to national and imported products, national producers might have cheaper alternatives for meeting environmental standards than the payment of the tax. There also seemed to be no requirement to notify deposit refund schemes, and the publication requirement in Article X which, according to paragraph 6 of TRE/W/4, would apply to these schemes, was insufficient.

118. Eco-labelling schemes, which were generally voluntary, were not covered by the notification requirements, although he agreed that they should be published. His delegation did not yet have a defined position on the treatment that should be accorded to voluntary standards in general and, in particular, to those administered solely by the private sector.

119. He considered that approving labelling standards based on product life-cycle analyses would entail making a value judgment on the PPMs in the exporting country. If these should be notified, it would be tantamount to admitting, within GATT, that countries have a right to examine and grade production processes in other countries.

120. He agreed with the representative of the EC that there were certain types of PPMs that should not be applied to imported products and were therefore not candidates for transparency requirements. Also his delegation had mentioned, in the previous meeting, that provisions on the handling and retrieval of packaging materials applicable to both national and imported products seemed to be covered neither by the TBT nor by the checklist of measures in the FOGS text; it would be necessary to extend one of those instruments to include them.

121. He added that the Group should also review the provision in the present and draft TBT Agreements, as well as the Sanitary and Phytosanitary Agreement, both of which explicitly excluded the obligation to notify

technical regulations or standards that were based on international standards, in the context of environmental technical regulations.

122. He agreed with Mexico on the inadmissibility of exempting Article XX measures from notification requirements. Precise parameters needed to be drawn up for distinguishing between ecological standards with trade implications - the only ones that would call for notification - and those with no trade effects. The range of measures subject to notification should not to be too wide for effective compliance.

123. These parameters would help fill the gaps in the existing provisions and would also make for uniform TBT notifications, without omissions such as those noted in paragraph 13 of TRE/W/2. Once these criteria have been worked out, his delegation considered it important to have transparency provisions on trade-related environmental measures for notification prior to the entry into force of the measure, as well as a reasonable interval between publication and entry into force, so as to allow time for exporters, particularly in developing countries, to adapt their products to the requirements of the importing country.

124. The representative of New Zealand stated that his delegation considered that TRE/W/4 highlighted well the areas likely to have trade effects which might require more scrutiny by the Group. His delegation was attempting to identify more clearly some of the trade effects under this typology of measures and once this analytical work was completed, the Group may then be able to approach the identification of gaps. In that context he shared the caution that had been voiced by some delegations about interpreting existing or draft provisions at this stage.

125. The representative of the European Communities stated that his delegation was still reviewing TRE/W/4 in terms of the statements contained about the different transparency requirements in the GATT, and did not wish to comment conclusively on it. He considered it a useful list of measures taken for the protection of the environment which may have trade effects. He believed that, at this stage, the Group would benefit from maintaining a broad approach rather than excluding prematurely any measure from the discussion. One of the most important uses of this document would be to help better assess which types of environmental measures may have such a significant impact on trade, how they related to the different transparency requirements in the GATT, and to identify any gaps in such transparency requirements.

126. His delegation shared the view first expressed by the Nordic countries at the previous meeting that internal taxes cannot be assumed to be trade measures within the terms of the 1979 Understanding. He believed that would represent a questionable interpretation of the Understanding.

127. A discussion about environmental taxes was important for the Group because they may have significant trade impacts which should be borne in mind. In that respect he noted preliminarily some issues which the Group may need to examine. One was the issue of tax differentiation in relation to products which differed in terms of their environmental characteristics.

Another equally, if not more, important question was which type of taxes could be applied to imported products eligible for border tax adjustment. He added that these were issues not exclusive to the field of environmental taxes, but may refer to other types of taxes in the GATT. In the environmental field, the use of taxes was becoming increasingly important and raised important dimensions which would benefit from the Group's attention.

128. He found that, in this context, a certain notification requirement in the GATT concerning border tax adjustments that was not specifically mentioned in TRE/W/4. It would be useful for the Group to clarify what transparency requirements were envisaged in this respect. He cautioned that transparency requirements which may eventually be applied to any environmental measures should not differ from those which applied to the same measures when taken for other policy reasons.

129. On the question of PPMs, he considered that the Group should clarify exactly what was meant when talking about PPMs that did not alter a product's characteristics, which was the terminology used in paragraph 14 of TRE/W/4. The comment made by the USA as regards the coverage of the new TBT Agreement raised interesting issues because the language used defined technical regulations as a document which laid down product characteristics or their related process and production methods. The issue was whether the two terminologies meant the same concepts. His delegation fully supported the tuna panel report which clarified that under Article III of the GATT, a PPM-type of requirement which did not affect the product as such could not be applied to imported products on the basis of Article III.

