PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

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SUB-COMMITTEE ON TRADE AND ENVIRONMENT

REPORT OF THE MEETING HELD ON 26-27 OCTOBER 1994

Note by the Secretariat

1. The Sub-Committee on Trade and Environment held its fourth meeting on 26-27 October 1994 under the chairmanship of Ambassador Luiz Felipe Lampreia of Brazil. The agenda for the meeting, contained in PC/AIR/35, was adopted.

2. The Chairman recalled that this meeting would focus on the first item of the work programme: "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements". He noted two documents that the Secretariat had prepared for this meeting: PC/SCTE/W/3 on recent developments regarding trade measures for environmental purposes taken pursuant to multilateral environmental agreements; and PC/SCTE/W/4 on dispute settlement provisions in multilateral environmental agreements (MEAs). He also noted that significant work had been carried out in the Group on Environmental Measures and International Trade on this subject. A summary of those discussions was in document L/7402. Other relevant documentation that had been prepared for that work was contained in TRE/W/1/Rev.1, TRE/W/5, TRE/W/8, TRE/W/16, TRE/W/17, TRE/W/18, TRE/W/19, TRE/W/21 and the factual note L/6896.

3. He said that the Sub-Committee would revert, as necessary, to the third item of the work programme and he also invited delegations to address any other issues that they wished to raise. In this regard, he noted a third new document that the Secretariat had prepared, contained in PC/SCTE/W/2, on arrangements for relations with non-governmental organizations in the United Nations, its related bodies and selected other inter-governmental organizations.

4. Under a point of order, the representatives of Morocco and Paraguay regretted the fact that the documentation for the meeting had not been made available in French and Spanish and requested the Chairman to ensure that documentation in all GATT working languages be provided well in advance of future meetings.

(a) Observer status of inter-governmental organizations

5. The Sub-Committee agreed to extend observer status to those inter-governmental organizations that had had observer status in the Group on Environmental Measures and International Trade. This included, apart from the United Nations (UN), the United Nations Conference on Trade and Development (UNCTAD), the World Bank and the International Monetary Fund (IMF) which already had observer status in the Sub-Committee, the United Nations Environment Program (UNEP), the Food and Agriculture Organization (FAO), the International Trade Centre (ITC), the United Nations Development Program (UNDP), the Organization for Economic Cooperation and Development (OECD), and the European Free Trade Agreement (EFTA). Any other organization which requested observer status would be taken up on a case-by-case basis.

6. The representative of India registered his delegation's understanding that the Sub-Committee's agreement regarding inter-governmental organizations, an element towards facilitating transparency, was taken in the context of Article V of the WTO. These organizations were admitted because they had a direct interest and were active in the subject. His delegation noted that it would like similar flexibility to be shown to some other inter-governmental organizations which his delegation knew would be interested in seeking observership to this body. He also noted that the Sub-Committee's present decision was without prejudice to the question of observers in the Committee on Trade and Environment, which would come into force after the WTO.

(b) Items one and three of the work programme

7. The representative of Japan noted that his government placed a great deal of importance on this item since it had wide-ranging implications. Full analysis was needed which meant that undue haste should be avoided. He presented some preliminary views to contribute to the work. The term "environment" covered a great variety of areas from protection of endangered species, dolphins and the ozone layer to abating air pollution, preserving scenery, traffic issues, etc. The Sub-Committee should carefully define what was meant by this term, especially if deviation from the GATT rules were to be allowed. Otherwise uncertainty within the carefully balanced network of rights and obligations and other problems would result. For the purpose of his intervention it was not necessary to define this term in a precise manner; he would use it in a broad sense.

8. As pointed out in earlier debates, the GATT/WTO was neutral towards the objective of environmental protection which did not mean an insensitivity to the need to protect the environment. If it was agreed that trade measures were not effective for that purpose, there would be no debate; however, since they were a powerful tool, trade measures could be used for that purpose. Given this, the fundamental issues would be (i) why a trade measure was necessary to achieve certain environmental objectives and were there not other equally effective means available for this purpose; (ii) what were the possible side-effects of using trade measures, and were they less serious than those of other measures; and (iii) who should pass judgement on these questions and in what manner? Maybe it was beyond the GATT/WTO's competence to judge whether a trade measure was most appropriate to achieve a certain environmental purpose, though it could point out the side-effects from the use of the measure.

9. It had been argued that solving an environmental problem through international cooperation would be useful and effective, particularly when the problem was transboundary, regional, arising from an area outside national jurisdiction, or global. Often international cooperation took the form of an MEA. The fact that only 18 out of 180 MEAs had trade provisions showed that trade measures were not always necessary to accomplish their objectives. There were some who highlighted the conflict between MEA's and the GATT/WTO, but under the existing GATT/WTO and MEA law, there were cases where no contradiction existed. It had been pointed out in the EMIT Group that there were a variety of trade measures available for environmental protection, if they were used in a manner consistent with Articles I, II, III, XI, XIII, etc. Even if they were not consistent with these Articles, a number of such measures could be justified under Article XX, which meant, in a way, that they would still be GATT-consistent. In cases where there was no alternative but to take GATT/WTO-inconsistent measures, there was still an option to seek a waiver for that measure. From these preliminary arguments, it could be stated that it would not always be necessary to generally exempt trade measures taken under MEAs from the rules and disciplines of the GATT/WTO.

10. On the issue of "non-parties", his delegation was considering whether there were cases where discriminatory trade measures against non-parties were necessary in MEAs, and whether the use of such measures was effective to accomplish the environmental objectives. Views had been expressed in the EMIT Group that discriminatory measures were not always effective, and that there were cases where such measures were even counter-productive to environmental protection. Also, if an MEA had broad enough participation, non-discriminatory measures, rather than discriminatory ones, would effectively serve environmental purposes. He noted that his delegation concurred with the findings contained in the panel report on United States - Restrictions on Imports of Tuna.

11. To conclude, he provided some points on organizing the furture work of the Sub-Committee. The Marrakesh Decision provided a number of issues to be dealt with. Each issue could be divided into sub-issues, while noting that there were some overlaps between issues. Given the complexity of each and the time available, it was wise not to tackle all the issues at once. Substantive progress could be made by becoming familiar with each issue by tackling one per formal session. After completing a generic but substantive overview, the issues on which to focus in order to efficiently push the work forward could be found.

12. The representative of Egypt considered that this issue should constitute a major part of the Sub-Committee's future work. He attempted to set some criteria to help distinguish between MEAs relevant to the Sub-Committee's work. The first criteria was the domestic versus the international impact of environmental problems. Whereas the environmental standards could properly be set at the national level for impacts confined to national boundaries, the same did not apply when the impact was global. In cases where there were regional or national problems and MEAs were designed to address these, costs arising from trade impacts would be borne globally whereas the benefits would accrue locally or regionally. This was why trade measures taken under such agreements should not be legitimized under the GATT/WTO. In the case of issues such as greenhouse gases, ozone depleting substances or the conservation of threatened species, international agreements were essential. These mandated specific actions that frequently included trade measures to address environmental problems, which should be examined closly.

13. The second criteria related to the scope of the agreement. The "universality" of MEAs should be emphasized. MEAs under the United Nations should be distinguished from regional or even multilateral environmental agreements that could have third party trade effects which could then pose serious difficulties. Such environmental agreements should be sensitive to and accommodate GATT principles. It was difficult to argue that it should be GATT that accommodated such agreements wherever their provisions intersected or overlapped, as no country would permit its trade advantages negotiated in the GATT to be eroded by the provisions of an MEA to which it was not a party.

14. The reasons for which a country may decide not to join an environmental agreement were also relevant, i.e. because of controversial scientific evidence, differences in national risk assessment, differences in the capability to adhere to certain environmental standards and different absorption capacities of its environment. Therefore, merely being a non-party to an MEA should not make a country more vulnerable for punitive action. The fact that members of an MEA may face trade declines and be forced to apply measures faster than stipulated in the MEA may also be a significant deterrent to joining the MEA, particularly for developing countries.

15. International cooperation to tackle environmental problems should include technology transfer, financial and technical assistance rather than unilateral measures and trade sanctions. These were necessary incentives to attract universal participation in MEAs and, hence make it

desirable to bring them into conformity with GATT rules and principles. Thus, the Sub-Committee's task should be confined to studying the trade provisions of those qualified agreements, which were open to all countries and embraced the widest possible participation of countries at all stages of development and with the largest geographical spread.

16. The third criteria was effectiveness. It would be important to evaluate the extent to which an MEA necessitated resort to trade provisions to achieve its environmental objectives and how successful it had been in this respect, before giving it a blank check regarding its compatibility with GATT rules and principles. It should always be kept in mind that trade measures for environmental purposes constituted only a second best solution. The concept of effectiveness, however, would require further work and elaboration on the part of the Sub-Committee. In the EMIT Group, there had been general agreement that environmental objectives and trade policy objectives need not conflict and that the GATT system was supportive of better environmental protection at both the national and international levels, as it allowed for an extensive variety of trade-related environmental measures, including exceptions for those that were inconsistent with basic GATT rules. The scope of exceptions to GATT provisions available under Article XX would have to be addressed in some detail. The conditions contained in Article XX reflected the checks and balances in the GATT system that were intended to prevent the abuse of trade measures for environmental purposes which could prove detrimental to both international trade as well as environmental protection.

17. A number of proposals had already been made to clarify the relationship between the GATT and trade measures taken pursuant to MEAs. Suffice it to say that his delegation saw tremendous difficulties involved in any attempt to reinterpret or clarify the application of the provisions of Article XX; the basic principles which should govern the use of exceptions should not be put in doubt. Trade measures taken for environmental purposes even under the aegis of MEAs should be non-discriminatory, not constitute a disguised restriction on trade, and be least trade restrictive. Accordingly, it was beyond doubt that Article XX provided for exceptions to protect the environment, but it did not warrant departures from established GATT principles. In so far as his delegation was concerned, preservation of the status quo should continue to be the option. This did not contradict the fact that if there were conflicts the waiver procedure could provide a provisional way out for MEAs that had third party trade effects while necessarily allowing for adequate compensation as provided for in Article XXVIII.

18. The representative of Canada sought to move the analysis forward by synthesizing some of the discussions in the Sub-Committee and the EMIT Group on several elements in the work programme. He returned to the discussion on eco-taxes from the September meeting of the Sub-Committee. As several delegations noted, many governments were exploring the increased use of economic instruments as a tool to address environmental problems. Environmental charges, or eco-taxes broadly speaking, may be a key component of the package of economic instruments. Environmental charges, as opposed to other measures like regulations were more flexible and therefore potentially more cost-effective, and their costs were likely more visible. At the last meeting a number of delegations focused on the effectiveness and necessity of applying border tax adjustments to imports pursuant to a domestic eco-tax programme. This discussion was not limited to only the types of border tax adjustments that may be consistent with the current trade rules. It also took account of proposals for the application to imported products of eco-taxes based on non-product-related PPM criteria, something that would go beyond the GATT rules.

19. The Sub-Committee benefitted from excellent analytical contributions from a number of delegations, in particular New Zealand, Brazil, Argentina and Mexico. He considered that the discussion was moving along two basic lines which were captured best in the analysis provided by

New Zealand. First, in the case of national measures aimed at addressing the *local* environmental impacts of products at the *consumption or disposal* stage, the effectiveness of an eco-tax would be enhanced if it were applied to all products being consumed and disposed of in the domestic market. It would therefore be reasonable to apply the tax to imports and not apply it to exports. It was noted, of course, that the GATT obligations relating to transparency and MFN and national treatment would have to be met.

20. In the case of measures aimed at *local* environmental impacts at the *production stage*, however, the effectiveness of applying domestic non-product-related PPM standards to imports and of exempting exports was not clear. In fact, the second main theme was that there would not appear to be a need to impose such PPM requirements on imports in order to achieve the domestic environmental objective. He noted that another dimension that had emerged in the discussion was what approach might be appropriate in cases where the environmental impacts of production, consumption or disposal were transboundary or global. This led to the MEA issue on the agenda of this meeting.

