WORLD TRADE ORGANIZATION

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Committee on Trade and Environment

REPORT OF THE MEETING HELD ON 5-6 JULY 2000

Note by the Secretariat

1. The Committee on Trade and Environment (CTE) met on 5 and 6 July 2000 under the Chairship of Ambassador Yolande Biké. The agenda in WTO/AIR/1321 was adopted.

2. The Chairperson noted that the Secretariat had prepared a list of documents that had been circulated in the CTE since 1995 in WT/CTE/INF/2.

LINKAGES BETWEEN THE MULTILATERAL ENVIRONMENT AND TRADE AGENDAS

MEA Information Session

3. To enhance the CTE's understanding of the linkages between the multilateral environment and trade agendas, the CTE invited six Secretariats to participate in an Information Session on Multilateral Environmental Agreements (MEAs) on 5 July 2000. Representatives of the following Secretariats made presentations and prepared the following background papers: the Convention on Biological Diversity (WT/CTE/W/149 and WT/CTE/W/136); the Montreal Protocol on Substances that Deplete the Ozone Layer (WT/CTE/W/142); the UN Framework Convention on Climate Change (WT/CTE/W/153); and the International Commission on the Conservation of Atlantic Tunas (WT/CTE/W/152). The Commission for the Conservation of Antarctic Marine Living Resources submitted a background paper (WT/CTE/W/148). See Annex I on the MEA Information Session.

4. The observer of UNEP made a statement on the relationship between MEAs and the WTO, circulated as WT/CTE/W/155.

5. The Chairperson noted the Secretariat papers on the Intergovernmental Forum on Forests (WT/CTE/W/140); and the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the draft Convention on Persistent Organic Pollutants (WT/CTE/W/151).

Items 1 & 5 The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs; and the relationship between dispute settlement mechanisms in the multilateral trading system and those found in MEAs

6. The representative of Switzerland introduced his delegation's submission in WT/CTE/W/139, which was intended to stimulate a constructive debate on this Item. The relationship between the rules and principles of the WTO and trade-relevant provisions in MEAs was one of the core issues of the trade and environment debate. It had been generally agreed that conflicts between the trade and the environmental regimes were to be avoided. To do so, the relationship between the two regimes must be clear. CTE discussions on this issue had not advanced in order to reach agreement to clarify this relationship. The only conclusion that could be drawn was that WTO Members did not agree on which rules and principles should govern the WTO-MEA relationship. As long as WTO Members did not clarify this relationship, there was potential for conflict for existing MEA trade measures and future MEA provisions with trade effects. The current ambiguity created legal uncertainty and tended

to encourage unilateralism and impact negatively on MEA negotiations. Clarification would help MEA negotiators to find the best mechanisms to realize their goals. It had been stated that while WTO Members had not been able to clarify this relationship, the Appellate Body (AB) had done so in the *Shrimp-Turtle* decision, which had clarified a two-tiered analysis of an Article XX justification. First, an assessment was made as to whether a measure qualified for provisional justification under Article XX(a) to (j), then it was appraised whether such a measure met the requirement of the introductory clause of Article XX. The AB had clarified that living natural resources, such as turtles, could be "exhaustible natural resources" according to Article XX(g). As this decision had not dealt with measures established by an MEA, it said nothing about the WTO-MEA relationship, but only clarified the conditions which national environment-related trade measures had to meet. While it could be argued that the easiest solution would be to leave the difficult questions to panels, such a decision should be taken by WTO Members and not panels. A panel decision involving the WTO-MEA relationship would be a decision in a specific case and would not necessarily clarify the general WTO-MEA relationship. This relationship was too important to delegate to the judiciary body. The participation of all countries in the solution of this issue, including smaller countries that might not be involved in a related panel, could be ensured only if WTO Members, not panels, took the decision.

7. The Swiss paper outlined general principles to be followed in a clarification of the WTO-MEA relationship, namely mutual supportiveness and deference. While the WTO and MEAs pursued the same overall goals, namely the promotion of wellbeing and welfare, they were concerned with different policy areas. By each focusing on their own policy area, the trade and environmental regimes were mutually supportive and complementary; each framework should remain responsible for the issues falling within its primary area of competence and pay deference to the other's competence. This approach recognized that trade measures could play an important role to promote MEA and that MEAs were sometimes the most effective means to achieve environmental objectives. This approach also acknowledged that it was not necessary for MEA trade measures to be unjustifiably discriminatory or protectionist to effectively protect the environment. Mutual supportiveness implied that, while the WTO should not assess the necessity of trade-related measures in MEAs, it should be competent to assess whether specific measures as adopted or implemented by a WTO Member constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevailed, or a protectionist restriction on international trade.

8. The current WTO legal framework reflected the approach of mutual supportiveness and could be sufficient to prevent conflicts between the WTO and MEAs; amendment seemed to be unnecessary. Switzerland suggested that Members clarify the meaning of WTO rules and principles concerning the WTO-MEA relationship by adopting, for example, an interpretative decision; this could clarify that mutual supportiveness and deference governed the WTO-MEA relationship and provide objective criteria for determining towards which MEAs deference should be paid. Such criteria might be, for example, that an MEA must be open to all countries and reflect broad-based international support. An interpretative decision would contribute to the clarification of the WTO-MEA relationship, and underline the WTO's commitment to environmental concerns. As there was general agreement that the trade and the environment regimes were mutually supportive, this agreement should be formalized to clarify the WTO-MEA relationship. This would enable a "win-win-win-win-win" outcome, whereby coherence, predictability, legal certainty, trade and environment could gain. The Swiss paper did not strive to formulate a concrete proposal for a perfect solution; rather, it outlined a general approach on which to base a solution. Once agreement had been reached on this, discussion of a concrete proposal could begin.

9. The representative of Canada said that there was value in providing MEA negotiators with a greater degree of guidance in their work, which should not be left to chance (i.e. a decision by a country to challenge an MEA trade measure at the WTO). Working out the WTO-MEA accommodation should be pursued both in the WTO and UNEP (acting on behalf of MEAs and working cooperatively with the WTO) to get true buy-in to rules defining the WTO-MEA relationship. The criteria in paragraph 10 of the Swiss paper were the same as the first three

principles in Canada's principles and criteria approach. For an MEA trade measure to be considered WTO-compatible, the MEA must be open to all countries, reflect broad-based international support, and be precisely drafted. These were legitimate, preliminary factors for a panel to consider in determining whether an MEA trade measure were WTO-consistent. Canada shared the Swiss view that an appropriate factor to be considered by a WTO panel in assessing the WTO-consistency of a particular MEA-based trade measure was whether that measure constituted arbitrary or unjustifiable discrimination. This meant that a given trade measure must allow for trade with a non-party on the same basis as with a Party, when the non-party provided environmental protection equivalent to that required by the MEA. Other issues of interest in the Swiss paper included whether questions of legitimacy, proportionality, and necessity should be treated in the same way; and the role of presumptions, shifting burdens of proof and other procedural techniques in giving effect to mutual supportiveness and deference. Canada's principle and criteria approach reflected this view in so far as it incorporated effectiveness and least trade-restrictive tests.

10. The WTO-MEA relationship was one of the most important items on the CTE's agenda and was also one where the CTE can and should produce a result. Canada echoed the EC's comment that MEAs were increasingly moving into areas of broad regulation of international trade. For this reason, among others, it would be prudent, for both environmental and trade reasons, to set down a written understanding of the relationship between WTO obligations and MEA trade measures. WTO jurisprudence had developed considerably in recent years and had clarified and confirmed the flexibility that WTO rules provided for environmental measures. Nevertheless, legal uncertainty still existed. Much of the focus of the debate in the Biosafety Protocol negotiations had been on the potential for a trade dispute between MEA Parties who were also WTO Members, and not on MEA Party/non-party disputes. Canada's approach to clarifying the WTO-MEA relationship was particularly relevant to the Party/non-party issue. In previous discussions, Canada had advocated a principles and criteria approach to MEAs and had proposed the following qualifying principles for an MEA for WTO panels to consider: (i) the MEA is open to all countries; (ii) the MEA reflects broad-based international support; (iii) the provisions specifically authorizing trade measures should be drafted as precisely as possible. These three principles were also present in the Swiss paper. Canada also added the following criteria: (iv) trade with non-parties is permitted on the same basis as trade with Parties when non-parties had equivalent levels of environmental protection; and (v) negotiators have explicitly considered the criteria developed by the WTO for the use of trade measures in MEAs. Canada also suggested several criteria for use by MEA negotiators: (i) trade measures should only be chosen when effective, when alternative measures are ineffective or have proven to be ineffective without accompanying trade measures; (ii) trade measures should not be more trade-restrictive than necessary to achieve the environmental objective; and (iii) trade measures should not constitute arbitrary or unjustified discrimination.

11. In Canada's experience, the implementation of this approach was not always self-evident. In the case of a new MEA that was being negotiated, MEA negotiators would be expected to apply these criteria in deciding on whether to include trade measures in the MEA. They would also be expected to explicitly record in the report of the negotiations that the criteria had been applied. If the negotiations were successful, the MEA would be concluded and enter into force. If no trade disputes arose, this would be the end of the story. If a trade dispute arose with respect to the implementation of the MEA, and a WTO Member challenged a measure introduced by another WTO Member allegedly pursuant to the MEA, a number of scenarios were possible. If a panel determined, on review of the measure and the MEA, that the measure was not mandated by the MEA, the rest of Canada's approach would not apply. If the measure were mandated by the MEA, but the parties to the WTO dispute were both MEA Parties, the rest of Canada's approach also would not apply. If the panel determined that the measure had been mandated by the MEA and the complaining party to the dispute was not an MEA Party, Canada's principles and criteria approach would be relevant. In this event, the panel would examine whether the qualifying principles had been met. If one of the principles had not been met, the measure in question would likely fall into the category of a unilateral measure. If the panel determined that the qualifying principles had been met, it would be able to

attach some weight to that fact. Elaboration was needed on this approach, upon which Canada had yet to form a view. Canada inquired as to whether it had the elements of these principles and criteria right and whether elements should be added, deleted or modified; for example, should they be elaborated by defining "broad-based international support". Under Canada's approach, an MEA negotiated in the OECD would not qualify. Canada asked whether there was a useful role for UNEP, in cooperation with the WTO, to refine this approach; what was meant by a measure mandated by an MEA; how amendments to an MEA would be treated; what was the impact on this approach of an MEA provision that set out the relationship between the MEA to other international agreements, i.e. a savings clause; what should be the consequences if a panel determined that an MEA met the qualifying principles: a range of possible options could be envisaged; and what form should be given to the principles and criteria approach. Canada had not yet finalized its proposal. However, Canada believed that it had a good idea to promote policy and institutional coherence. Canada welcomed the opportunity to work with the CTE to develop these approaches further.

12. The representative of Hong Kong, China said that the Swiss paper provided a useful basis on which to move discussions forward and made initial reflections on the Swiss paper. The question that came to mind was whether, at this moment, there was a crisis. Some delegations had noted the need for legal certainty and the need to clarify the WTO-MEA relationship. However, Hong Kong, China did not think there was a crisis situation. As had been confirmed by the MEA Information Sessions, MEA Secretariats did not envisage problems related to the WTO-MEA interface. Thus, Members should not create more problems than were intended to be solved. On legal certainty, the issue of the difference in membership between MEAs and the WTO necessarily pointed to the division of labour, as set out in the Swiss paper. Given differences in membership, was the intention to create different levels of WTO rights and obligations, especially with respect to MEA non-parties who were WTO Members? Acknowledging Canada's reference to the concept of equivalency for MEA non-parties, Hong Kong, China was not as concerned about MEA non-parties as preserving WTO Members' rights and obligation in light of the Swiss proposal; this should be discussed further. Switzerland and Japan had noted that the WTO should give deference to a consensus by the international community; definition of the term "international community" was required. Some MEAs consisted of only a few members when compared to the 137 WTO Members and it was not clear how MEAs had been negotiated and whether the international community had been involved.

13. On the Swiss paper, Hong Kong, China asked if there were any existing principles governing the WTO-MEA relationship. If so, there was no need for further discussion. In paragraph 6, Switzerland gave the example of the Shrimp-Turtle case to confirm an existing principle. However, Shrimp-Turtle was not a good example to substantiate its argument as it had not dealt with the WTO-MEA relationship, but with the relationship between a unilateral measure by a WTO Member and the rights and obligations in Article XX. The Swiss paper advocated an interpretation of the WTO-MEA relationship and proposed that part of Article XX should not be handled by a panel or the Appellate Body, but deferred to MEAs. In legal terms, this was an amendment to Article XX, not an interpretation *per se*. Hong Kong, China was not against an amendment to Article XX, but the implications should be considered. Hong Kong, China asked if a specific measure were brought to a WTO panel or the Appellate Body, should the WTO wait for the relevant MEA to determine if, for example, under Article XX(b) the measure were necessary to protect human, animal plant life or health, before the chapeau could be considered. Or, vice versa? Similar arguments had been encountered in the Shrimp-Turtle case, but the issue of the division of labour, as foreseen in the Swiss paper, had not arisen as the Appellate Body had handled the case under Article XX. If there were to be a division of labour between the WTO and MEAs, it was critical to determine which agreement came first. Given that the Swiss proposal mainly dealt with the relationship between Article XX and MEAs, how did this proposal relate to the challenges raised by the CBD Secretariat at the MEA Information Session with respect to the TRIPS Agreement, or GATS and other WTO Agreements? Also, Article 13 of the DSU enabled a panel to seek information and to establish an expert group to provide advice to the panel. This might provide a possible mechanism to address the issues.

14. The representative of India gave preliminary comments on the Swiss paper. On the importance of trade-related measures in MEAs, India recalled that only about 10 per cent of MEAs contained trade measures and, thus, this issue should be put in perspective. When an authoritative interpretation or amendment of a WTO provision was suggested, it should be kept in mind that trade measures were seldom the centre of environmental objectives. Moreover, there was a near consensus in the CTE that trade measures were not the first best solution to environmental problems. There was evidence, at least in the Montreal Protocol and the CBD, to suggest that provisions relating to capacity building, technical and financial assistance, and technology transfer were important components in an MEA, in addition to trade measures. Paragraph 4 noted that the WTO should not try to decide whether an environmental goal pursued by an MEA were legitimate or whether a measure taken to implement an MEA were necessary. If the chosen way to implement an MEA was through trade measures, among other things, India felt it was necessary to examine MEAs through trade principles, although environmental principles may also be relevant. However, the CTE's mandate could not exceed WTO competence when examining trade measures. India endorsed Hong Kong, China's comments on paragraph 6 concerning the Appellate Body report on Shrimp-Turtle, which had not enjoyed unanimity or consensus in the DSB, as illustrated by the comments of several Members at the DSB; the report had been adopted because of the principle of automaticity. Although the Swiss paper only referred to one aspect of Shrimp-Turtle, this case was more complex than an over simplification of Article XX or the relationship between a trade measure and MEAs. As stated by Hong Kong, China, MEAs had not been at the centre of the discussion in this case, although the Appellate Body had suggested that MEAs might be one way for the US to implement the DSB recommendations.

15. To date, there had yet to be a legal challenge in the WTO concerning an MEA. Thus, as stated by Hong Kong, China, there was no crisis. As to why there had yet to be a legal challenge, if an MEA, such as the Montreal Protocol, CITES or the CBD, had been successfully negotiated, it would be unlikely that such an MEA would be challenged in the WTO as the vast majority of WTO Members were also Parties to those MEAs. A central issue in this debate was non-product-related production and processing methods (PPMs). Yet, the CTE avoided referring to this issue as such. Instead, reference was made to MEAs in general as MEAs were like "motherhood and apple-pie"; MEAs were liked because they are multilateral. However, if an MEA had over 100 WTO Members that were also Parties to that MEA, there was little chance that a country with a small percentage of world trade, who was not an MEA Party but a WTO Member, would bring a dispute to the WTO and argue that its trade was being disrupted. That would not happen. If countries were members of both an MEA and the WTO, it would also not happen; so what was the issue?