130. Another important point was the question of production processes which may affect physically the environment of another country even if they had no impact on the product as such. He considered that those were not the type of PPMs which could be covered under the provisions of Article III, (the tuna panel report was quite categoric in that respect) nor in the context of Article XX. How to address these PPMs required further examination, however if any trade measure could be justified in relation to them, it could only be under the provisions of Article XX of the GATT and not under any other provision of the General Agreement or other agreements.

131. The representative of Egypt stated that his delegation shared the views expressed in paragraph 8 of the Secretariat paper TRE/W/4 concerning voluntary eco-labelling schemes. Such schemes did have adverse effects on imported goods which did not have access to the schemes on the same terms as domestically produced products. The main difficulty with such schemes was that they were not covered by GATT and were not subject to any transparency requirements. His delegation welcomed any contribution that would ensure that these schemes would be under a firm system of publication and notification well in advance of application. His delegation also shared the view that PPMs had no basis in GATT. Therefore there should be transparency provisions in GATT to cover these measures.

132. The representative of Mexico stated that his delegation believed that before discussing the possible need for new mechanisms, it was essential to

ensure the implementation of those that already existed. It therefore seemed urgent to settle the question of compliance with existing requirements and with commitments arising from the Uruguay Round. Also he agreed with New Zealand that, before discussing possible gaps, it should be determined whether the measures to which the Group was referring had, in fact, significant trade effects. Caution should be exercised in making such interpretations, especially in regard to economic instruments and PPMs.

133. In order to focus deliberations and remain within the Group's present terms of reference, his delegation proposed concentrating initially, particularly in discussing "gaps", on aspects directly related to the items on the Group's agenda. In other words, among the environmental policy instruments identified in TRE/W/4, the Group could first discuss regulations adopted in compliance with MEAs (agenda item 1) as well as those for packaging and labelling (agenda item 3).

134. Regarding MEAs, his delegation supported the proposal by other participants to review the transparency requirements contained in existing agreements, in order to identify possible gaps. For that purpose, Secretariat input would be indispensable in compiling such requirements. Once gaps had been identified in MEAs, the Group could assess the need for supplementary provisions to cover them. In any case, his delegation believed that such requirements should be applied only to measures or instruments that had direct trade effects. On publication and notification, effort should be made to avoid administrative duplication and overload, as this could be counterproductive.

135. His delegation believed that in the area of packaging and labelling requirements there was an important gap in transparency already pointed out by members and which merited attention. This was the exclusion of voluntary requirements and programmes from the existing notification disciplines. It was an area marked by disorder and disinformation and was causing not only confusion among consumers but serious trade distortions. His delegation considered it urgent that such measures, like standards, be made subject to prior notification and publication requirements.

136. He cited an article which appeared in the January 1993 issue of the magazine "Down to Earth" on the trade effects of labelling requirements. In reporting on an eco-labelling programme instituted in a certain country, it revealed that by using the labelling in question, certain products increased their market share from 1 to 20 per cent in ten years (more than 100 per cent annual growth). The article further stated that labelling could lull consumers into a "false sense of security", and often lead them to believe that by purchasing and consuming the product concerned, they were helping to reduce environmental problems, which may not always be true.

137. The use of symbols on products was undoubtedly becoming a marketing trend obviously fuelled by the appearance and spread of voluntary programmes, sometimes financed by governments themselves. At the previous meeting, his delegation had put forward some ideas on the way with which

this issue might be dealt and his delegation hoped to discuss them in further detail at forthcoming meetings of the Group.

138. The representative of Switzerland considered that TRE/W/4 afforded a good overview of economic and regulatory instruments and their trade effects. The distinction between economic and regulatory instruments seemed useful for identifying possible trade effects. She suggested that the same approach could be followed in the second chapter on PPMs. A distinction could be made between economic and regulatory instruments for PPMs such as a mandatory requirement to reduce process emissions, which would fall in the second category, or charges varying with the amount of emissions, which would fall in the first.

139. The document stated in paragraph 3 that economic instruments in general would have more uniform, less distorting trade effects in a market economy than regulatory instruments. Thus, she considered that more attention should be devoted to the transparency of regulatory instruments. Her delegation agreed with the conclusion that the trade effects of economic instruments were more uniform, since they affected prices directly. Insofar as they were predictable they contained an element of stability for the economic system itself since they would contribute to stabilising the expectations of economic agents.

140. Also, a regulatory system would call for administrative management. Experience had shown that a system of licences was needed to regulate prohibitions and restrictions on imports and exports. It was well known that this kind of system was discretionary in nature, and seemed to be in contradiction with the demand for predictability within the system.