21. In pursuing the discussion of applying national PPM standards to imports *via* border tax adjustments, account of the motivation should be taken into account. Two of the main motivations identified were: (1) to encourage a change in environmental behaviour by foreign producers; and (2) to respond to concerns of domestic producers, who had incurred environmental costs as a result of government measures, that they were not disadvantaged vis-à-vis foreign producers. Many viewed the first rationale as a direct expression of the kind of extraterritorial imposition of domestic standards that had been clearly rejected in discussions here and previously in Principle 11 of the Rio Declaration. The debate had therefore tended to come down to competitiveness concerns. It had been noted in this context that environmental policy-makers were sometimes faced with a dilemma in designing a measure to address an environmental problem. The most effective measure from the domestic environmental point of view may be one that focused only on domestic production processes. However, arguments made by domestic industry interests about the competitive disadvantage they would face if the measure were implemented may make its domestic political acceptance very difficult.

22. His delegation would not question the difficulty of gaining acceptance of any environmental measure that involved greater costs. However, there was always a tendency for industry to exaggerate the loss of competitiveness that might result from new environmental measures. Even in sectors where the competitiveness argument might have some validity, his delegation had not been convinced that it was an appropriate reason for extending domestic PPM standards to imports. In terms of addressing the competitiveness argument where it was overstated, there were a number of relevant points. First, in most cases, it was not clear that higher environmental standards accounted for a sufficiently significant element of the cost of production that they alone would have a critical impact on competitiveness. Second, in many areas, conforming to higher standards could actually improve the appeal of products and therefore enhance their competitiveness. Third, there were many other elements in the cost of production equation that accounted for much greater differences in competitiveness, including ones that also reflected national values and choices.

23. The question then arose, why should environmental costs be adjusted at the border when, for example, more significant social programme costs on industry were not? In some countries, like Canada, there were health care, unemployment insurance, health and safety, and other programmes that imposed significant costs on Canadian industry. If everything in the cost equation that varied from country-to-country was adjusted, chaos would result.

24. Even if border tax adjustment schemes on imports did not adjust for the full costs incurred by domestic producers, there would also be the practical problem of developing an objective basis for calculating a border tax. Indeed, it was probably not administratively feasible in most cases to make border tax adjustments in a way that fairly reflected differences in the costs of production standards from one country to the next. For example, what about a situation in which a country imposed, *via* a tax, its own domestic non-product-related PPM standards on imports from countries that had standards that were different, but equally stringent in their own way? If exports from these countries failed to conform to the particular standards of the importing country and therefore faced a border tax adjustment, they would be paying a double price for environmental production, once at home and again in the foreign market. This could potentially have the effect of undermining support for appropriate domestic standards in the exporting country if the cost of environmental protection in a foreign country also had to be absorbed. It had to be recognized that the competitiveness argument worked both ways and, indeed, became a two edged sword.

25. But what about where there may in fact be a legitimate concern about competitiveness? He suggested that in cases where it could be demonstrated that the competitive position of a domestic industry could in fact be significantly affected by higher production standards, then other alternatives should be considered. For example, in some cases it may be a transboundary or global environmental problem that was at issue, in which case efforts would need to be made to find common approaches on a multilateral basis. In cases where the environmental problem was entirely local, the possibility of adjustment assistance could be considered. The WTO Agreement on Subsidies and Countervailing Measures would allow financial assistance to firms that had to meet new environmental requirements imposed by governments.

26. It was useful to examine if some points made about eco-taxes applied to other types of environmental measures covered in the work programme, including eco-labelling, requirements for packaging, recycling and recycled content and disposal programmes, and if common themes were emerging. Of course, these measures were different from one another and, indeed, may be treated differently vis-a-vis the existing trade rules or with respect to any new disciplines that may be considered in the work. For example, as his delegation noted in September, some of the measures that had been examined would be applied at the border pursuant to government regulation and thus have an immediate impact on market access. Others would apply, in either a mandatory or voluntary fashion, after importation in a way that could alter the terms of competition within that market and thus could also have a real impact on effective market access.

27. Notwithstanding the differences, many of the underlying issues that had been identified in the discussions were common to all these types of measures. Once again referring to the framework set out by New Zealand, with respect to measures aimed at addressing *consumption and disposal externalities*, it may be necessary and effective to apply requirements to both domestic production and imports. Key considerations in these circumstances would be ensuring programmes were developed transparently to minimize the possibility that they could be captured by protectionist interests, and ensuring that they provided effective most favoured nation and national treatment.

28. With respect to national measures or criteria aimed at addressing *local production externalities*, the questions were more complicated although the answers may not be. There was general agreement, and Canada strongly supported the idea, that the harmonization of PPM requirements was not environmentally desirable since absorptive capacities differed dramatically from place to place. This was recognized in the Rio Declaration, Principle 11. Therefore, in many instances the standards of the importing country may not be at all environmentally

appropriate in the exporting country and, as had been seen in the example of recycled content requirements, could even lead to environmental damage in the exporting country.

29. His analysis therefore led to questioning any attempt to impose domestic non-product related PPM requirements to imported goods. This would continue to be a central theme in the discussions and one that was particularly challenging with respect to voluntary measures, some of which were outside of current GATT disciplines. Finally, regarding PPMs in the context of MEAs, he recalled that his delegation had suggested that one type of trade measure that might be considered for inclusion in an MEA was a restriction on imported products based on non-product-related PPMs. Of course, in many cases trade measures would not be required to address environmental problems and were not a "first best" solution. Nevertheless, this type of measure might be considered. He suggested that many of the points just reviewed were relevant to MEAs.

30. Using New Zealand's framework, an analysis of the necessity and effectiveness of applying to imports measures aimed at addressing *production externalities* where the environmental effects were *transboundary or global* might lead to a different conclusion than that related to measures aimed at *local* externalities. As New Zealand had pointed out, in the case of transboundary or global environmental impacts, the effectiveness of measures would depend on all, or almost all, of the countries concerned applying the same requirements relating to the production externality. There could be little doubt about the validity of this observation or the fact that it pointed clearly in the direction of pursuing such measures multilaterally. This could be through MEAs, in which case his delegation would pursue the possibility of accommodating in the trade rules the use of such PPM-based measures to deal with transboundary or global problems in the work on MEAs.

31. Another form of international cooperation was the development of what the ISO had called "environmental management standards". These would be an agreed means of measuring the sustainability of various production practices. For certain sectors this may be a practical and desirable approach and could be useful, in particular, where there was a call for the use of more "environmentally friendly" PPMs. These voluntary standards, accompanied by an agreed and verifiable certification system would provide consumers with the information needed to make environmentally sound purchasing decisions. A prime example of a sector in which this could be a promising approach was the forestry sector. One advantage of this approach was that the development of international environmental management standards involved primarily private sector business and environmental interests directly through organizations like the ISO.

32. In closing, his delegation believed that analysis was bringing the Sub-Committee closer to three important conclusions that would help define the direction of future work. First, the imposition of non-product-related PPM requirements to imports would *not* appear to be effective or necessary to accomplish a domestic environmental objective. Second, in cases where the environmental problem was transboundary or global, solutions had to be found through multilateral cooperation. MEAs that contained standards, including PPM-based measures, that reflected broadly-based international agreement should be considered for accommodation under the trade rules in the context of the Sub-Committee's work on MEAs. Third it was essential that any programme be developed in a fully transparent fashion to minimize the possibility of capture by protectionist forces.

33. The representative of Sweden, on behalf of the Nordic countries, noted that pressing global and regional environmental problems had resulted in the emergence of several MEAs during recent years. Even though MEAs normally related to actions within countries, some

provided for trade measures as a means of reaching their objectives. As multilateral cooperation was the most effective way of solving global and regional environmental problems, the negotiation of MEAs, in open and transparent processes, should be promoted and facilitated. Sometimes trade measures were necessary ingredients for MEAs to fulfil their purposes. Efficient and well functioning MEAs were also a safeguard against unilateral trade measures for environmental reasons. Unilateralism in this field should be avoided, as it contained risks for arbitrary discrimination and hidden protectionism; the latter would not only be negative from a trade point of view, but also from an environmental point of view. Unjustified environmental arguments, used for protectionist measures, would threaten the credibility of the environmental work. It was thus likely that environmental policymakers would be equally negative towards misuse of environmental arguments as would trade policymakers.

34. The issue of MEAs and GATT rules had already been the focus of much analysis, which could be used as basis for future work. Continuing this work with the aim of reaching substantial results was a high priority in order to improve the stability and predictability of the trading system. Her delegation perceived the goals of this process to be to mutually reinforce the trade and environmental systems and to avoid trade conflicts. There was a need for development of GATT rules to take into account the fact that existing MEAs contained trade measures (which might be necessary in future MEAs) and thus, in a suitable way, to make sure there was room for those kinds of measures within the GATT system. This must be formed in such a way that it would provide guidance to future negotiators of MEAs and at the same time would protect the trading system against misuse by unfounded environmental arguments.

35. Her delegation believed that this combination was possible to achieve. Legal accommodation of MEAs in the trading rules should be made in such a way that it would provide for predictability and stability and would provide the negotiators of future MEAs with some guidance as to what criteria GATT would use if a dispute occurred. Such clear and predictable rules would reduce the risk for future trade conflicts and thereby also serve the purposes of the MEAs as such. In particular, the legal accommodation would have to solve the treatment of countries which were not signatories of the MEAs. An important issue was to establish *criteria for what should count as an MEA eligible for exception from GATT/WTO*. Relevant parameters could be the level of global or regional representation, extent of participation of countries concerned, whether the MEA was open for accession by all concerned countries, if it was negotiated under a multilateral forum such as the United Nations system, whether the environmental goal in question was based on sound scientific evidence, etc.

36. Another issues was how to *solve a trade conflict that had arisen due to measures taken in pursuance of an MEA*. The point of departure was that such conflicts should be avoided. In case a conflict arose, however, it would best be settled within an MEA if both parties were signatories, and dispute settlement was provided for in the MEA. However, in case only one party was a signatory to the relevant MEA, the issue would be different. Provided that the trade measure was relevant for the environmental problem, this case would involve the balancing of the interests of free trade and of protecting the global or regional environment. Such a conflict might have to be solved within the GATT system. Therefore the multilateral trading system must be able to deal with this kind of conflict. The measures taken by one country against another would have to be judged on the basis of criteria such as least trade restrictiveness, non-discrimination etc.

37. In her delegation's opinion, an MEA that had fulfilled the internationally agreed criteria of the type proposed above, should have a strong position. If a global or regional environmental issue was so pressing that an MEA had been judged necessary, this would indicate the importance of the issue in relation to free trade. In summary, her delegation believed that the issue of

accommodating MEAs in the GATT system was of high priority, and that due actions should be taken to accomplish this goal.

38. The representative of Malaysia, on behalf of the ASEAN countries, noted that while much discussion on this subject had taken place in the EMIT Group, it had been confined to trade measures pursuant to MEAs. Examination of the item today would necessarily require discussion of other trade measures adopted independent of MEAs. His delegation hoped that the Sub-Committee would give this aspect also due attention.

39. He considered it interesting that of the 180 international environmental treaties and agreements only 18 contained trade provisions. While it may be tempting to conclude that environmental objectives could be achieved without much resort to trade measures, the issue still merited serious consideration especially in view of current MEAs being negotiated or those to be negotiated in the future and their potential for using trade measures. He noted that it was becoming fashionable and perhaps expedient to use trade measures to achieve non-trade objectives. However, the above figures indicated that there may be sufficient means other than trade measures to address environmental problems. His delegation, therefore, considered that there was a need to examine the necessity of certain trade measures taken to achieve the environmental goal.

