

GENERAL AGREEMENT ON

TARIFFS AND TRADE

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Group on Environmental Measures and International Trade

REPORT OF THE MEETING HELD ON 6-7 MAY 1993

Note by the Secretariat

1. The Group on Environmental Measures and International Trade held its tenth meeting on 6-7 May 1993 under the chairmanship of Ambassador Hidetoshi Ukawa (Japan). The agenda and relevant documentation were contained in GATT/AIR/3418.

2. The Chairman reiterated the Group's previous agreement to focus the discussions under the three agenda items to the points indicated in GATT/AIR/3418. While he did not wish to strictly limit the discussions, he encouraged delegations to focus on the agreed sub-issues in order to streamline the Group's work and build upon the results already achieved.

Agenda item three

3. The Chairman noted that the Secretariat had prepared a second addendum to the generic typology of packaging and labelling requirements, document TRE/W/3/Add.2.

4. The representative of New Zealand considered that a common framework for analyzing the trade effects of various packaging measures would enable delegations, individually and collectively, to advance work by sharpening the focus of analysis without detracting from its substance. He suggested that the Secretariat make an initial attempt to draw out a common analytical framework based on some interventions which contained elements of a possible framework. His delegation and others, notably the Canadian, had considered dimensions such as trade diversion, distortion, creation and chilling effects. Others, including Hong Kong, had envisaged analysis in terms of the impacts on market access, competitive opportunity and other effects. The Nordic delegations had reminded the Group that the overall purpose of the Group's work should be to assist in identifying unnecessary, unjustified or discriminatory trade effects.

5. Such an analytical framework would provide delegations with a basis on which to guide individual interventions in identifying key issues. Its relationship to the case-study approach was symbiotic so that, once formulated, it would provide a consistent approach to case-study analysis.

6. He suggested that the Secretariat and delegations should bear in mind the desirability of developing a framework that applied also to the wider categories of measures identified under agenda item two. It could assist the Group in identifying the trade effects of the categories of measures identified in TRE/W/4 and in the annex to TRE/W/7; this would be important to the subsequent determination of the real "gaps" in transparency.

7. The representative of Canada said he would welcome comments on his earlier substantive interventions on agenda items two and three. He considered that, since last autumn, the Group had made significant progress towards an effective structure for the analysis of trade-related environmental measures both under agenda items two and three. Delegations had provided useful suggestions on how the Group might organize its examination of trade measures, in order to effectively build a databank of information upon which to base later stages of its work. While the Group remained in the educational stage on both agenda items, there appeared to be broad agreement that sufficient progress had been made to warrant a more structured consideration of this important information in future discussions.

8. His delegation, therefore, supported New Zealand's suggestion for the Secretariat to prepare a paper which would bring together suggestions on process, in order to crystallize the consensus that his delegation considered was nearly in place. Such a paper should reflect the high degree of agreement concerning the utility of using generic case-studies to bring measures of interest and concern before the Group, as well as the general consensus on using, what New Zealand termed, the "filter" or "bottom-up approach" of examining trade effects as a way of classifying and determining priority areas for later discussion.

9. The representative of Hong Kong agreed with the idea of a framework to organize the information the Group had acquired and to move the Group to the next stage of analysis. From an operational standpoint, he saw merit in developing an analytical framework which could group generic measures, in a hierarchical manner, according to direct and indirect trade effects, such as conditions for market access, opportunity to compete and impact on trade rules. This exercise could help to identify where gaps were and how to address them. He added that this approach would also grade measures according to their degree of trade effects which could provide guidance to policymakers in choosing among trade measures to formulate environmental policy.

10. The delegation of the European Communities considered that the Group provided a useful forum for the exchange of views regarding the potential trade effects of packaging requirements aimed at protecting the environment.

11. He agreed that the Group was still in an educational phase of defining the issues in order to understand the trade effects of packaging programs with environmental protection objectives. In this phase, it could identify the types of measures that were most likely to achieve these objectives in the least-trade-restrictive manner; after which, it could identify areas in which clarification or development of GATT rules would be appropriate. His delegation considered that the Group should orient all phases of its work towards reducing avoidable trade impacts of packaging requirements, while at the same time respecting the right of countries to deal with the environmental consequences of packaging through appropriate policies. Paragraph 3 of TRE/W/9 noted the important observation that packaging waste was viewed as a pressing problem in an increasing number of countries that

considered their traditional means of waste disposal to be at or near exhaustion.

12. He considered that the usefulness of the Group was highlighted at the last meeting, where a number of delegates expressed their concern with legislation either in force, or presently being developed in the EC and its member states. These comments had been studied carefully, and would be studied further by the competent people directly involved in waste management in the EC. Given the complex and often unclear nature of the issue, his delegation would give a detailed response at the next meeting.

13. His delegation concurred with the point in TRE/W/9 regarding the usefulness of permitting foreign suppliers timely access to information on new packaging requirements, as much as possible, as this would enable necessary adjustments to their packaging methods. This issue could also be taken into account under agenda item two, where the Group could examine whether clarifications or developments of GATT law were necessary to deal with this issue. His delegation agreed also that some trade effects and concerns were unavoidable; for example, the concerns that overseas suppliers would generally need to use more transport packaging than domestic producers because their products would generally have to travel longer distances to markets.

14. The representative of Sweden, on behalf of the Nordic countries, stated that the Nordic countries would examine the proposal for an analytical framework and consider its feasibility; perhaps, as a first attempt, Hong Kong's ideas could be employed. He considered his comments at the previous meeting on the environmental rationale behind government's actions in the packaging area as a general point of departure for more specific issues.

