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WORLD TRADE ORGANIZATION

Committee on Trade and Environment

REPORT OF THE MEETING HELD ON 11-13 SEPTEMBER 1996

Note by the Secretariat

1. The Committee on Trade and Environment met on 11-13 September 1996 under the chairmanship of Ambassador Juan Carlos Sánchez Arnau of Argentina. The agenda contained in WTO/AIR/403 was adopted.

Items 1 & 5 The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements; and

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

2. The representative of the United States presented his delegation's non-paper (dated 11 September 1996) which put forward a number of principles relating to the relationship between multilateral environmental agreements (MEAs) and the WTO for inclusion in an agreed framework to be presented to Ministers for their endorsement.

3. The representative of Japan said that the WTO should demonstrate its willingness to respond to new issues, especially trade and the environment and that the results of CTE discussions would have an impact on WTO credibility. CTE progress on Item 1 should be fully reflected in Section III of the Report of the CTE to the Singapore Ministerial Conference (the "Report"), from which further discussion on this Item could be built. Japan proposed including the following elements in Section III: (i) a mechanism to enhance dialogue and cooperation between MEAs and the WTO should be established, with an expansion of the CTE mandate as necessary; (ii) certain disciplines were necessary to provide predictability and stability on the relationship between trade measures pursuant to MEAs and the WTO; (iii) the differentiated approach (i.e. the distinction between trade measures between MEA Parties and between Parties and non-parties, and the distinction based on the specificity of the trade measure) should be the basis for building consensus on possible disciplines for trade measures pursuant to MEAs and the WTO; (iv) in the differentiated approach, priority should be given to the Party to non-party issue in future work; and (v) to make trade and environmental policies mutually supportive, the WTO should ensure that any disciplines would be no more restrictive to MEAs than the *status quo*.

4. The representative of New Zealand said a range of approaches had been suggested to deal with this Item and views remained divergent and strongly-held. In addition to the approach suggested by the United States, to adduce some "key themes" for Ministerial endorsement, New Zealand saw merit in focusing on identifying common ground in Singapore based on an examination of different categories of trade measures. Some of these categories could be dealt with before Singapore and the rest after. This was a useful way to proceed as there was a problem to be resolved and a "deliverable" package should be secured in Singapore. On current indications, such a package was unlikely to resolve the fundamental

disagreement over the compatibility of relevant international law. If this issue were ignored, it would leave a dubious legacy for the trade and environment communities. For example, there would continue to be the negotiation of trade measures in MEAs whose position *vis-à-vis* WTO rules was uncertain which would act as a deterrent to some countries to sign MEAs. The CTE effectively would be saying that this was an issue which it would leave to the dispute settlement process. It might be difficult, but it was not premature to address this issue. A *status quo* outcome which attempted to do more than reflect common conclusions could amount to an interpretation, which was not doing nothing. Although "do-nothing" outcomes appropriately nuanced might constitute an acceptable result in Singapore, he asked if that was as far as the CTE's collective vision extended. A better approach could be to present modest, but tangible results which demonstrated the seriousness of the CTE's commitment to addressing this issue. New Zealand saw merit in a statement that set out that specific trade measures agreed between MEA Parties were unlikely to represent a real problem of WTO-consistency. This was possible and practical and addressed the desire that WTO rules should not hamper the ability of MEAs to achieve their environmental objectives. Another possibility was to refer to factual observations on the WTO-MEA issue arising from the CTE's analysis. Although it might not be possible to address substantively the non-party issue, if it were agreed that the CTE needed to present credible results, this fact could be acknowledged and agreement reached to take up this issue after Singapore.

5. The representative of the European Communities said his delegation had ambitious expectations for results on this Item. The EC's approach, contained in a non-paper (dated 23 February 1996) on how to address the interface between MEAs and the WTO, was based on certain philosophical assumptions. Results had to be presented which were credible on controversial issues, among which MEAs. With this in mind, the EC was prepared to work towards the best possible outcome in Singapore. Results should be balanced and should form a package. If ambitions on Item 1 aimed no higher than a policy statement along the lines of the US and Australia's proposals, then no more ambitious results could be expected on other Items.

6. The representative of Australia said his delegation would consider the US proposal which presented the type of solution that would be of value to the CTE. The focus should be on presenting results which were realistic, set out divergences of views and provided tangible outcomes, whereby the WTO recognized and would continue to work on difficulties.