40. GATT was an institution that regulated trade and his delegation attached great importance to the need to ensure that all measures were permissible and in conformity with GATT provisions. There should not be any deviation from this approach that could stifle trade. Furthermore, the integrity of the multilateral trading system had to be preserved and the benefits that had been derived from the system must continue to flow. Therefore it was imperative that compatibility with multilateral trading rules and disciplines be addressed throughout the process of selecting measures for environmental purposes of which trade measures was one of several options, whether within a national or international context.

41. In the EMIT Group, approaches had been forwarded to deal with trade provisions taken under MEAs such as the waiver approach and a collective interpretation on applying Article XX. There may be other approaches proposed in the course of discussions. His delegation was still examining the relationship between GATT provisions and trade measures under MEAs and it was not in a position to pronounce on this issue. With regard to future MEAs or those that were being negotiated, his delegation firmly believed that if trade measures were one of many alternatives in addressing environmental problems, they should be the last recourse and have the least adverse effect on trade. Since most of the countries that participated in negotiations of MEAs were or would be members of the GATT/WTO, it should be assumed that they take into account their GATT obligations so as to avoid future inconsistencies.

42. The representative of Venezuela considered that this item required the Sub-Committee to examine the ways in which the rules of the future WTO could be effectively harmonized with MEAs. As a general point, his delegation considered it important to stress that the relationship between the rules of the WTO and of MEAs should take into account the fact that, in the context of the multilateral trading system, despite the legal equality of States and the provisions and principles concerning special and differential treatment, developing countries were at a disadvantage. This disadvantage persisted despite the increased interdependence of all the participants in the system. From the environmental standpoint, this situation would gradually be corrected to the extent that developing countries were able, through specific technology and resource transfer mechanisms, to adopt environmentally sound production methods. Until this came about in the appropriate forums, whatever solution agreed upon multilaterally should include

specific provisions to maintain a balance between the capabilities of the developing and the developed countries.

43. It was not the function of the WTO to serve as a mechanism for putting pressure on a country to sign MEAs. On the contrary, it was more appropriate that the so-called "environmental window" be designed so as to protect the interests of the members of the WTO from the possibility of environmental trade measures being used in ways incompatible with the GATT. In this respect, the solution adopted for incorporating environmental objectives should be based on clearly defined principles and be clearly delimited in scope. His delegation considered that trade measures could be permitted if they were provided for in MEAs, but only between signatories. As for the MEAs that did not contain trade provisions, it should be pointed out that this situation stemmed from a lack of agreement in those forums regarding their appropriateness or their lack of practical usefulness. Before including these measures in the range of measures permissible under the WTO, it would be better for these agreements, through scientific working parties, to determine scientific parameters under which trade measures could be incorporated. It would be risky for the WTO to permit trade measures on which there was no scientific agreement in the corresponding environmental forums. His delegation would intervene at a later stage to refer to more specific aspects of the question.

44. The representative of Switzerland considered that MEAs covered very different types of agreements related to environmental questions. A basic criterion to define the types was the scope of the environmental problem with which the agreement dealt, i.e. global, regional or local. Not many MEAs existed that addressed truly global commons, i.e. environmental problems with the potential to directly affect all States. The Climate Change Convention and the Montreal Protocol on ozone-depleting substances were the clearest examples. A number of other agreements were multilateral in nature, but their direct benefit could be seen as more locally confined although there was a large global interest at stake; the Biodiversity Convention, the Basle Convention and CITES may be put in this category. A third group of multilateral agreements addressed regional problems of only limited impact, such as the Geneva Convention on Long-Range Transboundary Air Pollution.

45. The question was whether all these agreements posed the same problems with regard to possible trade measures and extraterritoriality in addressing the free rider problem posed by non-parties. Her delegation considered that there were differences which needed to be worked out more precisely. Obvious differences were the number of contracting parties to a convention; the trade measures that were foreseen by the agreement (as contained in document TRE/W/1/Rev.1) and their impacts on the trading system; the impacts of these measures on non-parties and the effects such measures may have particularly on developing countries. At this point of the discussion her delegation considered it important to address this latter issue which had great consequences for global MEAs, the aim of which could not be achieved without the full participation of developing countries.

46. Possible difficulties for developing countries to comply with provisions of global MEAs could and should, if possible, be mitigated by compensatory measures and mechanisms. For example, the Climate Change Convention clearly stated that parties should protect the climate on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. The Convention acknowledged that developing countries would need to increase their energy consumption for economic development while the developed countries had committed themselves to take immediate action. However, it must be noted that the Climate Change Convention did not specify any target for stabilization or reduction of green house gas emissions. Commitments under the Convention related only to the need for developing and

updating national green house gas inventories and for reporting on programmes containing measures to mitigate emissions. Only developed country parties were required to report within six months of the entry into force detailed information on their policies and measures to mitigate emissions. In addition, developed country parties had committed themselves to provide new and additional financial resources to meet the agreed full cost incurred by developing country parties in complying with their obligations under the Convention.

47. What was clear from this example was that the Climate Change Convention, as well as other MEAs such as the Montreal Protocol and the Biodiversity Convention, fully acknowledged the particular needs and differentiated responsibilities of developing countries. It was within these conventions that transition periods for developing countries and compensatory financing mechanisms could be further developed. She underlined that any trade measure in future MEAs or in new Protocols to existing MEAs would automatically have to take account of transition periods granted to developing countries for reaching certain objectives. It was therefore important to define the relation between the stage of development of a country and its capacity to improve its environmental standards. This point was particularly important regarding the issues raised by PPMs. The example of the Montreal Protocol mentioned in PC/SCTE/W/3 illustrated PPM-based measures taken pursuant to an MEA. Parties to the Montreal Protocol had decided in November 1993 that it was not technically feasible to impose a ban or restriction on the import of products produced with, but not containing, controlled substances listed in Annex A of the Protocol. The Report of the Technology and Economic Assessment Panel stated that it was not technically or economically feasible to determine whether controlled substances were used because little, if any, residue of controlled substances would be present or detectable in the products concerned.

48. In conclusion, she recalled that the mandate of the Sub-Committee was to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system were required, compatible with an open, equitable and non-discriminatory trading system, and, in particular, the need for rules to enhance positive interaction between trade and environmental measures for the promotion of sustainable development, with special consideration to the needs of developing countries. This called for coherent development of both the international trading system and international environmental agreements. This meant that coherence between MEA-based rules and measures and the rules of the WTO needed to be fostered. This required intensified dialogue between trade and environment experts at all levels.

49. The representative of Austria recalled that his delegation had submitted an analytical paper on the relationship between GATT and MEAs to the EMIT Group (TRE/W/19) which it considered to be a working paper for this Sub-Committee. He wished to build on the issues raised in TRE/W/19 in order to stimulate and possibly advance the discussion. With regard to *existing MEAs*, to his delegation's knowledge not one MEA which allowed for trade measures had been challenged in GATT. Consequently, the issue of negotiating either a specific/individual exception or granting individual waivers for existing MEAs appeared to be rather theoretical. Of course, disputes could arise at any time because of differing views on the application of trade measures based on MEAs which could be settled *either* according to the specific dispute settlement procedure outlined in the MEA *or*, for WTO members, according to the WTO dispute settlement procedure if they considered their WTO rights infringed.

50. Furthermore, *an understanding* by WTO members to use the measure which did not create unnecessary barriers to trade, and to apply such a measure in the least trade distortive manner, could be helpful from the point of view of dispute prevention. In addition to such an understanding concerning the application of trade measures, *a trumping clause* covering existing,

unchallenged MEAs which could, for instance, be modelled after the one used in the NAFTA would be worth considering for the predictability and security of the multilateral trading system. The *burden of proof* could and should be shifted so that trade measures based on the MEAs enumerated in the trumping clause were presumed not to create unnecessary barriers to trade, to be least trade distortive, or to be least inconsistent with GATT/WTO rules.

51. He added that for *future MEAs* an approach based on the following considerations could be useful. Principles, such as non-discrimination, least trade restrictiveness, least trade distortiveness, efficiency, proportionality, transparency, sound scientific evidence and necessity should be taken into account in developing criteria. These criteria could serve as yardsticks to determine the legitimate use of trade measures in future MEAs. Such a procedure would allow evaluation of MEAs, thus preventing disputes. Ultimately this could lead to development of guidelines, which should take into account work undertaken in other international fora.

52. In order to *prevent disputes*, members of the WTO may, through the Council, ask for a non-binding legal opinion of the legal service of the WTO or the newly created Appellate Body whether the trade measures envisaged in an MEA could be regarded as compatible with WTO rules. If parties to an MEA decided *not* to accept this non-binding legal opinion, the members of the WTO among the parties should be encouraged: (i) to demonstrate to the Council *why* the envisaged trade measures had to be included in the future MEA in order to fulfil its environmental goal effectively; or (ii) to *apply* for a special environmental waiver, if the other members did not follow their reasoning. If trade measures were targeted specifically at non-parties to an MEA in order to assure the realization of the environmental goal, unanimity of the WTO members could be required. Given the expected near universality of the WTO, the outlined procedure should protect non-parties from protectionist abuse of such measures. In addition, the International Court of Justice (ICJ) could be given a role as an authority above both trade and environmental interests.

53. Trade measures not based on MEAs and producing extraterritorial effects may pose a legal problem. Governments were inclined to resort to such measures if there was a strong demand by their citizens to try to achieve an environmental goal for environmental, social or moral reasons. Some of the following reasons may induce governments to take on the role of a catalyst: (i) the underlying environmental goal or preference was not universally or widely shared; (ii) there was no agreement on the evaluation of the scientific evidence produced to support the argument; or (iii) the negotiating process to conclude an MEA was perceived to be slow or obstructed by some countries. It should be noted that the chances of succeeding in that role were directly proportional to the political and economic power of a country.

54. His delegation believed that new efforts should be undertaken in the Sub-Committee to devise ways and means on how to keep trade measures not based on MEAs under the WTO umbrella well before disputes were to arise. Dispute prevention should always prevail over dispute settlement. He thanked the Secretariat for its document on dispute settlement and noted that the non-compliance procedures contained in the Montreal Protocol should not figure under the heading of "conciliation" but rather should be considered as an instrument of dispute prevention.

55. The representative of Korea considered that since this item touched upon the fundamental nature of the existing GATT/WTO framework and the delicate balance between rights and obligations under the GATT/WTO, it had been found preferable by many in the EMIT Group not to prejudge the new approaches or options suggested. His delegation hoped that this approach would prevail in future discussions. He drew attention to some points that were, in his delegation's view, largely shared by other delegations at previous discussions. Trade measures were not the best means and should be the last resort for achieving the environmental objectives of

MEAs. Trade liberalization would contribute to the objective of sustainable development by facilitating the optimal use of world resources. Second, out of approximately 180 MEAs only a handful contained trade provisions, and they could generally be operated in accordance with existing GATT/WTO provisions. Few conflicts between these agreements had caused difficulties. Third, to cope with trade measures outside of the GATT/WTO framework, the existing GATT/WTO provisions should be taken into account, together with the important concepts or principles that were being established by international consensus and/or were emerging from GATT practice. Among others, these included the principles of least-trade restrictive measures, avoidance of arbitrary measures, necessity, proportionality, avoidance of unilateral action, and non-discrimination. Most were provided for in the Rio Declaration and Agenda 21, and some were emerging in the GATT system.

