RESTRICTED

WT/CTE/M/2

8 May 1995

(95-1186)

WORLD TRADE ORGANIZATION

Committee on Trade and Environment

REPORT OF THE MEETING HELD ON 6 APRIL 1995

Note by the Secretariat

1. The Committee on Trade and Environment held its second meeting on 6 April 1995 under the chairmanship of Ambassador Juan Carlos Sánchez Arnau of Argentina. The agenda for the meeting was adopted as contained in WT/AIR/31.

2. The Chairman recalled that the focus of the meeting would be on items four, five and ten of the work programme after which there would be a review of item seven, which had been the focus of the last meeting. He noted the Secretariat's background documentation for each item was, respectively, WT/CTE/W/5, PC/SCTE/W/4, PC/SCTE/W/2 and WT/CTE/W/6. With respect to item five, the delegation of Chile had submitted WT/CTE/W/2. For discussions under item ten, the delegation of the United States had submitted PC/SCTE/W/6. The Secretariat also had made available the report it had submitted on its own responsibility to the Secretariat of the Commission on Sustainable Development for its third session, WT/CTE/W/3, as well as the Report of the UN Secretary-General on trade, environment and sustainable development prepared by the UNCTAD Secretariat as Task Manager for sustainable development and trade issues.

Observer status of inter-governmental organizations

3. The Committee agreed to extend observer status to those inter-governmental organizations (IGOs) which had had observer status at the Committee's last meeting, pending the approval of criteria and conditions for observer status for IGOs in the WTO.

Item four of the work programme:

> The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects

4. The representative of Japan said that although WT/CTE/W/5 made reference to a broad agreement and a common understanding which had emerged in the EMIT Group on transparency, he recalled that work in the EMIT Group had not drawn specific conclusions nor had it reached a prescriptive stage. His delegation considered that transparency was not an end in itself; the end was to strengthen the functioning of the multilateral trading system. Although the WTO had comprehensive notification mechanisms, his delegation was concerned that there would be a growing number and variety of environmental measures which were trade restrictive and which would be developed more comprehensively and systematically outside its framework. It had been noted that multilateral initiatives should start before a major economic bloc refused imports of products as they did not meet certain criteria which it had developed already. Further

improvement of WTO transparency mechanisms would be a step towards addressing these concerns and the Committee could identify measures with a trade impact that fell outside their scope. TRE/W/7 provided a basis upon which to identify gaps, although many of the measures listed were already covered in the WTO.

5. With respect to environmental enquiry points, it was not usual in GATT/WTO, nor probably feasible, to establish transparency mechanisms based on a measure's purpose as opposed to its nature. Given the subjectivity of defining the scope of the term "environment", it would be difficult to identify which measures had been taken for environmental purposes. He enquired as to whether governments were expected to be aware of voluntary measures and, if not, how the WTO could collect information from private entities as an inter-governmental body. The priority given to voluntary measures would depend on how seriously they affected trade in reality. Duplication should be avoided within the WTO and between it and other multilateral transparency mechanisms and overburdening the notification process should also be avoided as compliance had been a practical difficulty in past reform initiatives.

6. The representative of Nigeria said that WT/CTE/W/5 helped identify where further discussions were required and common positions were yet to be established on transparency, which was an important element of the Committee's work as it built confidence in the trading system and was necessary for the stability and predictability of expectations of trading nations. It provided a lever with which to handle crises when they arose, such as in the case of transboundary movements of hazardous wastes and recent fishing disputes which touched on the spectrum of trade and environment linkages. Although agreements existed in the fishing and fish conservation area, disputes had arisen regularly over transparency of fishing methods, transparency of fish holds in trawlers, transparency of intent, and transparency as to whether countries were effectively regulated by agreed fishing quotas. Explicit and verifiable transparency provisions reduced the chances of trade restrictions and distortions occurring and enhanced the adaption of entrepreneurs to changes in trade policy.

7. In his delegation's view, transparency provisions should be explicit, comprehensive in scope and feasible in application. Apart from the TBT Agreement, *ex ante* provisions could not be made without an understanding of trends based on hard evidence; *ex post* provisions were rarely made without there being some assumptions, predictions and deductions involved. His delegation noted the statement in WT/CTE/W/5 that the GATT standard was the *ex post* approach, although substantial benefits would derive from *ex ante* notification and the reality would entail a combination of the *ex ante* and *ex post* approaches. His delegation considered that at this stage Article X provisions along with the Decision on Notification Procedures and elements of the TPR Mechanism were sufficient for transparency. As multilateral cooperation increased, these provisions might be extended to cover areas of conflict that arose and to integrate verification arrangements for transparency provisions. Transparency was a means for the achievement of unrestricted trade and more provisions than currently existed might impair the ability of WTO Members, overload the Secretariat and divert from the main goal of expanding trade consistent with sustainable development.

8. He said that implicit in some of the views expressed previously was that variable levels of transparency should be applicable, depending upon the circumstances. In his delegation's view, it would be an error to adopt this approach because it was of doubtful validity and would create confusion. Transparency provisions should be maximal; if a trade measure used for environmental purposes or an environmental measure with significant trade effects was not maximally transparent, then it would not meet the conditions for transparency. The Committee should avoid the pitfalls of conditional statements on the application of transparency provisions,

such as "the greater the potential for a measure to have significant trade effects, the more transparent it should be to a country's trading partner" (WT/CTE/W/5) which inferred that lower levels of transparency might be acceptable for less significant trade effects. This would create interpretative difficulties and loopholes that would lead to provisions being exploited or undermined. It was necessary that transparency included the duty to publish, notify, maximal interpretations of transparency and that notified regulations be applied in a reasonable, uniform, and non-discriminatory manner. His delegation considered that transparency was a horizontal issue that cut across a range of other items and discussions would be more productive when it was applied to particular product areas.

9. The representative of the United States said that since the EMIT Group's discussion of this issue, improvements had resulted from the WTO's transparency provisions which included an increase in the scope of measures subject to *ex ante* notification under the TBT and SPS Agreements. Specifically related to an area of concern in previous discussions, the TBT Agreement extended notification requirements to sub-central government authorities. Also, the Subsidy Agreement's transparency provisions were an important advance, whereby Article 8.3 imposed mandatory notification requirements on certain environmental subsidies in order to claim non-actionable status for them.

10. Discussions on transparency had reached a point where the issues were well developed. With the results of the Uruguay Round in place, his delegation considered that there were no real gaps in WTO transparency requirements and, for the most part, the level and mix of transparency for various types of measures was satisfactory. Nevertheless, his delegation felt that the Committee could explore whether more transparency might be appropriate with respect to packaging and waste handling requirements and was interested to know whether other delegations shared that view or felt other areas might provide a useful focus.

11. The suggestion of creating enquiry points for environmental measures deserved consideration. However, his delegation's experience in establishing enquiry points under the TBT and SPS Agreements revealed the need to consider the resource commitment this would entail. It was also necessary to reflect on whether to design a transparency mechanism with coverage defined in terms of a measure's policy purpose as opposed to its characteristics; for example, whether there was a greater need for transparency for a tax scheme when it was designed to achieve environmental goals rather than to raise revenue. Also, there was a need to avoid a potentially confusing proliferation of enquiry points in addition to those of the TBT and SPS Agreements. If a third was created, whose scope of responsibility was likely to be vague given the lack of definition of the coverage of the term "environment," it should not confuse users about where to make enquiries. Nevertheless, the idea of enquiry points deserved further examination.

12. The representative of Canada recalled some of the themes that had emerged on transparency, such as that transparency requirements for environmental measures should not be more onerous than those in other areas of policy-making that affected trade, duplication of transparency requirements should be avoided and the TBT Agreement created a high level of transparency. In her delegation's view, the Committee should address transparency as a horizontal issue and as part of work on the various types of trade-related environmental measures under examination. She proposed focusing discussions on the related issues of voluntary programmes such as eco-labelling, transparency, and the TBT Agreement. She noted that the earlier reluctance to discuss the TBT Agreement since it had not been in force was no longer an impediment. Her delegation felt that there was a basis for pursuing consensus that voluntary programmes such as eco-labelling were covered at least by the TBT Agreement's Code of

Good Practice. This would mean that they would be subject to a number of transparency requirements, such as publishing their work programmes, notifying specific guidelines under development, providing a minimum of 60 days notification before adopting a draft guideline to allow for submission of comments from interested parties within the territory of other WTO Members, and providing upon request copies of draft guidelines at the same cost as for domestic parties. She added that discussions would need to enter into detail to address what existing disciplines were in this area and whether they were adequate; her delegation felt an informal session would be useful to start these discussions and prepare the Committee for the October meeting on eco-labelling. Also, as the Committee's analysis of transparency and the relationship of measures to the TBT Agreement progressed, it would be necessary to coordinate with the TBT Committee.