7. The representative of Switzerland felt that although the type of solution proposed by the United States was minimalist, it provided a basis for tangible results. Although it was true there were divergences in the CTE and positions were far from apart, as New Zealand had recognized, the CTE was confronted with a difficult problem with which it would have to deal. Switzerland felt it was a matter of defining the legal relationship between two types of international agreements, the WTO and MEAs. From this perspective, a result which would be a political statement on the least problematic aspects of this issue would not permit a durable solution and was not satisfactory. Further efforts should be undertaken to reach a consensus on the legal aspects. Although it would be difficult to do so in the time available, any agreement in Singapore should not close any doors and should provide a platform to continue work in this field with a view to reaching concrete solutions. Switzerland supported Japan's comment that a clear message be sent to Ministers on the need to enhance cooperation between the WTO and MEAs, along the lines of the Swiss non-paper (dated 20 May 1996).

8. The representative of Korea said that divergences in the proposals on this Item could not be attributed to technical factors but to systemic, legal and political aspects. As a result, it was unlikely that issues relating to Item 1 would be resolved entirely in Singapore even though a possible consensus was emerging on issues such as avoidance of unilateralism and enhancement of transparency. The CTE's efforts had yielded meaningful progress and had crystallized several options and identified their merits and demerits. The Ministerial Conference should take note of progress on this Item and take a decision to continue work in the CTE, including: (i) analysis of all the options in the proposals taking into account the concerns expressed, particularly in Section II of the Report; (ii) analysis based on elements such as specificity and trade measures between MEA Parties or against non-parties, as identified in Korea and

New Zealand's proposals; and (iii) modalities to promote cooperation between the WTO and MEAs to enhance transparency.

9. The representative of the United States said his delegation was not looking for a minimalist solution and it's non-paper proposed a starting point from which to build in order to reach the highest level of consensus possible.

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

10. The representative of the United States said that the Ministerial Conference should endorse the concept of environmental reviews of trade agreements as had the UN Commission on Sustainable Development and other organizations. In this regard, the United States had circulated a non-paper (dated 11 September 1996) containing a draft Decision on environmental reviews.

11. The representative of Norway said that recommendations to Ministers should include environmental reviews of trade agreements in the context of further trade liberalization.

12. The representative of Mexico recalled her delegation's comments on environmental reviews of trade agreements at previous meetings.

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

13. The representative of the United States presented his delegation's non-paper (dated 11 September 1996) containing a draft Decision on transparency of eco-labelling, which built on a previous proposal by the United States (WT/CTE/W/38). In light of the disagreement regarding the issue of the coverage of the TBT Agreement and without proposing another notification requirement, the United States suggested that this be a Ministerial decision in which the importance of transparency could be agreed. In his delegation's consultation with the private sector on this issue, the environmental and business communities and consumer groups had indicated that the enhancement of transparency met their objectives.

14. The representative of the European Communities said his delegation's non-paper on eco-labelling (dated 23 July 1996) outlined that it might be inappropriate to address the transparency issue without first clarifying the status of life-cycle assessment (LCA) tools in voluntary eco-labelling. Although the US proposal was not consistent with this idea, the EC recognized that it contained some useful elements. For the reasons outlined under Item 1, the EC was not convinced that it would be appropriate to adopt a specific Decision on eco-labelling in Singapore. At this stage, it was preferable to deal with eco-labelling in Section II of the Report, possibly including some policy conclusions for consideration by Ministers depending on the format of the Report and the outcome on other Items. The EC did not feel that the elements in the development of an eco-label listed in the US proposal constituted independent status in the development of eco-labelling programmes, e.g. the manner in which non-domestic environmental practices were taken into account in determining product eligibility was a horizontal requirement.