141. She considered that the provisions of GATT Article X concerning publication covered only laws, regulations, taxes and other charges on imported or exported products, not domestically-produced goods targeted for local consumption. She gave an example of a local tax on products for internal consumption. The price could modify the demand for that product, among other things, and based on price elasticity, the consumer would replace this product by others that may be of foreign origin. The domestic tax could therefore have a trade effect. Did GATT Article X cover this case which, in her delegation's opinion, could be a gap in transparency?

142. Her delegation also considered that private sector, voluntary eco-labelling schemes would not seem to be covered by the General Agreement. In Switzerland, over one hundred privately-sponsored eco-labels had been identified, and there may be others. Experience showed that there was a gap in transparency concerning these private initiatives at the national level. She considered that the extent to which this gap could be covered by the revised Technical Barriers to Trade Agreement would depend largely on the interpretation of the term "rule-making organization". Would it also cover activities of individual companies undertaken for purely marketing reasons? This would seem to go too far. Her delegation considered that transparency at the domestic level was the primary concern; co-ordination or even co-ordinated international action would be impossible until the groundwork had been laid at the national level.

143. On PPMs, the issues concerning differential trade treatment of products if their final characteristics were not modified by their PPMs were yet to be resolved. It seemed it would be necessary to determine whether the characteristics of products were in fact divorced from production methods that did not alter the product. The amendments to the Technical Barriers to Trade Agreement and provisions on sanitary and phytosanitary measures included PPMs, therefore, it seemed difficult to assert that no provision of GATT or the Draft Final Act justified the application of trade-related measures to products based on unincorporated PPMs, as stated in paragraph 14 of TRE/W/4. The document's conclusion, that no GATT provision on transparency would be applicable to them, should be studied in greater detail.

144. To conclude, she proposed that the Secretariat examine and report to the Group on the notification mechanisms existing in other organizations that could be useful to the contracting parties.

145. The representative of Brazil repeated his delegation's earlier perception that the existing transparency instruments in the GATT system, and those resulting from the Uruguay Round, seemed to be adequate to deal with the environmental issue. There was no need to subject environmental measures to stricter notification disciplines than those affecting other trade-related measures. To do so could imply that environmental measures were potentially more incompatible with GATT rules than measures taken for other purposes; on the contrary, the Group should highlight that a number of them were fully compatible with the GATT.

146. He added, however, that this did not exclude the possibility that some environmental measures could have greater trade effects, nor that clarification was needed in relation to measures with important trade effects whose ability to be notified was in doubt. Also it did not exclude that the Group should suggest ways of improving the fulfilment of transparency obligations, especially regarding notification procedures.

147. It was clear that the degree of notification obligations varied among countries and the situation in relation to environmental measures did not differ from other similar measures in this respect. This had been examined in the FOGS Group where some improvements had been suggested. His delegation saw little use in re-examining the issue as such, but would be willing to examine new suggestions to ensure that notification obligations, or the transparency objective were accomplished.

148. He added that since transparency was the objective, not notification per se, other transparency mechanisms could be explored in the environmental area, such as the establishment of enquiry points. The TBT Agreement obliged parties to establish enquiry points for technical standards and regulations, including environmental ones, but not other kinds of measures with an impact on trade, such as internal taxes and charges, deposit refund schemes, subsidies, handling and waste disposal procedures, import and export prohibitions, etc.

149. An environmental enquiry point could provide not only information on environmental restrictions on trade, but also trade opportunities created for environmentally-friendly products. It could provide a good complement to notification procedures, and a potential solution for voluntary schemes. At the same time, the Group could also identify and examine measures that were not clearly subject to notification procedures, but, due to their impact on trade, could be included in them.

150. One important example was handling and waste disposal schemes. The tendency to attribute to producers the responsibility of reprocessing their products, an idea advancing quickly in the area of packaging, would have the potential to distort trade, and thus would justify assurance of transparency through notification. Apart from complex marking regulations, material requirements, and other standards, handling and waste disposal schemes, even if accessible on a non-discriminatory basis, implied other questions regarding procedures for access to collection networks. These would require timely information and their adaptation would be difficult and painful for developing country exporters.

151. Developing countries had little experience in the use of most of the instruments in TRE/W/4, thus the Group would benefit from greater concreteness in the discussions. He stressed that, although notification procedures on environmental measures should not be more encompassing than regular notification of other measures, for the purposes of the Group's work, a basic national notification should be made in the context of the Chairman's proposal for voluntary submissions. The Group would also benefit from countries presenting their environmental instruments from the perspective of their impact on trade, or "counter-presentations" of difficulties from environmental measures faced by exporters. This could be done informally to avoid that those contributions be interpreted as contentious actions or definitive interpretations of GATT compatibility.

152. The representative of the Philippines, on behalf of the ASEAN countries, considered transparency a fundamental principle of the GATT. Predictability of market access and prevention of trade disputes required multilateral rules to ensure transparency of national regulations and their implementation. Recent proliferation of national environmental regulations, many affecting or likely to affect trade, had caused awareness and concern that the lack of transparency would increase the difficulties for traders, particularly those from developing countries, to comply with them in order to maintain their competitive position in the markets.