13. The representative of Norway considered that although the EMIT Group had held comprehensive discussions on transparency, the Committee would have to take into account the WTO Agreements now in force. Those Agreements introduced some new notification requirements and had filled at least some of the potential gaps in transparency provisions identified in the EMIT Group, such as in the area of subsidies. Also, they addressed other concerns expressed in the EMIT Group, such as the need to avoid duplication of notifications. Also, a Working Group under the Council for Trade in Goods would be undertaking a thorough review of all existing notification obligations to simplify, standardize and consolidate them.

14. His delegation supported the preliminary conclusion that GATT provisions as supplemented by WTO provisions and the TPRM created a broad basis for ensuring transparency, including for environmental measures likely to have significant trade effects. These could be elaborated where necessary, keeping in mind that transparency requirements for environmental measures should not be more onerous than for other areas of policy-making that affected trade and should avoid becoming an administrative burden. On this basis, the Committee's work could clarify to what extent measures falling outside WTO Agreements should be subject to transparency disciplines; for example his delegation felt that transparency in one form or another would have to be provided for eco-labelling, deposit refund schemes and recycling requirements. He agreed that the Committee should deal with transparency as a horizontal issue. It would have to be ensured that Members followed-up their transparency obligations in the trade and environment interface. In addition to multilateral reviews in various Agreements, his delegation considered that it would be appropriate for such a follow-up be made in the TPRM.

15. The representative of Mexico said that coverage of and disciplines on transparency could play an important role in ensuring greater predictability for trade as well as ensuring the necessary level of environmental protection. Transparency was part of a whole and one of its most important elements was the process of *ex ante* notification which allowed unnecessary trade restrictions and distortions to be avoided, provided time for suppliers to adjust to new legislation and ensured trade-related environmental measures did not have adverse effects on trade. However, transparency was not an end in itself and it could not resolve real conflicts of interest. Even in the broadest sense, it was insufficient to resolve trade distortions that were beginning to be felt from the proliferation of instruments and voluntary environmental schemes based on unilaterally-defined criteria. Introducing measures, such as labelling and packaging based on life-cycle analysis could adversely affect imports, favour domestic production and fail to solve environmental problems. Also, they could give rise to new problems by imposing inappropriate environmental conditions on overseas suppliers.

16. Her delegation felt it was worthwhile to re-examine the list of potential gaps in transparency listed in WT/CTE/W/5 in light of WTO provisions and the high level of

transparency that existed under the TBT and SPS Agreements as many of these gaps might have been overcome. However, her delegation had doubts that voluntary measures and certain other measures were covered so as to ensure they did not discriminate *de facto* against imports, particularly when the measures reflected the importing country's environmental preferences. Discussions under item three would also need to clarify the adequacy of WTO transparency disciplines in this respect. Effective application of MFN and national treatment was essential to ensure predictable and fair trade conditions when applying in a transparent manner measures necessary for environmental protection.

17. Her delegation supported the delegation of Canada's proposal to examine the adequacy of the TBT Agreement's transparency provisions for measures such as eco-labelling, packaging, recycling, re-use and waste handling requirements. Her delegation considered that these measures were already covered by the TBT Agreement, but it would contribute to an exercise to confirm that. In the case of voluntary measures, it was valid to consider establishing environmental enquiry points as well as *ex ante* notification of measures with provision for prior consultation, taking into account concerns that had been raised regarding their feasibility and the need to avoid their proliferation. The TBT Agreement's Code of Good Conduct should contribute to alleviating the lack of transparency of voluntary labelling, but it was worth confirming by consensus as suggested by the delegation of Canada that it covered such standards adequately. Also, it would be necessary to further review the Code's operation and evaluate its effectiveness.

18. The representative of Argentina said that the EMIT Group's discussions on transparency had led his delegation to the conclusion that many environmental measures were covered by existing notification obligations, although countries frequently failed to comply with them. However, there were loopholes for some measures which had trade effects but were not subject to sufficiently precise notification obligations as most environmental measures were not applied as border restrictions but as internal measures, such as charges and taxes or technical standards and regulations which could affect market access and conditions of competition. Of the measures for which clear and precise rules of transparency did not exist, his delegation considered the following to be particularly important: (a) waste handling requirements, including recovery, reuse and recycling schemes for paper, plastics, aluminium and glass and take-back requirements. These did not fall within the TBT definition of a technical regulation and their notification was not required under the TBT Agreement; (b) non-mandatory provisions, particularly voluntary eco-labelling schemes, including evaluations of processes and production methods (PPMs) whose externalities were not reflected in the product and were therefore not covered by TBT provisions; (c) packaging, labelling and other general environmental measures taken by provincial and municipal governments or directly by industry; (d) certain economic instruments used for environmental policy purposes, such as taxes, drawbacks, and subsidies which were not directly trade-related but had an impact on it; (e) measures applied under Article XX; and (f) trade measures taken pursuant to MEAs.

19. Although the EMIT Group had not been asked to reach conclusions or recommendations, some general points of consensus had become apparent: (a) additional transparency requirements established for environmental measures should not be more onerous than those applied to other policies that affected trade; (b) duplication with other notification processes should be avoided; and (c) environmental enquiry points could fill gaps in the existing notification systems, such as for voluntary measures and non-central government measures to which governments and individuals should have access. While these were not definitive conclusions, his delegation felt they could be used as the starting point for further work. Transparency was a cross-cutting issue and it should be analyzed separately for each type of trade measure adopted for environmental reasons and each environmental measure with trade effects. His delegation felt that the

Committee should reach a consensus on general transparency standards, defining the necessary improvements in transparency for the gaps identified in WT/CTE/W/5, and working out in greater detail the proposal for setting-up environmental enquiry points as an important element of such improvements. Alternatively, transparency could be covered in a discussion of each type of measure under other items, in which case work under this item would deal with the latter two points. He supported the delegation of Mexico's comment that transparency was a necessary but not sufficient condition to avoid conflicts that could arise such as, for example, concerning eco-labelling measures. Transparency could not replace the need to establish disciplines based on the environmental rational that some measures should have if they had trade effects.

20. The representative of Colombia said that WTO Members had agreed on the need for clear transparency rules and mechanisms. The Committee should establish criteria in order to ensure adequate levels of and identify gaps in transparency, including: (i) *ex post* publication of legislation which was insufficient; notification should be *ex ante* so that interested parties from other WTO Members could comment on draft legislation, as was the case already under the TBT Agreement; and (ii) measures adopted by sub-federal government bodies and private sector voluntary measures, for example eco-labelling. For trade measures taken pursuant to MEAs, it was important to avoid duplication of notification obligations and dispel doubts concerning their transparency, for example with respect to WTO Members who were not parties to the MEA or for whom MEA transparency requirements did not measure up to those in the WTO. His delegation supported the creation of environmental enquiry points similar to those under the TBT and SPS Agreements and highlighted the importance of the TPRM to the transparency process.

21. The representative of Korea said that transparency was a necessary but not sufficient tool to minimize unnecessary trade effects. Some measures, such as PPM-based standards fell outside current WTO rules and others, such as recycled-content requirements were compatible with it but caused *de facto* trade effects. WT/CTE/W/5 described gaps in the transparency of environmental measures, including, *inter alia*, trade measures taken pursuant to MEAs, eco-labelling, packaging requirements, economic instruments and PPM-based measures. Any discussion of the scope or coverage of transparency mechanisms related to these specific measures should be preceded by a discussion of their acceptability under the WTO. He agreed that discussions related to transparency should comprise a component of work under items one and three rather than a separate topic. Regarding the level of transparency, his delegation considered that WTO mechanisms would be effective and could be elaborated if necessary. Enhancing transparency by widening the use of *ex ante* notification procedures, as in the TBT Agreement had several advantages as noted in WT/CTE/W/5, but duplication of notification obligations should be avoided. In order to identify any gaps in transparency, it would be necessary to further case-by-case analysis of major environment measures, as carried out in the EMIT Group.