56. He recalled that a number of the merits and demerits of *ex-ante* and *ex-post* approaches had been expressed in the earlier discussions in an effort to determine the relationship between GATT/WTO provisions and MEAs. His delegation considered that a case-by-case approach, possibly complemented by some elements of an *ex-ante* approach, deserved attention, particularly with respect to the following points:

(a) conflicts between trade provisions in MEAs and the GATT/WTO Agreement were not likely to occur frequently. Therefore, providing leeway for the trade provisions in MEAs on an *ex-ante* basis was not necessary or efficient. A case-by-case solution would provide the best means of solving potential problems, and would better prevent possible abuse of trade measures for environmental purposes;

(b) states most likely to be influenced by measures in MEAs were probably non-party states from developing countries. The reason why they were outside the MEAs was not directly related to trade, so trade measures may not be the best solution. The most effective way to induce those countries to join was to provide positive incentives such as financial assistance and the transfer of technology, rather than to utilize trade restrictions;

(c) in some cases, it was rare that developed countries were non-parties to MEAs, in other cases, certain developed countries had chosen to remain outside MEAs. They were not likely to be seriously affected by trade measures in MEAs. Developing country parties may be more vulnerable to trade restrictions than non-parties in developed countries.

57. His delegation believed that the various problems with *ex-ante* approaches could be mitigated by introducing some of the important elements found in these approaches in a combined approach which would enhance the predictability of trade measures in MEAs and help to avoid the use of unilateral measures. It would also result in the provision of guidelines for *ex-post* approaches. However, *ex-ante* approaches should be designed in a very flexible and generic manner and should include principles that were emerging in GATT practice and concepts that were established in other fora by international consensus.

58. The representative of Australia noted that this item encompassed a range of issues that had received significant public attention and deliberations on it could be expected to attract great interest. First, the item included consideration of the relationship between the provisions of the multilateral trading system and the use of trade provisions in MEAs, an issue that had been subject to detailed discussions in the EMIT Group. This first aspect might concern the

relationship betw[illegible] international cooperation in the fields of trade and environment and the role of the provisio[illegible] the multilateral trading system in this cooperation. Second, the item included consideration of the relationship between the provisions of the multilateral trading system and actions taken pursuant to MEAs by individual countries. It may be useful to distinguish this issue from the question of the use of trade provisions in MEAs given that these provisions may be discretionary rather than mandatory and may provide significant scope for interpretation by individual countries regarding their implementation. This second aspect might be said to concern the issue of how a country managed implementation of international obligations in the fields of trade and environment and how this related to the provisions of the multilateral trading system.

59. Third, this item concerned the use of trade measures for environmental purposes by individual countries in pursuit of objectives they determined individually rather than in the context of provisions contained in an MEA. This third aspect may be said to concern the relationship between environmental and trade policy in individual countries, and the disciplines set by the multilateral trade rules on the implementation of trade or trade-related measures used to further environmental objectives. On this third aspect, in particular, much of the work may primarily have an educative value, in helping to improve understanding of the multilateral trade rules and responding to concerns about what these rules meant for countries' regulation of their internal affairs. Considerable freedom would appear to be provided by the multilateral trade rules for pursuing environmental concerns within a country's own jurisdiction, including through the use of trade and trade-related measures. At the same time the Sub-Committee's terms of reference required it to carefully examine the rules in the light of the need for them to enhance positive interaction between trade and environmental measures while supporting the open, equitable and non-discriminatory nature of the multilateral trading system.

60. On the use of trade provisions in MEAs, the work of the EMIT Group provided a good basis for deliberations. However, there was now a new context to the discussion, both in regard to the Sub-Committee's terms of refere[illegible]ce and the enhanced multilateral trading framework provided by the Uruguay Round Agreements. For example, these Agreements could mean that a wider range of MEAs was now relevant to the provisions of the multilateral trading system, or that the relationship was now broader and more extensive. As a forum for international cooperation on trade issues, it seemed natural that the WTO should endorse the need for cooperative, multilateral approaches to dealing with environmental problems, particularly those of a transborder or global nature. However, the international community, at UNCED, pointed to the importance of international cooperation for the two fields to be "mutually supportive". This objective reflected an awareness of the need to address issues of poverty and development at the same time as responding to environmental problems if the broad objectives of sustainable development were to be advanced.

61. The challenge for the international community was how to ensure that the "mutually supportive" ideal was put into practice, in other words that there was a genuine partnership between international cooperation in the trade and environment areas. The specific challenge for the Sub-Committee was the contribution which the provisions of the multilateral trading system could appropriately play in this process. The potential for conflicts of law between a country's obligations under the GATT and trade measures it may take pursuant to an MEA was a subject which had generated considerable interest. In responding to this concern the Sub-Committee could take a more narrow view of its work. Attention could focus on responding to perceptions that uncertainty about the scope for such conflicts of law may hinder international cooperation to deal with environmental problems. The Sub-Committee could focus on finding an efficient and effective means of clarifying the relationship between the provisions of the multilateral trading system and the use of trade measures in MEAs with a view to limiting the scope for conflicts of

law while maintaining the integrity of the fundamental principles of the multilateral trading system.

62. He cautioned that the importance and complexity of the issues involved should not be underestimated. There were certain uses of trade measures which could pose fundamental questions for the basic principles of the multilateral trading system, whether these trade measures were adopted unilaterally or in the context of an MEA. For example, using trade measures to address competitiveness concerns could raise major issues, such as in relation to the contribution of the provisions of the multilateral trading system in furthering development objectives and encouraging greater equity in the conduct of international economic relations. The Marrakesh Decision provided the basis for a wider view of the Sub-Committee's work and for examination of whether there was a need for the provisions of the multilateral trading system to play a more active role in ensuring that international cooperation in the areas of trade and environment were mutually supportive in favour of sustainable development.

63. It may be appropriate to explore whether there was a role for the provisions of the multilateral trading system to express policy views with regard to the use of trade measures in MEAs. Provisions expressing such policy views could provide guidance to governments in the negotiation of MEAs and assist them in ensuring that any trade provisions included in such agreements were tested against the "mutually supportive" concept agreed at UNCED. In addition, such provisions could provide guidance to individual governments in their choice of policy instruments for national implementation of obligations under MEAs, especially when these agreements provided member countries with significant discretion in the means used to meet their obligations. Any such provisions would need to be carefully circumscribed so that they focused on those specific issues where a contribution to furthering the mutually supportive objective could be made within the competence of the multilateral trading system. His delegation did not intend to express any preference for a narrower or broader perspective regarding the objectives under this item. However, it was important that the Sub-Committee appreciate that this item was more than just a continuation of the work of the EMIT Group and that it carefully analyze and reflect on the full range of issues it raised.

64. The representative of Argentina noted that discussion of this item could include both trade measures adopted unilaterally and those adopted within the framework of MEAs. However, within the extensive and somewhat confused work programme, this was the only item under which the Sub-Committee would be able to analyze the relationship between the WTO and the restrictions on free trade which it might be *indispensable* to adopt within the context of MEAs. Moreover, it was perhaps the only opportunity to deal with the thorny problem of PPMs not related to the product, but which nevertheless had cross-border effects. National provisions concerning "product-related" PPMs were comparable either to the technical regulations or to the standards defined in the TBT. Provisions concerning PPMs "not related" to the product and without cross-border effects were reserved for the environmental policy of each country and therefore, in so far as they did not have a distorting effect on trade, GATT did not need to concern itself with the .

65. There remained, however, a third category of PPMs dear to legitimate environmental interests: those which, although not product-related, produced cross-border effects. For this reason and to dispel a certain image of environmental insensitivity which the GATT had unjustly acquired in some sectors of public opinion, his delegation considered it necessary to focus the debate on the relationship between the trade measures which could be included in MEAs and the multilateral trading system, expressed by the WTO.

66. Before entering into details, he put forward some thoughts. The relationship between environmental protection and international trade was complex and had come before this forum for clarification. It would be neither prudent nor intelligent to believe that the environmental challenge would fade away with time. His delegation was convinced that it was necessary to recognize this reality in order to be able to propose a multilateral path compatible with the GATT. It was also convinced that it was necessary to accompany this message with a refusal to accept unilateral measures contrary to the GATT which had an adverse effect on free trade or claimed to link competitiveness with environmental protection. In other words, it was not realistic to suppose that the multilateral trading system could be protected from unilateral actions linked to the environment without at the same time offering a means of receiving and processing in the GATT the environmental objectives shared and adopted in multilateral fora, when these necessarily required the adoption of trade measures.

67. MEAs at times included trade restrictions which the participants considered necessary to ensure the complete achievement of their objectives. These trade measures were usually included to ensure the achievement of the objective of the agreement or for other complementary purposes such as: (i) to promote universal participation in the agreement; (ii) to prevent environmentally harmful practices being transferred to countries which were not parties or signatories; or (iii) to discourage countries not parties to the MEA which might try to derive economic advantages from the situation (free riders). Some of these provisions could prove to be incompatible with the existing rules of the GATT, especially where countries that were parties to the MEA applied trade measures which adversely affected contracting parties which were not party to the MEA. However, it should be pointed out that, so far, the GATT dispute settlement mechanism had not had to deal with any controversy originating in measures adopted under the MEAs in force.

68. An initial analysis of document PC/SCTE/W/3 revealed that the latest MEAs negotiated (Climate Change, Biological Diversity and Desertification Conventions, International Tropical Timber Agreement 1994) did not include trade provisions or if they did, they were of a feeble and general type. This confirmed the impression of many delegations that, although clarifying the relationship between GATT and MEAs may be important, there should not be any undue haste to reach conclusions. From the discussions held in the EMIT Group it appeared that there were two main approaches to ensuring that the trade provisions of the MEAs were consistent with the GATT. A first approach, which might be called the *ex-ante* approach, basically involved modifying or interpreting the general exceptions provided for in Article XX in order to establish, in abstract form, the criteria which the trade measures contained in the MEAs must satisfy to be considered compatible with the GATT. This approach had the advantage of providing a certain a priori assurance of the legality, vis-à-vis the GATT, of these trade measures, but did not guarantee the application of the specific measures adopted in this context, if any. The second approach, which might be called the *ex-post* approach, appeared to favour a casuistical solution, such as granting waivers under Article XXV:5. This approach was based, on the one hand, on fear of giving the environmental negotiators a "blank check" and, on the other hand, on the reduced number of MEAs with trade provisions and the absence of disputes arising from the application of their provisions. Also the diversity of the future MEAs suggested that it would be extremely difficult to anticipate the criteria that would ensure consistency with the GATT.

69. His delegation considered that this approach had one defect: it presupposed that, in those cases in which the MEAs provided for trade measures, the possibility of their actually being applied was left to the discretion of the GATT and would leave no frame of reference for determining the legality of such measures. Accordingly, his delegation was inclined to follow an intermediate path which combined the advantages of the two approaches mentioned above. He summarized the essential features of this approach. First, the Sub-Committee could identify and

define the criteria which would, *prima facie*, make the trade measures adopted within the context of an MEA compatible with the GATT. This process could be based on the analysis made in the EMIT Group. These criteria would have to include definitions concerning the conceptual scope and the characteristics which the MEAs would have to have and concerning the justification and characteristics of the trade measures they contained. In this connection, he clarified his delegation's position on four basic criteria. The first two related to the characteristics and conceptual scope of the MEAs and the second two to the justification and characteristics of the trade measures therein.

(i) The term "multilateral" should be considered from two standpoints: quantitative and qualitative. The first was related to the number of countries which, in the geographical region covered by the MEA, would have to be, as a minimum, parties to it. The second, qualitative aspect was connected with the need for these MEAs to form part of a multilateral effort open to the participation and accession of any contracting party irrespective of its level of development, market characteristics or geographical location.

(ii) The term "environmental" should embrace any agreement having an environmental protection objective, even if this was not its only objective. This was a recognition of the complexity of the concept of "environment", which in reality was interwoven with various disciplines.

(iii) The concept of the "necessity" of the trade measure, in GATT lexicon, should be translated as "indispensable", when working with environmental agreements. This would enable dispute avoidance and leave trade measures as a last resort. This concept should be examined in the Sub-Committee from an abstract point of view; it should not be tied to a specific case. Of course, the application of this concept to specific cases was outside the Sub-Committee's competence and should be dealt with in the corresponding MEA.