15. The representative of Canada responded to comments on his delegation's draft Decision on eco-labelling (WT/CTE/W/38-G/TBT/W/30). Many delegations had questioned the staged approach to eco-labelling whereby the CTE would agree in Singapore on notification requirements and address life-cycle approaches (LCA) and non-product-related process and production methods (PPMs) after Singapore; this would not prejudge the non-product-related PPM issue. While it was clear that measures dealing with "labelling requirements as they apply to a product, process or production method" fell within the TBT Agreement's scope generally, it was less clear whether coverage extended to all

measures relating to any PPM, including those that were non-product-related, particularly with respect to standards, given the ambiguous wording of the definition contained in Annex 1 of the TBT Agreement. Canada's draft Decision was based on this distinction. The CTE should be able to agree that eco-labelling programmes, as other labelling programmes, fell within the TBT Agreement's general scope without prejudging whether specific eco-labelling standards based on non-product-related PPMs were covered. Although the CTE could agree to disagree on the TBT Agreement's coverage of the latter, this should not preclude the recognition that eco-labelling programmes should be established in accordance with the TBT Agreement's provisions. Within eco-labelling programmes, it was not possible to separate performance-based and non-product-related PPM-based product criteria. The EC's suggestion for a parallel code of conduct for eco-labelling programmes meant taking out of the TBT Agreement performance-based product criteria even though they were standards like any others. This could lead to "forum" shopping and possibly conflicting or reduced obligations. The US proposal on enhanced transparency could supplement basic TBT disciplines. However, it was not viable as a stand-alone proposal and might provide encouragement to those that favoured a parallel code of conduct.

16. Concern existed that action to recognize LCA and possible use of non-product-related PPMs in voluntary eco-labelling programmes might create precedents elsewhere. Canada recognized and shared, to a certain extent, these concerns with respect to the concept of "like product". Canada's approach reflected the business needs of it's forest products industry in responding to market demands although other industries, such as chemical industries, textiles, and consumer products, had faced similar issues. For example, paper had the same physical characteristics, whether it was produced from sustainably-managed forests, whether it used chlorine or alternate bleaching technology and whatever the percentage of recycled fibre content. However, consumers had demonstrated purchasing preferences for what they perceive as environmentally-preferable paper that pertained to non-product-related PPMs. Canadian industry had responded to this market reality and it's concern had shifted from "like products" to equivalency. For business, the issue was whether product differentiation on the basis of non-product-related PPMs reflected differences in environmental absorptive capacities and policy requirements between countries. Concern had moved from whether such process differentiation was valid to how to ensure that such differentiation was not abused for protectionist reasons.

17. Another concern pertained to the fear of developing countries regarding labour standards, which was shared by at least one developed country, albeit from a different perspective. For some, the CTE would be opening the door; for others it would be closing it. Canada had stated it's intent to ensure that non-product-related PPMs did not spread beyond the context of voluntary eco-labelling programmes. Another concern related to the term "international standards" in the draft Decision. Discussion of this issue had focused on the use of ISO 14000 as an example of work on international standards in this area, given concerns about the degree to which ISO reflected international consensus. Acknowledging these concerns, Canada had proposed unsuccessfully that UNCTAD convene an experts group meeting to examine this issue. Regardless of Canada's general views on ISO, the market impact of ISO 14000 must be recognized. Industry participation at the recent ISO TC 207 meeting indicated the degree to which industry was looking to ISO to develop such standards to respond to market requirements. This impact should be discussed jointly by the CTE and the TBT Committee. Canada's reference to international standards in the draft Decision was open-ended given work underway in the Global Eco-labelling Network and the emergence of sectoral environmental management standards. While Canada did not preclude consideration of domestic standards based on LCA as suggested by one delegation, reference to international standards was appropriate for the reasons outlined above. This responded to criticism of Canada's proposal (WT/CTE/W/21-G/TBT/W/21) that eco-labelling programmes be developed according to multilaterally-agreed guidelines which were still under development. Given that such guidelines, in the form of guiding principles, methodologies and procedures rather than specific values or indicators, would likely come into effect during the next CTE mandate, it was appropriate to review their possible impact.

18. Some delegations had questioned whether voluntary eco-labelling programmes were effective market-based policy instruments to encourage environmentally-preferable products and services. Some had suggested analysis of their commercial impact, notwithstanding UNCTAD case studies and Agenda

21 references to them. While the success record of eco-labelling programmes was mixed, several had demonstrated market impact. While further analysis was possible, it should not preclude action on basic notification and related disciplines. Concern had been expressed by some developing countries on difficulties encountered by small and medium-sized enterprises (SMEs) in developing countries with respect to eco-labelling programmes. As with all standards, the challenge for SMEs in all countries, particularly developing countries, was more difficult than for larger companies, but the impact of eco-labelling should not be exaggerated. Experience with Canada's eco-labelling programme, shared by the Nordic Swan programme, was that producers need not be aware of the procedures of the eco-labelling programme given that it was their importer that provided the necessary interface with the programme. Consulting with eco-labelling experts on the problems of developing country exporters, particularly in the textile sector, revealed that, while developing country exporters strongly resented the use of non-product-related PPMs, they adapted to market requirements. The issue was one of transparency and the opportunity to participate in product group selection and product criteria, which was the aim of the TBT Code of Good Practice.