153. Problems arose especially if countries were remiss in their obligations to notify prior to the implementation of the measures, and did not provide adequate time intervals to allow for consultations and comments. Her delegation recognized that problems in this context laid mainly in areas of coverage and compliance with transparency obligations. She considered that the scope of notification and publication requirements should, in principle, be broad enough to cover all regulations which had or were likely to have trade effects.

154. Also, identification of the transparency gaps which might exist in present GATT and prospective Uruguay Round provisions was useful. Gaps frequently mentioned included waste handling requirements, regulations or standards based substantially on international standards, some voluntary measures such as eco-labelling schemes, and economic instruments. The Group needed to examine these measures and regulations in detail, as well as the parameters within which measures to be notified could be identified.

155. The representative of Canada agreed with many of the views expressed so far. His delegation found both Secretariat documents helpful and useful in focusing thinking on this issue. It was instructive that TRE/W/2 showed differences in interpretation amongst contracting parties as regards the measures covered by the various GATT transparency obligations. He cautioned against the Group getting into a discussion, with the view to arriving at a common agreement, of what was covered by the particular provisions and of how they were being complied with.

156. The Group should reflect on those kinds of measures which haven't been notified, but which have significant or potentially significant trade effects, starting with specific measures, such as eco-taxes, particularly those where the level of tax would be a function of a particular environmental characteristic, deposit returns schemes, recycle-content-regulations and voluntary eco-label-programmes, particularly those based on the life-cycle-approach. The latter would involve looking at PPMs. The Group should focus its discussion on the desirability of transparency for such measures.

157. He agreed, however, with Brazil that the objective of this exercise was not to call for more onerous requirements on trade-related environmental measures than on trade-related measures in other areas. Rather the Group should assess what existed and was important to be notified, and then at the end of the exercise, make suggestions. He suggested that the Group adopt an approach similar to agenda item 3 of volunteering generic case-studies for the Group's consideration.

158. He noted that his delegation notified all trade measures implemented, whether pursuant to an MEA or not. His delegation hoped that the Group could agree that measures taken pursuant to MEAs should be notified on a timely basis. Finally he supported a point raised by Brazil on the question of enquiry points, and a point made by the Philippines, on the importance of transparency to traders. He suggested that delegations consider whether the Group could recommend to governments to support the use of enquiry points for information in this area.

159. The representative of Hong Kong stated that transparency was a fundamental requirement of the GATT, and an area where the Group may make a first contribution. He agreed with the ASEAN representative that serious consideration was needed of the parameters in the GATT of the measures that should be subject to transparency or notification requirements.

160. He suggested first looking at measures that have an ability or propensity to change conditions of market access. This would help focus

better, rather than proceeding by the general concept of impact on trade or trade-related. Secondly, he considered that transparency offered an opportunity to understand the rationale for measures and an opportunity to offer comments if and when necessary. But these requirements should be balanced with the administrative burden that too onerous a notification or publication requirement would create. A suitable balance would not discourage voluntary and active participation in this exercise, and would add predictability for trade and environment. Also it would help to understand the intended effects of the trade measures, and it would offer the opportunity to measure the actual trade effects with the internal effects, to see areas of possible improvement.

161. He agreed that transparency was not just notification and publication. There were other means, such as enquiry points and the TPRM mechanism which could be considered. He added that the time element was also important; information was needed probably before the trade effects began. With this information, the Group could see how voluntary rather than mandatory schemes could be encouraged, and where choice could be made between, for example, a labelling requirement and a packaging requirement, or between a scheme that encouraged or enabled consumer choice, or restricted market access. The less trade restrictive should always be sought.

162. He informed the Group that his government had introduced a noise-labelling requirement for hand-held breakers and air-compressors since November 1992. Because they were in place for a short time, he regrettably had no detailed information on their trade effects. His government was working at efficiency-labelling for electrical appliances, which it would notify when introduced.

163. The representative of the Republic of Korea believed that transparency through notification requirements would restrict trade measures related to the environment. However, the existing GATT provisions including the publication requirements in Article X and the tentative results of the Uruguay Round negotiations were not enough to ensure transparency of highly technical and variable trade measures. The Group should explore ways to strengthen transparency of trade measures related to the environment.

164. A useful topic for the Group's discussions was the issue of introducing new notification obligations to fill the gaps between GATT transparency provisions and environmental measures. His delegation considered that if transparency reduced the negative effects of certain trade-related environmental measures through appropriate notification requirements, grey-area measures should also be subject to notification.