(iv) Regarding the principle of "least trade restrictiveness", it was precisely in the GATT/WTO that each specific case should be analyzed though using the inputs provided by the corresponding MEA. He would refer below to the appropriateness of adjusting this concept to a particular case.

70. Second, in accordance with the second half of the proposal, it would be necessary to reflect these criteria in the WTO through a collective interpretation of Article XX, although this interpretation would also have to include an explicit recognition that before a trade restricting measure was applied, its appropriateness, i.e. its compatibility with the above-mentioned criteria, would have to be analyzed on a case-by-case basis. For this purpose, it might be possible to follow a procedure similar to that provided for in Article XXV:5 of the GATT.

71. In summary, his delegation believed that the path proposed would make it possible to resolve two of the principal concerns involved: the need to admit legally, in the context of the GATT, the possibility of applying trade-restricting measures if they are based on MEAs with specific characteristics and scope which, in their turn, may be considered "indispensable" and compatible with the principle of "least trade restrictiveness"; and on the other hand, the need to avoid disregarding free trade and the law of any contracting party in the course of the extremely important and specific task of dealing with environmental problems.

72. Before concluding, he referred to a concern which could inhibit the consideration of this question. He recalled that initially the Sub-Committee spent a great deal of time establishing the order in which to examine the items in the work programme. No delegation wanted to leave questions out, but there was a concern to identify those which should be given priority. However, if the Sub-Committee had to present its report to the first Ministerial Meeting in two years time, he asked why the Sub-Committee was so concerned with the order of priority of these questions? He responded because there was a certain uneasiness and concern in the air that some questions of particular interest to some contracting parties might receive special treatment and be settled prematurely, with other questions, of particular interest to other contracting parties, left for later. As this item was one of the topics that aroused this apprehension, his delegation believed that it would be highly desirable to leave these suspicions aside and proceed with the work free of this burden. His delegation noted that the work programme was a balanced package of interests; partial progress on one item should not be considered definitive until the same is done for all the items. Nevertheless, this did not prevent starting straight away to seek the basis for a consensus.

73. The representative of New Zealand considered that this item of the work programme was an important area of work because it affected the public perception of the interrelationship between environmental protection and the multilateral trading system, it involved cooperative multilateral approaches, and it encompassed the message which emanated from UNCED regarding the mutual supportiveness of trade and environmental policies. He noted that this item was broader than the similar item of the EMIT Group's agenda. Although the EMIT Group had done considerable work in this area, further work was needed before prescriptive approaches could be considered. He agreed with Canada, Australia, and the ASEAN countries that the other dimensions of this item needed to be thoroughly considered. In this context, his delegation would be interested in studying analytical contributions on the effectiveness of trade measures taken outside MEAs to address global or transboundary environmental issues. In this regard, he noted the comment by Australia about a possible educative role in relation to public perception of some of the circumstances outlined by the Austrian delegation. His delegation would consider making an analytical contribution on this issue at a later stage.

74. The representative of Hong Kong noted that his delegation's position on this issue had been clearly spelled out in the EMIT Group. He considered that the Sub-Committee had come to the stage where some interaction among delegations might help improve understanding of the issues and gradually move towards concrete ideas and, later, options. In this context, he noted that the Canadian intervention had raised a number of issues which were not only relevant to border tax adjustment but to measures such as labelling, packaging, and technical regulations. In particular, he was interested in the comparisons made on efforts towards changing production, consumption or disposal patterns. This was helpful in understanding the effectiveness and necessity of the measure as well as the effect of those measures on international trade.

75. On a point raised by New Zealand and Argentina, he was not sure that the distinction between product related and non-product related PPMs was very clear. Another way of analysing implications was by the effect of the PPM on the product's "likeness"; whether the PPM consideration actually changed the character of the product in terms of it being "like" to another comparable product. Another point to be considered was what were the effects of local, global, and foreign externalities and why and how they should be dealt with. If eventually the Sub-Committee came to the point of considering solutions, Canada's point, that the costs and the benefits had to be taken into account, was relevant. He considered that the in some cases, the analysis showed that the benefits might be marginal on the environment side, or the same effects could be achieved by other means, whereas the costs to the trading system might be high. He would revert to this at a later stage.

76. He noted that Japan, Korea, and the ASEAN countries spoke to the need to preserve the stability and predictability of the GATT system. Also reference was made to the exceptional nature of trade measures in MEAs; document PC/SCTE/W/3 stated that ten per cent of MEAs contained trade provisions. Even in this ten per cent, a smaller percentage would contain provisions for GATT-inconsistent trade measures. Therefore, talking about a conflict between MEAs and the GATT system, addressed a very small cluster of issues. The Austrian submission, TRE/W/19, and the intervention by Argentina at this meeting, moved the process forward and his delegation could see possible approaches to manage any conflict within the GATT. First, there was the waiver approach which would maintain the status quo with the existing GATT. Next, there was a clarification approach. The submission by the European Community in the EMIT Group, TRE/W/5, talked about a collective interpretation of Article XX; Argentina had given points to think about in this context. Finally, there was the new rules approach. He considered that the Sub-Committee should start with the status quo, i.e. the waiver approach, and examine if it was inadequate and then, if necessary, move towards clarification. However, his delegation would be very hesitant to elaborate new rules in this area.

77. He noted that a number of interventions appeared to show a preference for a combined approach and perhaps this should be considered. The basic idea was already in Article XX(h) of GATT. Overall, he sounded a note of caution; the Sub-Committee had to maintain a sense of proportion. Although some MEAs contained trade provisions which might be inconsistent with GATT, there had never been a challenge, thus this was not a *real* problem. If the solution to transboundary, global environmental problems was international consensus, then the GATT system had to accommodate this when it was genuine and truly international. The Sub-Committee was not designed to rewrite GATT, to dismantle what was accomplished in the Uruguay Round, nor to find measures which would encourage policymakers to introduce trade measures in MEAs which were inconsistent with GATT. The overriding view had to be that the greatest contribution that GATT could make to sustainable development was through trade liberalization. He asked that more time be given to this item because it might be the first area where the Sub-Committee could send signals to the environmental community.

78. The representative of the European Communities noted that document PC/SCTE/W/4 on dispute settlement in MEAs would be more suitable for future discussion under the fifth item. He considered that such issues would constitute a "second generation" of issues which may come up again under the first item once the approach to that issue was established. His delegation considered that this item was one of the most important issues. His intervention would mainly focus on the relationship between the GATT and future WTO provisions and trade measures for environmental purposes *when taken pursuant to MEAs*. However, before turning to this issue, he stressed that many measures taken for environmental purposes which *affected* trade were allowed under GATT rules insofar as they complied with specific conditions. He agreed with Egypt that such measures need not conflict with trade rules.

79. For instance, product standards were accepted if they conformed to the basic principles of Articles I and III of the GATT and to the provisions of the existing and revised TBT Agreement. Many sanitary and phyto-sanitary measures were accepted under Article XX(b) of the GATT and the rules applicable to them had now been clarified in the Uruguay Round SPS Agreement. It should also be noted that the Preamble of the revised TBT Agreement stated as a basic principle that no country should be prevented from taking measures necessary for the protection of human, animal or plant life or health, as well as the environment, at the levels it considered appropriate. Of course, the measures must be in accordance with the fundamental GATT principle of non-discrimination, they may not constitute arbitrary discrimination or a disguised restriction on international trade, and they must otherwise be in accordance with the provisions of the

TBT Agreement. Finally, he noted the important references in the Preamble of the WTO Agreement to the aims of sustainable development and environmental protection.

80. However, this item existed because negotiators of MEAs sometimes deemed it necessary to take certain trade measures, which might - in the absence of an MEA - be at unease with GATT obligations, and that they sometimes even considered that, in order to avoid that the environmental objective of an MEA be undermined by the environmental behaviour of non-parties, it was "environmentally" necessary to take such trade measures also against non-parties to the MEA. Particularly in this respect his delegation was happy with the Argentinean statement that it was neither prudent nor intelligent to believe that this environmental challenge would fade away with time; and neither GATT nor the WTO could ignore this challenge.

81. It was generally recognized that the multilateral trading system should positively consider MEAs, including trade measures contained therein. As stated in Principles 7 and 12 of the Rio Declaration, international cooperation should be favoured to protect global commons and solve transboundary environmental problems. Furthermore, it was agreed at Rio, in point 2.21(a) of Agenda 21, that governments should strive to make international trade and environment policies mutually supportive in favour of sustainable development, and that they should do so through relevant multilateral fora, including GATT. In view of ensuring this mutual supportiveness, his delegation had made almost two years ago a submission to the EMIT Group which focused mainly on the issues raised by trade measures taken in accordance with MEAs under the existing multilateral trading system (TRE/W/5). That paper suggested that the work within the EMIT Group be carried out in view of a *collective interpretation* of Article XX which would ensure a positive approach by GATT towards trade measures taken pursuant to MEAs. After submission of that paper there was considerable discussion on this item in the EMIT Group, including the approach suggested in this paper. His delegation wanted to pick up that discussion again.

82. He considered that the discussion in the Sub-Committee should focus only on certain trade measures against non-parties. With regard to MEAs, the main issue of concern to the multilateral trading system was the taking of trade measures by one or more parties to an MEA with regard to one or more GATT contracting parties or WTO members, which were *not* party to that MEA. Measures agreed upon and applied *between parties* to MEAs seemed to be "*res inter alios acta*", which did not need to be of concern. Those were issues where it was assumed that the general rules of public international law would provide the necessary guidance to GATT contracting parties or WTO members which were also parties to the MEA concerned, although he did not exclude that they may have to be touched upon when discussing the fifth item, the relationship between dispute settlement in MEAs and in multilateral trade agreements.

83. Furthermore, trade measures taken pursuant to MEAs against non-parties to those MEAs were mainly of concern, as far as they arguably would be contrary to the rules of the multilateral trading system if they were not taken pursuant to an MEA. For instance, if, in order to implement its obligations under an MEA, a GATT contracting party or WTO member imposed a certain technical regulation on a product in order to avoid environmental harm which would otherwise be caused by that product, and that product standard was arguably in conformity with its GATT obligations - in particular Article III of the GATT and the TBT Agreement - his delegation would consider that such a measure need not be of great importance to the discussions in the Sub-Committee, even though it was taken to implement obligations under an MEA.

84. An essential element of the discussions in the EMIT Group and in his delegation's submission to that Group was the question of what constituted a "genuine" MEA for GATT's purposes. In the view of his delegation, the concept of an MEA should be defined so as to ensure

not only that international environmental cooperation was not hindered, but also that restrictive trade measures were the result of a genuine multilateral process among the countries concerned. In this respect, his delegation made the following suggestion in it submission: that MEAs should be negotiated under the aegis of the United Nations or a specialized agency (e.g. UNEP) or the agreement should be open for participation to all GATT members; and that the MEAs should also be open for accession to all GATT contracting parties on equitable terms in comparison with original members.

85. With regard to this point, his delegation considered that a source of inspiration may also be found in the rules applying to inter-governmental commodity agreements. Inspired by documents TRE/W/17 on Art. XX(h), his delegation noted the formula used by the drafters of the GATT in Article 60, paragraphs (a) and (e), of the Havana Charter Chapter on Intergovernmental Commodity Agreements. This read that full publicity should be given to any proposed intergovernmental commodity agreement, and that such agreements should be open to participation, initially by any member (i.e., ITO member) on terms no less favourable than those accorded to any other country. Another issue regarding the multilateral nature of MEAs was that they should reflect a genuine multilateral consensus. In that respect, one question was whether it would be appropriate to provide that trade measures against non-parties taken pursuant to MEAs may only qualify for a possible special approach by the multilateral trading system, if the MEA concerned had been ratified by a qualified number of States. With regard to this question, he underlined that his delegation was not convinced that it would be desirable for the WTO to set fixed minimum numbers of participants in order to determine which MEAs were sufficiently representative of a common interest to protect the environment.