16. Concerns with respect to MEAs centered on the definition of an MEA. In this respect, Switzerland had suggested some good, but incomplete, criteria. India asked whether, according to the Swiss proposal, it would be acceptable if the OECD negotiated an agreement, called it an MEA, and decided to use trade measures against non-OECD members. It could be argued that this agreement was broad-based, particularly as some developing countries were OECD members, although many developing countries were not. Such a situation would note be acceptable for India and was the reason why India had suggested that the definition of an MEA should include adequate geographical representation and representation of countries at different development levels. Otherwise, countries with similar development levels could negotiate an agreement, call it an MEA and decide to include trade measures against other countries whose development levels were different and, thus, the trade and environment trade-offs were also different. Thus, the issue centered on how to define an MEA, how to tackle the issue of non-product related PPMs, and whether to dilute the concepts of necessity and proportionality in Article XX. India felt there was sufficient jurisprudence on "necessity" in the context of Article XX, which should not be diluted. Some of the decisions made by panels and the Appellate Body were leading in a particular direction. In this present context, India asked what developing countries could hope to gain from an interpretative decision or an amendment, particularly if they did not consider there to be a real problem. There had been some panel and Appellate Body reports that India believed had gone beyond their mandate; others believed that it was within their mandate. The question was whether it would be possible to bridge the gap on such thorny issues as

non-product-related PPMs and the definition of an MEA. Also, some countries with an interest in this issue had lost interest in the debate as they considered that panels and the Appellate Body were doing the job and it would not be necessary to undertake difficult, time-consuming negotiations, which would require checks and balances. India felt these issues were important and should be discussed further, but that some of them were difficult to resolve given recent developments.

17. The representative of Japan agreed with Switzerland that while both MEAs and the WTO had common goals of enhancing welfare, each had different areas of competence; thus, some sort of division of labour should be considered. Substantial matters, such as whether trade measures were necessary for environmental protection in MEAs, should be decided upon by MEAs, which had the necessary expertise and competence. The WTO should deal mainly with how trade measures adopted by MEAs were applied and whether these measures were applied in a discriminatory or arbitrary manner. The WTO should focus on whether the application of trade measures met the criteria of the chapeau of Article XX. The CTE should examine guidelines for criteria to identify what type of application of trade measures was deemed to be arbitrary, discriminatory, or unjustified. These criteria could be agreed as guidelines or as an interpretative understanding by a General Council decision. To develop these further, Members could present examples of arbitrary or discriminatory applications of trade measures in MEAs. Examples could include applications of trade measures without consultation with the countries concerned, which were deemed to be arbitrary. Issues to be considered in the development of criteria included the treatment of trade measures pursuant to regional organizations. As Japan had stated at the WTO High Level Symposium on Trade and Environment in March 1999, environmental issues should be tackled and resolved principally within the framework of environmental policy. Environmental concerns would not necessarily be solved effectively by the use of trade measures. Therefore, efforts should ensure that appropriate environmental measures were taken at the source of environmental problems, including through technical and financial assistance. However, if the international community recognized that trade measures could play a role to complement environmental measures and were necessary, it would not be desirable for the MEA or the WTO if the WTO prevented such decisions by the international community from being implemented, as the WTO's goal was to achieve sustainable development while preserving the environment. Clarifying the relationship between MEA trade measures and WTO rules would bring legal certainty and predictability with respect to trade and environment.

18. Canada's criteria needed to be clarified and made more concrete. For example, Canada's use of the term "effective" should be clarified, as did the term "necessary". The meaning of arbitrary and unjustifiable should also be clarified through examples of what would constitute such measures. If Canada's criteria were strictly applied, trade measures pursuant to regional fisheries organizations could be questioned even though all the major countries in the region were participating. These criteria could affect the future introduction of trade measures to conserve fisheries resources. Japan recalled Canada's statement in July 1998 that dispute settlement in MEAs and the WTO were different in nature. In an MEA framework, Parties as a whole handled a violation of an agreement through dialogue and cooperation. This approach differed from that in the WTO, where the individual Members concerned undertook dispute settlement through panels and the Appellate Body. The process of WTO dispute settlement had an aspect of confrontation, while MEA dispute settlement attempted to solve a violation of an MEA through cooperation. Although WTO Members' right to use the DSM should not be denied, the focus should be on whether MEA trade measures were applied in an arbitrary, discriminatory or protectionist manner. If a WTO Member were considering bringing a matter to the WTO, it would be important to consider whether use of the DSM were suitable for the matter given that the WTO's competence was in trade. On India and Hong Kong, China's statements, although there was no current conflict concerning the WTO-MEA relationship, there may in future be problems, for example, with respect to the relationship between the CBD and the TRIPS Agreement on benefit sharing. If the CBD provisions were challenged in the TRIPS Agreement, the need to clarify the WTO-MEA relationship would be recognized.

19. The representative of Iceland said that the relationship between MEAs and the WTO was complex given that certain MEAs contained trade-related provisions to further certain environmental objectives, while the WTO's *raison d'être* was to remove trade restrictions. In both instances, the majority of governments, by being simultaneously MEA Parties and WTO Members, had recognized MEA objectives and means. The current WTO-MEA relationship entailed a potential for conflict that might lead to contradictory conclusions, with little benefit for either the multilateral trading regime or the environment. This legal confusion was already clear in the Tuna-Dolphin and Shrimp-Turtle panels and the Shrimp-Turtle Appellate Body report. This was not simply an interesting academic question, but a real issue that could have serious effects on the environment and the socio-economic development of developed and developing countries alike. Absence of a clear international consensus on the WTO-MEA relationship could encourage unilateral actions for obscure environmental objectives outside the jurisdiction of the importing country. Iceland had no simple solution to address this relationship, but shared Switzerland's concerns that clarification was so fundamental that it should not be relegated to the judiciary body. To be consistent with the approach of multilateralism, it should be the membership itself that decided. The CTE was mandated, *inter alia*, to address the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs. There was a need to reinvigorate the dialogue on this issue to reflect all Members' concerns and guided by mutual supportiveness and deference, which would contribute to making trade and environmental policies mutually supportive.

20. The representative of Korea said that, despite the fact that there had been no actual conflict between WTO provisions and trade measures pursuant to MEAs and that only 20 out of 200 MEAs included provisions affecting trade, analytical work to clarify this relationship should be continued and preventive measures against legal inconsistencies should be explored. At the Singapore Ministerial Conference in 1996, Korea had proposed a "differentiated approach", such that trade measures pursuant to MEAs be differentiated based on whether or not they were specifically mandated by MEAs, and that the application of trade measures be differentiated based on whether they were applied among MEA Parties or between an MEA Party and a non-party. Korea's approach was similar to the Swiss proposal in that both underlined that the domains of the WTO and MEAs be respected, while remaining mutually supportive. Korea supported Switzerland's mutual supportiveness approach. Determination of whether a measure were environmentally harmful and whether a counteraction were necessary should be left to MEAs, while the WTO should focus on assessing whether a trade measure, designed to counteract this harmful effect, were arbitrarily discriminatory. This was warranted by the fact that most MEAs already pinpointed the process and production methods that had been collectively recognized as harmful and thus reprehensible. Should there be a dispute between MEA Parties, Parties should exhaust all measures provided for in the MEA to solve the dispute before addressing the matter to the WTO. Korea agreed that an interpretative decision would create greater legal certainty. On possible objective criteria to define whether an MEA had broad-based support, as noted in paragraph 10 of the Swiss paper, Article 9 of the WTO Agreement on decision making was a valuable reference. Overall, Switzerland's proposal was balanced and could help to achieve progress on this Item. However, many questions were unanswered, such as how areas for which no MEA existed could be dealt with; how a conflict between an MEA Party and a non-party could be addressed; and whether the DSB should be directly referred to in such a case. These questions required further discussion.

21. The representative of Australia welcomed the Swiss presentation of the concept of mutual supportiveness and agreed with Switzerland about the importance of MEAs and the WTO being mindful of their respective mandates and competencies. However, Australia believed that current WTO provisions provided a suitable framework for facilitating mutual supportiveness. Both MEAs and the WTO were vehicles for promoting shared objectives by the international community and Australia supported efforts to enhance coordination between them, such as the regular MEA Information Sessions in the CTE. A striking fact that had emerged from these MEA Information Sessions was the diversity of interactions between the WTO and MEAs. However, it was not clear that the Swiss approach took account of this diversity. Existing rules may more appropriately cater to

this diversity though promoting the goal of mutually supportive trade and environment policies. MEAs varied in the extent to which they contained specific trade-related measures. For example, the Biosafety Protocol provided a framework for information exchange and cooperation between importers and exporters to allow informed decision; it was this decision making by individual countries, rather than specific trade measures in the Protocol, that was most likely to raise potential WTO issues. In countries that were party to both agreements, appropriate domestic coordination processes were critical to ensure that their rights and obligations under each were respected and both trade and environmental factors were considered. Existing WTO rules might have a positive role to play to ensure this. It would be unfortunate if countries sought to use the Biosafety Protocol to justify measures that did not respect the decision-making processes, transparency requirements and provisions on the appropriate level of protection in the SPS Agreement. Caution was necessary concerning proposals to amend WTO rules in relation to MEAs.

22. In contrast to the Biosafety Protocol, a range of other MEAs included specific trade-related measures that had been agreed by the Parties to each of these agreements, for example CCAMLR's catch documentation scheme for toothfish. The process for the development and adoption of this scheme was a model for how trade and environment issues could be constructively addressed. This scheme had been introduced in response to the threat that illegal, unregulated and unreported (IUU) fishing posed for the depletion of Patagonian toothfish. IUU fishing, which reflected the high market value of Patagonian Toothfish, continued to undermine the effectiveness of the conservation measures adopted by CCAMLR. The catch documentation scheme complemented these other measures through the provision of information on the origins and the extent of the catch and trade in the species. It had been developed through extensive international negotiation and following efforts to gain the cooperation of non-parties to conserve Patagonian Toothfish. This type of cooperative, targeted, transparent and non-discriminatory measure in CCAMLR should pose no conflict with WTO rules.

23. The representative of Mexico endorsed Hong Kong, China and India's statements and thanked the MEA Secretariats for their presentations at the MEA Information Session, which had contributed to Members' understanding of the issues. As there had been no conflict to date between MEAs and the WTO, it should be asked why this issue was being discussed. Rather, CTE efforts should be devoted to substantial matters of importance to all Members. Mexico made preliminary comments on the Swiss paper. On the proposed principles and criteria to guide MEA negotiators on the relevant WTO rules, it was the sovereign right of every state to enunciate the criteria and principles it wished its negotiators to use. However, to transfer these criteria and principles to the WTO and make them part of the WTO framework would be inappropriate. WTO rules and MEA provisions did not raise any contradiction or confusion. WTO rules were clearly designed; the WTO was responsible for trade and MEAs were responsible for the environment. The point of intersection between these two legal frameworks was clear. There were WTO provisions that recognized the establishment of environmental policies provided that WTO rights and obligations were observed. As there was no conflict, but coexistence between the WTO and MEAs, there was no need to establish principles or criteria to clarify the WTO-MEA relationship. There were also principles to guide the DSB on conflicts with WTO rules. As a result, Mexico considered it difficult to accept the Swiss proposal.

24. The representative of Argentina referred to the key element of the Swiss paper in paragraph 6, where it was proposed that the necessity test in Article XX be exempted for trade measures taken pursuant to an MEA. This argument had merit in that it assumed that governments should consistently deal with policy-making in both fora. It would be unusual if a government considered a measure necessary in an MEA, but unnecessary in the WTO. However, trade measures were part of a package of tools in MEAs that included financial and technology transfers and technical cooperation. The issue was whether one of the tools in this package of measures, i.e. trade measures, should be upgraded, if the other measures had not been applied, particularly for developing countries. Would it not be more logical to respect the balance of measures in the package of measures in an MEA? The fact that the WTO and MEAs should focus on their primary competence did not mean, however, that the WTO could not adopt principles and rules that affected the environment. In the CTE, Argentina

and many others had been asking for the elimination of trade restrictions and distortions that were environmentally harmful. Thus, Argentina agreed that the WTO should take action for the sake of the environment that was consistent with its mandate, which was to promote trade liberalization. Argentina was open to explore formulas to enhance consistency and mutual supportiveness between MEAs and the WTO, as suggested by Switzerland, and promote "win-win" opportunities arising from complying with the CTE's mandate to identify and remove trade measures that had negative environmental effects. The first step for the WTO would be to remove environmentally harmful trade restrictions and distortions, which was dealt with under Item 6.

25. The representative of the European Communities shared the Swiss analysis that the CTE should continue to work on the WTO-MEA relationship. There seemed to be doubt among some Members as to whether this issue mattered. The EC felt that some comments were reminiscent of the Titanic, which was thought to be unsinkable and the risks minimal, just like the multilateral trading system; thus, it was not necessary to have sufficient lifeboats. Similarly, the EC was not reassured that although there had not yet been any conflict between MEAs and the WTO, a conflict could arise. From the discussions in the MEA Information Session, it was clear that some MEAs that would soon come into effect would apply to much trade of importance to developed and developing countries. Other areas of MEA activity that were in the process of implementation would also have trade consequences. Thus, it would be wrong to be complacent with respect to the WTO-MEA relationship. The EC noted that there were few panels related to the issues on the CTE agenda, yet the EC sought to engage in a positive spirit on all Items. Thus, if an item were important it might deserve to be examined even if there had not yet been a dispute. The trading system was not merely about the avoidance of disputes. The uncertainty that prevailed on the WTO-MEA relationship was making matters more difficult for governments in developing MEAs. Concerning the Biosafety Protocol, much time had been wasted arguing about this emerging framework of international public law and WTO rules. With other MEAs under negotiation, it would be wise to clarify the WTO-MEA relationship so as not to waste more time on this issue. Complacency was not the message that the WTO should send to the outside world in this respect.

26. The EC agreed that this discussion was not solely about the GATT, but about WTO rules as a whole, including GATS and TRIPS, which could have an impact on MEA negotiations. This should be borne in mind, although the EC had focused on the model of Article XX in determining how to proceed. All areas of WTO rule making should be covered. The question of non-parties was also important. At the MEA Information Session, the Montreal Protocol Secretariat had said that although it had been necessary to include some trade provisions for non-parties, it had not been possible to consider the PPM-related aspects of these trade measures, as they could not be effectively implemented. The EC agreed with Hong Kong, China and others that MEA membership mattered and should be discussed further as global MEAs were of universal importance. Even with respect to conventions dealing with toothfish in the Antarctic or tuna in the Atlantic, these agreements contained MEA-style provisions in the sense that the primary players, with a territorial responsibility to exploit the resource, had participated, as could any interested country.

27. The representative of the United States agreed with Switzerland that challenges to trade measures in widely-supported MEAs were unlikely and that current WTO rules, as they had been interpreted, permitted the adoption and implementation of trade-related measures. The US also agreed that the WTO and MEAs should each focus on their primary competency, while taking into account the concerns of the other. Trade measures could be a critical means of achieving internationally agreed environmental objectives when carefully tailored and appropriately applied. However, wholly apart from the unlikelihood of a challenge to a trade measure contained in a widely supported MEA, the US believed that trade measures in MEAs were broadly accommodated by WTO rules. The US was therefore not convinced that there was a need to further clarify WTO rules to safeguard environmental protection measures taken under an MEA.