22. The representative of Switzerland supported several general points made in WT/CTE/W/5 for which agreement had been reached: transparency built confidence in and provided security and stability to the multilateral trading system and provided predictability in private firms' trade conditions; environment-related transparency requirements should not be more onerous than those in other areas; duplication of work should be avoided; transparency requirements should be comprehensive, but not pose an administrative burden; *ex ante* notification should yield substantial benefits; and the role of enquiry points especially in the TBT Agreement was important. Further work would be more specific and technical. During the EMIT Group, her delegation had said that it would be ambitious and time-consuming to identify all possible gaps. It considered that in view of the WTO Agreements, the Committee should focus on questions raised in WT/CTE/W/5, such as the extent to which environmental subsidies were covered by WTO transparency provisions; whether measures taken by local authorities were covered; whether the

GATS covered environmental measures for services; whether WTO disciplines applied to eco-labelling schemes based on life-cycle analysis that featured unincorporated PPMs; and whether non-product-related PPM-based trade measures were covered.

23. Her delegation considered that work on transparency should focus on the question of deficiencies in WTO transparency mechanisms as well as on problems of inadequate compliance. As noted in WT/CTE/W/5, the latter might result from differences in Members' understanding and interpretation of obligations and her delegation did not oppose the suggestion to assess this through Secretariat questionnaires or surveys. Further work should identify remaining questions and discuss any recommendations for modification of WTO transparency provisions.

24. The representative of Hong Kong said that transparency contributed primarily to dispute prevention by dealing with problems before they developed into trade conflicts and modified the trade impact of environmental measures with trade restricting or distorting effects. A sufficiently effective but flexible system of transparency was needed to ensure information flowed and was of relevance and use to traders. He considered discussion of this item to be more mature than others. The two kinds of gaps which needed to be addressed were physical gaps related to coverage and qualitative gaps concerning compliance with existing WTO disciplines.

25. His delegation had a positive attitude towards the proposal to establish enquiry points, given its experience with those under the TBT Agreement, but felt that it was necessary to define their objectives and address whether they should be based on the nature of a measure or its purpose. The Committee should be aware of the point at which it would go beyond discussion of the transparency of a measure and enter into questions of a measure's legitimacy under WTO rules. As yet there was no common understanding of what measures were covered or what their relationship was to existing WTO disciplines. As such, his delegation supported the delegation of Canada's suggestion to examine an area such as eco-labelling at the technical level without any presumptions as to whether or not PPM-based measures were covered by the TBT Agreement. On this basis, the Committee would be able to frame discussions on transparency.

26. The representative of the European Communities agreed that transparency was essential in preventing trade disputes. His delegation shared the EMIT Group's conclusions in L/7402 that transparency should not be an end in itself; transparency requirements for environmental measures should not be more severe than those applicable for other measures; compliance with transparency rules should be considered, possibly through the TPRM; and the volume of transparency notifications should remain functionally manageable. Also, his delegation considered that notification should be limited to measures with significant trade effects. There was much work to be done to provide a uniform definition of transparency as well as to consider any existing gaps. An initial exercise might consist of developing an understanding of the term "significant effects on international trade" as it related to environmental measures. From this could be determined for which environmental measures further notification mechanisms would be necessary through a case-by-case approach. Once it was determined what should be submitted to WTO transparency, the type of transparency should be examined, i.e. *ex post* or *ex ante*, notification or publication; as such, enquiry points could constitute an efficient and flexible way of ensuring transparency.

27. Provisions for *ex post* transparency were contained in GATT Article X, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Article III of the GATS, Annex B of the SPS Agreement and in Articles 2.5 and 8.11 of the TBT Agreement. The scope of some of these rules was uncertain, particularly Article X and the 1979 Understanding could be insufficient concerning some environmental measures due to their technical complexities and potential trade effects. The TBT and SPS Agreements contained the

most elaborate and efficient type of transparency and applied to any technical measure affecting products which was not based on international standards and had significant effects on trade. To determine potential gaps, a case-by-case analysis or the consideration of environmental measures by individual categories was the best approach.

28. In the services sector, environmental measures with trade effects could be identified under item eight. Subsidies, including those granted for environmental purposes, were subject to transparency rules under the Agreement on Subsidies and Countervailing Measures and it would be useful to initially analyse the significance of their trade effects. Indirect taxes were already subject to *ex post* transparency requirements under GATT Article X and the 1979 Understanding; it could be considered whether these existing rules were satisfactory under item three. It should be considered whether deposit systems with packaging and return requirements had significant trade effects and should be subject to transparency rules. Some technical environmental requirements, such as packaging and labelling could have significant trade effects and it was necessary to determine the extent to which they required additional transparency.

29. It was not appropriate yet to consider environmental PPM measures as a separate category. When these measures affected the characteristics of a product, they were covered by the TBT Agreement. Insofar as their scope of application in principle should remain confined to the national territory, they would probably not have significant trade effects. Environmental measures taken pursuant and subject to transparency requirements under MEAs should not be overlooked. The Committee should ensure that these rules were satisfactory while avoiding duplication of efforts. He referred to the linkage between this and other items for which results would orient the Committee's conclusions. Discussions on item four would be inspired by results on items one, three (a) and (b), and eight. At the conclusion of the Committee's work, transparency of environmental measures could be dealt with by concentrating on measures with significant trade effects.

30. The representative of Brazil agreed that transparency obligations for trade-related environmental measures should not be more onerous than those for other areas of policy-making that affected trade. The Committee should consider the transparency of waste handling, take-back and eco-labelling requirements where potential gaps might exist in substantive WTO disciplines on non-tariff barriers. He supported the delegation of Canada's proposal to examine at a technical level the relationship between particular trade-related environmental measures, such as eco-labelling requirements and the TBT Agreement. His delegation's proposal to establish enquiry points had been prompted in part by the observation that transparency could be achieved by other means and did not have to be equated with notification requirements, which could prove onerous for national administrations. Existing TBT or SPS enquiry points could act as a model and be extended to cover trade-related environmental measures.

31. The representative of Australia said that transparency of trade and trade-related policies with significant trade effects helped ensure openness and predictability in the multilateral trading system, acted as a means to avoid disputes and could also contribute to promoting mutually supportive trade and environment policies. Effective transparency in the application of environment-related trade measures and environmental measures with significant trade effects could help dispel concerns that there was a protectionist intent behind these measures and could provide a means to ensure that measures taken by other countries were proportional to the environmental objectives being pursued, and were the least-trade restrictive. It was important to ensure that transparency and notification provisions did not become unduly onerous, did not impose unreasonable administrative burdens, and did not duplicate work in other fora.

32. He agreed that there were important linkages between item four and especially item three, but also items eight and nine. Transparency might also be important in work on the relationship between WTO rules and trade measures taken pursuant to MEAs. These linkages could be examined under other items, such as eco-labelling. Improved transparency, notification procedures and provisions for timely consultations could contribute to minimising trade distortions and maximising the environmental effectiveness of eco-labelling schemes. Clarifying the relationship between eco-labelling schemes and the TBT Agreement would help the Committee to better understand their coverage under the WTO, clarify the role of notification procedures in improving transparency and respond to concerns about eco-labelling, packaging requirements and waste handling requirements. His delegation considered that there was widespread agreement on the contribution which transparency could make to ensure that trade and trade-related measures did not create unnecessary obstacles to international trade. Transparency, notification and consultation procedures were also subject to interest in other fora as a means to ensure that eco-labelling schemes met their environmental objectives and both the trade and environmental perspectives recognized their value in promoting international cooperation to ensure good policy outcomes and avoid disputes.

33. The representative of New Zealand said that as a relatively small international trader active in a range of markets his delegation supported the transparency of all trade measures, including those applied for environmental objectives as it helped to ensure the security and predictability of market access, avoid disputes and ensure that trade measures were used in an effective and legitimate way. Concerning gaps in WTO transparency provisions, account should be taken of the net benefits in order to justify the use of resources to fill those gaps and not overload the system. His delegation considered that WTO provisions had clearly enhanced the coverage of transparency of environmental measures with trade effects and it supported the need to focus the analysis on a range of these measures.

34. The representative of Pakistan said that although WT/CTE/W/5 suggested that broad agreement had been reached on several points related to transparency in the EMIT Group, his delegation felt that work in the EMIT Group had not progressed much. It was not appropriate for example for the TPRM to assist in drawing attention to areas where compliance with WTO transparency provisions could be further improved as this would interpret the role of the TPR exercise as an enforcement instrument, which was not his delegation's understanding of it. The Committee should deal with broader trade and environment issues and not review the notification requirements under the TBT and SPS Agreements. His delegation said that transparency was the cornerstone of multilateralism and it should be *ex ante* to allow developing countries in particular to bring their products into conformity with measures which could be trade restrictive.