86. His delegation's earlier submission had suggested that reflection could be given to the idea that certain types of trade measures applied vis-à-vis non-participants should only benefit from the provisions of a WTO exception for trade measures in MEAs if the agreement fulfilled certain criteria as to a level of participation which was sufficiently representative of the *producers* of the specific product subject to restriction. His delegation still considered this a valid approach. With regard to the decision to provide for the obligation or possibility to use trade measures against non-parties in an MEA, the multilateral trading system should show a considerable degree of respect for the judgement of environmental experts which had negotiated an MEA, that such measures were *necessary* to achieve the aim of that MEA. In this sense, his delegation's submission had stressed that if technical regulations, as well as sanitary and phytosanitary measures, when they conformed to international standards, were deemed to be "necessary" and consistent with the TBT and SPS Agreements, this should *a fortiori* be the case for trade measures taken pursuant to MEAs. Nevertheless, it would seem that there were some points with regard to this issue which were worth noting.

87. There would seem to be no reason for the use of trade measures against non-parties simply because they were non-parties, if they nevertheless applied the necessary level of environmental protection as indicated by the MEA. What was relevant from a GATT perspective was whether there was an actual difference between the environmental protection commitments applied by parties and by the non-party concerned. This element was related to the requirement in the headnote to Article XX, that in order to be covered by this Article a minimum requirement was that the measures concerned were not applied in a manner which would constitute a means of arbitrary of unjustifiable discrimination between countries where the same conditions prevailed. Another question to ask was what kind of trade measures exactly were foreseen in the MEA concerned. As said in the earlier submission, there was a legitimate concern to avoid a situation - however hypothetical - in which an MEA would provide for the application of trade measures

vis-à-vis non-parties on products which had no connection whatsoever with the environmental damage addressed by the agreement.

88. It was clear that the multilateral trading system should acknowledge that trade provisions in MEAs against non-parties to that MEA could provide for restrictions on products which were environmentally damaging *themselves*, or through the substances which were physically incorporated in them. However, such measures may very well, under certain conditions, also be taken by GATT contracting parties or WTO members individually, even in the absence of an MEA, by the imposition of *product standards* which would be intended to redress the negative environmental effects of *product characteristics*. This also meant that MEAs may need to include measures, based on negative environmental effects of PPMs, in cases where the possibility to impose product standards had proven insufficient to tackle the environmental problem. As noted in PC/SCTE/W/3, the Montreal Protocol provided an example of an MEA where it was considered necessary to at least include the *possibility* for parties to jointly decide to impose restrictions on imports of products produced with ozone-depleting substances, even though this possibility had so far not been used.

89. This led to the conclusion that, while the multilateral trading system may be well advised to take a more cautious approach with regard to PPM-based restrictions rather than restrictions on products which were *in themselves* environmentally harmful, it should not exclude that it may be necessary, from an environmental perspective, to also include measures related to PPMs in MEAs, and even to apply such measures to non-parties to an MEA, if otherwise the environmental objective of the MEA would be undermined. However, a more cautious approach could be useful. For instance, a requirement that there be a causal link between the production method of the product subject to restriction and the environmental damage which the MEA aimed to redress could be considered. Also, a requirement that the MEA parties must have explicitly determined that other forms of trade control were not sufficient to achieve the MEA's environmental goals and that therefore PPM-based trade measures were necessary to achieve the environmental objective pursued by the MEA could also be considered.

90. A related issue was whether trade measures taken pursuant to MEAs could be subject to different treatment when they were not specifically provided for by the MEAs. This question could pose itself in two forms: (i) an MEA obliged parties to take the necessary action in order to achieve a certain result, but did specify exactly which action; and (ii) an MEA obliged parties to take a certain minimum number of actions, but also allowed them to take further measures. With regard especially to the first category, in its submission, his delegation had considered that, where an MEA left a party a significant margin of assessment, it should be possible to examine whether the measure may not have been taken for protectionist purposes. Tests like those in Article III, paragraph 1 or in the introductory language of Article XX could be imagined. It could be discussed whether the same approach would be suitable for the second category, where, although not *required* under MEAs, stricter trade measures than were provided by the MEAs themselves were possible. A positive approach to such further measures may be justified in cases where the parties to an MEA collectively invited parties and non-parties to that MEA to take further action.

91. Regarding future MEAs, the main question was whether a rule should be developed in the WTO which "*ex-ante*" exempted trade measures against non-parties taken pursuant to an MEA, as long as these fulfilled the requirements discussed before, or that the use of such trade measures in MEAs could or should be subject to "*ex-post*" WTO "approval" on a case-by-case basis. Some delegations in the EMIT Group had suggested an "after the fact" waiver approach, based on Article XXV of the GATT. His delegation had always been extremely hesitant towards this "*ex-post*" approach and had supported the "*ex-ante*" approach, based on the development of a

general framework under which trade measures taken pursuant to MEAs which fulfilled the conditions discussed before would not be challenged, even when they affected the interests of non-parties.

92. The "*ex-post*" waiver approach still seemed unsatisfactory to his delegation for a number of reasons. It would seem to imply that the WTO took precedence over MEAs because the WTO Council could decide either to grant or deny a waiver to an MEA. This perception would be worsened by the fact that, in accordance with Article IX, paragraph 4 of the WTO Agreement, waivers could not be granted for an unlimited time, but should state the date on which they would terminate. Waivers could be extended, but this was not a viable solution for the long-term and for global problems addressed by MEAs. Furthermore, even if a waiver was granted for a long period, Article IX, paragraph 4 of the WTO Agreement also provided that it should be reviewed annually, and the Ministerial Conference could decide to terminate the waiver on the basis of this annual review. This did not give MEAs the legal certainty which they needed to operate constructively. Also, using a waiver approach meant that until the waiver was granted, it was not certain that the measures which were deemed necessary by the MEA negotiators to achieve the aim of the MEA would not be challenged under GATT. A formal denial of a waiver could even create, or at least appear to create, an untenable conflict of international obligations for those WTO members which were also party to the MEA. Finally, even if a waiver would be granted for a long period of time and continuously extended under the Uruguay Round, any Member could invoke Article XXIII of GATT 1994 if it felt that benefits accruing to it were being nullified or impaired, *even if that was simply the result of measures applied fully consistently with the terms and conditions of the waiver*. Would this then mean that, even when the international community had expressed through an MEA that certain trade measures were necessary to redress an international environmental problem, and the WTO Council had granted a waiver for these measures, in as far as they were applied to non-parties to an MEA could such non-parties still claim GATT compensation for the effects of such measures?

93. For these reasons, his delegation stressed that it still considered the optimal solution to be an "*ex-ante*" approach, based, with regard to the substance of this approach, on the model it had proposed and discussed before. However, with regard to the procedural means to achieve this, there may be more options open to the Sub-Committee than was the case before. Although his delegation had previously supported a "collective interpretation" of Article XX to ensure mutual supportiveness between MEAs and the multilateral trading system, without in any way wanting to run ahead of the result of the discussions, his delegation noted that, in accordance with its mandate, the Sub-Committee may make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system were required, compatible with the open, equitable and non-discriminatory nature of the system. This meant that, if there would be consensus to take a certain course in order to ensure mutual supportiveness between MEAs and the multilateral trading system, his delegation might also use legal means other than a collective interpretation to implement that course. The Argentinean delegation acknowledged this when it said that an "*ex-ante*" approach could involve modifying or interpreting the general exceptions of the GATT (Article XX). The work had so far concentrated on "interpreting", but the Sub-Committee could now also consider "modifying". His delegation was not suggesting any change in its current proposal, but remained open to considering alternative "procedural" approaches. However, regarding substance, his delegation strongly preferred an "*ex-ante*" approach.

94. Finally, with regard to trade measures for environmental purposes which were not based on MEAs, his delegation believed that Principle 12 of the Rio Declaration should remain the guiding principle. In this context, as stated in his delegation's previous submission, that principle meant that countries should avoid unilaterally, and in a manner contrary to their GATT

obligations, restricting imports on the basis of environmental damage that did not impact on their territory. Furthermore, it was extremely important that every possible effort was made to ensure that environmental measures addressing transboundary or global environmental problems were based on an international consensus. Finally, his delegation would carefully examine the suggestions from this meeting and would like the opportunity to revert to them at the next meeting. In particular, the Argentinean approach seemed constructive, although his delegation objected to the need to grant a waiver *ex-post*.

95. The representative of Bolivia considered it indispensable to create, at the multilateral level, compatibility between the provisions of the multilateral trading system and trade measures for environmental purposes and the application of MEAs, so that not including sustainability criteria in some cases, and the existence of standards and regulations expressing different environmental assimilation capabilities and resources in others, did not lead to "ecological dumping" or unilateral protectionist policies contrary to the basic principles of the GATT. Her delegation supported those initiatives which maintained the multilateral "transparency" of national environmental regulations. Her delegation shared the view that environmental problems which generated negative externalities or "spillover" effects should be dealt with within the framework of international cooperation and not through unilateral action. It was therefore necessary to extend the Sub-Committee's treatment of items concerning trade measures and the environment to the interrelationship between trade, development and the environment.

96. The representative of the United States considered that trade measures were not an end, but were sometimes a legitimate means to an end. This was generally recognized to be the case for MEAs. There was at best limited recognition of this point in GATT for environmental agreements, although GATT did recognize other non-trade objectives and did confer on those, in some cases, a greater degree of legitimacy and clarity in terms of how they were treated in GATT rules. Indeed, rules had been elaborated for health and safety measures but the stature and legitimacy of environmental and conservation objectives had also grown over the years. This fact had to be taken into account by the Sub-Committee to ensure that the GATT would grow commensurately with international recognition of the legitimacy of environmental and conservation objectives and actions.

97. He added that as the Sub-Committee set out to provide greater clarity in GATT, it must be vigilante in avoiding abuses. Clear rules were needed to ensure an open trading system that coexisted constructively with environmental and conservation objectives. The concept of "trade measures" was vague and broad. Many of the issues discussed at the Sub-Committee's September meeting were probably considered as "trade measures", but those addressed under the first item were separate from those discussed under the third item of the work programme. The first item related to another aspect of the issue: there were and would be situations in which trade measures were a means of achieving an environmental objective, or a means of enforcement or implementation of agreements, including trade measures as sanctions.

98. He added that this item consisted of two broad areas of work: the relationship of the multilateral trading system to the use of trade measures for environmental purposes, which was a broad topic inclusive of contexts other than MEAs; and MEAs. Both of these areas must be taken-up as the deliberations progressed. He considered that the current situation in GATT was ambiguous and evolving and was perceived negatively by the environmental community. He recognized that there were some hopeful signs in recent GATT panel decisions, but the ambiguities were still there and the need to focus on those was compelling. At the same time as taking into account environmental concerns, commercial interests would have to be considered. For the latter, clear rules were needed.

99. He suggested two initial tasks for the Sub-Committee. First, it would need to analyze how trade measures had been, were or might be used, maybe including some case studies with input from the relevant international organizations and other experts as well, and some sense of how those had worked. Second, the Sub-Committee would need to turn to an analysis of how the rules of the multilateral trading system had been interpreted to date. At a later stage, it would have to turn to the question of the adequacy of the current situation. His delegation was encouraged by the number of statements that suggested an open mind on this latter point.