15. TRE/W/9 presented two main environmental objectives of packaging requirements: (1) to reduce the amount of packaging waste, and (2) to reduce the resource-intensity of packaging. Regarding the second objective, one interpretation was that the use of packaging with high resource-intensity should always be avoided. However, in some cases, such a conclusion might be misleading as the use of packaging material with a high initial resource-intensity could constitute, in the long run, the most environmentally adapted alternative. An example was glass-packaging, which, although requiring an initially high energy input (hence, resource intense at the manufacturing stage), was easy to clean and recycle and, therefore, excellent for refilling requirements (as stated in TRE/W/3). In order to reduce the total environmental impact of packaging, it would be necessary to assess the resource-intensity of packaging on a carefully conducted life-cycle analysis of the relevant packaging. Hence, to reduce the total environmental impact of packaging, the second objective of packaging requirements could be to reduce the resource-intensity of packaging, viewed in a life-cycle perspective.

16. Pertaining to the classification of packaging measures contained in TRE/W/3, which was a basis for further analysis, he inquired whether economic policy instruments should not be treated separately as they seemed

to constitute a category with special characteristics whose trade effects could be wider in scope and more difficult to foresee than other packaging regulations. In addition, he would include various forms of subsidies in the list of economic policy instruments in TRE/W/3.

17. With respect to packaging regulations on imports and exports, he referred to the Canadian hypothetical example of a fifty per cent recycled content requirement on packaging, introduced to reduce the amount of waste in a country. In focusing on the situation which occurred if the requirement also covered imports, it appeared that if a foreign supplier procured waste packaging either from a third country, or used its own recycled material, then the fifty per cent recycled content requirement did not affect the amount of waste being recycled in the importing country.

18. He concluded that applying packaging requirements to imports and exports was related closely to the extraterritorial effects discussed under agenda item one; the Canadian case was an illustration of an extraterritorial production and process method regulation. He suggested that this analysis be pursued using other examples. A distinction could be drawn already between packaging legislation which was more effective in achieving the domestic environmental objective if it also applied to imports and/or exports and packaging legislation where the effectiveness was not affected by imports and/or exports. For example, a fifty per cent recycled content requirement on imports to a country did not reduce directly the waste in that country but reduced it only in the exporting country or in countries from which it imported the recycled material. On the contrary, a fifty per cent recycled content requirement on exports from the country imposing the requirement helped to decrease the amount of waste if the exported packaging was produced from recycled material in the country itself. Thus, in the Canadian example, to achieve the domestic environmental objective to reduce waste, the requirement should be imposed on exports but not on imports. If imposed on imports, it would reduce waste in another country.

19. The same analysis could be applied to other types of packaging requirements. For example, a requirement to make all material recyclable would be put on a country's imports and not on its exports, if the objective were to reduce the amount of domestic waste, because the imported packaging should also be recycled. The recycling of a country's exported packaging material did not affect the domestic environmental objective.

20. The above examples illustrated the effects of packaging requirements in a concrete manner. As a general proposition, his delegation considered it important to relate requirements with trade effects directly to the environmental objective, in order not to restrict trade more than necessary to achieve that objective. The consequences of both of the above cases, would be trade distortive, either in favour or disfavour of producers in the exporting or importing country. He agreed with Canada that the disposal of imported recycled material covered as much space as an equivalent amount of imported packaging made from new material.

21. He underlined how MEAs could change the above-mentioned conditions. If agreement were reached between a group of countries on a certain content of recycled material or to make all material recyclable, these requirements should apply to all exports and imports to and from the countries concerned, as the MEA-parties would have agreed upon the same objectives and the desire to cooperate to fulfil them.

22. He suggested that to interpret the concept "like product," the analysis could be divided into at least two problems: 1) were two products with identical characteristics, but enclosed in different packaging material, considered to be "like products," and 2) which criteria had to be fulfilled if two packaging materials were to be considered alike? In the first question, it was clear that packaging was included in the concept of "like product" under Articles I and III as well as Article 2:1 of the TBT Agreement. Therefore, the rules of MFN, national treatment and the TBT Agreement applied also to packaging; the latter was confirmed by the Agreement's explicit mention of packaging.

23. When examining whether two products could be defined as "like products," it seemed that the packages and contents had to be compared separately even though they both belonged to one entity. This led to the second question. Criteria could be: 1) recyclability and bio-degradability; 2) content of hazardous substances; 3) life-cycle performance; and 4) use of exhaustible and non-exhaustible resources. As further analysis was needed in order to answer this question, he suggested that the Secretariat could present an illustrative list of criteria that had been used to determine "like products" which could also apply to packaging, for example, in the context of the TBT Agreement. It seemed necessary to ensure that differential treatment based on claims that packaging materials were not alike was permitted only when two packaging materials had a significantly different impact on the environment.

24. Finally, he underlined the need for further discussion of the Canadian suggestion to add the concept in Article 2.1 of the TBT Agreement (and its clarification in the current Uruguay Round) to the principles for reducing unnecessary trade effects found in TRE/W/9. This concept ensured that technical regulations (including mandatory packaging and labelling requirements) did not have the effect of "creating unnecessary obstacles to international trade". This was important as packaging regulations could be geared, without being discriminatory, to the particular type of packaging used in the domestic market, as was frequently the case with recycling, recovery and deposit refund systems.

25. The representative of India considered that an analytical framework could be a useful instrument to facilitate discussion. Regarding Hong Kong's suggestion to use, as criteria, the trade effects of measures, he considered both actual and potential effects as classifications; measures with no trade effects were not relevant to the Group's considerations. One problem could be that a demonstrable trade effect for one exporting country may not be the same for another exporting country. Therefore, any analytical framework would have to be based on a premise,

which would have to involve detailed case-studies. He considered the latter to be a more important emphasis for the Group's work.