165. Any new notification requirement, however, should be administratively manageable and, in this regard, the "significant" trade effects expected from the measures in question could be an effective guideline in deciding the necessity of notification. The Group could further discuss what constituted the objective basis of such significant trade effects. The survey approach suggested by the United States on actual practices of contracting parties could be useful for this purpose. Regarding trade-related environmental measures taken by local government and

non-governmental groups, the revised TBT Agreement, which stipulated that member governments should ensure compliance of measures by the local government, could be of use.

166. He added that regulatory instruments for environmental purposes should be subject to notification requirements as they might have direct impacts on trade. Economic instruments and PPMs might have more negative effects on trade and should also be notified to the GATT. His delegation also supported a review of notification practices in the TPRM exercises in order to strengthen transparency of national environmental regulations likely to have trade effects, and ex-ante notification to secure reasonable periods for comments by interested parties, similar to the TBT and SPS Agreements.

167. His delegation did not believe that a separate register should be set up for notifications of trade-related environmental regulations. The central register of notifications, established under the Uruguay Round, might be used as an international body for national notifications of environmental regulations. He believed that making the notification system more transparent to a wider audience including NGOs, should be studied cautiously in light of GATT precedents. More detailed discussion could be held in the context of an overall review of the GATT notification system following conclusion of the Uruguay Round.

168. The representative of the Secretariat agreed that the Secretariat was not in a position to interpret the Uruguay Round agreements and explained that, in preparing TRE/W/4, it had been careful not to do so. The conclusions in the paper were guided, in large part, not by the differentiation between trade measures and economic measures, but by the Uruguay Round FOGs Agreement. The latter said that, "contracting parties ... agree that the introduction or modification of such measures [those covered in the Annex to that Agreement] is subject to the notification requirements of the 1979 Understanding".

169. He considered that one of the references in the Annex, to "any other measure covered by the General Agreement, its annexes, or its protocols", seemed quite wide. This was why TRE/W/4 stated frequently "it would appear that" many of the measures are covered by the 1979 Understanding.

170. He added that his understanding was that if voluntary eco-labelling schemes were standards then they would appear to be covered by Article IV of the existing TBT Agreement. If they were put in place by standardizing bodies, then the Code of Good Practice in the revised TBT Agreement would appear to apply, however, by and large, such schemes appeared not to be covered.

171. On the issue of environmental subsidies, the Secretariat had been guided by Article XVI, paragraph 1 of the GATT which called for the notification of any subsidy which directly or indirectly increased exports or reduced imports. Regarding border tax adjustments, the 1970 Working Party Report, which had been adopted by the CONTRACTING PARTIES, recommended that a notification procedure be introduced whereby contracting parties would report changes in their tax adjustments.

172. He noted that the Secretariat had received seven responses to the invitation issued by the Chairman for information on packaging and labelling. Based on his understanding of delegations' requests, he added that the Secretariat would also prepare two papers under this agenda item for the next meeting, one on the kinds of notification requirements that existed in MEAs with respect to trade and trade-related measures, and another would be an evolving list of possible gaps that may exist in GATT transparency provisions that delegations had identified.

Agenda Item Three

173. The representative of New Zealand considered that, at this stage, the Group should not try to prescribe what kinds of packaging measures should be applied, how they should be applied, and what GATT implications might be. If some understanding could be reached on the potential trade effects of such measures and on which types of measures were most likely to achieve the relevant environmental objectives in the least trade-distorting way, the Group would have progressed towards mapping out a basis for consideration of where matters might be taken.

174. He would attempt to analyse the potential trade effects and explore possible policy implications. He supported suggestions by several delegations that the Group take advantage of relevant work which had been done in other fora together with any preparatory analysis of national measures which delegations could make available generically to the Group.

175. He focused on the first two "command and control" type packaging regulations included in TRE/W/3 in an analytical, zero-based manner. Trade effects from packaging measures potentially arose in two respects: effects on trade flows of packaging material and effects on trade flows of products contained within the affected packaging material. (He noted that effects on contained products could stem from requirements specifying separation and/or disposal of packaging at particular points in the distribution chain.) These "direct" effects would also be accompanied by effects on trade flows of associated component inputs in the production of the packaging material and/or the packaged products.

176. He considered that the obvious effect of a ban on a particular type of packaging material would be the elimination of that material from imports into the country imposing the ban. Presumably the ban would apply also to packaging of domestically produced products sold in the country. Would it also extend to packaging of domestically produced goods destined for export markets or to production of the domestic packaging industry when destined for export? He noted that equity considerations did not suggest an entirely unambiguous response to this point.