19. A valid concern of many developing countries was a requirement for more time to adapt to the new market requirements posed by eco-labelling programmes. An example was the German technical regulation banning the use of azo dyes in textiles and clothing (G/TBT/Notif.93.312). This non-product-related PPM had not been challenged by the countries most concerned, but rather their industry chose to adapt to it. This likely reflected that the importing country provided opportunity to comment to affected exporters and delayed the implementation date to provide time for exporters to adapt. Some case studies demonstrated the practical approach taken by developing country industries. The Textiles Committee of Bombay had taken a "pro-active" role in advising member companies how to adapt to the requirements of eco-labels (see *Eco-labelling and other environmental quality requirements in textiles and clothing: indications for developing countries*, International Trade Centre, 1996). A leading Indian textile wholesaler and retailer, Ramlal Durgadutta and Co., developed an "eco-collection" of fabrics and found that "the cost of production increased only marginally but the product image and reliability gets significantly upgraded", which improved profitability. Canada's preliminary conclusion was that existing Article 12 provisions of the TBT Agreement were adequate to address the practical concerns of developing country exporters, particularly on the requirement for additional time to adapt to new market requirements. For Article 12 to apply, agreement was necessary that eco-labelling programmes were within the TBT Agreement's general scope. Once this first step had been taken, Canada would not object to exploring whether additional provisions were required in a post-Singapore work programme along with consideration of mutual recognition and equivalency. One delegation had noted the absence of an equivalency provision in the Code of Good Practice in contrast to the relatively weak obligation of Article 2.7 of the TBT Agreement. The TBT Triennial Review should consider equivalency issues for the TBT Agreement and Code of Good Practice as this was a generic issue. Canada's eco-labelling practitioners were addressing equivalency and related issues. UNEP and UNCTAD also could play a role in this regard. There had been suggestions that the CTE might look at how eco-labelling programmes carried out LCA in their selection of product criteria. The distinction between full life-cycle analysis and more approximate life-cycle approaches had been noted and further consideration of how the latter were applied in the development of product criteria could be part of future work. Concerning technical assistance, the ITC had an active programme that addressed the practical aspects of eco-labelling programmes and related requirements as part of it's Uruguay Round follow-up seminars.

20. Concrete results on eco-labelling in Singapore were important. It would be ironic if the CTE failed to address the one Item with the most immediate trade impact. Agreeing on only further analysis would demonstrate to the business community that the CTE was not serious in addressing the trade implications of environmental policies which risked a panel being established which involved these issues. The panel would in effect determine policy with only the input of the parties (and perhaps the third parties) to the dispute. CTE Members should provide policy guidance to future panels on the issues related to eco-labelling. Absent such policy guidance, Canada's understanding of the *status quo* was: (i) eco-labelling programmes, whether voluntary or mandatory, would be considered to fall under the general scope of the TBT Agreement and the Code of Good Practice. This reflected the fact that the granting of eco-labels was analogous to standard setting and the bodies that granted eco-labels were a form

of standardizing body. As noted by Australia, the TBT Committee's Decision that a label was covered by the TBT Agreement irrespective of the information contained in (or behind) the label was likely to be a relevant factor; (ii) for voluntary eco-labelling programmes, the coverage of the TBT Agreement with respect to non-product-related PPMs might be unclear given the ambiguity of the definition of standards. Depending on the case and the nature of the panel submissions, the panel might consider the issue in terms of whether a particular eco-label criteria based on non-product-related PPMs was discriminatory, and not necessarily whether it was a non-product-related PPM; and
(iii) the emergence of international standards based on LCA such as ISO 14000 might create the basis for the rebuttable presumption that any such standard did not create an unnecessary barrier to international trade (Article 2.5). Given that ISO standards were management standards relating to compliance with local policy requirements, the issue was more likely to revolve around whether the eco-label in question was discriminatory, rather than whether it was based wholly or in part on non-product-related PPMs.