35. The representative of India endorsed many of the comments of other delegations regarding the importance of transparency and felt that it was a cross-cutting issue which would need to be addressed under several other items, particularly under item seven, the issue of exports of domestically prohibited goods. The degree of transparency required should be related to the significance of a measure's trade effects. As such, he suggested that the Committee would need to consider how to define significant since an insignificant trade effect to one country might be considered highly significant to another. His delegation said that, if there was consensus, transparency requirements should apply to measures which did not fall under WTO disciplines, with the caveat that the notification of measures to the WTO would not bestow legitimacy on the criteria upon which they were based, such as for PPMs, or the manner in which they were determined. His delegation considered that substantive new disciplines were needed to prevent certain trade-related environmental measures from causing adverse trade effects. It supported the delegation of Canada's proposal to have a focused discussion on eco-labelling.

36. The representative of Malaysia, speaking on behalf of the ASEAN countries, said that the Committee's work had not reached the stage where conclusions of a prescriptive nature could be drawn. His delegation felt that there were sufficient WTO notification requirements to ensure transparency and that there was merit in adopting an *ex ante* approach to allow a country's trading partners to adjust to legislative changes. It was important not to impose burdensome new transparency requirements, but that that should not be an excuse to avoid further transparency, particularly for voluntary measures such as eco-labelling, where his delegation had gained experience through the timber trade of measures applied at the private sector and sub-national level. Hence, his delegation supported the delegation of Canada's proposal for a technical exercise to examine eco-labelling.

37. The representative of Venezuela agreed that the main purpose of transparency was to avoid trade disputes. Concerning potential gaps in transparency identified in WT/CTE/W/5, his delegation felt that PPMs were particularly important since measures adopted on this basis even for national purposes, could have a significant trade effect. It supported the proposal to review ways to fill gaps in transparency where they existed and was interested in enquiry points in this regard.

38. The representative of Egypt said that transparency was not an end in itself but an important means of confidence building in the multilateral trading system which helped minimize trade restrictions and distortions. He agreed that gaps in WTO transparency provisions related to environmental measures should be identified and that the TBT and SPS Agreements could be used as models. Environmental measures taken by local government and NGOs represented a potential gap in transparency. His delegation considered that a differentiation should be made between two categories of environmental measures. The first category constituted measures which directly affected conditions of market access, and included bans on import, sale, or use, technical regulations, and licensing or permit requirements. Most, if not all, were covered by existing provisions. The task of the Committee would be to develop a common understanding of obligations and work should be aimed at ensuring compliance with these provisions. The second category comprised measures that affected the equal opportunity to compete and affected market access conditions indirectly, such as eco-labelling programmes. A gap existed concerning eco-taxes, handling, recycling and waste disposal requirements and work should develop a common understanding of how to address this.

39. Even though he agreed with the delegation of the United States that both *ex ante* and *ex post* notification was needed, his delegation preferred *ex ante* notification as it was better at confidence-building. Effective *ex ante* notification was crucial for enhancing predictability and providing opportunities for prior comments and consultations with interested parties. It was clear that transparency in this context furthered, *inter alia*, sharing information to minimize adverse trade effects, assisting traders to make the necessary adjustments, and averting potential disputes through prior notice and consultations. He agreed with the delegation of India that progress on transparency was subject to progress on other items. The Committee would need to reach a common understanding of how to deal with eco-labelling schemes, to define what was meant by significant trade effects, and determine the market access effects of environmental measures, especially for developing countries.

40. The Chairman reiterated that the objective in seeking transparency was to give greater security and predictability to the trading system and avoid disputes. At the same time, work undertaken in this regard should not lead the Committee to expect unrealistic results as transparency could not be a substitute for other disciplines with which trade measures should comply and that duplication and burdensome administrative cost should be avoided. A first area

for work was the need to define clear and precise rules on the meaning of transparency of a trade measure and whether notification should be *ex ante* or *ex post*. The WTO contained extensive notification obligations; hence, the greater the number of the notification mechanisms, the greater the risk that compliance would be loose. In this regard, the Council for Trade in Goods would undertake a review of existing notifications obligations established under WTO Agreements in Annex 1A in order to simplify, standardize and consolidate them. He recalled that the issue of notification obligations had been raised at the Committee on Trade and Development's last meeting related to the need for technical cooperation in developing countries.

41. A second area for the Committee's work was a case-by-case analysis of each type of measure in order to determine coverage and identify any gaps in transparency in WTO rules and disciplines. A third area which implied more technical work and had been suggested by the delegation of Canada was an analysis of eco-labelling, packaging and the waste-handling requirements. It should be examined whether it was appropriate to focus on those types of measures where transparency could give rise to trade problems and whether each type of measure should be analyzed separately in a working party of the Committee. The fourth, was the creation of enquiry points, keeping in mind that a similar mechanism already existed in the TBT and SPS Agreements. New areas of work could be related to the possible contribution of the TPR Mechanism in strengthening transparency of environment-related trade measures.

Item five of the work programme:

> The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements

42. The representative of Chile presented his delegation's submission contained in WT/CTE/W/2 which was addressed to some aspects of item five. In this context, the paper drew the Committee's attention to some of the legal procedural aspects contained in the new agreement for the implementation of the 1982 United Nations Convention on the Law of the Sea, which had recently come into force and whose Section 6 of Part XI (production policy) explicitly recognized the competence of the GATT/WTO. It provided for: (i) a dispute between parties regarding a purely technical, scientific or legal matter to be resolved by the dispute settlement mechanisms in Part XV of the Convention; and (ii) a dispute over matters concerning production policy in the international seabed, in particular subsidies and restrictive trading practices to be submitted to the WTO dispute settlement mechanisms. It would not always be easy to establish into which of the two categories a dispute would fall as what one party considered to be an incentive for technical development or measures for the protection of the marine environment, another party might consider a disguised subsidy. For this reason, apart from studying the theoretical aspects of attributing competence to the WTO under the Convention, it would be useful to set up a link between the WTO Secretariat and the future seabed authority, a responsibility which currently was being carried out by the UN Legal Department.

43. His delegation referred to the Convention in order to recall that the first thing a panel would have to consider when examining the relationship between the WTO and an MEA was whether either of the treaties in question had attributed competence to the other. In the case of the Convention, Section 6 of Part XI had been introduced to deal with a specific subject area. Other MEAs, such as the Convention on Biological Diversity outlined that adherence to it would not effect the rights and obligations of parties to earlier treaties. The Havana Charter of the International Trade Organization referred explicitly to multilateral agreements on the conservation of marine resources, migratory birds and endangered animal species. The 1902 Convention for

the Protection of Birds useful to Agriculture and the 1911 Convention respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, as well as many international agreements on fishing contained trade measures. During preparatory work for the ITO's Charter these matters were specifically discussed. An analysis of the post Uruguay Round context should also highlight this valuable aspect of the preparatory work for the interpretation of sustainable development as it was supported in the Final Act.

44. He noted that the negotiations of the Montreal Protocol and the Framework Convention on Climate Change were also of interest. The negotiators of the Montreal Protocol had wanted it to be consistent with GATT and based on the legal opinion of a GATT expert on the applicability of Article XX to its trade provisions, its negotiators had considered that this reconciliation had been achieved. However, the GATT expert had insisted that the decision on whether Article XX could be invoked would lie with the GATT contracting parties. During negotiations on the Convention on Climate Change it had been proposed that parties should only be able to apply measures consistent with GATT in order to achieve the Convention's objectives, which had not been accepted. However, the wording of the Convention's Principles retained the idea that measures taken to further its objectives "should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade". He pointed out that those elements of harmonization did not change the fact that, in principle, each MEA had its own mechanism for settling disputes, as did the WTO under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). MEAs and the WTO were coexisting jurisdictions and a question of which jurisdiction would arise if one of the parties to the dispute was not a party to the MEA whose compatibility with the WTO was to be examined. Theoretically, the parties could agree to waive the respective competence of the MEA and the WTO in favour of the International Court of Justice, with the exception of CITES. His delegation favoured reinforcing the DSU without prejudice to the right of parties to choose the dispute procedure. This would be carried out by improving the flow of information, carefully considering the composition of panels, and laying down some general criteria or guidelines of conduct.