28. The representative of Norway said that the MEA Information Sessions revealed that trade measures were in some cases necessary to achieve environmental objectives. The multilateral trade regime should contribute to sustainable development and coexist in a mutually supportive way with other international legal instruments. Norway welcomed the decisions at the last COP of the CBD, including the invitation to the WTO to acknowledge the relevant CBD provisions and to take into account the interrelatedness of the CBD and the TRIPS Agreement. Norway expressed its support for the application by the CBD Secretariat and UNEP for observer status in the TRIPS Council and the Agriculture Committee. Norway underlined the importance of the relationship between the CBD and the TRIPS Agreement concerning the issue of fair and equitable benefit sharing arising from the use of genetic resources, including the question of disclosure of the origin of the genetic resources used in products for which patents were applied. Many felt that the current TRIPS Agreement prevented effective CBD implementation. While compatibility between the TRIPS Agreement and the CBD should be ensured, this relationship should not be seen in isolation from the general debate on the WTO-MEAs. The CTE should ensure that what was achieved in one multilateral forum would not be undermined in another and that MEA negotiations were not delayed due to a lack of clarity with respect to their relationship to WTO rules; this situation had been seen in the Biosafety Protocol and POPs Convention negotiations. During the ten-year trade and environment agenda of the WTO, the WTO-MEA relationship had been one of the main issues, even if there had been no *de facto* and clear relationship at the outset, the debate had created one. Clarification of this relationship was necessary and could possibly be made in relation to Article XX or through guidelines.

29. Bearing in the mind the differences of views on the need to clarify the WTO-MEA relationship, Norway welcomed the Swiss paper. Before discussing a possible interpretative understanding, the CTE should focus on premises or principles governing this relationship. As stated by Norway at the CTE's June 1999 meeting, examples of such principles could be: that there should be no hierarchy between the WTO and MEAs; that the WTO and MEAs should be mutually supportive; that the most effective way to solve global and transboundary environmental problems was through international cooperation and multilateral rules; unilateral measures should as far as possible be avoided; in certain cases it seemed necessary to adopt measures, including trade measures, to achieve MEA objectives; multilateral environmental policies should continue to be drawn up within MEAs and not in the WTO; and conflicts between MEA Parties in relation to the implementation of that MEA should be solved within the MEA. On Canada's statement, the WTO should take care when considering the development of any criteria for negotiators of other international instruments. Norway believed that there was no hierarchy between the WTO and MEAs. The criteria approach, however, could easily become a hierarchy. Thus, it would be most useful to consider general principles.

30. The representative of Brazil shared Hong Kong, China and India's views that it was not necessary to clarify the scope of the WTO with respect to its relationship with MEAs given the fact there had not been any conflict. Thus, it could be inferred that there was a mutual recognition between MEAs and the WTO that a conflict did not exist. Even though this did not mean that a future conflict could not arise, as pointed out by the EC and others, it should be kept in mind that most WTO Members were also MEA Parties. Brazil felt that there was a mutual understanding that the WTO and MEAs had different areas of competence. Furthermore, as noted by Argentina, trade was only one element of a package of measures used in MEAs, and only approximately 10 per cent of over 200 MEAs applied trade-related measures. Brazil asked whether, given that the recent Biosafety Protocol negotiations had been successfully concluded, it was necessary to continue to debate the WTO-MEA relationship. Brazil encouraged informal initiatives, such as by UNEP, to exchange views on trade-related measures in MEAs and their WTO-compatibility. If there were an attempt to formalize a clarification of the WTO-MEA relationship, it may prove difficult, if not impossible, and would take a lot of time and money to bridge the different perspectives of Members.

31. The representative of New Zealand said that the discussion had helped to crystallize the issues concerning the WTO-MEA relationship. Although there had eventually been agreement, negotiation

of the Biosafety Protocol had been difficult. Many of the concerns expressed by Switzerland on mutual supportiveness and deference had been considered at length during these negotiations. The preambular language of the Protocol explicitly referred to precisely the point of the Swiss paper on mutual supportiveness and deference. The subsequent preambular paragraph unambiguously noted that the Protocol should not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements. As noted by Australia, the WTO already provided a mechanism for mutual supportiveness and deference with respect to the WTO-MEA relationship through the regular MEA Information Sessions in the CTE. New Zealand noted the difficulty in the Swiss approach with regard to mutual deference and asked how it would be possible to convince WTO Members that were not parties to a particular MEA that "mutual support and deference" should apply between these two sets of agreements. This fundamental issue should be discussed. In legal terms, an interpretation of Article XX would be treated as an effective amendment, which would not be helpful. MEAs were highly dynamic and those involved in MEAs were finding inventive solutions to complex problems; it was this element of flexibility in MEAs that made them so appealing. Codification of the relationship through an interpretation of Article XX, as proposed by the Swiss, ran the risk of stifling dynamism and innovation in international environmental law. On paragraph 10 of the Swiss paper, New Zealand was not sure that determining the proportionality of a measure to achieve an environmental goal should be decided exclusively by an MEA. In many cases, such measures may be trade-related and, thus, subject to WTO obligations. It was not clear how the Swiss approach helped to "outline the principles governing the relationship between the WTO and MEAs". New Zealand would comment further on Canada's principles and criteria approach.

32. The representative of Hungary said that the Swiss paper gave impetus to an in-depth discussion of the WTO-MEA relationship. The MEA Information Sessions, as well as the information collected by the Secretariat in the Matrix, WT/CTE/W/144, showed that only a few MEAs used trade measures. Nevertheless, like Switzerland and many others, Hungary felt that the potential conflict between the WTO and MEAs merited focussed discussion. Hungary shared Switzerland's view that trade and environment regimes could and should be mutually supportive. The WTO should focus on trade-related issues and not engage in setting environmental standards. MEAs should not set trade rules and should use trade measures only when it was demonstrated that they were necessary to achieve environmental objectives, and only in a way that did not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised trade restriction. There were global environmental problems that can best be solved through the use of trade measures. However, as noted by Argentina, trade measures were only one instrument in a package of measures in MEAs. Hungary shared the Swiss view that in order to clarify the WTO-MEA relationship, there was no need to reopen or amend Article XX, or to include a new article in the WTO Agreement to deal with this issue. Hungary viewed favourably the Swiss suggestion to clarify this relationship in the form of an interpretative decision. If it were decided to proceed along the lines suggested by Switzerland, there were two key issues such a decision should address to minimize protectionist abuse. A decision should contain objective criteria for determining which MEAs would be covered. The criteria in paragraph 10 of the Swiss paper and those raised by Canada were worth examining, and could be supplemented by others. India had put forth two additional valid criteria. A decision should make clear that MEA trade measures should be necessary to achieve an environmental objective, the least trade restrictive available and not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Members should discuss the questions raised, particularly by Hong Kong, China. Hungary would comment later on the Swiss paper and Canada's principles and criteria approach.

33. The representative of Malaysia sought clarification from Switzerland as to whether it was suggesting that two Members who were both MEA Parties could proceed with a trade measure without having to satisfy the chapeau of Article XX. She inquired as to what would happen if one of the two Members decided to pursue its case in the WTO on the grounds that its rights had been violated, and whether it was suggested that the DSB should not examine whether the measure at issue met the necessity test under Article XX; whether the WTO should limit itself to other aspects, such as

whether the measure was arbitrary or unjustified discrimination; and what if the measure at issue had not been justified in the first instance. The rights and obligations of countries that were parties to both the WTO and MEAs could not be ignored. In complying with one, consistency with the other should be considered, without being in conflict with each other. As Brazil had said, Members should not reach the point of resolving conflicts at a high cost in terms of time and money. Malaysia sought clarification on whether there was a potential contradiction between paragraphs 4 and 5 of the Swiss paper as to the focus of the WTO and MEAs on their areas of competence, while not excluding the possibility of the WTO or MEAs examining each other's areas. Current WTO provisions provided a suitable framework for mutual coexistence between MEAs and the WTO.

34. The representative of Pakistan supported comments by Hong Kong, China, India, Mexico, and Brazil, and shared New Zealand's point that an interpretative decision would lead to a legal amendment to the WTO Agreement. Pakistan did not envisage any place for this type of decision. On the possibility of a future WTO-MEA conflict, it was necessary to take matters as they came. Hong Kong, China's comment that there was no crisis at present was valid.

35. The representative of Switzerland thanked Members for their comments, which had stimulated debate and indicated that this issue required discussion. Several Members had argued that since only 10 per cent of MEAs included trade measures, there was no conflict between the WTO and MEAs as there was no crisis and, hence, no need for clarification. These arguments were not persuasive. It was not relevant how many MEAs included trade provisions; it was enough that several important MEAs included trade provisions which bore a potential for conflict. During the Montreal Protocol's presentation at the MEA Information Session, it had been made clear that there was a substantial risk that Parties to the Protocol, which were not all Parties of subsequent amendments, might bring a dispute to the WTO over a trade measure provided for in an amendment. The Montreal Protocol Secretariat had also noted the need to clarify the WTO-MEA relationship. Several Members had mentioned that the potential for conflict related not only to existing MEAs, but also to future MEAs, and that clarification was necessary especially to facilitate the negotiation of future MEAs. Reference to the Shrimp Turtle case in the Swiss paper had not been intended to indicate that this case had resolved the WTO-MEA issue; it outlined a way of interpreting WTO rules such that the terms "exhaustible natural resources" and "necessary to protect human health" in Article XX would accommodate the Swiss approach. Thus, WTO panels had not clarified the WTO-MEA relationship and it should be Members that did so, not panels. Switzerland agreed that trade measures were "only one tool in the package of instruments used in MEAs"; that technical and financial assistance, technical cooperation and capacity building were also important; and that trade measures should be a last resort. However, while there was no problem with technical assistance and WTO rules, there was a potential for conflict with MEA trade measures. An important element of the Swiss proposal was that the WTO should be competent to check whether MEA trade measures were arbitrary, discriminatory or protectionist. However, MEA negotiators would already have decided whether these measures were necessary; the WTO should not duplicate this work.

36. Switzerland noted the agreement that the WTO and MEAs should be mutually supportive and that the starting point for the discussions should be their compatibility. India's criteria that MEAs should represent all continents and levels of development were valid; an MEA negotiated only by some countries would not constitute a broad-based MEA. As to whether the Swiss principles should be different depending on whether a dispute involved MEA Parties or MEA Parties/non-parties, Switzerland felt that the rules should be the same, but this needed reflection. There were different valid forms to clarify the WTO-MEA relationship. As suggested by Canada and Norway, this issue need not be resolved at this stage; the focus should be on the content of the relationship.

Item 7 The issue of the export of domestically prohibited goods

37. The representative of Bangladesh presented his delegation's paper on trade in domestically prohibited goods (DPGs), WT/CTE/W/131, which described Bangladesh's experience and set out

recommendations to build on work on DPGs. Several MEAs helped to control trade in DPGs and contributed to reducing risks to human, animal and plant life and health with respect to hazardous wastes, narcotic drugs and psychotropic substances, chemicals and organic substances, and persistent organic pollutants. When addressing DPG trade, a country's sovereignty to take decisions to restrict or ban imports of goods injurious to human health and the environment should be kept in mind. At the same time, restrictive measures should be based on scientific principles, in accordance with WTO provisions, particularly the SPS Agreement. It was necessary to strike a balance to ensure that measures did not become unnecessary trade barriers. Governments had a role to play by accepting responsibility so that commercial interests did not override the wellbeing of other countries. Human welfare and equity demanded that goods scientifically categorized as harmful to humans and the environment were not traded. Importing, exporting and transit countries should commit themselves to minimizing the possible damage caused by DPG trade. Bangladesh's paper identified possible redressal measures. As a first step, the CTE should revive and strengthen the existing 1982 DPG notification system, which to be effective should include DPGs whose export had been prohibited and those that continued to be exported. Bangladesh requested the Secretariat to update previous papers on DPGs, focusing on the export of domestically prohibited consumer products in cooperation with relevant MEAs, such as the Basel, PIC and draft POPs Conventions, WHO, UNEP, and UNCTAD. NGOs working on trade, environment and health could also help to generate support for action in this area. There was a need for capacity building, technical cooperation and enhanced information sharing on DPGs among developing and developed countries, and amongst developing countries on illicit DPG trade. The export of DPGs should also be a priority for the UNEP-UNCTAD Capacity Building Task Force on Trade, Environment and Development.

38. The representative of Egypt believed that Bangladesh's paper touched on fundamental issues related to DPG trade and highlighted Bangladesh's experience. Egypt supported the need for technical assistance for developing countries to build capacity to deal with DPGs. It was also important to seek international cooperation to take the necessary measures to control DPGs globally, which could help governments to detect disguised practices by some companies. The second recommendation in Bangladesh's paper assumed that the DPG problem could be addressed through appropriate domestic health and environmental standards and regulations to manage DPG imports; Bangladesh thus called for technical assistance in this area. However, Egypt felt that technical assistance was required not only to formulate domestic regulations, but also to render domestic regulations effective. Technical assistance should also be consecrated to develop the human and institutional capacities of the competent authorities to detect imports of DPGs, and to define how to deal with trade in DPGs. Egypt would provide detailed comments after the paper had been further considered in capital.

39. The representative of India said that his delegation attached importance to the export of DPGs and supported the points made in Bangladesh's paper. Bangladesh had also made concrete recommendations upon which to progress DPG work. India felt that the CTE was competent to act upon Bangladesh's recommendations, which mainly dealt with transparency and technical assistance.

40. The representative of Hong Kong, China said his delegation was sympathetic to Bangladesh's recommendations on DPGs. He asked how the 1982 DPG Decision was administered in the WTO; whether its enforcement should be pursued under that administering body; and, after the entry into force of the WTO, whether there were other notification requirements relevant to DPGs.

41. The representative of Japan said his delegation was sympathetic to the concerns raised in Bangladesh's paper. A discussion of the concrete types of problems faced by developing countries would be useful. As a result, concrete results could be considered, as well as the type of technical assistance. Given that there were other international organizations and agreements that already dealt with many DPGs, the Secretariat could prepare an update of work on DPGs.

42. The representative of Switzerland made preliminary comments on Bangladesh's paper. It was interesting to note that while DPGs may cause problems to the domestic environment and economy,

as well as involve risks to human health, they may also serve other functions, such as health or food security. Switzerland was interested in more information on how DPGs had been addressed at the UNCTAD Regional Workshops, including the specific situation in developing countries. It was worth investigating why there had been no DPG notifications to the GATT/WTO since 1990. According to preliminary information, Swiss industry had established a Code of Conduct that required notification to the importing countries of DPGs and chemicals severely restricted for certain uses in Switzerland. Switzerland had prohibited not only the use, but also the production of many dangerous chemicals, such as DDT. Switzerland had also signed the PIC Convention, which should be ratified by Parliament this year, and hoped that other industrialized countries would do likewise. MEAs, such as the PIC, Basel and draft POPs Conventions and the Montreal Protocol were the best place for solving most problems involving DPGs. However, it would also be necessary to clarify the WTO-MEA relationship. There may be situations involving DPGs that were not covered by existing international agreements. The Secretariat could prepare, in cooperation with other international organizations, a study on the export of domestically prohibited consumer products relying on previous papers. To avoid duplication, the focus should be on DPGs not yet covered by other instruments. Switzerland would contribute constructively to effective solutions in this area.