21. The representative of the United States said his delegation's view was the TBT Agreement applied to eco-labelling programmes. The US proposal sought a political commitment to transparency, without prejudicing Members' views on coverage. This was important for those who felt there should be more in terms of clear obligations and for those who felt there should be better compliance with existing obligations. The six elements in the development of an eco-label, listed in the US proposal, which required transparency might not all be independent steps and this was why the proposal noted that they might occur separately or simultaneously.

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

22. The representative of Norway said that this issue had been discussed extensively, including in the EMIT Group, and it should be possible to present recommendations to Ministers that:
(i) any new transparency mechanisms should be linked to current disciplines; (ii) requirements for notifications which might lead to duplication of other provisions in the WTO or other fora must be avoided; (iii) relevant WTO fora should be requested to improve compliance of existing notification obligations regarding trade-related environmental measures; (iv) the Secretariat should be requested to provide an up-dated compilation of existing notifications for reference by Members; and (v) measures taken in accordance with Article XX should be notified.

23. The observer from the International Trade Centre (ITC) said that ITC worked with trade promotion institutions and the business sector to promote the trade of developing countries and economies in transition. ITC maintained databases on products and markets, buyers and sellers, export quality, export packaging and legal provisions governing foreign trade. As environmental measures increasingly influenced the trade of developing countries, ITC had been mandated to undertake work on trade and the environment to provide: (i) information on trade-related environmental measures to facilitate adjustments by exporters from developing countries and economies in transition to environmental requirements for international markets; and (ii) identification of commercial opportunities for exporters from developing countries and economies in transition, e.g. green marketing and green purchasing. As a first step, ITC was studying the development of a database on trade-related environmental measures, which would benefit from information available in WTO notifications. The ITC would make its proposal for a database available to interested delegations.

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

24. The representative of Japan said discussion on this Item should be broad-based, objective and should not highlight only the agricultural sector. It was unacceptable to adopt a simplistic description in the Report that the elimination of trade distorting measures would bring about only positive

environmental effects. This would not automatically occur without appropriate environmental policies in place and the environmental impact of trade liberalization could differ between sectors and countries.

25. The representative of Argentina said there was an inherent contradiction in claiming that free trade and environmental protection were mutually supportive, while at the same time, denying that trade distortions did not have negative environmental effects. Argentina was prepared to discuss sectors in addition to agriculture under this Item.

26. The representative of Australia agreed that discussion of the relationship between trade liberalization and environmental protection should be broad-based. Australia's paper (WT/CTE/W/36) had cited agriculture as an example, but the Report should include other sectors for future work. The relationship between the elimination of trade distortions and the environment was complex and adequate environmental measures needed to be in place for the environmental benefits of trade liberalization to be realized. The Report should firmly rebut that there was conflict between the objectives of trade liberalization and environmental protection.

27. The representative of Korea said that, while in principle trade liberalization contributed to environmental protection, there were cases where if the appropriate environmental policies were not in place trade liberalization could exacerbate environmental protection, as had been identified in WT/CTE/W/1. As such, there were no inherent contradictions in Japan's statement as trade distorting measures such as subsidies could contribute to environmental protection in certain cases.

28. The representative of New Zealand said the fact that trade liberalization in every instance would not lead to environmental enhancement indicated that this would require further analysis.

29. The representative of Norway said his delegation's non-paper (date 20 June 1996) had identified energy as an example of a sector which could yield a potential double dividend, whereby trade liberalization might entail both environmental and economic gains. The CTE should explore whether such "win-win" situations prevailed in other sectors. Agriculture was a case in point. The Agriculture Agreement had initiated substantial agricultural reform, and its full effect remained to be seen. More experience in the agricultural reform process was needed before conclusions were drawn on the nature of further liberalization. Norway supported the general conclusions of the EC's non-paper (dated 23 July 1996) on the relationship between environmental benefits and agricultural reform. Norway supported proceeding in a balanced manner and recognizing and analysing non-trade concerns linked to farming, including the preservation of agricultural land resources, cultural landscape and ecological processes, securing of biodiversity and sustainable resource utilization.

30. The representative of the European Communities said there were not significant differences that could not be reconciled on this Item. Where those differences existed, they should be recognized.