45. The representative of Nigeria asked whether it was necessary to link WTO dispute settlement mechanisms to those in MEAs or vice-versa. He enquired as to whether disputes under MEAs could be brought to the WTO, for instance disputes arising from a Member's challenge of a breach by another or enforcement of MEA provisions. Based on the delegation of Chile's statement, he asked whether there should be any effort to integrate jurisdictions in cases of overlap. The WTO's improved dispute settlement mechanism was clear. Provisions for dispute settlement in MEAs combined the use of a wide range of methods ranging from non-binding consensus building, which included negotiation and conciliation as well as judicial settlements. There was a great reliance in MEAs on enhanced transparency measures in order to avoid conflict and formal dispute settlement. In practice also, the evidence suggested that disputes between parties were initially taken up for resolution through consultation and negotiation between the parties concerned. If this failed, then parties to the dispute had recourse to the binding judicial procedures of arbitration, or the International Court of Justice. The Montreal Protocol on Substances that Deplete the Ozone Layer offered a good example of the flexible multi-stage approach to MEA dispute settlement. Thus, for most MEAs there were provisions for dispute settlement that combined consensus through negotiation and consultation, mediation and conciliation, and a second track that provided for legally-binding procedures of arbitration and judicial settlement.

46. He referred to the observations in PC/SCTE/W/4 that: (i) parties to MEAs were not obliged to submit to a process of binding judicial resolutions; (ii) there was widespread reluctance to call on procedures for formal dispute resolution even though compliance had been incomplete;

and (iii) there was no central institution mandated to consider environmental disputes even though the ICJ had established in July 1993 a special seven member Chamber for Environmental Matters to deal with disputes that might come before it. Hence, MEAs contained appropriate and suitable provisions for dispute settlement and their legally-binding procedures were similar to WTO mechanisms. On this basis, it would appear unnecessary to seek a formal linkage between dispute settlement arrangements in MEAs and the WTO. There could be more complex scenarios, such as when an aggrieved MEA party could prove that its rights under the WTO Agreements had been breached by another party. The resolution of this dispute under the WTO could only be based on a clear breach of rights and obligations under WTO Agreements of which both the complainant and the defendant had to be Members. It was not realistic for a complainant to use dispute settlement provisions of either an MEA or the WTO against a non-party.

47. His delegation's preliminary position was that conflicts of interest that led to the use of MEA dispute settlement procedures should not be a matter for WTO dispute settlement procedures. This general position was underscored by the fact that the WTO should not be overburdened and that jurisdictional questions would arise, such as whether the WTO should consider breaches or enforcement issues that arose under MEAs for which convincing arguments would have to be advanced. If the delegation of Chile's proposal was to be followed, it should still be determined why it was necessary to integrate jurisdictions when MEAs already contained appropriate provisions.

48. The representative of Colombia said that WTO Members should preserve their legitimate privilege to submit any conflict which might arise related to environmental measures with trade effects to WTO dispute settlement. Whereas MEAs contained provisions for resolving conflicts, not all these would have an influence on the trading system. In an analysis of environmental measures, WTO Members would find that conflicts might have to be handled in the WTO if there were effects likely to hinder trade.

49. The representative of the United States said that the broad range of MEA dispute settlement procedures did not appear to be as strong as those in the DSU. In some respects, the DSU might suffer in comparison to MEA dispute settlement mechanisms. For instance, a number of MEAs relied on the International Court of Justice, where all hearings were public unless it decided otherwise or parties to the dispute demanded that the public not be admitted. This was relevant and would require further reflection in view of the Commission on Sustainable Development's 1994 session conclusions which stated that:

> "The Commission highlights the importance of achieving transparency, openness, and active involvement of the public and experts in relation to work on trade and environment, including work within the WTO, UNEP and UNCTAD, and to dispute settlement process. The Commission recognizes that there is a considerable need for improvement in these areas and looks for the development of specific recommendations in this regard by governments and the appropriate organizations in accordance with Chapter 38 of Agenda 21."

50. His delegation said that WTO rules were reaching more deeply into technical trading questions that might have a bearing on environmental policy at the same time as the number and scope of MEAs was increasing. Under item one, the focus had been on potential conflicts between the WTO and MEAs and it was here where opportunities for synergy existed. It would be useful to explore possible mechanisms through which a WTO dispute settlement panel could be informed of MEA provisions which might be relevant to its consideration of disputes, including interpretations and applications of an MEA or judgements on international environmental matters

pursuant to MEAs. His delegation felt that the WTO dispute settlement process would benefit if panels, where appropriate, sought expert advice on environmental, scientific and technical matters in disputes involving environmental issues and it was essential that the DSU procedures established for that purpose operated effectively.

51. The representative of Argentina said that MEAs generally included various dispute settlement mechanisms, ranging from non-binding, consensus-building to arbitration and judicial procedures if the parties had consented. As MEAs focused on mechanisms for avoiding disputes, emphasis was given to mechanisms for enhancing transparency and international cooperation. Despite the preference for avoiding disputes, disputes were likely to arise given the growing environmental pressure from population growth and the increasing consumption patterns of the most highly industrialized societies. Disputes within MEAs would be difficult for the WTO as they would likely centre on trade measures contained in MEAs. As such, environmental disputes should be prevented from becoming an extra burden for the WTO's Dispute Settlement Body (DSB) and allowing it to become involved in resolving environmental aspects of MEAs. In this respect, he mentioned two general principles: (i) WTO Members could agree that as a general rule of conduct the MEA dispute settlement mechanisms should be exhausted before the dispute could reach the DSB; and (ii) environmental aspects of the dispute should be settled in their specific environmental forums.

52. He enquired as to when it would be possible to consider that an MEA dispute settlement mechanisms had been exhausted as MEAs were often silent in this respect. Even assuming that parties to the dispute were also MEA parties, it could be imagined that the party applying a trade measure, which could often be the one that had not only the right but also the commercial capability to do so, would consider that the dispute settlement mechanisms had not been exhausted whereas the party affected by the measure would want to refer it to the DSB as soon as possible. He asked what attitude the DSB should take when only one of the parties to the dispute was an MEA party as it would not be possible to require that the MEAs dispute settlement mechanisms be exhausted before intervening. Nor would it be possible to apply the second above-mentioned principle as no MEA could be considered the specific environmental forum. It was difficult to respond without knowing the outcome of the Committee's work on item one. Hence, his delegation considered that it was under item one where it was possible to establish the basic provisions to guide the DSB's work.

53. The Committee could also try to progress in identifying possible solutions to problems that would arise for the DSB when it had to work with either of the following alternatives that appeared feasible if a dispute arose. Where there were only two parties to a dispute and assuming that both were WTO Members, either: (i) both were parties to the MEA; or, (ii) only one was an MEA party. In the first case, the main problem lay in determining when the MEA dispute settlement mechanism had been exhausted. He enquired as to whether a time-limit could be set to fill this legal gap and if the MEA concerned was asked, what would happen if it was silent. In the second case, the main questions were how to avoid the DSB from becoming involved in a specifically environmental conflict, whether the panel would have to have recourse to a scientific and technical opinion, as allowed under Article 13.2 of the DSB, whether this opinion was binding on the DSB, whether it should be made public and from whom it should be sought. His delegation considered that this analytical exercise should pose questions in order that the Secretariat could identify general principles that might emerge from the Committee's discussions and the problems that could arise in their application which could be submitted under item one before the October meeting.

54. The representative of the European Communities considered it necessary to ensure that when there was a dispute concerning environment-related trade measures, the interests and the specificity of trade and environment were taken into account and that one did not jeopardise the fulfilment of the legitimate objectives of the other. When approaching the issue of the relationship between MEA and WTO dispute settlement procedures, his delegation had focused on the possible legal uncertainty of a situation where parties to a dispute might resort, in the absence of rules on competence, to the MEA procedures and/or the WTO, which was referred to as forum-shopping. His delegation asked the Secretariat to provide an analysis of this issue. His delegation felt that no similar case had yet occurred and that discussions might prove rather theoretical. However, given the ever-broadening interaction between environmental and trade disciplines, the questions were which dispute settlement mechanism would be legally competent and which one had the necessary expertise to settle the dispute. His delegation considered that the Committee's task would be easier if consensus had been achieved on rules regulating the relationship between the WTO and MEAs under item one and that procedural discussions on item five were taking place in the absence of clear rules of substance

55. Three cases could be envisaged whereby a dispute: (i) arose between two MEA parties concerning compliance with MEA requirements and trade measures were adopted against the party in breach of these requirements; (ii) arose between an MEA party and an MEA non-party which was a WTO Member; (iii) was a trade and environment one but the environmental problem was not covered by any MEA or no party to the dispute was a member of an existing MEA related to the specific environmental problem. In this case, the issue was not directly linked to the relationship between MEA dispute settlement and the WTO, but concerned environmental expertise in the DSB, which was undoubtedly competent to judge on the matter.