177. The effect of the ban on the product mix of the packaging industry would depend on the significance of the market applying the ban. A ban applied in a large market could induce a change in the products produced by the packaging industry, in the country applying the ban and in overseas countries. A ban in a small market would be unlikely to have this effect,

except in the case of an industry, domestic or foreign, for which the country imposing the ban constituted a significant market. Without changes in the product mix of packaging industries in other countries, a packaging industry in the country imposing the ban could be presented with the opportunity of a captive home market and potential export sales to countries seeking to continue supplying packaged products to the country with the ban.

178. The potential trade effects on packaged products would depend on the technical and economic feasibility of alternative packaging. If either differed between domestic and foreign countries, or among foreign countries, the measures could have the effect of de facto protection of the domestic industry or discrimination against foreign suppliers. For instance a ban on packaging material that impacted more on transport packaging, in either a technical or economic sense, could have a disproportionate effect on trade of foreign suppliers, especially those not near-market.

179. A requirement to use alternative packaging which was either not technically feasible nor economically feasible (in the sense of implying an uneconomic increase in cost of an otherwise low-value product) for a particular product would likely lead to the elimination of that product from the market of the country imposing the ban on the previously used packaging material. This could result in trade elimination to particular markets and trade diversion to others. One possible implication was that the wider the choice of available packaging alternatives, the less potential overall trade effect and/or the fewer the countries which might be affected by the introduction of the measure.

180. Effects on trade in packaged products would also depend on the significance of the market for the product in the country imposing the ban on previously used packaging material. If the additional cost of alternative packaging material was significant, a ban on previously used material in a small market was unlikely to affect product industry behaviour in foreign countries except in cases where the small market was a significant market for the product of a particular industry in a particular country. In such cases a domestic producer, in the country imposing the ban, geared to supplying the domestic market was likely to face much reduced external competition.

181. In similar circumstances a ban imposed in a country which was a large market for a particular product may be sufficient to induce changes in the packaging behaviour of foreign suppliers of the product. Depending on the significance of the market to product industries in particular countries, some may be able to differentiate packaging for the market imposing the ban. Others may specialise either in supplying products to the market imposing the packaging ban or to other markets.

182. A ban applied in a market of global significance for a particular product could result in changes to the packaging of products exported to third markets. He noted that non-complimentary bans in significant markets would increase the likelihood of market segmentation and effective

protection of domestic producers in countries imposing the ban. Sequential imposition of the same ban in different markets could well have multiplier effects through first, second and third effects extending to different product areas.

183. The effect on trade in products to the country applying the packaging ban would also depend on the response of packaging industries to the measure. In cases where a product industry was unable to secure appropriate packaging material from a proximate supplier, or at an economically viable cost, that industry's trade to the country imposing the ban was likely to be effectively prohibited.

184. Concerning recycling/recovery laws, he considered that depending on the stage of the distribution chain and the type of packaging on which a measure is imposed, a recovery law could amount to an effective ban on packaging material. Such a situation could arise in respect of an obligation to recover transport packaging at the border (irrespective of the stage of the distribution chain this occurred at). In such circumstance the potential effects on trade of packaged products would largely correspond to those stated above. Similar effects could result from the economic impact of a recovery measure even if not embodied in a physical ban on the packaging material. Impacts in either case would likely depend on proximity of suppliers to the market imposing the ban.

185. Depending on the internal measures established to utilise the recovered material, recovery laws could also lead to increased exports of waste packaging materials for disposal or re-use. Recovery laws tended to be accompanied by recycling systems which may, in turn, be accompanied by mandatory recycled content standards. Such mandatory standards either constituted bans on non-conforming material or may be reinforced by taxes on non-conforming material. In either case they could have potentially significant effects on trade in the packaging material (or its component inputs) and hence on packaged products.

186. The representative of Sweden, on behalf of the Nordic countries, considered that packaging issues, as presented in TRE/W/3 and by delegations, could be grouped into four categories. The first was the coverage of packaging requirements by different GATT rules and disciples. The second related to the problems of obtaining information on packaging requirements and of adjustments to new requirements by industry. The third was the relation of packaging requirements to the concept of like-products, and the fourth concerned the harmonization of packaging requirements. The latter related to how to balance the sovereign right of countries to decide their appropriate level of environmental protection with the obvious benefits of international standardization.

187. Regarding the coverage, TRE/W/3 provided a comprehensive introduction for further studies on possible trade effects of the measures included, and on which GATT rules, including those resulting from the Uruguay Round, might be of relevance. The study could also take relevant panel proceedings into account. He did not mean to suggest that the Secretariat hint at which disciplines applied to individual packaging and handling

requirements, but it would be helpful to have some basic ideas of possible relevant provisions as a point of departure for discussions. Furthermore, his delegation requested special attention to be paid to handling systems, environmental taxes, and voluntary agreements.