43. The representative of Norway said that Bangladesh's paper provided useful input to the discussion on trade in DPGs. Bangladesh suggested the revival of the DPG notification system established by the GATT in 1984, and that this system should apply to consumer products not covered by other international instruments; Norway was sympathetic to this proposal. Norway referred to the Secretariat's Note, WT/CTE/W/73, which provided information on product coverage and notification requirements of other international instruments. This Note could be updated to better understand the products to be covered by the notification system proposed by Bangladesh. In 1991, the GATT Working Group on DPGs had failed to agree on the product coverage of the notification system. Without clearly defined product coverage, the notification system would provide non-uniform information. Norway felt this issue should be addressed, but, in the meantime, the DPG notification system of 1984 could be revived as suggested by Bangladesh.

44. The representative of Pakistan endorsed Bangladesh's approach and thanked Egypt for raising concerns about specific DPGs. Bangladesh's recommendations were modest and were within the CTE's competence; the recommendations sought transparency in terms of notifications and concrete steps towards technical assistance concerning control of trade in DPGs.

45. The representative of New Zealand said that DPGs was an important issue on the CTE's agenda and appreciated the concrete recommendations in Bangladesh's paper. As identified by Bangladesh, there was ongoing work in other international organizations, such as UNEP and the draft POPs Convention. New Zealand adhered to the principles outlined in Bangladesh's paper that there should be strengthened cooperation amongst the relevant organizations on DPGs to ensure there was an effective system to deal with this area. As a first step, it would be useful for the Secretariat to update developments in the DPG area. As noted by Egypt, technical assistance was important and required further thought. Information on the specific needs of developing countries was needed and it would be useful to consider the technical assistance already provided by the WTO and others in the DPG area. New Zealand was favourable to Bangladesh's recommendations; concrete work on DPGs would complement discussions on market access issues.

46. The representative of the European Communities said that his delegation was sympathetic to Bangladesh's concerns. The EC noted the sense of cooperation and activism on this Item and made the link to the discussions under Items 1&5, where the EC hoped a similar spirit would prevail. On the case of soaps containing mercury raised by Egypt, as evidence was assembled on trade in these products, it was clear that there was some illegal activity in several EC Member States. Soaps containing mercury that had been banned in the EC had been found in neighbouring countries. Some of these products had been produced in Europe, while others had been produced elsewhere but presented as European production. Even in the EC, a heavily regulated market with a high degree of

governmental resources for consumer protection, products that the EC wished to prohibit, nevertheless found their way onto the shelves. This was relevant to the practical implementations of some of Bangladesh's recommendations. As illustrated by the experience with DPG regulation in select developing countries, not all DPGs were "bad" from the perspective of importing countries; countries had different views on the utility of certain products. For example, Uganda was reported as having noted in the UNCTAD Workshop in Cuba that used clothing was a DPG; it was not in the EC's view. On the experience of Costa Rica, as Egypt had noted, the development of capacity in domestic regulatory authorities to prevent certain products from reaching the market was the first-best solution to the problem of marketing products contrary to consumer interests. Given that each country should assume responsibility for regulating its imports in the least-trade restrictive way possible, how far would it be appropriate to establish more constraining systems in the exporting countries? In principle, if the exporting regime were based on prior informed consent, this should not be trade restrictive. In practice, trying to impose controls on exports of non-hazardous wastes even when administered in highly resourced, bureaucratic networks led to delays and costs in both the importing and exporting economies. This issue was not only a North-South issue, but also occurred between countries with different regulatory frameworks for the products at issue. It was important to be aware of the costs implied in establishing controls in this area. It would be useful for the Secretariat's paper on DPGs to include a description of the UN Consolidated List.

47. The representative of Egypt thanked the EC for the additional information on the issue of soaps containing mercury. Egypt hoped that the CTE's debate could lead to more intensive international cooperation, assistance and coordination to develop a mechanism to control trade in DPGs globally and to help government authorities to detect disguised practices by companies in this respect. The DGP issue was more of a problem for developing countries than developed countries. With all the health, safety and environmental regulations in place in many developed countries, Egypt felt that DPGs could not easily enter developed countries, but that it was not difficult for them to enter developing countries given the lack of resources to monitor these movements.

48. The representative of the United States said his delegation was reviewing Bangladesh's paper and was interested in the Secretariat's response to Members' questions, including on which WTO Body administered the 1982 DPG Decision. To the extent that there was a systemic problem with respect to notifications in this case and elsewhere in the WTO, it should be addressed as such.

49. The representative of Thailand said that his delegation placed a high priority on the DPG issue and endorsed Bangladesh's recommendations in its paper.

50. The representative of Brazil shared the views expressed in Bangladesh's paper. Brazil was interested in recycling certain types of wastes, as the recycling industry was profitable. When the Secretariat updated the DPG study, it should keep in mind that DPGs covered a wide range of different products as noted by the EC. It would be difficult for the Secretariat to provide information on the possible effects of DPGs on human health and the environment.

51. The representative of Canada said that his delegation was interested to note that the DPG issue had been revived, given that other international instruments had been negotiated to deal with the more serious DPG issues. This issue was being dealt with in several MEAs, including the Basel, PIC and draft POPs Conventions and the Montreal Protocol. Countries may not be notifying pursuant to the 1982 DPG Decision as they considered that their membership in MEAs was sufficient. In order not to duplicate work under way in environmental instruments in this area, the CTE should focus on gaps in the coverage of MEAs and other international organizations. This issue should be examined with renewed vigour to determine what could usefully be accomplished.

52. The observer of UNCTAD said that UNCTAD was implementing a project, funded by the United Kingdom, on capacity building on trade and environment involving ten developing countries. Workshops had been held in November 1999 in the Philippines and in May 2000 in Cuba, at which

the issue of DPGs had been discussed, focusing on identifying gaps in the coverage of DPGs by international instruments. Bangladesh had taken the initiative to carry this issue forward based on the paper it had contributed to the Cuba Workshop. UNCTAD would be pleased to provide the country contributions to these Workshops for the DPG study. On the example of used clothing, if these products were contaminated with substances listed in the Basel Convention, then used clothing was within the Basel definition of hazardous wastes. Identifying gaps in the coverage of international instruments was complex; the country studies prepared for the UNCTAD Workshops were a first step to identifying specific concerns in this area. Discussion at the Workshops had focused on domestically prohibited consumer products, as set out in Bangladesh's paper. UNCTAD and UNEP had circulated a paper, WT/CTE/W/138, on the Capacity Building Task Force on Trade, Environment and Development, according to which Bangladesh could submit the proposal set out in its paper.

53. The representative of Bangladesh thanked Members for their support of the proposals in his delegation's paper. As a first step, he reiterated Bangladesh's request for the Secretariat to update information on the gaps in coverage of domestically prohibited consumer goods.

54. The representative of the Secretariat said that WT/CTE/W/43 contained information on the DPG notification system established in the GATT in 1982 (BISD29S/19). Fifty notifications had been made under this system from 1983 to 1990; it remained in force, although no notifications had been received since 1990. A main reason this system was no longer being used was that it had become a one-time procedure, whereby countries notified that they did not export DPGs. On the extent to which other WTO notification mechanisms provided information on DPGs, as set out in WT/CTE/W/43, the TBT, SPS, quantitative restrictions and other WTO notifications systems may be relevant. The coverage of DPGs in other international instruments was addressed in WT/CTE/W/73. On technical assistance related to DPGs, the WTO's regional seminars on trade and environment included this issue; proposals were welcome for further technical assistance.

55. It was agreed that the Secretariat would prepare an update of previous papers on the export of DPGs, focusing on the gaps in coverage of other international instruments and the extent to which these instruments addressed domestically prohibited consumer goods.

Item 8 The relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights

56. The representative of India introduced his delegation's paper on India's national experience with the protection of biodiversity and traditional knowledge in WT/CTE/W/156-IP/C/W/198. India's position on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) had been reflected in its previous papers, WT/CTE/W/65 and WT/CTE/W/85. India was one of the twelve mega-biodiversity countries of the world, with 7-8 per cent of global species, and India was also rich in coded and informal traditional and indigenous knowledge. India was a Party to the CBD, which entered into force on 29 December 1993. India had introduced the Biodiversity Bill 2000 in Parliament to address the basic concerns of and access to collection and use of biological resources by foreigners and benefit sharing arising from this access. This legislation provided for a national authority to grant approvals for access subject to conditions to ensure equitable benefit sharing, pursuant to the CBD. India's paper touched on the relationship between biodiversity and the TRIPS Agreement, particularly with respect to patents. There had been cases of biopiracy of India's traditional knowledge. The most well known case was turmeric, for which a patent had been granted in the US, but consequently revoked. Since then patents had also been obtained in other countries on the hypoglycaemic properties of karela, and brinjal. The issue was foreign obtention of patents based on Indian biological material. In this respect, the view existed that the TRIPS Agreement aided the exploitation of biodiversity by privatizing biodiversity expressed in life forms and traditional knowledge. There had also been a recent case where the European Patent Office had revoked a patent on neem as a fungicide in May 2000. India's paper made the point that prohibitive amounts of time and money had been involved in having patents reexamined and revoked

in foreign patent offices in developed countries. Hence, the need for an internally accepted solution to such biopiracy. Whilst domestic legislation was important, the problem of biopiracy could not be resolved solely by domestic legislation. There was also a need for international action.

57. While the CBD recognized the sovereign rights of states over their biological resources, the TRIPS Agreement treated intellectual property rights (IPRs) as a private right. India had proposed that patent applicants should be required to disclose the source of origin of the biological material in an invention under the TRIPS Agreement, and should be required to obtain the prior informed consent of the country of origin of that biological material. If these requirements were put in place, domestic institutional mechanisms in the country concerned would be able to ensure benefit sharing arising from the commercial use of patent holders with owners of traditional knowledge, i.e. indigenous communities. Protection of traditional knowledge, innovations and practices associated with biological resources did not appear to fall within conventional legal systems of IPR protection. Conventional IPRs were inadequate to protect traditional knowledge as they were based on protection of individual property rights, whereas traditional knowledge was largely collectively owned. The difficulty was that traditional knowledge had been developed over a period of time and may not have been codified in texts or retained in oral traditions. Thus, the conditions of novelty and innovative steps for grant of a patent had not been satisfied as this knowledge had been in the public domain for generations. Communities also held knowledge in parallel with other communities. India felt that the development of an appropriate form of protection for the knowledge of local communities was of interest to countries that were rich in biodiversity and traditional knowledge.

58. Documentation could prevent biopiracy; India was putting in place Community Biodiversity Registers. Following the patenting of brinjal, an exercise had been initiated in India to prepare easily accessible computerized databases of documented traditional knowledge of prior art in the public domain, i.e. Traditional Knowledge Digital Libraries. If available in patent offices throughout the world, such digital databases would help to prevent biopiracy. Documentation of traditional knowledge was only one way of recognizing knowledge holders; it would not allow benefit sharing arising from the use of such knowledge unless it were backed by a mechanism to protect this knowledge. Thus, documentation was necessary, but not sufficient for the protection of traditional knowledge. India had made efforts regarding registration and innovation patent systems by inventors, for example through the Honeybee Database Network, which was one of the largest databases on grassroots innovations. On the development of a *sui generis* system for biological resources, in contrast to that provided for plant variety protection in the TRIPS Agreement, India said that documentation and registration were important, but that owners of traditional knowledge did not have the capacity to benefit from ownership. Thus, as part of its 1999-2000 budget, India had proposed a National Innovation Foundation to build a national register of innovations.

59. On WT/CTE/W/125, it was interesting to learn that of the 112 countries adhering to the FAO International Undertaking on Plant Genetic Resources (IUPGR), only 44 were UPOV Parties. Out of these, only 12 adhered to the 1991 model. Thus, a majority of those who had chosen UPOV appeared to prefer the 1978 model (paragraphs 4 and 11). UPOV did not appear to be fully informed about various other existing and emerging models that were based on precepts other than those in UPOV or patent systems (paragraph 10). India drew attention to a recent paper by Carlos Correa, "Options for the Implementation of Farmers' Rights at the National Level" for the Instituto Agronomico per l'Oltremare, Italy. It was interesting that FAO and UPOV observed that UPOV and IUPGR were not incompatible and could co-exist in a *sui generis* system (paragraph 13). Paragraph 19 did not fully reflect the relevant CBD provisions. The CBD also called on Parties to take legal, administrative or policy measures regarding access to biological resources and technology transfer that made use of these resources. The CBD provisions, read with Articles 7, 8, 27.2 and 27.3(b) of the TRIPS Agreement, provided a model for access and protection laws. Article 27.2 was also relevant to paragraph 21. The study of only 18 out of 137 countries was not a relevant sample to determine national practices on plant variety protection models adopted by WTO Members. India drew attention to Section IV of WT/CTE/W/125, which illustrated that: (a) derivatives of genetic resources and

other intangible elements were becoming an integral part of *sui generis* protection systems, particularly in developing countries; and (b) prior informed consent of patent applications for use of genetic resources and traditional knowledge was being introduced in national laws.

60. The representative of Thailand thanked the FAO for its paper and welcomed the revision of the Undertaking. Thailand noted that the Undertaking recognized the importance of farmers' and plant breeders' rights, unlike UPOV 1991. The sovereign right of countries over their resources and the rights of indigenous communities and farmers must be protected. The TRIPS Agreement should recognize the concept of equitable benefit sharing. Article 27.3(b) must remain open for Members to choose a patent system. Thailand understood that the Undertaking would become a legally binding instrument linked to the FAO and the CBD and felt that consideration of the reinforcement mechanism should be addressed when implementing the Undertaking.

61. The representative of Peru said that India's paper had made an important contribution to the discussion. Many developing countries had defined this position in international fora, such as WIPO and FAO. India had analysed ways in which to provide protection through IPRs for genetic resources and traditional knowledge by using existing and *sui generis* systems. Peru appreciated the reference to India's concrete problems with respect to biopiracy. Peru agreed that traditional knowledge could not be covered by conventional IP. In some instances, it would be necessary to establish *sui generis* regimes or adjust existing regimes to accommodate the protection of traditional knowledge.

62. The representative of Brazil thanked India for its valuable paper. It was well known that traditional knowledge could make a significant contribution to several industrial sectors, particularly the pharmaceutical sector, where traditional knowledge may play a key role in the pre-scanning phase to identify the active substance of medicines. If such active substances were to be developed synthetically, it would take years and probably millions of dollars in research in laboratories. Like India, Brazil was discussing draft laws on access to genetic resources, which included issues such as benefit sharing and the protection of traditional knowledge to implement the CBD. Brazil agreed with India that it would be less cost-effective to establish benefit sharing schemes in the patent system, either nationally or internationally, than to use resources in expensive judicial processes for the revocation of patents that included illegal genetic resources. India had noted its experience with biopiracy in the cases of neem, basmati and turmeric and introduced a relevant argument to implement the CBD in this respect. The main countries that had suffered from biopiracy were the biodiversity-rich countries, most of whom were developing countries. Biopiracy may turn out to be less cost-effective for biopirates than establishing benefit sharing schemes in the patent system. Brazil agreed with India that the conventional legal systems of IPR protection did not necessarily provide adequate scope for protection for traditional knowledge. Some countries had mentioned the possibility of using the existing IPR system to protect traditional knowledge. To the extent that this may be feasible, countries should not rule out this possibility, although it may be worthwhile to carry out this discussion in other organizations, such as WIPO, where there was enough expertise and resources to establish technical cooperation in this area. India had provided a useful contribution regarding the documentation of traditional knowledge. India's rich experience, as set out in its paper, provided a concrete basis for discussion on the different possibilities to protect traditional knowledge. Whether documentation may facilitate biopiracy, as referred to in India's paper, was debatable. Brazil agreed with India that the establishment of databases had the benefit of providing documentation for patent offices to check against patent requests that were filed without the consent of the community.