56. In the first case, the question was whether an MEA party was entitled to challenge trade measures taken by another MEA party in the WTO, which raised principles of international law. His delegation had not yet developed a position but it considered two approaches in this respect. The first was that it might be argued that relations between two MEA parties constituted *res inter alios acta*. Where the MEA envisaged the adoption of trade measures for its effective operation, it could be considered that signatories of the MEA accepted at the act of accession all its rights and obligations, including the possible use of trade measures. As such, the competence for settling the dispute should fall within the MEA, since its *lex specialis* would supersede the *lex generalis* of the WTO. Consequently, MEAs should be endowed with efficient dispute settlement mechanisms, which was not generally the case as MEA dispute settlement was characterized by a political-consensual nature which focused on dispute avoidance rather than settlement and the final judicial procedure was generally not compulsory and could be initiated only if the parties involved agreed. Also, the enforcement mechanism was generally weak compared to that of the WTO.

57. The weak character of MEA dispute settlement was explained by the fact that international environmental law was considered to be soft law. However, when environmental law took the form of an MEA, developed through international consensus, its parties should be prepared to endow it with the judicial and enforcement powers necessary to ensure compliance and the fulfilment of its environmental goal. Attention might be given to developing strengthened dispute settlement mechanism for existing and future MEAs to dispel the risk that when trade disputes arose between MEA parties they would resort to the WTO because of the lack of well-established, efficient and enforceable MEA provisions. This was probably not a matter for the WTO; UNEP might be requested to define MEA dispute settlement guidelines. In order to ensure that the specificity of the trade interests of the complainant were considered and to foster the necessary interdisciplinary exchange of expertise, arrangements might be envisaged whereby, for a

trade-related dispute between two MEA parties, the necessary trade expertise might feed in to the MEA dispute settlement mechanism through WTO cooperation.

58. The second approach to the first case entailed that when a dispute arose due to the adoption of trade measures by an MEA party against another party, nothing would prevent the complainant from starting WTO dispute settlement proceedings. The WTO was the institution regulating international trade and competent to judge on any dispute related to trade restrictions, irrespective of their objective. The "exclusive" competence of the WTO might be nuanced by establishing appropriate cooperation arrangements between the WTO and the MEA competent bodies, so as to ensure that the MEAs environmental objective was considered in the settlement of the dispute. It was difficult to delineate general rules of principle which avoided the legal uncertainty related to competence for settling disputes between MEAs and the WTO when the dispute arose between two MEA parties. He suggested that a pragmatic approach would be case-by-case, whereby parties negotiating an MEA stipulated *ex ante* in the MEA if they intended to settle possible disputes with other MEA parties within that MEA.

59. In the second case, if an MEA party considered that the action of a non-party undermined the MEAs environmental goal and adopted trade measures against the non-party, the competent forum to settle the dispute was the WTO. In this case, as well as in the second approach examined in the previous case, two scenarios could be envisaged depending on which rules the Committee would reach consensus on under item one. In the first scenario, the Committee would reach a consensus on item one and the recommendations made to the Ministerial Conference would be endorsed, whereby a form of exemption from WTO scrutiny of trade measures taken pursuant to MEAs would be granted. In the second scenario, no consensus would be reached and trade measures taken pursuant to MEAs would not benefit from any special treatment in the WTO.

60. The first scenario would translate into appropriate rules for the WTO dispute settlement mechanism being developed, whereby an exception could be claimed by the party adopting the trade measure. In the second scenario, when a dispute arose between an MEA party and non-party, the WTO as the competent forum for settling the dispute would consider current rules and procedures. His delegation considered that in the process of settling a dispute arising from the adoption of trade measures pursuant to an MEA, appropriate consideration might be given to the MEAs environmental objective for which the trade measures had been taken. In this case, appropriate arrangements for cooperation and consultation between the MEA and the WTO could be made.

61. The third case was not directly related to item five, but his delegation considered it opportune to address it since item five was where a focused discussion on WTO dispute settlement could occur. When discussing the need to ensure the integration of environmental considerations in a trade dispute, his delegation was aware that the main criticism from the environmental community was that the DSU referred to the panellists' right to seek information, including environmental expertise. He noted that environmental expertise would prove essential for the necessity test of an environment-related trade measures and that the assessment of scientific evidence, requested in support of certain trade measures, would require environmental and technical expertise. He emphasized the importance of the DSU improvements given in terms of legal certainty, clarity of the rules, transparency and effectiveness. However, given the sensitivity and the increasing overlap of environment and trade policies, his delegation considered that the current rules on relevant expertise in WTO panels should be interpreted to ensure that there was environmental expertise when the dispute was environment-related.

62. The representative of Switzerland said that trade restrictions might be an important element of some MEAs in order to fulfil specific environmental objectives or to enforce MEA obligations. As such, overlap existed between trade and environment and the potential for disputes would increase. Since it was desirable to promote a coherent development of trade and environmental policies and avoid disputes, effective rules and mechanisms had to be put in place within MEAs and the WTO in order to settle such disputes. The WTO and MEAs provided specific dispute settlement mechanisms which were equivalent in terms of international law. MEAs provided provisions such as consultation, mediation, conciliation or arbitration usually of a non-binding nature to settle disputes on environmental matters. However, MEAs were based on cooperation to achieve general goals and did not outline obligations in detail making compliance difficult to enforce. This might be a reason why disputes within MEAs had been rare. However, there were compulsive multilateral trade rules on dispute settlement procedures such as transparency as an element for dispute management, consultation, conciliation, mediation and arbitration. The WTO dispute settlement mechanism was considered to be one of the cornerstones of the WTO system and as described in the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures it was a central element in providing security and predictability to the multilateral trading system.

63. The two different dispute systems had common principles such as the preference given to negotiated solutions through consultation, mediation and conciliation. However, the handling of conflicting obligations under the WTO and MEAs might give rise to difficulties. Her delegation focused on whether existing WTO dispute settlement mechanisms were sufficient to solve trade and environment disputes and whether any modifications of these provisions were required in order to avoid conflicts stemming from the overlap of both systems. Her delegation was not in a position to present an answer to these questions, but it would like to indicate how the Committee could proceed in its analysis.

64. Concerning the institutional aspects of the WTO dispute settlement mechanisms, one question which could be explored was how to deal with a dispute involving a measure consistent with an MEA but contrary to WTO rules. She enquired as to whether it was necessary to set up new institutional arrangements such as a superior institution, which could judge disputes between trade and environmental policies, or whether it was preferable to work out pragmatic solutions on the basis of existing mechanisms. The answers would depend on the outcome of the Committee and other international fora's work. Regarding the procedural aspects of WTO dispute settlement, she asked whether existing provisions provided for sufficient environmental expertise to judge trade and environment disputes. Under the WTO Agreements, a range of trade-related measures could be taken to achieve environmental objectives provided they were non-discriminatory, transparent and proportional. An evaluation of the proportionality of a measure might be contentious, including whether it was more trade-restrictive than necessary to fulfil a legitimate environmental objective and considering the risks of non-fulfilment. The evaluation of the proportionality and necessity of a trade measure based on an MEAs agreed environmental goal was an example in that respect.

65. According to the DSU, panels had the ability to look at all relevant rights and obligations of concerned parties and to consider agreements covered which provided a comprehensive overview of the varying and of eventually competing provisions of the system. If panellists were not environmental experts, they could seek environmental expertise according to Article 13. She enquired as to how to ensure that such expertise would be sought by a panel where necessary and whether the decision should be the panellists or whether guidelines should be developed to define situations in which such expertise had to be sought. Since the WTO did not have experience with disputes on conflicting obligations under the WTO and MEAs, there was no legal interpretation of

the MEAs concerned. Based on Chile's submission, it might be useful to analyze the Convention on the Law of the Sea, which transferred competence in all matters relating to subsidies and restrictive trade practices to GATT.

66. The representative of Norway said that MEAs contained varying forms of dispute settlement and to date the emphasis had been on dispute avoidance through the exchange of information, monitoring, reporting and inspection. Consequently, binding dispute settlement procedures were not widely included in MEAs. His delegation felt that international cooperation, particularly through MEAs was recognized as the most effective way of solving global and transboundary environmental problems. As such, provisions for the use of trade measures for environmental purposes would probably be negotiated within their framework which might imply an increased number that contained trade measures. This necessitated the need to address the relation between WTO and MEA dispute settlement.

67. In the first case, a conflict arose between parties to both the MEA and the WTO where one party claimed that its trade measures were legitimate under the MEA, while the other party, whose interests were affected by the trade measures, claimed that its rights under the WTO had been violated. In order to resolve the conflict within the MEA, his delegation considered that MEA dispute procedures needed to be made clear and binding. There was nothing to prevent MEA parties from providing for disputes related to their application and interpretation to be solved within the MEA. As such, parties would be bound by MEA dispute settlement provisions as outlined by the delegation of Chile, although in a different direction. The second case was where one of the parties was an MEA party and the WTO while the other party was a WTO party only. In this case, WTO provisions would be applicable if one party so requested. As such, he agreed with the delegations of Argentina and the European Communities that the issue of dispute settlement was linked to the outcome of work on item one.