26. The representative of Poland summarized a paper on eco-labelling in Poland which had been submitted for circulation to the GATT Secretariat. The per capita weight of used packaging in Poland was close to fifty kilogrammes per person, three times less than the relevant figure for West European countries. Nevertheless, the lack of an efficient system of collection and recycling provoked a serious threat to the Polish environment. A large share of used packaging came with imported products; for example, it was estimated that thirty-five million PVC bottles, ninety-two million PET bottles, fifty-one million metal cans and ten million various laminated packages were imported from the EC countries to Poland in 1992.

27. This unfavorable situation and increasing ecological requirements imposed on Polish exporters called for plans to elaborate and implement the system of eco-certificates for packaging and labelling in accordance with EC directives. The new system aimed at limiting the share of used packaging in communal waste under the general principle that the economic entity introducing packaging into the market should also be responsible for its recycling or destruction.

28. The Polish Packaging Research and Development Centre, in collaboration with the Ministry of Environment and Natural Resources and the Central Bureau of Quality Standards, taking into consideration the experience of other countries in this field, had worked out a general outline of a system of eco-certificates which was based on these general concepts:

- certificates should promote the utilization of environment-friendly packaging;
- the certificate awarded to a product would authorize its producers and traders to use appropriate markings (eco-labelling);
- the possibility of recycling should be the basic criterion for granting the eco-certificate. Low energy and resource-intensity of production, utilization and recycling of packaging should serve as additional criteria;
- the detailed criteria for each group of packaging should be based on life-cycle analysis facilitated by the selection of objective and quantitative criteria for a testing process;
- the certificates should be awarded by an impartial testing research institution; a committee granting eco-certificates would be selected from among highly qualified experts representing industry, commerce and environmental protection;
- the eco-certificates should be granted for a period of one to three years, subject to extension. Within this period the institution granting certificates should verify the fulfilment of the necessary requirements;

- eco-certificates and labelling should be optional. Exceptions could result only from separate regulations issued by the Minister of Environment and Natural Resources. The principle of non-discrimination between imported and domestic goods should be warranted.

29. The representative of Switzerland stated that packaging was chiefly responsible for the mountains of waste produced by industrialized countries, which had led to laws requiring industries to rethink their sales techniques and encourage consumers to adopt new consumption patterns.

30. She considered that managing this accumulation of packaging materials was both quantitative and qualitative in nature. Apart from its environmental impact and its implications for the exhaustion of natural resources, the quantitative aspect was the increasing cost of treating so much waste, which was, above all, an economic problem. The qualitative aspect, which was an environmental problem, related to certain types of packaging components affecting the environment or public health (for example, by releasing toxic gases during their destruction).

31. The harmful effects of packaging waste were felt, in principle, where the goods were consumed, resulting in a trend towards subjecting imported, as well as domestic products, to the same rules. Therefore, packaging standards affected international trade as they forced exporters to ensure that their packaging conformed.

32. She agreed with the Nordic delegation that the Group should not make the mistake of considering that all trade effects should be avoided as a matter of principle. While potentially negative trade impacts of packaging regulations should be avoided, it should not be forgotten that these same regulations could also have positive effects.

33. She recognized that environmental protection was becoming a form of competitiveness which resulted in the development of new technologies, the emergence of new markets and the contraction and even disappearance of others. Demand would grow for some products and shrink for others, which was GATT consistent. On the other hand, GATT should intervene if the application of certain packaging requirements produced unjustified barriers to trade or was protectionist, whether intentionally or not. Two basic GATT principles in this area were national treatment and transparency; non-discriminatory application of packaging requirements was an imperative. Although there was little likelihood of formal discrimination between foreign and domestic suppliers, it was conceivable that packaging requirements could unnecessarily penalize foreign suppliers. In such instances, the GATT should intervene to ensure that packaging requirements did not become an unjustified barrier, or had trade effects disproportionate to their environmental intention.

34. Also, foreign suppliers should be able to obtain precise information on packaging requirements or packaging utilization and disposal programs. She concluded that national treatment, proportionality and transparency were key aspects to consider in packaging issues. The Group could usefully examine the series of related questions which the European Communities had raised at the previous meeting.

35. The representative of Hungary indicated certain problems her delegation was facing in elaborating new legislation on packaging and labelling and considered them similar to those of many other countries. Packaging and labelling requirements were becoming increasingly important tools of environmental policy in Hungary. They aimed at reducing or eliminating waste, recovering materials and establishing principles for liquid packaging bottles, boxes and any other type of closed packaging that contained liquid and was made of reusable materials, mainly glass.

36. She added that the reintroduction of a deposit refund scheme on all glass bottles (the elimination of which was a negative consequence of the price liberalization and deregulation process), eliminated one-way plastic bottles and encouraged the return of glass bottles. It would contribute to the progressive withdrawal of non-refillable and non-recyclable materials from the market. A balance should be made between the amount of the deposit and possible negative effects on the sale caused by the deposit. Non-discriminatory treatment of foreign products should also be ensured.

37. In addition, Hungary intended to introduce a system of product charges, whereby products made fully from recycled materials would be exempt and products made partly from recycled materials would face a lower or no charge. The income from these charges would be used for the collection of re-usable materials and for neutralizing the one-way materials. The Law on Environment and the Law on Consumer Protection were currently before the Parliament; these laws were expected to increase the stringency of current packaging and labelling regulations by putting greater emphasis on ecological and consumer protection aspects.

38. Hungary intended to elaborate a national environmental labelling system on the basis of the "Blue Angel system", which would explain why the label had been issued. She would provide details at a later stage. She concluded that all packaging and labelling requirements would modify consumer and producer behaviour and, therefore, could cause changes in trade patterns. The Group should concentrate on identifying the unjustified or unnecessarily discriminatory trade effects of different legislation.