63. Brazil agreed with India on the need to go beyond the national level to provide adequate protection for traditional knowledge in addition to that provided by conventional IPR regimes. India had mentioned the possibility of exploring options, such as the so-called “petty patents” and *sui generis* systems, which may be useful, but not sufficient to protect traditional knowledge adequately. In previous debates, some countries had mentioned that the *status quo* already provided for different means of protecting such knowledge. For instance, companies could establish *inter partes* contracts with traditional or indigenous communities. Such contractual modalities of

protection, however, were not easily enforceable and were subject to the direct negotiations between the parties involved. There was no way to ensure that the prior consent obtained from these communities would be an informed one, or that benefit sharing between a company and a community would be fair and equitable. Several countries were establishing national legislation, which would help to regulate the different elements in the relationship between IP and access to genetic resources. The most efficient way to protect traditional knowledge under the IP system would be to establish minimum standards of protection at the multilateral level. Some countries might argue that the fact that the relatively low numbers of existing national legislation made it difficult to establish an internationally recognized regime to secure benefits arising out of the use of traditional knowledge. It should be recalled, however, that the greatest majority of countries who negotiated the minimum standards of IPRs in the TRIPS Agreement had not incorporated such minimum standards at the national level when the TRIPS Agreement had been concluded. In fact, even after the entry into force of the TRIPS Agreement, several WTO Members had not yet incorporated protection in some areas of their patent legislation, and they were still protected by the transitional period established in Article 65.4 of the TRIPS Agreement. The absence of protection at the national level had not deterred WTO Members from negotiating and establishing one of the most ambitious international treaties on IPRs. The TRIPS Agreement and the CBD should be mutually supportive and the implementation of both should promote sustainable development. India's contribution moved the discussions forward. Brazil requested the Secretariat to circulate the relevant Decisions from the COP of the CBD, particularly Decisions V/16 and 26, as a joint CTE-TRIPS Council document.

64. The representative of Japan made preliminary comments on India's paper. Providing a legal framework through domestic legislation to protect biodiversity resources and documentation of traditional knowledge may be an effective response to the request of India's indigenous communities. Protection may differ between countries, given the various kinds of traditional knowledge in the world. Japan shared India's view on the nature of traditional knowledge as being different from other forms of IP, which were subject to conventional systems of protection provided by the TRIPS Agreement. These differences underlined the reality that the TRIPS Agreement was not the appropriate forum to provide protection for traditional knowledge. India's paper clearly explained the differences, such as that traditional knowledge was developed over time and may not be codified in text, but be retained in oral traditions over generations. The collective nature of traditional knowledge was different from that relating to patent and copyright, which was concerned with private property rights. The unique nature of traditional knowledge may require an international approach other than the TRIPS Agreement. Japan felt that India's proposal that patent applications should be required to disclose the source of origin of the material used in an innovation may be an effective solution that the international community could provide to complement India's domestic efforts. However, it remained to be determined if the international community could accept this proposal, particularly with respect to establishing a legal framework for protection. Voluntary disclosure of information may be expected, but there was no reasonable justification to require patent applicants to disclose the source of origin. This issue required examination in other international organizations with expertise.

65. The representative of the United States said that, upon an initial reading, the US found particularly interesting India's information on how it had dealt with these issues domestically. On India's reference to so-called "biopiracy", the US noted that, while there were often disputes about whether something were patentable, India's examples had been successfully addressed. The US was not sure that it accepted the notion that there was a phenomenon that can be termed "biopiracy". The US would review India's paper and looked forward to further discussion at future meetings.

66. The representative of the European Communities said that India's paper gave "real world" insight into the administrative complexities of dealing with traditional knowledge within a country's jurisdiction. Issues raised in respect of CBD implementation and the TRIPS Agreement were being reviewed in the TRIPS Council. In this respect, the CTE did not have the same degree of expertise to deal with this issue as the TRIPS Council. On suggestions for prior informed consent and compulsory notification of geographical origin, the EC recognized that biopiracy existed in theory and in practice.

The fact that patent offices had been called upon to revoke patents that had initially been granted suggested that biopirates also existed. In the field of patentability of biotechnology inventions, the relevant EU Directive included prior informed consent and notification of geographical origin. The scope of these concepts was limited. Prior informed consent was limited to inventions based on biological material of human origin. Geographical origin of inventions based on biological material of plant or animal origin was to be notified where known. The concepts that were being explored in India's domestic debate were similar to those under consideration in the EU. On the section in India's paper on the 1999 Patent Bill, the EC asked how India viewed the grounds for rejection of a patent application as relating to the TRIPS Agreement. Like the EC, would India see this as relating to the national discretion left to WTO Members under Article 27.2 of the TRIPS Agreement to provide for exclusion from patentability in cases where countries consider such exclusions necessary to protect *ordre publique* or morality? In the field of traditional knowledge and access to genetic resources, India's paper and WT/CTE/W/125 illustrated that there was much work under way at the national level that required more international cooperation and assistance. This work was consistent with the TRIPS Agreement and the CBD. At the MEA Information Session, the CBD Secretariat had said that there was also encouraging work being undertaken at the international level in this respect.

67. The representative of Canada acknowledged the valuable contribution of India's paper on this complex issue and congratulated India on being able to proceed with legislation in this area. Canada was examining the effectiveness of its current IP protection regimes in this context, but had yet to come to firm conclusions. Canada remained concerned about how to identify traditional knowledge holders and whether they possessed the right within their larger communities to authorize use of traditional knowledge and to receive benefits arising from its use. Canada had encountered reluctance from indigenous peoples to permit the documentation of their knowledge and innovations, which had been the basis for India's approach. This pointed to the importance of dealing with this issue primarily in the national context, as India was undertaking. Discussion was under way in several international fora, including the CBD Working Group on Traditional Knowledge. Canada welcomed the issue being raised in the CTE and expected further discussion in the TRIPS Council. The most appropriate forum for dialogue on this issue was WIPO, which had engaged indigenous peoples directly in its activities, and where the primary expertise in this field resided.

68. The representative of Norway was impressed by the practical, "real world" approach to this issue in India's paper. Norway would comment further at a later stage.

69. The representative of Switzerland made preliminary comments on India's paper. Some Members, who had argued that there was no problem with the WTO-MEA relationship, seemed to take another position on this Item. Coherence was important between different fora and within the same forum. India had noted that countries were free to deny patents on life forms, except on microorganisms and microbiological and non-biological processes. While this was correct, it must be underlined that countries were not allowed to deny any protection to life forms but that they must protect plant varieties at least by a *sui generis* system. Switzerland agreed that traditional knowledge did not seem to fall easily in the conventional system of IPR protection. As noted by India, the conditions of novelty and an innovative step necessary to grant patents and the fact that communities often held knowledge in parallel presented difficulties for recognizing informal knowledge as a conventional IPR. Another difference between traditional knowledge and conventional IPRs was that conventional IP protection was limited in time. Switzerland asked what would be the case for traditional knowledge that had not been documented. Switzerland questioned the TRIPS-compatibility of rejecting or revoking patent applications because of non-disclosure or wrongful disclosure of the source of origin of biological resources or knowledge in the patent application.

70. The representative of Cuba supported the approach in India's paper and felt that the TRIPS Agreement should be reviewed and perhaps amended to enable greater protection of traditional knowledge and to encourage technology transfer. Cuba was currently in the process of adopting legislation on plant variety protection jointly with legislation on biodiversity and access to genetic

resources. Criteria for access to genetic resources had been agreed upon and would help Cuba to avoid the possible harmful effects of the automatic application of the TRIPS Agreement. Cuba would provide further details on its legislation at a later stage.

71. The representative of Malaysia said that the issues raised in India's paper were practical and worth consideration, particularly the need for a system to protect traditional knowledge and international action to complement domestic legislation. The TRIPS Agreement gave protection under geographical indications to goods originating in a territory, region or locality that were attributable to that geographical origin. There may be justification for a system to protect traditional knowledge that was indigenous to a community. There was also value in considering some of the systems of protection raised in India's paper where protection can be given through some *sui generis* system or a multilateral register of traditional knowledge so that they can be recognized and accorded protection. It would be useful to further pursue these processes in order to put in place an efficient benefit sharing system. Discussions in WIPO and the CBD would contribute to discussions in the TRIPS Council and the CTE. Malaysia felt that WT/CTE/W/125 had contributed to the CTE's understanding of issues concerning Article 27.3(b).

72. The representative of Hong Kong, China said that this was an area in which his delegation had substantive interests and in which domestic debate was occurring. Hong Kong, China welcomed India's paper and looked forward to further CTE discussion on this issue.

73. The observer of FAO noted the paper the FAO had provided to clarify the negotiations on the International Undertaking on Plant Genetic Resources in WT/CTE/W/146. The FAO drew attention to the Report of the FAO Conference in November 1999, where it had been confirmed that negotiations to revise the Undertaking would proceed on the basis that the Undertaking would take the form of a legally binding instrument closely linked to the FAO and the CBD. Under negotiation was the range of options for the legal status of the revised Undertaking, including the relative advantages of a stand-alone instrument or a protocol to the CBD. There was a continuous dialogue between the FAO and the CBD on these possible options; the COP of the CBD had been regularly informed of progress in the negotiations to revise the Undertaking and had given its support in Decisions II/15 and III/11. The FAO would update the CTE of developments in these negotiations.

74. The observer of the CBD said that, as noted in its presentation at the MEA Information Session, the COP of the CBD had welcomed discussion of this issue in the CTE. It was reassuring to note that the observations made in the CTE resembled the dialogue in the CBD. He recalled the conclusion at the last COP on the importance of *sui generis* systems for the protection of traditional knowledge and the equitable sharing of benefits arising from its use. He also recalled that the COP had invited the WTO to acknowledge the relevant CBD provisions; to take into account that they were interrelated with the provisions of the TRIPS Agreement; and to further explore this relationship. The CBD presentation had highlighted that this issue was central to CBD work. In preparation for the next COP meeting, the main issues were: (i) the role of IPRs and prior informed consent; (ii) IP and traditional knowledge related to genetic resources; and (iii) IPRs and access and benefit sharing agreements. The COP had requested that Parties and other relevant organizations submit information to the CBD Secretariat on these issues by 31 December 2000. This information would be used by the CBD Secretariat to prepare a background document on the subject for the Panel of Experts on Access and Benefit Sharing. This panel planned to meet in March/April 2001 to discuss recommendations for consideration by an open-ended Working Group on Access and Benefit Sharing in October 2001 in Germany. This Working Group would work on guidelines or recommendations to be considered by the COP in April 2002 in The Netherlands. This process was dependent on information being submitted to the CBD. In this regard, CTE deliberations were germane to CBD work; cooperation with FAO and WIPO was also important to CBD implementation.

75. The observer of WIPO, commenting on UPOV, said there were currently 46 members of the UPOV Convention, of which 14 had ratified the 1991 Act. Nine members had changed their laws, but

had not yet ratified the 1991 Act. To date, thus, there were 23 members that conformed to the 1991 Act, half the UPOV members. However, there were 111 countries in the process of implementing plant variety protection in the form of *sui generis* systems based on UPOV, of which the legislation of 86 conformed to the 1991 Act. An example was the 16 members of l'Organisation Africaine de Propriété Intellectuelle (OAPI), where the revised version of the Bangui Agreement had not yet entered into force. It would be interesting to have information from India on other forms of *sui generis* systems. Work was being undertaken in UPOV and WIPO on these issues, and they would be pleased to work with the WTO.

76. The observer of UNCTAD said that UNCTAD would convene an Intergovernmental Expert Meeting on Systems and National Experiences for the Protection of Traditional Knowledge in Geneva on 30 October to 1 November 2000 in cooperation with WIPO, the CBD and the WTO. Information exchange in this area was also taking place in the UNCTAD Workshops sponsored by the UK.

77. The representative of India thanked Members for their comments to which India would react later. In response to Switzerland, India stressed that documentation was necessary, but not sufficient to protect traditional knowledge. If it were not for the fact that the healing properties of turmeric had been transcribed in ancient Indian scriptures, the patent may not have been revoked. India had been fortunate to be able to document turmeric's healing properties, and thus to convince the US patent office that turmeric was in the public domain. The situation was complex if oral knowledge had to be relied on. This issue should be dealt with in a pragmatic manner. Work in WIPO and UNCTAD was important, but it would be necessary for the WTO to find solutions to these issues.

Other Items

Item 2 The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provision of the multilateral trading system

78. The representative of the European Communities presented a Communication of the European Commission on the precautionary principle, adopted on 2 February 2000, WT/CTE/W/147-G/TBT/W/137.[1] The objective of this Communication, addressed to the Council and the European Parliament, was to contribute to the debate on the application of the precautionary principle in international fora. The EC hoped this paper would help to build a common understanding of how to manage risks in situations where there was scientific uncertainty and indications of potential adverse effects on the environment and/or health and to dispel fears that the precautionary principle might be used in an arbitrary way or as disguised trade protectionism. Recourse to the precautionary principle had been increasingly in the spotlight, stimulating public debate on the circumstances in which precautionary action was necessary. Given that precaution was implicit in many national approaches to policy making in many fields, this principle as such was not a new idea. The most recent application of this principle at the international level was the Cartagena Protocol on Biosafety, which should further consolidate this principle internationally. There was a need to clarify the use of the precautionary principle in the WTO. Invocation of the principle was not a basis to justify arbitrary measures and measures based on the precautionary principle had to comply with general WTO principles on risk management, including proportionality, non-discrimination, cost effectiveness and transparency. Clarification would improve domestic policymaking and reduce the degree of international friction around risk management and precaution. It was often said that the EC's concept of precaution conflicted with science-based risk assessment and that precaution was not sound science. Decisions based on precaution were always informed and reviewed based on science. It had been stated that the EC was emphasizing precaution to restrict trade. It was clear that precaution based measures involved a range of governmental actions, some of them trade-related and that, in exceptional cases, precaution-based decisions in Europe, as elsewhere, had involved trade bans. For

[1] This document was also issued in the SPS Committee as G/SPS/GEN/168, 14 March 2000.

this to take place, as set out in the EC's paper, there had to be an explicit, prior judgement that such a measure was appropriate and proportional to the risks. Precaution was not going to lead to measures that were more restrictive of international economic cooperation, as precaution was not about setting standards or defining the level of risk, which were domestic judgements. Precaution was used to take decisions on how to achieve a given level of protection. Uncertainty of the possible adverse effects had to exist before precaution was involved. Involvement of precaution in policy making will not lead to more restrictive environmental measures.

79. The representative of Japan said that, in Japan, risk assessments were conducted for health and environment-related issues based on the latest scientific information, and appropriate measures were applied accordingly. If there were insufficient scientific evidence or rational reasons to consider factors, such as damage to health and the environment, appropriate measures could be taken. On the precautionary principle for food safety, however, there was no international consensus, including on the relationship between the precautionary principle and the SPS Agreement. In general, Japan felt that the EC's approach was useful to prevent the precautionary principle from being used in an arbitrary or unjustified manner. However, several issues, such as the definition of this principle and the relationship between risk assessment and risk management were still not clear. Discussions in other fora, including UNEP and CODEX, should be carefully watched to clarify this principle before it was dealt with in the WTO and the CTE. Japan commented on the five conditions of application of the precautionary principle in the EC's paper. On point 5 on scientific developments, which mentioned Article 5.7 of the SPS Agreement, it was necessary to ensure that the measure was provisional, taken only when scientific evidence was insufficient, and reviewed in light of scientific progress. Examination of proportionality in point 1, and overall costs and benefits in point 4 were also important. On point 2, non-discrimination should include the concept in the chapeau of Article XX so that measures should be applied on and not discriminate between domestic and imported goods where the same conditions prevail. Risk assessment, as the EC pointed out, should not be confined to quantifiable assessment, but include unquantifiable assessment. Also, as stated in the Appellate Body decision on Hormones, when scientists could not reach a conclusion, a minority opinion by highly respected scientists as well as a majority opinion should be considered. The EC also raised the point that various measures could be taken based on the precautionary principle, and Japan believed that providing information on risks to consumers was important. However, this may not be sufficient. On reversing the burden of proof, the EC's paper stated that, in some cases, measures should be examined on a case-by-case basis, considering the hazard level. Clarification was needed as to when the burden of proof could be reversed and to what degree proof was needed.