188. On the second category, his delegation considered that discussions of transparency rules and practices under agenda item 2 should also respond to the specific concerns of the information needed regarding packaging legislation. This would help to alleviate the adjustment for industries confronted with new packaging requirements. On the third category, he believed that further analysis was needed and the Group would have to revert to this problem. A legal brief on the issue of like-products would be interesting.

189. Finally, knowledge of the conclusions of the general discussion on harmonization in the GATT system could prove beneficial to the Group before it analysed deeply the whole packaging issue, employing eventually the models of the TBT and SPS Agreements. In the meantime, activities in the field of international standardization on environmental protection and packaging might be interesting for the Group to learn and his delegation supported inviting experts of ISO and CEN to give presentations.

190. The representative of Japan believed that the Group should continue an analytical examination of trade effects and the efficacy of individual packaging requirements on the basis of the generic typology contained in TRE/W/3. The Group should conduct this examination in a specific manner in order to have a better understanding of various packaging requirements.

191. Rather than creating a conceptual framework for this complicated issue, the best approach would be for each member to present an analytical study focusing on specific packaging requirements to share with other delegations. Compiling these studies could provide appropriate ground work and a possible orientation for future work. The Group could then look into the relationship of each type of measure with the relevant GATT principles, such as MFN and national treatment.

192. He presented some issues to be looked at concerning deposit-refund schemes (DRS). When a deposit was imposed on a container, it would have the same effect on the product as a surcharge in that it would increase the price of the product, unless the container was returned. The purpose would be to encourage the return of the container, therefore, the deposit should be set at a price which would effectively reach this purpose.

193. On page 10 of TRE/W/3, an example was given that the doubling of the deposit amount had resulted in a noticeable increase of the return rate. However, if the deposit was increased unnecessarily high, the sale/import of the product could decrease. In this case, the deposit would have an unintended restrictive effect on imports of the product concerned. A careful balance should be made between the amount of the deposit and the negative effects on the sale/import caused by imposing a deposit.

194. Moreover, it should be ensured that the actual operation and administration of the scheme would not treat foreign products discriminatorily. An example in the same paragraph was a DRS required on containers of wine and liquor, many of which were imported, which were to be returned to national liquor stores, of which there were few. Here, it could be reasonably expected that there would be considerable difficulties returning the containers. Such difficulties could also have a negative effect on the sale of the products concerned.

195. Page 9 of TRE/W/3 also contained some interesting examples, such as a DRS applied to refillable plastic bottles but not to non-refillable bottles. If most of the products contained in refillable plastic bottles were imported and most of the products contained in non-refillable bottles were domestically produced, this DRS could cause negative effects on the sale/import of the products.

196. He believed that these examples indicated that consideration should be given to avoid unnecessary negative effects of the deposit, and that DRS should be designed to avoid de facto discrimination, in particular, against foreign products. Also, page 3 of document TRE/W/4 contained some interesting descriptions of DRS, and said that the trade impact of the packaging requirement "may be increased if imported products needed more or different kinds of packaging (e.g. because of larger transportation distances), particularly if the deposit was high in relation to the value of the product, or if access to retrieval and recycling schemes was less readily available to, or more costly for, importers". The trade effects caused by a DRS should be examined by taking these aspects specifically into account during the Group's further discussions.

197. The representative of the European Communities found the United States compilation of information in this area useful and his delegation would undertake a similar exercise at a later point in time. He encouraged other countries to also do so. It was not the focus of the Group's work to discuss specific measures taken by different countries, but such an exercise would be important for transparency, and for a better understanding of the types of issues arising in this field.

198. He believed that the issue of packaging would benefit from a more focused discussion in which the Group tried to clearly and analytically identify the types of trade concerns or issues which arose in the field of packaging.

199. An important point which should be taken into account was that packaging was not an instrument, but an objective of environmental policy. Therefore different types of instruments may be used in isolation or together to achieve the environmental objectives concerned. In this regard, TRE/W/4 would serve to focus interventions on the different types of instruments concerned.

200. On the typology, his delegation believed that there were a number of packaging measures of a fiscal nature, including different types of taxes. However the type of issues which may arise in the context of taxes were not

limited to the area of packaging; taxes were also used in other areas of environmental policy. That was why he had suggested, in regard to transparency, that the Group would benefit from having a more general type of examination about the type of trade issues that arose in relation to taxes applied for environmental reasons. DRS seemed to be, however, a type of instrument specific to the packaging field, and one on which his delegation would focus.

201. A second category of measures related to technical regulations which laid down criteria for the marketing of packages. This may relate to different elements, such as the composition, the volume or the characteristics of the package, and the capacity of the package to be recyclable or reusable. This was also a useful area to concentrate work.

202. A third category related to handling requirements. This was an area where a more focused, analytical discussion on the types of trade issues would be useful.