39. The representative of Mexico was concerned particularly with transparency of packaging requirements which could adversely affect competitiveness of foreign producers. Insufficient information and short deadlines were of concern. However, the crux of the problem lay in the failure to comply effectively with fundamental GATT principles. She considered that equality of competitive opportunities was the main criterion that needed to be examined in order to determine national treatment of these requirements. The concept of necessity was also an

important basis for balancing the environmental objective and possible resulting trade distortions. Thus, her delegation agreed that concepts in the TBT Agreement were relevant to this analysis, particularly that technical regulations and standards should not create obstacles to international trade and should not be more trade-restrictive than necessary to attain a legitimate objective.

40. She considered that, among the packaging instruments discussed in TRE/W/9, the following were of most concern regarding potential trade effects: the rules establishing requirements that packaging must meet in order for trade of the products therein; recovery, reuse and recycling schemes that had handling requirements; and requirements specifying recycled material content. Regarding the latter, the Canadian case highlighted the imbalance between the environmental effectiveness of the requirement versus the trade-distorting potential.

41. Her delegation did not believe that attaining the environmental objective would require applying the measure equally to all imports. This would raise questions of extraterritoriality and would harm the environment of the exporting country subject to the measure if it had to import waste in order to comply. However, the requirement should be extended to the exports of the imposing country because all domestic production should be subject to the requirement.

42. Also, her delegation considered this type of requirement tantamount to a standard on the final characteristics of the product. Therefore, it must comply with the disciplines under the TBT Agreement, particularly that it not create unnecessary barriers to trade and that the measure applied be the least trade restrictive. These two conditions would demonstrate the necessity of the measures.

43. The second type of instrument, recovery, reuse and recycling requirements, was complicated and merited careful study. The obligations concerning the return of waste were of concern as they entailed giving responsibility for handling requirements to the producers which disadvantaged foreign producers faced with transport expenses and problems of access. Also, handling requirements did not seem to be covered by the TBT Agreement.

44. In conclusion, to advance learning in this complicated area, she supported the mixed approach presented by India, whereby discussions would continue within an analytical framework, while not excluding the study of specific cases.

45. The representative of the Philippines, on behalf of the ASEAN contracting parties, supported New Zealand's concept of an analytical framework and considered that such a framework should make possible the analysis of specific cases of measures having trade effects. He stated that certain types of measures deserved further study with respect to their trade effects. One such measure, mentioned in document TRE/W/3, was product taxes, intended to promote recovery and re-use of containers which might affect the competitiveness of foreign products more than domestic

products. He noted the observation in New Zealand's non-paper, that a requirement to use alternative packaging, which was either not technically or economically feasible (for example, because of an uneconomic increase in the packaging cost of a low value product), could lead to either trade diversion or trade elimination. The wider the choice of available packaging alternatives, the less would be their potential trade effects and the number of countries affected. He stated that it might be useful for the Group to examine how this concept could be used to minimize adverse effects of different packaging regulations.

46. The representative of Austria noted that in constructing an analytical framework, the Group should keep environmental objectives in view; not all economic effects should be regarded as negative or unwelcome as long as they were necessary to achieve the environmental objective. If measures were grouped according to their degree of trade effect or to their relationship with GATT rules, the Group should bear in mind the basic principles that should guide its assessment of environmental measures: necessity, non-discrimination, national treatment and justification in terms of the environmental objective. The Group should avoid giving the impression that it was working under the assumption that a trade effect of any environmental measure was automatically considered negative, unwarranted and, thus, to be avoided.

47. The discussion of the transparency of labelling schemes pertained to agenda items two and three. The influence of consumer information and behaviour in the economy was important. He summarized the objectives of the voluntary Austrian eco-friendly labelling system, in operation since 1991:

- to provide consumers with information in order to enable them to make a deliberate choice between products with the aim of furthering environmental protection;
- to motivate producers to develop and offer environmentally-friendly products by providing the opportunity to achieve a competitive advantage;
- to minimize the abuse of various and increasingly numerous misleading advertising messages pertaining to environmental protection;
- to promote the consumption of environmentally-friendly products compared to less beneficial products;
- to give producers the opportunity to profit from changing consumer preferences and to focus the attention of environmentally conscious consumers on products bearing this eco-label.

48. The label was awarded on an entirely voluntary basis and was non-discriminatory in nature; it had already been granted to imported products. The criteria for the award were contained in guidelines approved by the Federal Minister for the Environment, Youth and Family, elaborated

under the auspices of the eco-label advisory board. The latter body was composed of representatives from the business and environmental communities, and representatives from the Ministries concerned, scientists and consumers. Both foreign and domestic parties were permitted to participate in this process. Criteria for these guidelines included: raw material and energy consumption (concerning production and use); waste and emissions (concerning production and use); marketing and transportation; and disposal and recycling.

49. The guidelines for obtaining the eco-label were published and subject to revision on a regular basis. The label could be obtained for a nominal fee. Guidelines had been established for certain product-categories such as refrigerators and appliances for cooling, reprocessing of toner-modules, ribbon cassettes and ink-cartridges.

50. The representative of Hong Kong clarified that, in his earlier intervention, he had not meant to suggest that wherever trade measures were used they were necessarily arbitrary or distortive. He considered that, in some cases, trade measures were taken for environmental purposes and, in some cases, these might affect the rights and obligations of GATT contracting parties. Regarding the discussion of "like product", he recalled that here the Group was discussing packaging requirements and not products. He considered that GATT rules were written around the concept of "like product" and could not be interpreted without a clear, common understanding of the concept. He understood the determination of "like product" involved the physical characteristics of a product, what it was made of and whether directly substitutable products existed. He considered that the Nordic countries' interpretation was rather alien to the basic structure of GATT. He wished to signal a note of caution (but not to present any final position) that the discussion of "like product" might contribute to misconceptions about the GATT, or raise false expectations thereby compounding the public image problem.