100. He reiterated some points that his delegation had made at the November 1993 meeting of the EMIT Group regarding MEAs. First, his delegation had come out clearly in favour of an *ex-ante* solution which created a presumption of GATT-conformity under certain conditions to be defined by the Sub-Committee, including appropriate disciplines. This did not imply a general "blank check" approach, but there was a need to provide clear rules. At this meeting, his delegation also had drawn attention to some of the weaknesses of an *ex-post* or waiver approach: the uncertainty to the environment community as to the outcome of the waiver; the time consuming and cumbersome nature of the process; the possible legally untenable situation of having two legal instruments in essentially a conflicting state; the possibility of relegating MEAs to "exceptional circumstance" status in terms of the GATT; the time limited nature of waivers; and the continued exposure to non-violation claims even after the waiver had been granted.

101. In terms of specific solutions to MEAs, his delegation was willing to look at creative ideas to ensure that the multilateral trading system allowed for the use of trade measures subject to appropriate disciplines pursuant to an MEA or where they enforced or implemented a prevailing scientifically-based international environmental or conservation norm. There were various ways this could be done, and his delegation was still considering the relevant options that had been cited, including a collective interpretation approach, an amendment approach, etc. These would have to be discussed further. It was also important to be mindful of the fact that in further discussions, the limitations of MEAs should be recalled. They took time; sometimes short-term interests prevailed over long-term imperatives; and MEAs may for a variety of reasons be vague on the use of trade measures.

102. He cited two examples of MEAs where there had been recent activities on trade measures. Last year, the CITES Standing Committee, in the face of an alarming threat to the existence of the world's population of tigers and rhinos, encouraged parties to consider the use of trade measures. In another case involving the International Commission for the Conservation of Atlantic Tuna (ICCAT) the international community was faced with a problem. The objective of this agreement was being undermined by non-parties who had been unwilling to join ICCAT and thereby undermined its important conservation objectives. The situation was indicative of the problems faced by many fishery conservation agreements, i.e. that achieving compliance with conservation and management measures was often difficult. Trade measures were increasingly seen as an effective mechanism to preserve the objectives of such agreements in certain circumstances. Although his delegation would argue that in both of the above cases, trade measures would be GATT consistent, clarity would be useful. Questions relating to the conditions under which trade measures were or should be permissible in the context of environmental or conservation problems were deserving of further specific attention by the Sub-Committee.

103. He added that internationally agreed environmental concerns may not always be accompanied by MEAs. Nevertheless, countries may and had on occasion found it necessary to take actions, including trade measures, without the cover of an MEA. These actions may help lead to needed MEAs, to address both the environmental and trade concerns that were at issue. These situations were also important elements of a full deliberation of the first item of the work

programme. He considered that all governments strongly preferred multilateral approaches and ways would have to be found in which GATT could facilitate them rather than hinder them. His delegation considered it premature to draw conclusions about the adequacy of the present rules and the *ex-post* approach. The analysis he had suggested earlier would be useful in informing delegations of the background to those situations where it was considered appropriate to incorporate trade measures in MEAs and use of trade measures in other contexts.

104. It had been argued that the current, relatively vague situation regarding the GATT rules and their application to MEAs had had a chilling effect on addressing, in a forthright manner, trade measures in the context of MEAs. He noted that the government agency which he represented had been accused at times of standing in the way of legitimate conservation solutions because of its general uneasiness about how GATT might be interpreted in the context those MEAs. He disagreed, therefore, with those who were inclined to say that it was a limited problem and did not need a prospective forward-looking solution in the GATT because only 10 per cent of MEAs had trade provisions. Further, it was useful to recall that not all MEAs were the same and that one GATT solution may not be appropriate for all of them.

105. The representative of India requested that this item be on the agenda of the next meeting of the Sub-Committee. The interventions at this meeting and the papers presented needed further analysis and showed the complexity of the subject. The sixth item of the work programme, scheduled for discussion at the next meeting, cut across other issues such as MEAs and product regulations. Flexibility was needed in order for delegations to intervene on two or three items together if needed. This would help the work to progress on numerous fronts. He shared the opinion of Hong Kong that at the next meeting, it might be useful to depart from written texts and address items on a point-by-point basis in a dialogue. This might also require a more informal setting, although he was prepared to do so in the formal meetings. He considered that there was a problem among delegations in understanding their respective interventions and points of views and such dialogue would go a long way to clarifying concepts and ideas.

106. He believed that the next phase of work on this issue was to concentrate on what he termed inductive reasoning. This meant examining specific measures and specific agreements to determine if they really were inconsistent with GATT and if they were really challenged under GATT. While the analytical work was useful, this item of the work programme spoke of the relationship between the provisions of the multilateral trading system and trade measures used for environmental purposes. Therefore, at some point the Sub-Committee would have to define what the provisions of the multilateral trading system were; rules of the multilateral trading system existed, such as those relating to non-discrimination, national treatment, necessity, effectiveness, least-trade restrictiveness, proportionality, and scientific evidence. On the other hand, trade measures were being taken for environmental purposes and the starting point of the Sub-Committee's work should be an examination of those specific trade measures against these rules with an open mind and with no preconceived ideas as to whether these rules should be maintained or be changed. There was no need for one side or the other to prove its point, but collectively a conclusion should emerge as to why and if the rules were inadequate and should be changed.

107. He noted that Switzerland had pointed to the idea of free riders. He asked who and what were free riders? Which countries were relevant and could examples be given? He considered that this argument was a false one but he looked to be convinced otherwise through an identification of the problem in a specific case. He noted that the Nordic countries had pointed out if there were two contracting parties to the GATT which were signatories to an MEA, there would be no problems; the problems emerged when there was a non-party to an MEA. They

also said that the trade measure should be relevant to an MEA and there should be a balance between free trade and environmental protection. These were general statements. He considered that the Sub-Committee was past the stage of principles, objectives and broad parameters of the debate. They were already known and were unexceptionable. He would prefer going into more specific details and situations to understand the balance that was being discussed. Was this balance the same for all countries or different for developing versus developed countries? Were theses choices that each country made on its own or did they have to be imposed and decided in a multilateral forum?

108. He added that it would be useful to examine why countries joined MEAs such as the Montreal Protocol. Did they join because trade restrictions were part of the Protocol? Did they join because there was funding or technology transfer provisions? These questions had to be examined in order to determine whether a trade measure was the only way and the most effective way to achieve an environmental objective. Particularly in the context of MEAs it was important to clarify what the motivations were of different parties to the MEA.

109. The representative of Mexico commented on some of the proposals made by other participants about how to proceed with the analysis of this first item. Her delegation was aware that this item was broader than the similar item of the EMIT Group because it concerned the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including but not limited to those pursuant to multilateral environmental agreements. The analysis of this item accordingly required that its extended scope be taken into account.

110. She noted that at some point the Sub-Committee would have to decide on making a serious study of the possible approaches. However, other questions and factors had been mentioned, which her delegation considered of utmost importance for focusing the discussion in the immediate future since their examination would provide the material necessary to determine whether the Sub-Committee would need to discuss options or alternatives such as those referred to above. One of these questions, mentioned by many delegations, related to the examination of concepts such as the *effectiveness and necessity of using trade measures for environmental purposes*. The suggestion by New Zealand that in the course of discussions the Sub-Committee examine any experience relating to the effectiveness of using trade measures for environmental purposes, in the context of environmental agreements or in some other context, seemed a constructive way of beginning the analysis of these concepts. This proposal complemented that made by the United States concerning the analysis of how trade measures for environmental purposes had been used and how they had worked.

111. Her delegation believed that the examination of the effectiveness of such measures constituted an important element, which, together with the analysis of the principle of "least trade restrictiveness", would determine the necessity of using these measures for environmental purposes, especially in the context of MEAs, and hence, the possible usefulness of the Sub-Committee examining options with respect to the rules. Her delegation envisaged the possibility of contributing along these lines to the continuing discussion of this subject.

112. A related question which also required attention and was raised by Japan and others concerned the *secondary effects* deriving from the use of trade measures for environmental purposes, in particular measures of a discriminatory nature. It would be necessary to take into account the fact that, in some cases, the use of trade measures may be counterproductive. The above related to the extended scope of the first item. With respect to MEAs, the question of *terminology*, mentioned by Japan, required careful examination. It was necessary to define what

was meant by global problems in this context. Her delegation agreed with Switzerland that not many environmental agreements referred to the so-called "global commons". Only two agreements fell into this category: the Convention on Climate Change and the Montreal Protocol. Other agreements may refer to problems which could be of "global" or international interest but whose effects had a local effective impact. It would be necessary to examine the relevant consequences of the various types of agreement and the problems with which they dealt.

113. Finally, and within the framework of MEAs, there should be a more detailed analysis of the question of the *specificity* of the trade measures in MEAs. As her delegation had pointed out on other occasions, this was a crucial point requiring clarification, since only a limited number of the few MEAs with provisions relating to trade measures contained a sufficient degree of specificity to be considered in whatever type of derogation from the GATT rules may eventually be discussed in the Sub-Committee. In short, her delegation supported those delegations which had proposed focusing the work of the Sub-Committee on those aspects which she had mentioned, namely examination of the concepts of necessity and effectiveness, the definition of the terminology and the analysis of the question of specificity. This seemed to be a logical next step in the examination of this topic in its new dimension and consistent with the discussion of the remainder of the items on the Sub-Committee's work programme.

114. The representative of Brazil supported the interventions of Canada, Hong Kong, and Argentina. He was concerned that the WTO should not act as a supranational entity with the power to interfere with multilateral work outside the trade field. He was not advocating a passive role for the WTO but a role of attentiveness and vigilance to fight trade distortions stemming from MEAs. The universality of the multilateral trading system, as the WTO replaced the GATT, would tend to facilitate coherence and compatibility between MEAs and the rules and regulations that bind GATT contracting parties. The WTO should be geared to acting within the margin of conflict between the two policy objectives and when negative trade effects occurred. What was most needed, in practical terms, was an agile, effective and transparent dispute settlement mechanism. He was not disregarding the conceptual basis on which the Sub-Committee had to work, however work must proceed with caution in terms of the nature of the activity of the WTO in this field. He agreed with Hong Kong that the Sub-Committee was not tasked with rewriting the GATT or the Uruguay Round Agreements, nor MEAs. He agreed with India that this item be kept on the agenda.

115. The representative of Austria clarified that when he spoke of a special environmental waiver in his earlier intervention, he had used the term in the context of an *ex-ante* approach as opposed to an *ex-post* approach where the traditional waiver approach would be used. He agreed with the EC and the United States that the *ex-post* waiver approach was problematic and his delegation favoured the *ex-ante*, dispute settlement prevention approach. Further, his delegation also did not consider that the WTO could take on any supranational powers.

116. The representative of Sweden, on behalf of the Nordic countries, recalled that the task given to the Sub-Committee by the Ministerial Decision was to explore the relationship between the trading system and trade measures for environmental purposes, including MEAs, with the aim of making them mutually supportive. The intention was not to endanger the benefits of the multilateral trading system but to establish and clarify to what extent present trading rules accommodated the needs for taking environmental measures. Her delegation considered that it must first be decided whether to follow an *ex-ante* or *ex-post* approach. Her delegation thought that in order to make the trading system supportive of environmental measures, accommodation for trade measures would have to be made in advance. Only by supplying predictability could multilateral solutions to environmental problems, as opposed to unilateral measures, be promoted.

The promotion of multilateral agreements for the goal of sustainable development had been agreed upon in Rio and subsequently endorsed in Marrakesh.

117. An *ex-post* solution, as was stated by several delegations, would not enhance multilateral agreements, but, on the contrary, would risk making them more difficult to achieve. To accept MEAs was not the same as to support them. Therefore, her delegation proposed that the Sub-Committee chose to explore ways to go forward on an *ex-ante* approach based on GATT Article XX.