80. The representative of Canada said that his delegation was interested in advancing discussion on precaution internationally in the CTE and other fora. There had also been discussion in the SPS Committee in this respect, as well as in the OECD Joint Working Party on Trade and Environment. Canada had provided comments on UNEP's draft paper on the precautionary principle. Canada shared some common ground with the EC on several issues raised in its paper, but noted that Canada had concerns with respect to some of the concepts and terms, which could benefit from clarification and debate. Canada would provide the EC with comments on its paper and would work with the EC and the international community to develop a comprehensive and coherent understanding of this issue.

81. The representative of Australia made preliminary comments on the EC's paper. Australia welcomed the EC's emphasis on the importance of scientific risk assessment. Australia saw no conflict between science-based decision-making and the exercise of what the EC had referred to as the "precautionary principle", a concept that Australia considered was more correctly described as the precautionary approach. Precaution was inherent in Australian regulatory frameworks to protect the environment and human health. WTO rules clearly catered for reasonable use of precaution in science-based decision-making, as reflected in the SPS Agreement. Noting the EC's comments on the misuse of the precautionary approach, Australia registered concern that it would not want to see this approach misused to weaken the scientific basis of risk assessment and management or to justify trade protectionism. The EC's paper appeared to be stating that exercise of the precautionary approach in

risk management was a political decision; Australia was not sure what this meant. It was necessary to avoid confusing the right of a country to set its appropriate level of protection, and the issue of the measures that were adopted to ensure that a country achieved the level of protection it had determined to be appropriate when faced with certain risks, including in the face of scientific uncertainty. Risk assessment and risk management were part of a decision-making continuum, with science-based analysis as a key element throughout. At the very least, an attempt at a risk assessment was important to determine whether there was scientific certainty.

82. The representative of the United States said that his delegation appreciated the EC's recognition that the concept of precaution was not new; precaution had been a long-standing and essential element of the US regulatory system in health and safety matters, particularly for foods, drugs, and chemicals. In the food safety area, the US government's use of precaution dated to 1906, when the Food, Drug, and Cosmetics Act had first been enacted. The concept of precaution was also reflected in various international fora. The US had doubts concerning claims that the Cartagena Protocol had broken new ground on the concept of precaution. For example, a precautionary approach to fisheries management had been a key component in the 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks, and had been prominently included in the FAO Code of Conduct for Responsible Fisheries. Precaution was reflected in several ways in the SPS Agreement. Through its long-standing experience with precaution, the US had learnt that its use was context-specific. This was why there was no single internationally agreed definition of the so-called precautionary principle. It was impossible to conclude that there was such a principle in customary international law. The US noted that the EC's paper was similar to its Communication on the Precautionary Principle to the SPS Committee in March 2000. On the EC's paper, the US agreed on the importance of striving for the highest level of consumer protection, and on the important role that precaution can play in achieving these goals; and on the need for non-discriminatory, science-based applications of precaution to protect people and the environment, and to ensure that decision-making procedures were transparent and inclusive. However, the US was concerned about the EC's assertion that actions should be taken based on a so-called "precautionary principle" without defining what it believed this principle was. The US had submitted to the EC written comments on its paper and looked forward to deepening its understanding of the EC's views through its responses. The US noted that although precaution was not a new concept, discussions had been made more difficult by the fact that there had been unfortunate occasions when this term had been used to justify trade protectionism.

83. The representative of Switzerland said that his delegation would comment on the EC's paper at the next meeting.

84. The representative of Argentina said that her delegation would comment on the EC's paper at the next meeting.

85. The representative of Hong Kong, China recalled that the EC had submitted a similar paper to the SPS Committee on which his delegation had commented. Hong Kong, China did not agree that precaution was already a principle of international law. In this respect, the Appellate Body had noted in paragraph 123 of the Hormones report, WT/DS26/AB/R, that "whether the precautionary principle has been widely accepted by Members as a principle of general or customary international law appears less than clear". In paragraph 124, the Appellate Body had stated that "the principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement." Thus, it was premature to conclude, as in Section 4 of the EC's paper, that this concept was a principle of international law. In this respect, Hong Kong, China agreed with the US observations. As raised by Australia on Section 5.2.1 of the EC's paper, the notion of political decision raised doubts about its compatibility with the objective and science-based approach in the SPS Agreement and risked being captured by interest groups for protectionist purposes. On reversing the burden of proof, as noted in Section 6.4 of the EC's paper, Hong Kong, China was not sure how this was compatible with Article 5.1 of the SPS Agreement; clarification by the EC would be appreciated.

86. The representative of the European Communities thanked Members for their comments; precaution merited further discussion at an early stage. Consolidation of domestic and international legal principles was a dynamic process. Where there were instruments of international public law that defined certain rights or principles, there could be a single expression of a right or principle or several similar expressions. It was more complex when a principle of international law emerged by successive stages, as with the precautionary principle. Thus, it was not possible to use the absence of a single formulation of a principle as a criterion to judge whether it existed in international law. The precautionary principle existed in international law. There were four issues to which science was relevant to precaution: hazard identification, assessment and management of risk and, a prior decision as to the level of risk a society was willing to accept. The level of protection was inevitably a political decision, as it involved trade-offs between social goods and costs. Thereafter, science was relevant to identify hazards, and assess and manage the consequent risks. Where science did not provide all the necessary information, the precautionary principle was used to draw policy conclusions from science-based assessments. Reference to the burden of proof in the EC's paper was to the cost allocation principle, and was not connected with WTO dispute settlement. The term referred to who paid for the scientific assessment following policy decisions based on the precautionary principle. These were domestic political decisions in which the burden to undertake scientific study could be placed on the product manufacturer or the government. In this case, the EC felt that the burden of proof was on those wishing to overcome a negative regulatory decision on the marketing of a product.

87. The observer of UNEP said that UNEP was revising its paper on the precautionary principle based on comments from Governments. UNEP also introduced its work on integrated assessments in WT/CTE/W/157, for which UNEP had established a Working Group of several international organizations and agencies, including the WTO, UNCTAD, OECD, the EC and collaborating institutions to prepare a manual on integrated assessment of trade related policies by early 2001. UNEP offered to present at the October meeting, subject to Members' interest, its work on assessment of the sectoral impacts of trade liberalization in Asia, Africa and Latin America. The institutions undertaking these assessments could be invited, on behalf of UNEP, to present their experiences.

Item 3(b) The relationship between the provisions of the multilateral trading system and the requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling

88. The representative of the European Communities said that WT/CTE/W/150 should also be circulated in the TBT Committee. An important factor was that if a large number of smaller eco-labelling schemes were developed, their positive environmental impact may be more limited than if a single scheme achieved a critical mass and influenced consumers. This made it desirable to develop common views on the best practice for labelling schemes. The EC inquired as to the scope of the term "stakeholders". In terms of transparency, the inclusion of foreign producers was important.

89. The representative of Canada said that eco-labelling and certification continued to be important issues for her delegation. Canada would comment on WT/CTE/W/150 at the next meeting.

90. The representative of the Secretariat said that the term "stakeholders" in Table 6 of WT/CTE/W/150 was from a study by the US Environmental Protection Agency on eco-labelling schemes world-wide, which defined "stakeholders" to include domestic and foreign manufacturers, academia, consumer and environmental groups and the general public.

Item 4 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

91. The Chairperson noted that the Environmental Database for 1999, which compiled the environment-related WTO notifications, had been circulated as WT/CTE/W/143.

Item 6 The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions

Sectoral analysis

Energy

92. The representative of the Czech Republic informed Members about the joint UN/Economic Commission for Europe (ECE)/OECD Workshop on Enhancing the Environment by Reforming Energy Prices in Prühonice, Czech Republic from 14-16 June 2000 with 120 participants from 26 countries and eight international organizations. The Workshop reviewed implementation strategies for energy-related economic instruments in OECD and non-OECD members of the ECE, including the removal of environmentally-harmful subsidies; the introduction of new environmental taxes; potential tax shifts, where revenues from subsidy removal and/or new environmental taxes were used to reduce distorting taxes; and impacts on the demand for relevant products/activities. Topics discussed included trends in energy production and consumption in Europe and related environmental impacts; energy, taxation policy and green tax reform; and removing/restructuring distorting energy subsidies. The seminar had adopted recommendations to ECE Governments on enhancing the environment by reforming energy prices. Documentation was available at: http://www.env.cebin.cz.

93. The representative of the European Communities said that there was a debate in some developed countries, particularly in North America, on the effects of the price of oil. One of the distortions that gave rise to distorted trade patterns and environmentally-unfriendly levels of oil consumption was the failure of energy prices to internalize the costs of discharging carbon into the atmosphere. Thus, there was an opportunity to discuss the environmental benefits of higher energy prices, as opposed to arguing that prices should be reduced.

Fisheries

94. The representative of the United States introduced her delegation's paper on environmentally-harmful and trade-distorting fisheries subsidies, WT/CTE/W/154, a topic that had been much discussed in the CTE. As the US had noted on many occasions, the depleted state of the world's fisheries had become a major environmental issue. The US was concerned not only about this sector's environmental sustainability, but also its economic viability. One of the contributing causes of overfishing was overcapacity; there were too many boats chasing too few fish. A main cause of this overcapacity was government programmes that reinforced tendencies to over-fish and over-invest by reducing fixed and variable costs; enhancing revenues and incomes; and mitigating risks. According to economic theory, subsidies were harmful as they distorted the efficient allocation of resources since they interfered with price and interest rate signals provided by the market as to where the most profitable business opportunities were found. If not for these subsidies, producers would make different decisions about what and how much to produce based on where the best profit opportunities arose, not on government decisions as to where resources should be directed. In practice, with reduced costs and risks, as well as enhanced prices, vessel owners would tend to pursue harvests to an unsustainable degree. In fisheries that had been exploited to their maximum sustainable yield, the additional effort and capital further dissipated rents, led to further resource erosion and generally resulted in an unsustainable level of economic activity. These subsidies, therefore, led to a situation where market forces were ignored and environmental damage ensued as fish stocks became depleted and, eventually, commercially extinct. Since fish and fish products were heavily traded with approximately 40 per cent of global harvest sold in foreign markets, the effects of the subsidies were felt not only within the subsidizing coastal state but also in its international markets.

95. Given the above parameters and as a result of ongoing international work in the FAO, APEC and the OECD, as well as US internal studies, the US had prepared this paper to provide examples of

subsidies it considered to be environmentally harmful and trade distorting. These categories of subsidies reduced fixed and variable costs and/or support income and prices. They tended to promote excessive levels of fishing effort and harvesting capacity, as well as distort prices and trade. The paper included an illustrative list of programmes falling into these categories. The US understood that there would be instances where some of these programmes may be beneficial, and thus discussion of each category and the categorization itself was necessary. Excluded from the list were, among others, government programmes that facilitated resource management and the transition to sustainable fisheries. Discussion was necessary on government programmes that benefitted conservation, on artisanal fisheries and the role of the fisheries sector in developing and least-developed countries.

96. The representative of New Zealand said that the US paper highlighted a range of financial transfers to the fisheries sector that had significant negative impacts on trade, environment and sustainable development. The US contribution was useful in terms of deepening the CTE's analysis. New Zealand had put forward a paper in March 2000, WT/CTE/W/134, that had also highlighted a range of areas of financial transfers, a number of which had a demonstrated negative effect on trade, environment and sustainable development. There had been a lot of work on this issue recently, particularly in the OECD for its study on government financial transfers in OECD countries in the fisheries sector, which would be published in September. This study would further highlight the problems faced in this area. New Zealand noted that the CTE had agreed at the March meeting that the Secretariat should update work in this sector. It would be useful to have an in-depth discussion of this issue at the October meeting, after the Secretariat's paper had been circulated. New Zealand encouraged Members to submit contributions in this area.

97. The representative of Peru said that the US paper had valuably contributed to the debate on the harmful effects of fisheries subsidies, which was a subject of concern for Peru. Peru had been making an effort to sustainably manage its fisheries resources. Members of the Standing Committee of the South Pacific, namely Chile, Colombia, Ecuador and Peru, had negotiated a Framework Agreement for the Conservation of Fishery Resources on the High Seas of the South-Eastern Pacific Ocean, which was about to come into effect and would be open to participation from other countries. The categories of subsidies in the US paper were illustrative and should be discussed further. Peru reserved the right to comment on the US paper after it had been examined in capital.

98. The representative of Norway said that the US paper moved discussions on fisheries subsidies and "win-win" scenarios a step further. Definitions and classifications of fisheries subsidies should be developed in the FAO. The US paper categorized fisheries subsidies and listed examples, rather than definitions and classifications. Norway would comment further after the paper had been examined in capital. On the list of environmentally-harmful and trade-distorting subsidies in the US paper, Norway questioned the inclusion of government funded, commercially applicable research and development. In Norway, R&D was being carried out, for example, to develop side products to better use raw materials, which was important for sustainable development. Government funding was necessary to ensure this type of R&D, which had a high risk of failure, was carried out. This funding, however, should only be considered in conjunction with funding from the fisheries industry. Norway looked forward to a constructive debate on fisheries subsidies.

99. The representative of Argentina made preliminary comments on the US paper. The list of subsidies in the US paper would facilitate the analysis, particularly as it was illustrative, and not exhaustive. Argentina would have liked the document to have reflected consideration of subsidies for artisanal fisheries, as the effects were different from subsidies to the industry in general, and subsidies that were implicit in preferential fishing agreements. Some countries negotiated agreements for preferential market access of their fisheries products. The country that offered access to its market so that its fleet could have the right to fish in the waters of a developing country gave up a tariff through foregone revenue; the country that granted access to its fishing area, usually a developing country, charged a fee that was normally inferior to that which normally would have been charged in exchange for improving its exports. However, less income would be received to control this country's

Exclusive Economic Zone (EEZ), which could have negative environmental impacts. It would be interesting to discuss this issue, which had been referred to in paragraph 24.1 of the US paper as government-funded foreign access payments. On Japan's question as to whether a problem existed, Argentina felt it was clear there was a problem of fisheries overexploitation. There were also problems concerning the lack of fisheries management, which were complicated by the fact that fisheries resources moved in and out of national jurisdictions; concerning difficulties in developing countries to control their domestic jurisdiction due, in large part, to a lack of financial resources; and concerning subsidies that distorted the costs and risks in this sector. Although fisheries management was not within the WTO's purview, the WTO could work to remove fisheries subsidies that were in its remit. Argentina asked Japan whether it could deny there was a causal relation between subsidies and fisheries overexploitation. The response would be a first step to determine if there was a problem. In Argentina's view, there was definitely a causal relationship between an economic stimulus given by governments to the fishing industry and overexploitation. It was necessary to evaluate how serious this causal relationship was, and then to assess how to eliminate the types of subsidies that caused overexploitation. Argentina would comment further on the US paper at the next meeting.