51. The representative of Sweden, on behalf of the Nordic countries, agreed that caution was needed on the conceptualization of "like product" but that this was central to packaging issues. The concept of "like product" was interpreted in many different ways within the General Agreement, depending on the context. Thus, economic factors were of particular relevance to the concept in the context of anti-dumping and countervail. When used in Articles I and III, "like product" had a somewhat different, perhaps broader meaning. It tended to be more narrowly defined in cases of exception. Concerning the proposal for the development of a hierarchy of measures according to their effects, this raised the question of the parameters upon which to base such a scale; many could be envisaged. Besides trade effects, another example which could be considered was effectiveness of measures from an environmental perspective.

52. The representative of the United States agreed with the delegations of Austria, Switzerland and the Nordics on the necessity of considering the environmental aspects of measures in order to categorize them; for the most part, these measures had been put into place with an environmental intent. She questioned the usefulness of developing a hierarchy of trade restrictiveness in the environmental arena when this had not been done in

more traditional areas of trade activity. Her delegation considered the case-study approach useful and asked for those presented today, by Poland, Hungary and Austria, to be put in writing. She considered that the Secretariat had usefully extracted information for case-studies, but studying the actual legislation would be helpful. She concluded that her delegation needed more information on the structure of an analytical framework but, in the meantime, desired to pursue the case-study approach.

53. The representative of Australia believed that the judgement made in paragraph 10 of TRE/W/9, which suggested that there was no reason to believe that the packaging needs of overseas suppliers would differ significantly from those of their domestic counterparts, did not apply in the case of his country which was an island state, located long distances from the major markets of the world.

54. The representative of New Zealand considered that the majority of statements were not inconsistent with his delegation's conception of an analytical framework, except regarding the extent to which the work would be taken at this stage. He had conceived of a framework which would not seek to answer every question at this stage, but which would enable the Group to consistently identify trade effects across a range of measures, and that would assist the case-study approach. In addition, he had envisaged that delegations would have input into the process of such a framework which, he considered, would start the analytical process of bringing various ideas together in a focused manner.

55. The representative of India, on the notion of evaluating different measures from the perspective of how well they protected the environment, emphasized that agenda item three addressed the trade effects of new packaging and labelling requirements aimed at protecting the environment; suggestions made in this meeting would effectively turn the agenda item around. Any analytical framework, from his delegation's perspective, should examine the trade effects. He clarified that case-studies should not be divorced from the overriding agenda item, and should analyze the potential trade effects of packaging or labelling requirements taken for protecting the environment.

56. The representative of the United States agreed that the Group was examining the trade effects of measures, but it was not trying to change everything that affected trade. Therefore to proceed to the next level of analysis, the Group needed to understand better the measures. It was not sufficient to look at the trade effects without understanding the "raison d'etre" for the measures and approaches taken. The case-study approach was appealing because it was practical and concrete; the ranking of trade effects would be more difficult. Measures could be taken in a number of ways; for example, handling requirements could be designed in a trade destructive manner in clear violation of GATT, or in a benign manner that achieved the objectives with minimal trade effect. How could an analytical framework that measured and ranked trade effects be constructed to capture such nuances?

57. He believed that caution was needed with respect to concepts such as "like product." At first glance, it appeared to his delegation that bio-degradability was a characteristic of the product. Also, Article III allowed countries to pursue a number of policies that might have effects and might not be economic. Thus, the concept of "like product" did not seem to be tied strictly to economic distinctions; it would be necessary to examine case law and the concepts embodied in Article III before making such a judgement.

58. The representative of Hong Kong agreed with the difficulty in reflecting upon the concept of "like product". It was important to remember that GATT was concerned basically with international trade and its rules were to address the economics of trade issues. Finally, he clarified that his concept of an analytical framework was that it would be an evolving process which would illuminate problems to be resolved under all three agenda items.

Agenda item two

59. The Chairman recalled that at the last meeting there appeared to be general agreement that transparency requirements in this area should be no more stringent than those in other areas; the idea of environmental enquiry points received favourable comments; and national regulations with substantial trade effects were the priority concern of the Group.

60. The representative of Japan preferred, in examining and deepening the Group's understanding of trade effects of a wide range of environmental measures including taxes and subsidies, a specific case-by-case approach rather than developing a generic, conceptual argument. In this context, he recalled that the informal presentation on packaging and labelling had provided the Group with useful examples of specific cases.

61. He considered that whether trade measures taken under MEAs should be exempt from transparency requirements or not involved a number of difficult questions. First, the question arose as to whether or not an MEA constituted a genuine international consensus, which related to defining the term "multilateral", discussed under agenda item one. A second question was whether or not an MEA provided special "standards" for parties to that agreement. If the MEA only provided objectives or a loosely defined standard, parties to the MEA would have discretion to set their own "standards" within the broad framework of the MEA, leaving room for arbitrary action. He added that it was difficult to imagine situations whereby a requirement to notify to the GATT measures taken under MEAs conflicted with international law or obligations under an existing MEA.

62. The representative of India emphasized that national environmental regulations which might have trade effects must be subject to as much transparency as other regulations. This agenda item applied to all national environmental regulations, including those in agenda items one and three.

63. Transparency was not an end in itself; it could help to build confidence in and provide security and stability to the multilateral trading system, to avoid trade disputes from occurring by providing an "early warning system", and to provide an opportunity for consultations among trading partners in some cases, and allow time for adjustment.