68. His delegation considered that a collective interpretation of Article XX was the appropriate way to regulate the relationship between MEAs and the WTO to reduce the risk of disputes. If a dispute was submitted to the WTO, the DSU provisions allowed for environmental expertise. These provisions were general approaches and did not give directions to ensure that such expertise would be consulted. It was important that appropriate environmental expertise be sought in environment-related disputes and an automatic system could be established for involving environmental experts and MEA bodies. This would have to be dealt with in the Committee. One possible solution could be an Article XX environmental "window" which included a reference to the need to call on environmental expertise in connection with disputes. When environment-related trade disputes arose outside an MEA, use could also be made of environmental expertise.

69. The representative of Hong Kong did not consider it to be the Committee's task to address MEA dispute settlement mechanisms and their improvement. This would not further the recognition that the WTO did not have any competence in determining whether environmental policies were appropriate or adequate. The Committee should look at dispute settlement in the context of the overlap between trade and environment, specifically when MEAs provided for trade measures, which, under certain circumstances, would be in violation of WTO obligations. If not, the WTO might be used to underpin MEAs or the WTO dispute settlement procedures would be used to implement MEAs' provisions which was futile.

70. The analysis given by the delegations of the European Communities, Argentina, Norway and Switzerland would have to be discussed by the Committee at a later stage. One point which should be accepted was that without clarifying the substantive rules it was not possible to discuss

dispute settlement. The idea of allowing environmental experts to participate in the WTO dispute settlement mechanism was a good one. In the TRIPs Agreement, for example, there was an evident interface with WIPO and intellectual property expertise could be sought in a dispute. Even though it was far-fetched to think of a TRIPs dispute, it had been felt necessary to create a list of panellists for TRIPs disputes. However, the Committee should wait until it knew what to do under item one and had experience using the DSB.

71. There was a set of WTO Agreements to institutionalize the exchange of commitments and Members were bound as they had voluntarily signed away some of their rights in return for others, including the right to use trade sanctions unless these were covered by WTO exceptions. No matter how noble the objective of a policy measure, it did not justify a violation. GATT/WTO jurisprudence considered the onus of proof to be on the party that invoked an exception and GATT dispute settlement generally had accepted that whenever a measure could be shown to be inconsistent, nullification and impairment of benefits was assumed. He referred to these features of the dispute settlement system as MEA dispute settlement and that under the WTO might not be compatible. In any case, he did not consider that the Committee should go into further detail at this stage as dispute settlement was not a priority. First, item one had to be dealt with substantively. Then some common understanding of concepts was needed before it would be possible to examine the procedural aspects and undertake any fundamental changes to the long-negotiated WTO dispute settlement system.

72. The representative of Australia said that discussions under item five were important to place it in the broader considerations under item one and that work on dispute settlement would need to proceed in step with deliberations on MEAs as the delegations of Argentina, the European Communities and others had noted. Experience with the use of MEA dispute settlement procedures should be seen in view of the fact that most MEAs were based on general obligations to attain broad environmental objectives. In contrast, the WTO encompassed specific contractual rights and obligations between its Members. Differences in the dispute settlement mechanisms of MEAs and the WTO reflected these differences. However, there were many similarities between the two dispute settlement mechanisms, such as: (i) transparency and notification obligations played an important role as a means of avoiding disputes and monitoring and ensuring compliance with obligations; (ii) the aim of dispute settlement in both was to secure mutually acceptable solutions between parties to a dispute that was compatible with the relevant legal regime; (iii) this aim of the WTO and MEA dispute settlement systems was reflected in the emphasis on consultations between parties to a dispute as a necessary first stage in the resolution of disputes and in order to seek a mutually satisfactory solution; and (iv) both contained provisions for good offices, conciliation and mediation as a means of settling disputes.

73. Differences between the WTO and most MEAs might exist if these first steps failed to resolve the dispute. The WTO included detailed provisions on the establishment and work of a panel whose members served in an individual capacity to impartially examine the facts and the applicability of relevant WTO Agreements and report its findings to WTO Members represented in the DSB. In contrast, MEAs might provide for arbitration either by an arbitral tribunal set up under procedures provided for in the MEA, or by an outside body such as the Permanent Court of Arbitration or the International Court of Justice, but only if both parties to the dispute had so agreed. In some cases, MEAs included provisions for conciliation by bodies it established.

74. His delegation identified a few of the issues which were worth consideration under item five, considering statements made by Chile, Argentina, the European Communities and others. One issue was the question of which dispute settlement mechanism should be used in the event of a dispute between two parties which were both WTO Members and MEA parties concerning an

issue which related to obligations under the WTO and the MEA. If a government was a party to both the WTO and MEA it would presumably seek to implement its obligations under one agreement in a manner as fully consistent as possible with its obligations under the other. It was important that governments, when adopting measures, fully examined them in relation to all of their international obligations; this should help avoid disputes. But it was also important that other countries which might be members of both an MEA and the WTO examined measures taken by another country which they might be concerned about in the context of all the international obligations between the two countries. In this regard, it was relevant to point to Article 3 of the DSU which called on Members, before bringing a case, to exercise their judgement as to whether action under the dispute settlement procedures would be fruitful.

75. If a dispute arose between two governments concerning their obligations under both the WTO and an MEA, initially it was up to the complainant to determine whether to make a complaint in the WTO or the MEA, which would be determined by its assessment as to whether its rights under the WTO or the MEA had been mainly infringed. Under both, the initial recourse to dispute settlement entailed bilateral consultations between parties to the dispute. Irrespective of where the complaint was made, these consultations provided an opportunity for parties to discuss their views on all aspects and provided the basis for a mutually satisfactory resolution. More GATT disputes had been settled through bilateral consultations than the formal panel process.

76. If a dispute could not be resolved in the consultation stage then there was scope for exploring good offices, mediation and conciliation. If a dispute was about the relationship between the obligations which governments had entered into in separate international agreements, there was an argument in favour of fully exploring a negotiated solution. A question that needed consideration was whether it was important if bilateral consultations or efforts at good offices, mediation and conciliation took place under the auspices of the WTO rather than the MEA, or vice-versa. Of relevance included the fact that WTO procedures involved obligations on the time period within which a Member must respond to a request for consultations. In addition, WTO procedures contained important transparency provisions requiring the notification of requests for consultations and provided for other Members with substantial trade interests to join the consultations.

77. If a dispute which had been brought to the WTO could not be resolved through consultations or mediation efforts, and the complainant requested the establishment of a panel, a number of issues arose. The WTO could take the view that a dispute between its Members who were also MEA parties should be dealt with under the MEA, unless the latter had determined that the measure involved was not covered by MEA provisions. However, he enquired as to what would happen if the MEA did not include dispute settlement procedures, or if they proved unable to reach a determination. The DSB, with the consent of the parties to the dispute, could establish terms of reference that directed a panel to consider the relevant provisions of the MEA and in carrying this out the panel could seek information and technical advice from the MEA. Panels could seek such advice even when not explicitly directed to do so in their terms of reference. The use of an expert review group was a further means to obtain relevant advice on environmental or other aspects of a case.

78. Careful consideration should be given to the implications and purpose of including in the terms of reference a direction to a panel to take into account the provisions of an MEA. The function of a panel as described in the DSU was to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered

agreements". Interpretation of the provisions of another intergovernmental agreement did not appear to fall within the scope of a panel's functions, or of the WTO and its dispute settlement procedures. But it would be within the competence of the WTO to determine whether Members' actions which might have been taken pursuant to another agreement were in conflict with WTO provisions. He enquired as to whether a panel could seek from the appropriate MEA body advice on the interpretation of the provisions of that MEA, including whether a particular action was in conformity with those provisions.

79. Consideration should also be given to those circumstances where the WTO might provide advice to assist MEA dispute settlement, for example if an MEA included provisions explicitly referring to WTO rights and obligations. Alternatively, MEAs could contain obligations on, for example, non-discriminatory treatment, perhaps drawing on WTO language. He asked whether there was a role for the WTO in assisting MEA parties to interpret and apply such provisions in relation to trade and trade-related measures. Also, the DSU explicitly provided that the purpose of the WTO dispute settlement system was to preserve the rights and obligations of WTO Members, and that DSB recommendations and rulings could not add to or diminish these rights and obligations.