100. The representative of Japan said that, upon review of the fisheries discussion in the CTE, two questions had been raised, but had yet to be answered. First, what was the problem? Japan was not aware of any actual example in which fisheries subsidies had played a major role in causing fisheries overexploitation. Japan had repeatedly asked those Members that advocated eliminating fisheries subsidies to provide concrete examples of cases in which fisheries subsidies caused overexploitation. The World Bank paper by Milazzo, which had been cited in this respect, set out concepts and theories, but not concrete examples. The only document that provided case studies, as stated by New Zealand, was the recent OECD study on the impact of government transfers on fisheries sustainability. However, the OECD study's conclusion set out nine key findings, including that "the effects of transfers on resource sustainability is difficult to determine as there are many influences on fish stock health that are difficult to disentangle." The second question concerned the relationship of environmentally-harmful and trade-distorting fisheries subsidies with the SCM Agreement. If certain fisheries subsidies were trade distorting, Japan asked why the SCM Agreement did not address them, as it was supposed to cover all trade-distorting subsidies, except for agricultural subsidies.

101. Japan made preliminary comments on the US paper. The US distinguished between effects of subsidies and fisheries management. In paragraph 9, the US categorized fisheries management into three categories and described how the negative effect of fisheries subsidies can be minimized depending on the type of fisheries management systems. Although it did not necessarily agree with this categorization, Japan appreciated the fact that the US mentioned the relationship between the effects of subsidies and fisheries management systems. The US paper clarified that certain government expenditures should be exempted, such as those for management, research and enforcement. Japan understood that the US did not wish to eliminate all fisheries subsidies, just those that contributed to overexploitation of fisheries resources. Thus, certain fisheries subsidies were necessary for fisheries management. Japan recalled that, at the FAO Sub-Committee on Fisheries Trade in March 2000, there had been consensus that at least the government expenditures for research and enforcement were necessary. The US paper did not describe what the problem was. Reference to the FAO Plan of Action was not neutral; the FAO Plan of Action set out that FAO Members should address all factors contributing to fisheries overexploitation and overcapacity, including subsidies. The US paper did not illustrate why the SCM Agreement could not be used to address this problem. Japan raised concerns about the list of "bad" subsidies in the US paper, given the OECD study's conclusion that possible negative effects of some kinds of transfers could be reduced or minimized when transfer and resource management policies were coherent. In other words, if fisheries management were adequate, it was not necessary to be concerned about the negative effects of subsidies. Rather than listing "bad" subsidies, the list should be of subsidies that could become "bad" with inadequate fisheries management. Noting the generic approach in the US paper to categorizing fisheries subsidies, Japan said it was necessary to take a decision as to whether a subsidy were "good" or "bad" on a case-by-case basis. Japan felt that a paper on fisheries subsidies should outline the

general theory, followed by specific examples of concrete cases in which these subsidies caused overexploitation; should set out that the SCM Agreement could not be used; should list subsidies that could become "bad" under inadequate fisheries management; and should stipulate that fisheries subsidies must be judged on a case-by-case basis depending on their effect on fisheries resources.

102. On Argentina's comments on the capacity of developing countries to manage fisheries resources, Japan noted that developing countries that were negotiating agreements for fishing in their EEZ with developed countries had the option of denying access to their EEZ. If developing countries were confident in their fisheries management, they could benefit from such agreements in return for access fees. Japan understood that Argentina had agreements with several countries on access to fisheries resources. In response to other comments that the burden of proof was on Japan to demonstrate that there was no causal relationship between subsidies and global exploitation of fisheries resources, Japan recalled that toward the Seattle Ministerial Conference, there had been a discussion of fisheries subsidies in which Japan had raised the possible negative effects of trade on fisheries sustainability. It had been pointed out at that time that there were no negative effects. Thus, if Japan had to demonstrate that there was no link between subsidies and fisheries overexploitation, others should demonstrate that there were no negative effects of trade on fisheries sustainability. As to whether subsidy elimination were a solution to overexploitation, Japan said that, as part of a comprehensive approach to overexploitation, if certain subsidies were found to impact negatively on sustainability, their elimination would be part of the solution. Japan asked which part of the OECD study's conclusions supported New Zealand's views and CTE discussion, and requested Members to provide "real world" examples of the negative effects of subsidies on the exploitation of fisheries resources. It was correct that financial incentives may cause increased catches, but any impact of subsidies should be considered in terms of fisheries management. For example, subsidies for vessel construction were said to have negative effects, however, if a country had limited access management systems, these subsidies may not necessarily be negative. If a country had a requirement that construction of new vessels must entail the scrapping of old vessels, and that the new vessel capacity must be smaller, such a subsidy contributed to fisheries sustainability. Without considering fisheries management, it was not possible to determine if fisheries subsidies were "good" or "bad".

103. The representative of Chile appreciated the list of categories of environmentally harmful and trade distorting fisheries subsidies in the US paper. Fisheries subsidies that generated surplus fishing capacity and contributed to fisheries overexploitation should be eliminated. Fisheries subsidies also affected straddling and highly migratory fishing stocks that were not normally in the territorial jurisdiction of the subsidizing country. Subsidized fishing fleets operating at the limits of a country's EEZ directly contributed to reducing the biomass and obliged affected countries to adopt conservation measures. Many of the countries that subsidized fisheries were developed countries with a supposed environmental concern to conserve natural resources. Although these countries had adopted environmental stances in several international environmental fora, they did not recognize the advantages of eliminating environmentally-harmful and trade-distorting subsidies in the CTE. Chile had an increasing commitment to environmental protection and felt it was essential to protect its marine species given the wealth and diversity of fisheries resources resulting from Chile's geographical location and the importance of the fishing sector in the Chilean economy. The Chilean fisheries law set out the conservation and sustainable use of fisheries resources. In 2000, Colombia, Ecuador, Peru and Chile had adopted a Framework Agreement for the Conservation of Fishery Resources on the High Seas of the South-Eastern Pacific Ocean. Chile welcomed contributions supporting an objective debate on the benefits of eliminating trade-distorting and environmentally-harmful fishing subsidies. Chile also noted Japan's absence in the APEC fisheries study.

104. The representative of Korea made preliminary comments on the US paper. Although sharing concern about the depletion of fisheries resources, Korea was not yet convinced that fisheries subsidies were closely linked to depletion and should be singled out. Korea noted the US observation in paragraph 16 that “the adverse effects have not yet been carefully assessed by non-government experts, internal organizations, or in WTO disputes.” Korea drew attention to the OECD report,

AGR/FI(99)3/REV3, "The Impact on Fisheries Resource Sustainability of Government Financial Transfers", which noted that "while some cases showed that overfishing had contributed to resource sustainability problems, few demonstrated the linkage between these problems and government financial transfers." Korea recalled that the FAO Plan of Action addressed marine resource conservation and related aspects, including the relationship between subsidies, trade and sustainability. Given that the toolbox to deal with fisheries contained many elements, such as management, illegal trade and subsidies, Korea asked which tool was the most important to fix the problem of overexploitation. While not intending to block discussions, Korea felt that this issue should be left to the FAO and the WTO Subsidies Committee. It could be decided whether to address this issue in the CTE after receiving the FAO results. Regardless of its basic position, Korea felt that the US paper showed some progress, as it excluded government programmes for fisheries management, science, enforcement, and most publicly financed port and leading facilities from the list of possible environmentally-harmful subsidies. Some fisheries subsidies played a positive role in the formation of fisheries resources and creation of employment on islands and in fishing villages, while not damaging fisheries resources. Fisheries support should be treated according to the specific situation of each country. It was not necessary to debate who had the burden of proof, which should be left to competent organizations, such as FAO and OECD. If environmentally-harmful subsidies were also trade distorting, discussion could be advanced in the SCM Committee.

105. The representative of Canada supported the efforts by the US to refine the CTE's understanding of the different types of fisheries subsidies by drawing on research and presenting the issues in a factual manner. The US paper complemented research in other organizations, such as FAO, APEC and OECD. Canada asked how the US had developed the categories of subsidies, and was interested in obtaining an expanded description of the programmes listed in the paper to better understand why certain programmes had been excluded and what certain descriptions meant. For example, Canada wondered how to interpret "inconsistent with market terms and customary business practices" in paragraph 23. On the harmful effects of subsidies to open access fisheries, regulated open access fisheries and rights based fisheries set out in paragraph 9, Canada was interested in the research behind these conclusions that the US or other Members could provide.

106. The representative of Australia believed that there was a clear role for the WTO, particularly the CTE, to complement efforts in other fora to address subsidies that contributed adversely to sustainable fisheries. Subsidies that affected the fisheries sector also raised development and environment issues, as trade in fish products was a significant source of foreign exchange for many developing countries. The lead-up to a future trade round should be used constructively to undertake preparatory analysis of this issue. Australia noted the points in the US paper on the interactions between fisheries management and subsidies. There was a need for actions to improve the effectiveness of sustainable fisheries management practices and to eliminate subsidies that contributed to overcapacity and overfishing. The CTE should be able to accept this basic point and not debate the respective roles of fisheries management and subsidy reform in addressing the serious problems affecting many fisheries. Australia also found useful the points in the US paper on spillover effects associated with subsidies and the attempt to categorize various types of subsidies that were environmentally harmful and trade distorting. This analysis provided a basis for further discussion.

107. The representative of the European Communities said his delegation favoured debate that required different perspectives and looked forward to a dynamic dialogue on this and other sectors. The forthcoming multilaterally-generated papers in the OECD and FAO would prove to be a valuable basis for an objective dialogue. Certain points in the US paper seemed to move away from the balanced description that was emerging in the FAO and the OECD. There was a danger that if the CTE moved away from balanced descriptions, it would not be possible to advance the discussions.

108. The representative of Iceland said that fisheries subsidies harmed the environment, distorted trade and undermined sustainable development in developed and the developing countries alike. While this fact was increasingly recognized, there had been a lack of concrete analyses to identify

precisely the perverse subsidies responsible for generating overcapacity and overfishing. To stimulate debate, Iceland had proposed at the February meeting that the Secretariat update the fisheries section of WT/CTE/W/67, focusing on salient issues to enhance the CTE's knowledge of the nature, extent and implications of fisheries subsidies. The US paper added an important dimension to the analysis by identifying categories of fisheries subsidies that offered a framework to identify perverse subsidies. While these categories were generally useful, more time was needed to consider them. As an initial response, it was important that these categories clearly distinguished between government financial transfers in general and perverse subsidies in particular, i.e. subsidies that clearly contributed to overcapacity. Identifying different types of subsidies was the first step to analyse in detail these subsidies and their effects. As the second step, the CTE should clarify the trade-distorting effects of different types of subsidies. It would be valuable to see figures, based on Members' notifications, for these categories. The Secretariat should consider this when updating work on fisheries.

109. The representative of Hong Kong, China recalled his delegation's support of New Zealand's paper, WT/CTE/W/134, particularly on the merits of the "win-win" situation for removing fisheries subsidies. Hong Kong, China recalled the request for the Secretariat to prepare an update of previous work on fisheries subsidies for the October meeting.

110. The representative of New Zealand, responding to Japan, said that his delegation would not quote selectively from the OECD study, whose conclusions resulted from a balanced, negotiation process. The OECD study contained factual information on government transfers in this sector, about which Members could draw their own conclusions. As to whether there was a problem, New Zealand said that when financial incentives were created to exploit fisheries resources, which FAO had repeatedly said were in a state of crisis, there were significant negative effects. Several Members had noted these negative effects in terms of the environmental consequences on fisheries resources. As reflected in the US paper, it was necessary to consider the trade-distorting effects of these subsidies and the difficulties thereby created for a number of countries, including developing countries. Some responses to calls for action in this area in the CTE, as noted by Argentina, had focused on the fact that subsidies were only part of a larger problem and thus management issues should be addressed; New Zealand did not agree that unless all aspects relating to overexploitation could be dealt with at the same time, there was no point in dealing with the problem in a piecemeal manner. As Argentina had noted, this approach failed to take account of the CTE and WTO mandates, which focused on trade-related aspects. Considering all the factors, fisheries subsidies were an obvious focus for the CTE; seeking to ignore subsidies would harm the WTO's credibility on trade and environment. Members should prepare for a detailed discussion at the October meeting.

111. The observer of FAO recalled the update on FAO fisheries-related activities for the implementation of the International Plan of Action for the Management of Fishing Capacity in WT/CTE/W/135 and the FAO Plan of Action in WT/CTE/W/126. Several activities were ongoing in the FAO in this area: (i) a set of technical guidelines for the management of fishing capacity to be published in 2000; (ii) a study identifying factors that contributed to fisheries overcapacity and unsustainability; and (iii) an analysis of fisheries subsidies. It should be noted that subsidies were one of several factors being identified as responsible for overcapacity. FAO work would be reviewed by an expert consultation in Rome in December 2000, the findings of which would be submitted to the 24th session of the FAO Committee on Fisheries in 2001 and circulated widely.

112. The representative of the United States thanked Members for their comments on her delegation's paper, which had moved the debate forward. The US appreciated Japan's participation in the OECD process and hoped that Japan could participate in the current APEC study on this subject. On Japan's call for concrete examples, the US said that fisheries off the New England coast of the US were in dire straits, which was the result of misguided government programmes put in place in the 1970's to encourage the building of vessels and investment in the fisheries sector. As a result, there had been an expansion of capacity and a collapse in these fish stocks. The US was in the process of taking steps to bring these stocks to sustainability, which the US hoped was still possible. The US

had undertaken an analysis of its own programmes and the US Congress had mandated a study on federal investments in the fisheries sector. Copies of this study were available at the US mission to the WTO. The US would address Members' comments at the October meeting.

113. The representative of the Secretariat said that, as agreed at the February meeting, an update of work on fisheries subsidies was being prepared for the October meeting in cooperation with other organizations, such as FAO, OECD, and APEC. Members were invited to contribute to this study.

Observer status for intergovernmental organizations

114. The Chairperson recalled the request from the Organization of Petroleum Exporting Countries (OPEC) for observer status in the CTE, which had been circulated to Members.

115. The representative of Indonesia said that experience illustrated the close link between oil trade and environmental protection. Trade in crude oil and other oil products may cause certain countries to enforce environmental protection measures in the form of restriction of new exploration and levying additional domestic taxes on oil consumption, including carbon taxes. Granting OPEC observer status in the CTE would be mutually beneficial for both organizations.

116. The representatives of Venezuela and Nigeria supported OPEC's request given its active role in world energy markets and the international environmental debate.

117. The representative of the United States said that, before taking a decision on OPEC's request, the CTE would benefit from further information on OPEC's interest in CTE work. The US hoped that on this basis it would be possible to move forward the deliberations on this request.

118. The Chairperson requested the Secretariat to ask OPEC to provide further information on its interest in the CTE's work so that this matter could be decided upon at the October meeting.

Chairperson's concluding remarks

119. The Chairperson recalled that the next meeting will be held on 24-25 October, with an MEA Information Session on 24 October. The MEA Information Sessions served to contribute to increasing the understanding of developments in the multilateral environmental agenda. Dr. Klaus Töpfer, the Executive Director of UNEP, had been invited to participate at the October MEA Information Session; it was also hoped that the Director-General would participate. The Chairperson said that it was her intention this year to maintain the constructive dialogue in the CTE and to encourage the active participation of developing countries, particularly African countries. The Chairperson encouraged Members' contributions with a view to deepening analysis and advancing the debate on all Items of the work programme. In order for Members to adopt the report of the CTE's work this year at the October meeting, a draft of the report would be circulated in advance.