64. Given that there existed a wide range of provisions designed to ensure multilateral transparency, including Article X, the 1979 Understanding, the provisions of the TBT Agreement and, in addition, the new provisions contained in the Uruguay Round package, such as the Central Registry of Notifications, his delegation would react cautiously to suggestions of new mechanisms.

65. The Group would have to examine the potential gaps in the Annex to TRE/W/7 to ascertain how many were covered by provisions that would come into force after the completion of the Uruguay Round. Many of the measures listed in the Annex, if they had trade effects, might also be covered under Article X of the General Agreement.

66. Concerning trade measures taken for the implementation of MEAs, his delegation considered that obligations regarding transparency which affected the functioning of the GATT were not altered substantially by the context in which such measures were taken. His delegation also believed that Article XX did not relieve a contracting party of all its GATT obligations, and measures introduced under Article XX did not escape notification requirements elsewhere, for example under the 1979 Understanding or the TBT or SPS Agreements.

67. It was worthwhile to discuss the proposal to establish environmental enquiry points, similar to those under the TBT Agreement, which could provide information on environmentally-related standards and regulations with a trade impact, such as internal taxes and charges, deposit refund schemes, handling and waste disposal procedures and trade opportunities for environmentally-friendly products, if it were believed that they could deal with the "gaps" in existing transparency mechanisms. He agreed that a common analytical framework might facilitate discussion of specific cases of national environmental regulations from the viewpoint of transparency, and merited further discussion in the Group.

68. The representative of Mexico drew several points from TRE/W/10. Several MEAs did not contain transparency provisions or, if so, were limited to recommending an exchange of information on scientific, technological and administrative questions. Among the MEAs containing transparency provisions, the majority consisted of the ex post publication of information through the relevant secretariat. Only MEAs which prohibited trade in hazardous chemicals or waste included requirements of ex ante notification, addressed directly to the parties concerned and requiring prior approval for importation. There was also variety in the periodicity prescribed for the publication or exchange of information and only some (primarily those related to conservation and protection of species) specified the products covered.

69. Also, in most cases, the information requested on the use of the measures was factual and, only in one case, the International Convention on the Protection of Plants, were parties obliged to provide detailed information on the reasons for the application of import restrictions or requirements. Only in one case, CITES, was further information required to prove that measures served the purposes of the MEA. She concluded that these elements gave rise to questions as to the effectiveness of MEA transparency mechanisms in guaranteeing trade predictability.

70. Two additional elements were of particular concern. First, MEAs generally left considerable discretion to the parties as to the type of measure to be used and the manner in which it should be applied. Second, in the majority of MEAs, there were no transparency provisions applied to non-signatories. With regard to the former, few agreements contained mandatory obligations; most recommended that parties carry out the "necessary actions" to achieve the purpose of the agreement. Where there was specific mention of the type of measure to be used (for example, quantitative restrictions), parties could decide how to implement them. Furthermore, in cases where the parties were to apply measures using certificates or import or export permits, the margin of discretion was broadened further. This could create an unpredictable situation, even for trade among the signatories to an MEA. It demonstrated the importance of guaranteeing transparency through notification of such measures to the GATT, especially for MEAs with limited participation, whose trade measures could affect non-parties, even when applied on a non-discriminatory basis.

71. She did not see the potential for conflict with international law if GATT required notification of trade measures taken under MEAs. She asked what the difference was between MEAs and, for example, economic cooperation or integration agreements, where relevant trade measures were covered by GATT notification requirements. A GATT notification requirement would not be aimed at judging the measures in question and would help to avoid trade conflicts.

72. Also, the idea that trade measures stemming from MEAs should be considered international standards was not clear to her delegation. It was first necessary to examine what a standard was, particularly since most MEAs did not establish precise standards or means of applying measures, but simply the environmental targets. In addition, a definition of what constituted an international standard existed in the TBT Agreement, whereby it had to be adopted by a recognized international standardization body.

73. Therefore, her delegation did not agree that trade measures under MEAs should be exempt from GATT notification obligations, as were international standards. She also did not consider that the GATT Secretariat establishing links with the respective secretariats of MEAs would be effective or functional since many MEAs did not contain any transparency mechanisms and the information transmitted to these bodies was not always germane to trade issues. As document TRE/W/4 pointed out, contracting parties had an individual responsibility to comply with GATT notification obligations, which were not significantly altered by the context in which such measures were adopted.

74. Nevertheless, in order to avoid an administratively unmanageable situation regarding notification, GATT obligations should apply only to measures with significant trade impacts. Thus, the Group could usefully examine, in greater detail, the trade effects of measures in MEAs.

75. The representative of the European Communities agreed that transparency was not a solution in itself, as it could not solve real conflicts of interest. Nevertheless, it was a valuable mechanism for communication among trading partners, allowing reasonable time for adjustment to new measures. To achieve this goal, prior notification, where possible, was preferable. However, the possible introduction of new transparency provisions should not result in administratively unmanageable systems that could result in greater problems in complying with notification obligations. In the interest of consistency, the Group should not aim to introduce transparency requirements for environmental measures which would be broader than those applicable to measures adopted for other policy reasons. His delegation considered that the suggestion for enquiry points in this area merited further examination in the Group. With respect to the transparency or notification requirements for trade measures of MEAs, the Group would benefit from further study of whether this raised conflicts with general principles of international law.

76. The representative of Canada considered that packaging and labelling programs, whether run by governments or the private sector, could have significant, unintended impacts on trade. In part, this was due to the difficulty exporters and trade officials could have in becoming aware of and understanding programs; hence, transparency of environmental measures, including packaging and labelling programs was important. His delegation expected to make a presentation on the Canadian Environmental Choice Program at a future meeting; it had submitted background information on this voluntary program to the Secretariat.