203. Finally, bans on the use of certain types of packages or voluntary agreements by industry which may or may not be related to government regulations were two other areas on which to usefully focus. He suggested it would be useful if the Group could agree on whether it should follow a sequential approach, in which it would focus first on certain types of instruments, or if this was premature, it should suggest issues which may relate to packaging without entering into a more formalized approach.

204. The representative of Canada considered that this item was important particularly for businesses involved in exports. His delegation thought the Group could proceed on a two-track approach. One track would be a generic paper by the Secretariat on the trade effects of certain measures. The second track would be submissions from individual delegations analysing generic case-studies to the Group for its consideration. The objective of both exercises would be to discuss in the Group cases with significant trade impacts in relation to GATT principles such as least trade-restrictiveness, and like-products, without necessarily judging, but simply allowing understanding of the issues.

205. Another objective would be to try to arrive at some ways to ensure or facilitate the achievement of the environmental objective without any unintended disruption to trade. He explained that he said unintended, because he could imagine a situation where two jurisdictions were pursuing an identical environmental problem, say in the packaging area, and one jurisdiction chose a solution based on re-use requirements, while another jurisdiction chose a solution based on recycle contents. The trade between those two jurisdictions could be significantly affected unintentionally.

206. He explained, for example, a case where, to reduce the generation of waste going to land-fill sites, a government required that packaging would have to contain 50 per cent recycled material. In a closed economy this would be fine, but in an open economy, the first question would be if that recycle content requirement applied to exports and to domestic production

which was exported? Also would such requirements apply to imported products?

207. There would be several problems with applying the same requirements to imports. For example, how would it be distinguished whether the requirement had been met at the border, and whether a packaging contained 50 per cent recycled materials or like-product packaging contained allowed virgin material? He asked that, since the product would be imported into the domestic system, would it really matter whether the product was made of recycled material or not?

208. Another set of questions could arise from the point of view of the exporter. If imports had to contain 50 per cent recycled content, what if the exporter did not have a particular waste disposal problem in its area? What would happen if the exporter consumed relatively little of the product, compared to its level of production? Would the exporter be required to import waste material in order to incorporate it into the production to export the product containing 50 per cent recycled material?

209. In closing, he supported the suggestion by the Nordic representative that it may be helpful to the Group's discussions if delegations could benefit from the experience of experts in the area of standards.

210. The representative of the United States encouraged delegations to submit information on practices within their countries, in order to know the full scope of the measures and the issue. To the extent possible, his delegation encouraged delegations to make their own submissions available in their virgin state to the members of the Group as opposed to having them summarized by the Secretariat.

211. He strongly supported the Nordic suggestion to draw upon the expertise of the ISO. His delegation believed that the ISO could give a formal presentation on its work in the area of eco-labelling, as well as in related areas such as life-cycle assessment and eco-auditing. His delegation would reflect on other suggestions for work offered by the Nordic delegation.

212. The representative of the Republic of Korea considered that one of the most complicated problems raised by packaging and labelling requirements related to voluntary systems initiated by the private sector; GATT provisions did not easily apply to voluntary requirements. However, governments could commit themselves not to support or encourage voluntary requirements with a view to minimizing the environmental effects on trade. In this case, the provisions of the Draft Uruguay Round Safeguard Agreement could be referred to, which stipulated that member governments shall not encourage nor support the adoption or maintenance by public and private enterprises of non-governmental measures.

213. He added that taking into account that handling after packaging, such as recovery and re-use, was not properly covered by the current GATT system, and that these schemes had great potential to impact trade, the national treatment principle alone would not be sufficient to deal with

this issue. The Group may have to discuss the necessity of providing new rules to regulate such questions.

214. The representative of the Secretariat stated that he understood there was agreement for the Secretariat to prepare a paper addressing, in a generic way, the trade effects and concerns that could arise from new forms of packaging requirements.

215. The Chairman recalled that the representative of India had referred to some inaccurate press reportings on proposed GATT provisions. He believed that silence from the GATT on this subject could be interpreted as acceptance of such criticisms. He would raise the subject with the Director-General of the GATT to determine how to address this issue, and he would inform the Chairman of the Council of this. He hoped that some appropriate means of relaying GATT's message could be found.

216. He proposed that the next meeting begin with discussion of agenda item 2, then move to agenda item 3. On the latter, he recalled agreement to separate the two issues, packaging and labelling, for the discussion of the trade effects involved. He encouraged delegations to be as specific as possible within their generic analyses of trade effects of such measures. Agenda item 1 could be discussed in the time remaining.

217. He circulated a proposed schedule of future meetings suggesting three additional meetings prior to summer recess, and at least two meetings after the summer. Although not definite, it was anticipated that sometime in mid-November the GATT Council would meet to discuss the UNCED follow-up, therefore the Group should plan a meeting in advance of that meeting.

218. The next meeting of the Group would be 18-19 March 1993.