ANNEX

MEA INFORMATION SESSION
5 JULY 2000

A. THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

1. The CBD Secretariat highlighted the process of negotiations, key elements and work programme of the Cartagena Protocol on Biosafety, adopted on 29 January 2000 by the Conference of the Parties (COP) to the CBD; and the 5th meeting of the COP in May 2000, focusing on the decisions related to agricultural biodiversity (Decision V/5); and intellectual property (Decision V/26). These decisions were set out in the CBD Secretariat's background paper, WT/CTE/W/149.[2] On Decisions V/16 and V/26, the COP had reaffirmed the importance of *sui generis* systems for the protection of the traditional knowledge of indigenous and local communities and the equitable sharing of benefits arising from its use. The COP also had requested the Executive Secretary of the CBD to transmit these decisions and its findings to the WTO and WIPO Secretariats. In Decision V/26, the COP had invited the WTO to acknowledge the relevant provision of the CBD, to take into account the fact that they were interrelated with the provisions of the TRIPS Agreement, and to further explore this interrelationship. The COP had renewed its request to the Executive Secretary of the CBD to apply for observer status in the TRIPS Council and the Agriculture Committee. The CBD highlighted the importance of CTE work on "win-win" situations, such as subsidies, which impacted negatively on biodiversity; progress on these issues in the WTO would impact positively on CBD work.

2. The objective of the Cartegena Protocol, circulated in WT/CTE/W/136, was to contribute to ensuring an adequate level of protection in the field of safe transfer, handling and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health and focusing on transboundary movements. To ensure these objectives, the Protocol put in place an information exchange process, whereby importing countries were provided with the necessary information and capacity to make informed decisions about the potential effects of a LMO on their environment and taking into account risks to human health, a similar approach to that used for hazardous chemicals, particularly in the Rotterdam Convention on Prior Informed Consent and the Basel Convention. The key element in the Protocol was the Advanced Informed Agreement (AIA) procedure; the way decisions were made, including risk assessment and the incorporation of socio-economic considerations in the decision-making process were also important elements. The Protocol contained provisions on capacity building in developing countries and countries with economies in transition; on information sharing, including a Biosafety Clearinghouse Mechanism; and on labelling once the permission had been granted for the transboundary movement of the LMO.

3. Risk assessment must be carried out in a scientifically sound and transparent manner and take into account expert advice and guidelines developed by relevant international organizations. For LMOs intended for introduction into the environment, there was a 270-day time limit on the decision-making process of the party of import. For LMOs intended for use as food, feed or processing (FFPs), otherwise known as commodities arising from biotechnology, a simplified AIA procedure was set out in Article 11. If an exporter applied for permission to import a commodity, Article 11 provided for the decision of the importing party *prime facie* to be based on domestic regulations; in the absence of domestic regulations, the party of import may rely on the principles of the Protocol to assist in decision-making. The Articles dealing with AIA explicitly recognized that the precautionary approach may be a valid basis upon which to take decisions. Paragraph 7 of Article 11 provided a definition of the precautionary approach in this context.

[2] See the COP V Decisions in WT/CTE/W/158, at >www.biodiv.org<, as well as *the Handbook of the CBD* by the CBD Secretariat.

4. A critical provision in Article 18 was paragraph 2(a), which provided that commodities or LMO FFPs must clearly identify that they may contain LMOs and were not intended for intentional introduction into the environment, as well as a contact point for further information. Development of this provision was set out in paragraph 2, such that requirements for this purpose, including specifications of their identity and any unique identification, were to be taken by the Parties no later than two years after its entry into force. The Protocol also established key institutions for its implementation, the Intergovernmental Committee for the Cartegena Protocol (ICCP) with a mandate to prepare for the first meeting of the Parties; and a Secretariat, which was the CBD Secretariat. An important aspect of the Convention was the Biosafety Clearinghouse Mechanisms, the central mode to facilitate information exchange. National focal points and competent national authorities had a central role in taking decisions on LMOs covered by the Protocol. The financial mechanism of the Protocol and the CBD was the Global Environment Facility (GEF). Annex II of WT/CTE/W/139 listed the signatories to the Protocol, which will remain open for signature until 4 June 2001, and will enter into force after the deposit of the 50th instrument of ratification. The ICCP's work plan, adopted by the COP V as Decision V/1 and reproduced in Annex III of WT/CTE/W/139, was based on the assumption that the Protocol would enter into force around the next COP meeting in April 2002. The first meeting of the ICCP was planned for 11-15 December 2000 in Montpellier, with a second meeting in December 2001; and an expert meeting will consider the modalities for establishing the Biosafety Clearinghouse Mechanism in September 2000.

5. On the challenges ahead, there was a need to develop the technological capabilities of developing countries and countries with economies in transition; information exchange would only be effective if the recipient understood the information provided and could make informed decisions based on this information and its own knowledge and capacities. This issue would be addressed by the ICCP. Legal drafting skills to implement the Protocol will be critical, requiring the implementation of detailed legislation for some of the procedures. The AIA procedure also required development, as anticipated in Article 10 of the Protocol. The Biosafety Clearinghouse Mechanism will have to be established and the relationship with the multilateral trade regime was a critical issue given the Protocol's broad scope. It was generally understood that the Protocol provided clarity to the application of the precautionary approach with respect to the transboundary movement of LMOs.

Questions

On the relationship between the CBD and the WTO.

6. The CBD background paper highlighted several challenges with respect to the Cartagena Protocol on Biosafety and the Decisions taken by COP V, including issues related to intellectual property rights, particularly the importance of *sui generis* systems for the implementation of the CBD. The CBD was following closely the TRIPS review of Article 27.3(b), and "win-win" opportunities concerning the removal of trade-distorting and environmentally-harmful subsidies in the forestry, fisheries and agricultural sectors, which was part of the WTO's ongoing work.

On the development of model legislation to implement the CBD provisions on traditional knowledge.

7. This issue was receiving attention in the CBD. In October 1999, the panel of experts on access and benefit sharing had recommended that guidelines should be developed. The *ad hoc* Working Group on Access and Benefit Sharing will consider this issue in detail. An open-ended meeting on Article 8(j) to address the issue of model legislation for implementation of the provisions on traditional knowledge was planned for early 2002 in advance of the 6th meeting of CBD Parties.

On technical assistance in the CBD.

8. This was an important aspect in the CBD and the Cartagena Protocol. Article 22 of the Protocol dealt with this issue. Technical assistance was critical to effective implementation of the

Protocol. Many developed country exporters felt that it was necessary to build capacity in developing countries. The work of the ICCP was focused on mobilizing resources and meeting the needs of developing countries. A first step would be to make an assessment of these needs. The GEF already provided resources for assessment of biotechnological needs and capacities and there was a proposal to expand the pilot project that was being implemented in 18 countries to a larger group of countries.

On incentives to encourage participation in the CBD.

9. The CBD had a different approach to incentives in that the process was participatory and included all Parties. It had been less of a struggle for the CBD to include those countries with few resources as often these countries had significant biological diversity. These countries therefore understand the issues to be important. The focus of the CBD included identifying needs through information exchange, and providing resources through the financial mechanism.

On cooperation between WTO, CBD, UPOV, WIPO and FAO.

10. The CBD dealt with a broad range of topics in a complex area; cooperation was critical for effective CBD implementation. The CBD Secretariat was coordinating its approach to the issues dealt with under the CBD to progress work and to avoid duplicating other international organizations' work.

B. THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER

11. The presentation of the Montreal Protocol Secretariat was based on its background paper, WT/CTE/W/142. There had been four amendments to the Montreal Protocol that, in essence, had each contributed a further Protocol, each of which had to be ratified. The latest was the Beijing Amendment of December 1999. There were, thus, different non-parties for the different provisions introduced in each of the amendments. All Parties had a timetable for the phase-out of controlled substances, with annual reports made to the Secretariat so that the Parties could verify implementation. There was a non-compliance procedure. Developing countries had been given a ten-year grace period for implementation. There was a Multilateral Fund with contributions from developed countries to assist developing countries to introduce alternate, ozone friendly technologies. There were provisions for transfer of alternate technology and for control of trade with non-parties.

12. As set out in WT/CTE/W/142, there were three categories of controls: on substances; on products containing those substances; and on products that may be made with those substances but not contain them. On the latter category, it had been decided that given difficulties in verification, there would not be control measures. To date, the compliance procedures in the Vienna Convention had not been used. Under the Montreal Protocol, there was an Implementation Committee consisting of Parties to consider cases of non-compliance that were brought to its attention by the Secretariat or by a Party, including the non-complying Party itself. Assistance to implement was the first way to deal with non-compliance, followed by a warning and, in the worst case, suspension of some of the Articles of the Protocol. So far, the Committee had considered the situation of non-compliance of 11 countries, including the Russian Federation. Assistance had been recommended and the GEF was assisting these countries to comply.

13. Trade measures in the Protocol had been effective in preventing CFC capacity to be transferred to non-parties. To date, there had been no problems arising between the Montreal Protocol and the WTO. The Montreal and Beijing Amendments had imposed trade restrictions on certain chemicals. There were many non-parties to these amendments and there was a theoretical possibility that some non-parties to these Amendments may bring a dispute to the WTO. Another problem concerned the phase-out of used products that contain CFCs. At the request of several developing countries, the dumping of these products in developing countries had been raised. Action by developing countries to stop the import of such products could be a source of dispute. The WTO and UNEP should identify potential problems such as these and take the necessary action.

Questions

On the implementation of technology transfer in the Montreal Protocol.

14. The provisions in the Montreal Protocol only facilitated but did not ensure technology transfer. This was not completely satisfactory from the perspective of developing countries. During the negotiations of the Protocol it had been argued that governments did not have the authority to compel private companies to transfer technologies. Thus, the final language had been only to "promote" the transfer of technologies. Nevertheless, considerable technology transfer was taking place. This was evidenced by the 2,500 projects being implemented in developing countries with funding from the Multilateral Fund. In certain instances, namely in India and South Korea, there had been concern over conditions imposed on the transfer of technology to manufacture HCFCs, for which these countries had developed their own technologies.

On the use of economic instruments in the Montreal Protocol.

15. Economic instruments were important in the context of the Montreal Protocol. Many countries were using economic instruments to implement the Protocol. Singapore and the US were examples of Parties that had put in place taxes and tradeable permits to implement the Protocol.

C. THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC)

16. The presentation of the UNFCCC Secretariat was based on its background paper, WT/CTE/W/153. The 1997 Kyoto Protocol required Annex I (developed) Parties to reduce by 2008-2012 their collective greenhouse gas (GHG) emissions to five per cent below 1990 levels. There was a shift in emphasis to more specific targets and the means to achieve them, which had corresponding impacts on national policies. There was an emerging distinction between the specific targets of Annex I (developed) Parties to reduce emissions to below 1990 levels by five per cent as well as other commitments, including policies and measures to facilitate the technology transfer and resource flows to developing country Parties to enable them to meet their commitments. Negotiations were emphasizing that supportive measures for developing countries should be met through existing institutions, such as the GEF, which was the financial mechanism for the UNFCCC. Experience with national communications indicated that countries were adopting a mix of market-based and regulatory policy instruments to meet their commitments. Some Parties felt that a significant portion of these measures should be taken within the country; others considered that measures could be taken in other countries to be cost-effective. The latter perspective took into account that climate change was a global problem and it did not matter where the emissions arose as long as the concentration of the total emissions in the atmosphere were reduced.

17. As set out in paragraphs 4-6 of WT/CTE/W/153, the Protocol contained several implementation mechanisms. There was a Clean Development Mechanism, whereby Annex I governments and private companies may obtain certified emissions reductions (CERs) by participating in projects in developing countries that reduced GHG emissions and satisfied local development needs. There was also provision for Annex I governments or private companies to share Emission Reduction Units for projects implemented jointly in that country for which emissions reduction costs were lowest. There was also emissions trading through the purchase of parts of assigned amounts by Annex I governments and companies with high marginal abatement costs from those with lower costs. These three mechanisms could be put toward the Annex I Parties' Protocol obligations during the 2008-2012 compliance period. The nature, scope and linkages between these mechanisms were under negotiation. The role of the private sector was important in the implementation of the Protocol and the potential interaction with the WTO. The compliance system would be addressed at the 6th COP in November 2000. For some countries, the key issue was to provide for and ensure that Parties met their reduction commitments. For others, deterrence was stressed such that non-complying Parties would be penalized.

Questions and comments

18. The comment was made that the implications to the global economy of implementing UNFCCC commitments were huge, and that the trade-related implications for the WTO were correspondingly huge, such as border tax adjustment, emissions trading, WTO standards and requirements, and recognition of environmentally sound subsidies.

On the structure of compliance and the prospect for the use of trade sanctions in the UNFCCC.

19. There were several areas of potential interaction between the WTO and the UNFCCC, relating to the way in which the Protocol was implemented. The range of approaches proposed by Parties included that a compliance system was not necessary as Parties would fulfill their commitments in good faith; it was necessary to monitor compliance to ensure that Parties met their commitments to reduce emissions; and it was necessary to put in place deterrence mechanisms, such as penalties for non-compliance. At this stage, there were no proposals to include trade sanctions.

On the relationship between the precautionary approach and the UNFCCC.

20. The precautionary approach was a central feature of the UNFCCC and the Kyoto Protocol.

On the benefits to developed country Parties from Certified Emissions Reductions (CERs).

21. Discussions indicated that for the moment CERs could be used to offset Parties' commitments under the Protocol. There was discussion about whether a developed country Party that invested funds and generated credits could sell these credits and whether these credits could be generated only by developed countries investing in developing countries, or whether the credits could also be generated by developed countries in their own country.

On whether the UNFCCC assumed that climate change is anthropogenic.

22. While the state of science was important for the scientific mandate of the Intergovernmental Panel on Climate Change, the targets set out in the UNFCCC sought to control anthropogenic emissions arising from economic activity.

D. THE INTERNATIONAL COMMISSION FOR THE CONSERVATION OF ATLANTIC TUNAS (ICCAT)

23. The presentation by the ICCAT Secretariat was based on its background paper, WT/CTE/W/152. The Commission had recommended numerous regulatory measures for various tuna species since 1972. In recent years, bluefin tuna and swordfish had attracted attention from the international community and there had been increasing fishing of these species. As a result, tuna and swordfish stocks had been found to be below the level of maximum sustainable yield and it had been necessary to take further measures to combat this problem. In order to address catches by non-contracting parties, entities and fishing entities, which were undermining the effectiveness of ICCAT's stock management programme, the Commission had adopted several measures in recent years, as set out in paragraphs 4-5 of WT/CTE/W/152. ICCAT encouraged the voluntary cooperation of non-contracting parties, entities or fishing entities, and recourse to trade measures was only considered after all other possible means had been attempted.

Questions

On flags of convenience vessels and illegal, unregulated and unreported (IUU) fishing activities.

24. ICCAT was mainly a research organization, which based its actions on statistics collected on who was doing what and where. The issue of flags of convenience was one of the greatest problems

at present. The meeting on IUU fishing in Australia in 1999 had been important in this respect. To control overfishing of bluefin tuna, the Bluefin Tuna Statistical Document Program and the trade measures were important.

On the main factors causing the depletion of bluefin tuna and swordfish.

25. The reason fishing continued for bluefin tuna was because the price for this species was very high. When the price of a species that was already overfished continued to increase, if trade measures were not taken, it would be difficult to act to conserve this species.

E. THE COMMISSION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES (CCAMLR)

26. The background paper submitted by CCAMLR has been circulated in WT/CTE/W/148.

Comments

27. It was pointed out that the CCAMLR Catch Documentation Scheme for toothfish provided an excellent example of the appropriate and WTO-consistent use of trade measures in an MEA. This scheme reflected the need for information on the capture of and trade in toothfish to complement other efforts to conserve the species. This scheme had been developed through a process of extensive international cooperation and negotiation. Its application was non-discriminatory and CCAMLR was open to, and encouraged accession by all interested parties. It was hoped that CCAMLR would keep the CTE informed of progress in implementing the Catch Documentation Scheme.

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