77. Finally, in light of the importance of transparency in the area of eco-labelling, there was merit in the Brazilian suggestion to provide information concerning eco-labelling programs to national enquiry points. His delegation would ensure that its national enquiry point be able to provide, on a responsive basis, the final guidelines for products receiving an environmental label under its Environmental Choice Program.

Agenda item one

78. The representative of Sweden, on behalf of the Nordic countries, confirmed his delegation's approach to many of the issues identified so far, which was based on a collective interpretation of Article XX, without committing to any specific form it should take. This latter issue was best left for a later stage. A range of possibilities existed from a simple decision by the Council or the CONTRACTING PARTIES, to a separate and formal agreement addressing the collective interpretation associated with Article XX, detailing the conditions that would apply.

79. His delegation was open as to the conditions and criteria needed for a collective interpretation or for any other solution that might be proposed;

the crucial issue in need of analysis was which criteria to apply to MEA-based trade measures. Probably all the terms found in the head-note language of Article XX were of relevance to MEA-based measures dealing with global or transboundary environmental problems and, in addition to other possible aspects, needed to be explored further. It was in this context that the Group was addressing the two sub-issues: extraterritoriality and the treatment of non-parties to MEAs.

80. He turned to three separate topics. The first was what constituted a multilateral agreement. A precise understanding was important because the discussions related to MEAs as instruments might affect the Group's view of extra-jurisdictional trade measures. The level of global support needed for an agreement to become international or multilateral was an important question. Apart from regional agreements, various mathematical formulae could be hypothesized. However, it might be advantageous to use a qualitative analysis rather than a quantitative formula. A number of factors were relevant in such an analysis: for example, was the aegis for the negotiations of the MEA sufficiently broad and representative, consisting of the United Nations or one of its specialized agencies; and did the MEA have a level of participation representative of the countries concerned by the issue? The latter could mean that a meaningful number of producing and consuming nations of a product dealt with by an MEA had signed that MEA. The participation of countries which were not concerned by the issue would not increase the relevance of the MEA. Another factor concerned whether the MEA was open for accession by all governments on terms which were equitable among the original signatories of the MEA and any countries that desired to join later. His delegation was interested in hearing from delegations on the relevant factors to define an MEA.

81. He considered that further analytical discussions in the Group could incorporate additional sub-issues. One was what he termed "specificity" which meant whether and to what degree an MEA must specify that trade measures may be used to attain the stated environmental objectives of the MEA. The value of this notion lay in being able to predict how governments would use trade measures. It was of interest irrespective of an Article XX or a different approach being favoured because a question to answer, in any case, was to what extent was the trade measure actually based on an MEA. An alternative to specificity could be that an MEA should contain at least some explicit understanding that trade measures may be used in its implementation. An MEA that set out environmental objectives, but did not specify how governments should attain them, would not appear to represent international agreement that trade measures may be used or which to use. In such a case, the MEA would serve as an excuse for the misuse of unilateral measures.

82. However, it was not possible to expect that an MEA be specific about which trade measures may be used; normally, an MEA would be implemented over a number of years and it would be difficult to determine initially which measures should be taken. Also, circumstances differed among signatories; an appropriate measure in one country might be less suitable in another, and the environmental point of departure might be different.

For example, when the Montreal Protocol was to be implemented, Sweden had already abolished the use of aerosols. Thus, in order to attain the same emission reduction goals as the other signatories, Sweden was obliged to take measures, for example against refrigerators, which were not called for in other countries.

83. Based on the circumstances, governments should decide which measures to employ to attain the environmental objective. He emphasized that this would not mean that governments would be free to implement the trade measures they would use to fulfil their environmental obligations under MEAs. Article XX criteria and conditions, as well as others that contracting parties would add as part of a collective interpretation, would still apply to individual measures.

84. A third topic, dispute settlement, was highly relevant to an analysis of the relationship between MEAs and the GATT and to the UNCED follow-up work. He considered that a better understanding of GATT rules, as they related to the environment, would reduce the potential for disputes in this area. To address the question of incompatibility between MEAs and the GATT, the Group needed to look at dispute settlement provisions in MEAs. These provisions were few and generally built on negotiation and arbitration. A common element was that it was left to parties to agree on the suitable forum for the resolution of the conflict. Parties to the Basel Convention sought the settlement of disputes (Article 20) through negotiation or other peaceful means of their choice. If this were not successful, the dispute would be submitted to the International Court of Justice or to arbitration under the conditions set out in the Convention while the parties continued to seek a negotiated resolution; detailed rules on non-compliance procedures and liability were to be developed later.

85. The CITES provisions (Article 18) were similar; an attempt would be made to resolve through negotiation and, if this failed, the Parties could submit the dispute, by mutual consent, to arbitration at the Permanent Court of Arbitration in the Hague. In the Montreal Protocol, non-judicial procedures for dispute settlement had been developed and an Implementation Committee established. There were no explicit provisions for dispute settlement in the Protocol itself. Instead the dispute settlement rules of the 1985 Vienna Convention applied (inter alia, Article 11), except as otherwise indicated. These rules prescribed resolution through negotiation then, that failing, joint demand of the good offices of a third party. Failing these, three possibilities existed: arbitration, submission to the International Court of Justice, or a conciliation commission. It was expected that potential conflicts would be settled in accordance with non-judicial procedures.