118. The representative of Brazil said that the question of why such a plethora of environmental agreements had been negotiated since around 1960, when the first rules of international environmental law had been drawn up, had to be asked. He noted that almost 250 international, multilateral treaties related to international environment were registered with the United Nations; this did not include bilateral or trilateral treaties. Such a quantity of treaties made an impressive statement about the international regulation of the special subject of the international environment. He noted that in no other area at no other time was there such urgency or velocity in rule-making. Regarding the question posed by India of what was meant by the term "environment", he considered that it meant the world in which we all live. So if the new aspects of international law related to protection of the world were considered, certain characteristics existed that were not found in other fields of international law. The first was a set of mandatory rules intended to protect public interest that provided for strong state intervention in the state of life of a country. If a law required strong implementation, there was no possibility of solutions other than regulation. Therefore, these were rules that forbade any manifestation of will of private persons and public authority because these were mandatory rules.

119. On the other hand, the nature of the rules related to international trade were precisely the contrary. They were rules that related to a particular area, trade, which must, in itself, be as free as possible. This was the first objective of GATT. International trade was difficult to regulate by international law. The second objective of GATT was transparency and the highest degree of non-intervention of the State in the economy. This was exactly the contrary of international environmental law which was highly interventionist. He considered that the compatibility of a new set of rules in international environmental law with the rules of GATT and of international law in general had to be studied. The Sub-Committee had to be prudent so as not to deny what had been accomplished throughout the history and experience of GATT in the face of this very urgent and rapid evolution in environmental law.

120. In considering the question of compatibility, the general rules of international law had to apply. This meant that a specific law took precedence over a general law. If environmental law considered the entire world, it was general law. Trade law was specific because it regulated a specific area of the world. Therefore, if this logic was followed, he concluded that trade law would prevail over environmental law in terms of international law. The next question was how to conciliate the philosophy of environmental law, i.e. intervention and protection, with international trade law in terms of GATT. He posed these thoughts to initiate discussion on this item of the work programme.

121. The representative of Morocco noted his delegation's agreement with points made by several delegations. He noted that Canada had raised interesting points regarding market access. His delegation shared the view of Austria that WTO members could ask the WTO or the International Court of Justice whether the provisions of an MEA were contrary to GATT rules. His delegation agreed with Egypt that criteria should be laid down, keeping in mind the concerns of developing countries, particularly their needs for transfer of technology and financial assistance.

He added that MEAs meant that the international community took on commitments and parties to the agreements took on specific commitments. For example, the Convention on Climate Change, which provided for the reduction of greenhouse gases from 1990 onwards, provided for financial help for developing countries. At the second Conference of the Parties of the Basel Convention, in March 1994, provisions were drawn up to ban exports of dangerous wastes from the OECD countries to non-OECD countries. Before taking trade measures, it must be determined whether the parties had actually fulfilled their commitments as provided under the MEAs so that there were no disguised discriminatory measures involved. He shared the opinion of India and Hong Kong for a point-by-point, in-depth, approach so as to cover all measures provided for in MEAs to see whether they were GATT consistent, how they could be changed, and how cases of non-parties could be covered.

122. The representative of Uruguay observed that this discussion was not just a repetition of the discussions in the EMIT Group but contained new elements. In this context, she noted that this item of the work programme was broader than the similar item in the EMIT Group because it included both trade measures which were and were not taken in pursuance of an MEA. For this reason, the Sub-Committee needed to pursue an analytical stage of work and not hasten towards any definitive conclusion. She added that the discussion showed that although the *ex-ante* and *ex-post* approaches were the two options that existed, there were a vast range of possibilities for variances and combinations. One example was proposed by Argentina and another in this direction by Korea. Her delegation found these approaches attractive. She noted that many delegations had not expressed a final position on this issue and her delegation was examining the various arguments with an open mind. While it was true that some of the arguments against the *ex-post* approach were convincing, the criticisms against the *ex-ante* approach was also valid. It was precisely the open nature of the discussion so far which had made it possible to envision alternative approaches. She linked this concept with a point made by Argentina that the work programme was a balanced result and that the Sub-Committee should not advance in some areas while not moving forward in others. Harmonious progress should be made because otherwise a situation of insecurity would emerge in which conciliatory solutions would be difficult to find.

123. The representative of Venezuela noted that his delegation also had not expressed a final position on this issue. It considered that it was too early to do so; none of the options should be discarded because all needed careful consideration. He agreed with the suggestion to begin discussing the application and experience with trade measures in the context of this item, which India had said were not so numerous and could be taken up point-by-point.

124. The representative of the United States believed that for the work of the Sub-Committee to progress, a flexible attitude was needed with no prejudice as regards any preferred approach. He noted that the *ex-post* option, i.e. the waiver approach, existed and in order to evaluate some of the alternatives, a number of steps had to be taken. This included answering some of the questions raised by India, Morocco and others about an *ex-ante* approach. This would require considerable analysis. In this context, the suggestion by Sweden to take on this work was useful because it was only through this work that some conclusion could be found in due course. Finally, he agreed that the Sub-Committee needed to take on the full work programme and he considered that the Chairman's organization of the meetings permitted precisely this approach.

125. Another representative of the United States presented a paper on eco-labelling which was contained in document PC/SCTE/W/5. This paper did not present a national position on eco-labelling, but rather attempted to bring together, in a comprehensive manner, a set of perspectives on eco-labelling and to identify issues for further discussion. The analytical framework set out in the paper attempted to look at eco-labelling both from a trade and from an

environmental perspective. However, his delegation did not necessarily view all of the issues presented in the paper as involving questions which would need to be worked out in the Committee on Trade and Environment. Some were included here for the sake of analytical presentation. Further, the paper did not cover mandatory hazard warning programmes. These were in many respects different from the eco-labelling programmes discussed.

126. His delegation considered that the use of environmental eco-labelling in the consumer marketplace was becoming increasingly wide-spread driven by a number of motivations: environmental, economic, business-oriented, and governmental. Nevertheless it appeared to his delegation that this was an area where there could be a strong convergence of interest in the value and utility of this tool to provide market information and to facilitate environmental improvements. However, there were also concerns raised by all that eco-labelling schemes needed to be properly structured to avoid problems and these were outlined in the paper. Generally, they related to the question of whether the information provided by the eco-labelling scheme was complete, adequately informed the consumer of the various environmental impacts, and allowed the consumer and producer to skew their decisions in a way that could lead to improvements in the environmental aspects of the covered products. There were also issues raised with regard to the multiplicity of different eco-labelling schemes. Did this affect their credibility and effectiveness? Could a consumer make sense out of multiple eco-labelling schemes and decide which one provided information that was worth acting upon? There were also problems with market segmentation and potential conflicts between regulatory requirements on one hand, and the criteria of eco-labels on the other hand.

127. His delegation considered that main issues with regard to eco-labelling schemes depended in part on the type of programme being discussed and the paper set out various types of existing programmes. The differences between various categories of programmes did not always have to be as starkly drawn as suggested in the paper. For example, some information disclosure schemes could rely on life cycle assessment to provide information for reporting key environmental impacts. Some of the schemes may involve life cycle assessment even if they were not seal-of-approval type schemes. There were also hybrid types of schemes, for example, some information-disclosure or report-card type schemes did involve some sort of overall environmental assessment as well. There were also schemes which had a series of assessments or marks for different impact areas, such as the impact on water, air, or solid waste disposal, and did not attempt to make an overall conclusion but rather ranked the impacts in each category. Each of the different sets of programmes might raise different issues or concerns. However, one thread that was common to all types of programmes was the question of what information was being provided. Was it quantifiable, verifiable about the product or was it an attempt to draw judgements on the overall environmental merits of one product versus another? The answer to this question could lead to different directions in terms of assessing the impact of the programme both in environmental and in economic terms.

128. He added that the paper also discussed the quality of the information provided. In this regard a number of different perspectives and concerns with regard to life cycle assessment and its role in the eco-labelling process were laid out. The paper also touched on the question of what environmental impact was the eco-label addressing. In this regard, it touched on some of the issues that had been raised by other delegations with regard to eco-taxes and other sub-issues in the third item of the work programme, i.e., what stages in the product's life cycle were important in terms of eco-labelling; were the criteria used based on local, regional, or national environmental priorities or endowments or was there an attempt to create some broadly based international criteria and what were the implications for either choice; were the criteria applied to

domestic products and imported products; and what were the implications of this choice and what were the possibilities for mutual recognition among labelling schemes.

129. The paper then turned to the main issues regarding eco-labelling particularly from the perspective of the multilateral trading system. Here, his delegation was assisted by the work in the EMIT Group. The paper touched on the issue of coverage of the trade rules, i.e. to what extent did the existing trade rules cover eco-labelling schemes and whether this was affected by the degree of government involvement in the programmes. It also addressed the issue of discrimination, the adverse trade affects and transparency issues, i.e. access to labels, and cost and competitiveness issues. Next, the paper moved to an examination of the issues of the eco-labelling schemes from an environmental perspective. This began with the question of whether further flexibility was needed in the multilateral trading system to allow for this relatively new policy tool to be developed and to be an effective element of environmental policy. The question of how to structure eco-labelling so as to accentuate the potential for improved environmental protection and technological development was also addressed as was the various considerations of how eco-labelling could be a tool for environmental cost internalization and for addressing concerns of the effects of trade and trade liberalization on the environment and sustainable development. Finally, the paper addressed questions of how, from the environmental and trade perspective, the effectiveness and acceptability of eco-labelling as an instrument could be enhanced.

130. The Chairman reported on his informal consultations on the issue of appropriate arrangements for non-governmental organizations. These consultations had resulted in a clearer picture of the initiatives and methods that the Sub-Committee might follow in order to improve the relationship with NGOs as far as providing transparency for the general public on the analytical work being carried out and to enable the Sub-Committee's work to benefit from the expertise of such organizations in the area of trade and environment. He added that he would work with the Secretariat to produce a paper in advance of the next meeting of the Sub-Committee which would collect the thoughts which had been presented in the form of a tentative list of measures and initiatives to promote this interaction. He would revert to this issue so that decisions could be taken soon.

131. He further reported on his informal consultations on the seventh item of the work programme: the issue of domestically prohibited goods. He recalled that he had been requested to consult on this issue at the last meeting of the Sub-Committee. He had consulted informally with some delegations and noted some points which had emerged. First, all the delegations consulted were in favour of carrying out this work under item seven of the work programme. Most considered that the work should begin early next year, although a few considered that it could begin immediately. Many of the delegations consulted believed that the issue should be revisited in light of the developments that had occurred both within the context of GATT's work on trade and environment and outside of GATT in the relevant environmental conventions and agreements. In this regard, all of those consulted agreed on the need for a Secretariat background paper which could be produced between now and the end of the year and which would address the history of the subject, the relevant discussions in the EMIT Group, the TBT and SPS Agreements (as appropriate) and the developments outside of GATT in relevant institutions.

132. It was agreed that this issue deserved full consideration in the Sub-Committee, but not isolated from the other issues on the work programme. It would be included on the agenda of the Committee's first meeting in 1995 (probably during the month of January) in order to give it a broad airing. In the meantime, the Secretariat would prepare the requested background paper in order to bring all delegations up-to-date on the relevant developments related to this issue.

133. It was agreed that the next meeting of the Sub-Committee would be on 23-24 November. These dates would benefit from the presence in Geneva of Ministers and high officials that would attend the UNEP/UNCTAD Meeting on Trade and Environment on 21-22 November. Given that this date would not allow the Secretariat sufficient time to prepare a comprehensive set of documents on market access, he proposed that the November meeting provide a first airing for the sixth item to which the Sub-Committee would revert at the subsequent meeting. The meeting would then revert to both the first and third items of the work programme. The Secretariat would prepare two background notes to assist discussion under the first item: (i) an issues paper which would present the state of the discussion by highlighting the different approaches presented and attempting to identify specific issues that would merit further analysis in the Sub-Committee; and (ii) an analysis of the use, necessity, and effectiveness of trade measures in the context of MEAs which would present a stock-taking of how trade measures in MEAs had been functioning.