80. The representative of Uruguay considered that the basic problem was that there could be future conflicts of jurisdiction which would have to be resolved in order to avoid the risk of forum-shopping. Her delegation felt that a prior condition to consider was that any legal instrument establishing a dispute settlement mechanism, the DSU or the MEA, established the coverage of the mechanism. Article 1 of the DSU outlined that the rules and procedures of dispute settlement would apply on the basis of the dispute settlement provisions of the agreements covered by the DSU, which were not MEAs. This implied that the WTO dispute settlement system had a specific competence in settling all disputes related to the rights and obligations that WTO Members had under these agreements. Thus, she agreed with the delegation of Hong Kong that there was a need to limit the discussions to those cases where MEAs included trade measures which could impair a WTO Member's rights. It was also clear that the DSU would not be able to make findings on strictly environmental issues because it would only be able to review cases where a WTO Member found its rights accruing from WTO Agreements had been nullified or impaired; MEAs were not covered by the WTO.

81. The representative of Brazil considered that there was an intrinsic relationship between discussions under items five and one and noted that the delegation of Uruguay had introduced an interesting concept when recalling that the DSU's coverage had been clearly defined to WTO Agreements. Consequently the issue was not the relationship between different dispute settlement mechanisms but the relationship between different agreements. When Members relied on the DSU process, they examined the situation in the light of WTO rules. But the question then was to know the relationship between the rules of the WTO and MEAs, which was covered under item one. In the past, his delegation had supported the idea of having an interpretation of Article XX and it saw the benefits of mixing *ex ante* and *ex post* solutions. But, part of the process of defining criteria to facilitate the relationship between the WTO and MEAs was the issue of dispute settlement. He enquired as to how dispute settlement in MEAs which were "candidates" for special treatment under the WTO could be examined under item one.

82. In examining item five, some delegations were questioning the WTO dispute settlement process and he agreed with the delegation of Hong Kong that the way the DSU or the WTO dispute settlement process worked should not be part of the discussion. He considered that it was not the WTO's competence to judge environmental issues but that the dispute settlement process implied a judgement on the consistency of the MEA measure with WTO rules. In this respect,

any expert whose opinion would be sought by a WTO panel would help it to understand what the measures were and not judge whether those measures were WTO-consistent or even consistent with MEAs. Making a parallel with what had been said on transparency, where it had been noted that environmental measures should not be subject to more stringent transparency obligations than other measures and that transparency obligations should not relate to the purpose of the measure, he considered that the dispute settlement procedure offered the possibility to request experts' opinion, but that there was no reason to particularize environmental experts or issues in this respect.

83. The representative of Canada gave some preliminary observations which were consistent with the statements of the delegations of Brazil and Hong Kong. She agreed with the suggestion that the two basic scenarios were where a dispute arose between WTO Members in which both were parties to the MEA, and where a dispute was between WTO Members where only one was a member of the MEA in question. In the first scenario, the point raised by the delegation of Australia related to avoiding future conflict was important for her delegation; governments needed to consider their responsibilities so as to avoid creating conflicts between two or more treaties they had signed. The best way to avoid conflict between MEA and WTO obligations arising between countries that were parties to both was in the negotiation and drafting of those treaties. However, there might be cases where disagreement arose under an MEA. Her delegation agreed that in the first instance this should be pursued under the MEA because it would involve MEA provisions.

84. MEAs would benefit from improved dispute settlement and the establishment of clearer obligations and provisions. Nevertheless, she did not intend to suggest that no case could arise in which disputes could occur involving WTO rights and obligations. There might be issues as to which forum would be the best for the pursuit of such a dispute; at this point it was not clear to her delegation whether it would be possible and necessary for the Committee to try to establish prescriptions to determine *a priori* which approach should be taken in any given case. Even the delegation of Argentina's suggestion to agree that all remedies under the MEA should be exhausted before turning to WTO dispute settlement raised the question of whether it was desirable to have WTO rights and obligations considered in other forums, such as when an MEA provided for disputes to be submitted to the International Court of Justice. She considered that there was not any standard approach that would be appropriate in every possible future case.

85. In the second scenario, if the MEA non-party felt that its WTO rights and obligations were adversely affected, it was entirely within its rights to bring a complaint to the WTO. This was the simple legal reality and the only way to limit access to those rights was possibly via the type of waiver or exceptions procedure that the Committee might discuss under item one. She supported those who had made the connection that item one had to be looked at in the case of MEA non-parties.

86. In either of those scenarios, a WTO panel would consider WTO provisions and that would be the only scope consistent with the DSB's competence and mandate. In some cases, there might be provisions in WTO Agreements, for example exceptions provisions, where trade-related environmental measures might be relevant and in that case there might be factual matters concerning environmental programmes that could be brought to bear. She agreed with the delegation of Brazil that what a panel would look at and seek expert advise on would not be the environmental objective or the environmental policy *per se* but rather the relationship with the trade measure itself to the environmental programme or objective. But in cases where there was no provision in a WTO Agreement that pertained to the measure, she doubted what environmental considerations there would be. In particular, she wondered on what basis a WTO panel would

examine an MEAs objectives or provisions. It seemed to have been agreed in previous discussions that the WTO should not second-guess MEAs objectives as it did not have any competence to interpret provisions of other treaties. Especially in the case of measures taken against non-parties, this could imply making WTO rights a function of membership or lack thereof in other treaties addressing a different policy area. In that sense, she considered that the mandate and competence of WTO bodies had to be kept in mind and the interpretation of MEAs or the judgment of environmental policy objectives would have to fall within the WTOs competence.

87. The representative of India recalled that when negotiating the Committee's terms of reference his delegation had expressed a reservation on this particular item. He had taken note of all the comments made and would make only preliminary comments. Concerning the comparison between MEA dispute settlement procedures and those of the WTO, an MEA by definition contained a complex set of obligations, including financial assistance. He would then not suggest that one set of obligations from an MEA could be transferred to a suitable forum and adapted to the needs of the particular situation. That would leave out a specific and well-defined set of situations which might be the only ones at stake in the WTO. He supported the delegations of Brazil, Hong Kong and Canada and if non-parties were the only issue under consideration, then it should be addressed as such. He agreed that this item was linked to item one. Referring to the questions which had been raised on the DSU process, he expressed strong reservations to undertaking any changes. As the delegation of Brazil had noted, there were many new areas covered by the DSU which had recently been ratified by governments. In addition, he felt that it was the panellists' task to judge a dispute and the DSU gave clear guidelines about how the panellists should carry out their work.

Item ten of the work programme:

> Arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO

88. The Chairman recalled that the WTO General Council had been meeting at the level of heads of delegations, and consultations were on-going to examine which provisions to adopt concerning relations with non-governmental organizations. He suggested that this item be addressed by the Committee after these consultations had reached a conclusion.

89. The representative of the United States agreed with the Chairman's proposal and stressed the importance his delegation attached to this issue.

90. The representative of Egypt said that the contribution of NGOs to the Committee's work was of great importance and would enrich its discussions. Various suggestions had been made concerning the manner in which to deal with NGOs as far as trade and environment was concerned. Some delegations had suggested that NGO contributions could be considered through the Secretariat and others proposed to organize informal meetings with NGOs. His delegation felt that these suggestions did not go far enough and that delegations would benefit from listening directly in meetings to a selected number of NGOs on trade and environment even though NGOs should not necessarily attend all meetings. A list of specialized NGOs or those with a direct interest in trade and the environment could be studied, from which a few could be invited to the Committee's meetings. If this could be agreed, the NGO representatives could be granted access to meetings and could possibility make contributions and exchange views.

91. It was agreed to postpone the discussion on item ten pending the results of discussions in the General Council.

Item seven of the work programme:

The issue of exports of domestically prohibited goods

92. The representative of Nigeria recalled that at the last meeting nineteen delegations had expressed their views on the subject of domestically prohibited goods. His delegation had been encouraged by the constructive comments and had felt that there was a consensus among delegations to consider this item from the point which had been reached in the 1991 draft Decision, while taking into account recent developments. He proposed that the Committee should take up this item again after the discussion on item six during the September meeting.

93. The representatives of Egypt, Senegal and the United States supported Nigeria's request to address the issue of exports of DPGs in September.

94. It was agreed to postpone consideration of item seven until the September meeting of the Committee.

95. The Chairman took note of the comments made. He would hold informal consultations on items eight and nine, namely TRIPs and Services prior to the Committee's June meeting. He noted that the Secretariat was preparing a background paper on these two items. He proposed that the Committee's meetings should be held on 12 and 13 September and 26 and 27 October. He would confirm these dates at the next meeting.