86. The question that arose was whether these MEAs needed to be addressed from the GATT perspective. He outlined two cases. First, if one party to the dispute were an MEA signatory and the other was not, but both were GATT contracting parties, GATT dispute settlement provisions also would apply to the conflict. Second, when a dispute was between two GATT contracting parties which were both parties of an MEA, then both signatories would be

bound by the MEA dispute settlement provisions, although this situation was unclear. If the conflict were brought to the GATT, one of the two parties to the conflict would, presumably, claim that its GATT rights had been nullified by the other party. The conflict could concern a trade measure which was not detailed in the MEA but which a signatory implemented according to its interpretation of a reasonable way to attain the MEA's objectives. The Party could interpret the conflict not to pertain to the implementation of the MEA provisions and, thus, legitimate to bring to the forum in which trade measures, in general, were evaluated.

87. An alternative in the second case could be if both parties to the MEA requested GATT to settle a dispute between them. Public international law did leave room for parties to agree jointly to a referral to the GATT. Both the interpretation of material provisions and the dispute settlement procedures must be based, in this case, on GATT disciplines; Article XXIII, the 1989 Decision and the normal terms of reference of GATT panels limited the authority of the panel to examine the dispute in light of the relevant GATT provisions. The qualifications of GATT panellists required that they have knowledge of the GATT and international trade; thus the competence of a GATT panel would not necessarily extend to interpreting MEA provisions, even with the possibility of convening experts. In this context, it was useful to recall GATT arbitration procedures. Another issue was how to protect third party GATT rights in a dispute settlement process which took place outside the GATT? He concluded that the situation was not so simple. Conflicts pertaining to trade measures which had not been specified in an MEA might be better addressed in the GATT. But, it was difficult to assess to what extent a GATT panel would analyze and interpret provisions of an MEA.

88. The representative of India added two relevant criteria for a MEA: first, an MEA should contain a geographical spread and second, it should comprise countries at different stages of development.

89. The representative of Austria focused on the types, effects and efficiency of trade provisions in MEAs. The underlying assumption was that trade and environment had to be mutually supportive: not only should the effects of environmental measures on trade be commensurate with the environmental objectives, but trade policies and rules should not inhibit the achievement of legitimate environmental objectives, in particular those based on an international consensus.

90. Important questions regarding types, possible effects and the efficiency of trade provisions contained in MEAs, and extraterritoriality and non-discrimination in the context of MEAs, had been discussed at great length. Different suggestions for solutions had been advanced already. Nevertheless his delegation considered that the Group was not yet at the stage of devising the solution to the questions raised; further analysis of the questions was needed.

91. He noted that the term "environment", which was part of the Group's "raison d'être" had, at least in the GATT, no generally agreed definition. His delegation, in a previous statement, had advanced some ideas on this subject and believed that it could be useful to have an exchange of views on it. His delegation believed that the Group needed a definition if it wanted to proceed further in the analysis of this agenda item, which should not focus on the environmental efficiency of certain concepts but on their compatibility with GATT.

92. One of the major questions with regard to any measures prescribed or allowed under MEAs was the question of necessity. It could be argued that if an MEA ranked trade measures in accordance with the nature of the substances and/or goods covered by the MEA, and if any such trade measure had been taken to avoid parties' circumvention of obligations under the MEA by, for example, transferring production to non-parties, the measure could be regarded as "necessary" for the proper functioning of the whole regime.

93. Such a concept could also help in analyzing the question of discrimination. If the entire concept was applied it could well be argued that discrimination would not take place in the case of trade measures applied under an MEA, as the same conditions only prevailed among countries which were parties to the MEA, and not with regard to non-parties.

94. Also, his delegation would like to explore the question of the nature of the MEA's subject matter (local, regional, or global), which related to the question of extraterritoriality. MEAs may be designed to deal with issues of regional/transboundary or global consequence. If such an agreement included trade measures to prevent damage to the environment everywhere, the argument of the extraterritorial application of domestic policies might be difficult to advance. In this context, the question of what might constitute an "international consensus", which was mentioned in UNCED, might be an interesting and important topic of analysis.

95. The representative of the European Communities welcomed the Group's renewed interest in agenda item one. He considered that the specific characteristics of regional agreements would benefit from further study in the Group since there might be ways to encourage the negotiation of regional agreements to deal with regional environmental problems; he would elaborate on this later. He found the identification of the sub-issues by the Nordic and Austrian delegations interesting and hoped that there would be further discussion of these issues at the next meeting.

96. The Chairman took note of the statements made. It was agreed that the Secretariat would prepare a note on the trade effects of labelling. Concerning the request for an analytical framework, it was agreed that delegations would advise and consult with the Secretariat on its formulation to be prepared for the next meeting.

97. The next meeting of the Group would be held on 5-7 July and would begin with agenda item three (focusing initially on labelling), item two, then one. A formal discussion of UNCED follow-up would be initiated on 6 July and continue on the morning of the 7th, if necessary. While the

Chairman considered it desirable to focus the UNCED debate, he acknowledged the difficulty in agreeing in advance on what the focus would be. Therefore, he suggested that this be a general debate covering the whole range of UNCED follow-up issues designated to the Group. He encouraged this first UNCED discussion to be constructive and cooperative and not to degenerate too much into an ideological debate. He reminded delegations that there had been an invitation for further thought on some of the issues that had been raised by the Nordic and Austrian delegations. In addition, he recalled his invitation to delegations to submit to the Secretariat, for its use, information reflecting their national experiences with packaging and labelling requirements.

98. The representative of Hong Kong suggested that during the July meeting, the Group could determine whether some flexibility would be necessary for the schedule of meetings in the fall, in view of the possibility that the Uruguay Round negotiations would pick up between September and December.

99. The Chairman suggested that, perhaps, it was appropriate, under the circumstances, to revise the schedule of meetings and to plan to meet in late September or early October with a second meeting near the November Council on UNCED. He invited delegations to reflect on this suggestion in order to discuss it at the next meeting.