31. The representative of the United States said his delegation's paper (WT/CTE/W/35) had outlined that at the macro level trade liberalization contributed to environmental protection through wealth creation and by addressing trade distortions that interfered with cost internalization, such as policies related to the environment and natural resources. The complexities of this relationship had been recognized in the US proposal for environmental reviews, a tool that countries might use to address these complexities. Although the United States had not suggested that any one sector be examined, discussion should be informed not only by broad principles, but based on particular areas for which potential existed for trade-related reforms to result in environmental improvement. Agriculture had received attention as there had been more analysis in this area.

Item 8 Trade-related Aspects of Intellectual Property Rights and the environment

32. The representative of Australia presented his delegation's non-paper (dated 11 September 1996) identifying several issues raised by the relationship between the TRIPS Agreement and environmental objectives for further discussion.

33. The representative of the United States said that his delegation would make available its comments on India's revised non-paper (dated 20 June 1996) on the TRIPS Agreement and technology transfer, which had not make a convincing case for further work on the relationship of the TRIPS Agreement to access to, and transfer of, technology and the development of environmentally-sound technologies and products (EST&Ps). There was insufficient evidence of any conflict between intellectual property (IP) standards mandated by the TRIPS Agreement, MEA obligations, and the transfer of EST&Ps. The United States objected to the presumption that problems existed or might arise over the use and availability of proprietary EST&Ps which were attributable to the TRIPS Agreement. The experience of the United States revealed that no substantial problems existed with the dissemination of proprietary EST&Ps among those countries that had established TRIPS-consistent IP systems. India's non-paper did not examine the source of any problems that might exist related to EST&P transfer, such as environmental regulations, the foreign investment climate, and market conditions, which had a greater and more direct effect than IP. The non-paper did not recognize that a country's lack of an effective IP regime could cause EST right holders to be less willing to transfer them to that country. India's non-paper contained a number of inaccuracies. As had been noted in the CTE and in the July meeting of the TRIPS Council, several Articles in the TRIPS Agreement made it clear that a Member could not revoke EST&P patents and remain consistent with the obligations of the TRIPS Agreement. To interpret the TRIPS Agreement in the way India suggested would nullify all the obligations in the patent section. Article 27.1 of the TRIPS Agreement obligated countries to make patent rights available for inventions in all fields of technology, excepting those fields expressly identified in Article 27.3 as those inventions were new, involved an inventive step, and were capable of industrial application. Patent rights were to be available without discrimination based on the place of invention, the field of technology, or whether the products concerned were imported or produced domestically. If patents could be revoked for any reason, Article 27.1 would contain a hollow obligation. Articles 27, 29 and 32 implied that the only basis for patent revocation was failure to meet patentability standards and any decision to revoke a patent on that basis was appealable. Failure to meet Article 62 conditions could also result in patent revocation, even if that decision also was appealable.

34. India's non-paper (dated 19 July 1996) referring to technology transfer goals in the Convention on Biological Diversity (CBD), suggested the phrase "fair and most favourable terms" found in Article 16.2 of the CBD meant "preferential and non-commercial" terms; this interpretation was unwarranted. Article 16 of the CBD addressed "technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment", which constituted a subset of ESTs. The obligation applied to "each Contracting Party" not just to developed countries, and the obligation was not to "provide or facilitate access for and transfer to other Contracting Parties". This obligation could be met by facilitating technology transfer. India's non-paper overlooked the second sentence of Article 16.2 of the CBD which clarified that the effort of a country to facilitate the transfer of proprietary technology must be consistent with adequate and effective IPR protection established by the TRIPS Agreement. No obligation in the CBD mandated developed countries to provide developing countries with proprietary technologies owned by the private sector on "preferential and non-commercial terms".

35. India's non-paper mischaracterized reference in WT/CTE/W/22 to the capability of technologies to be copied. Certain technologies were more susceptible than others to misappropriation through copying by third parties without the authority of the right holder. India's non-paper converted discussion of the relative ease with which certain types of technologies could be misappropriated through "copying" into a suggestion that misappropriation was legitimate behaviour being promoted by WTO Members; this was inappropriate. India's non-paper suggested that Article 31 of the TRIPS Agreement should be weakened so that compulsory licensing could serve as a tool for ensuring rapid technology transfer, regardless of patent rights. This ignored the purpose of Article 31, evident from the restrictions on the availability of such licenses, which was to provide governments with specific, limited remedies for addressing patent abuse by a patent owner, while at the same time preventing abuse of those same rights by governments at the patent owner's expense. The Article 31 provisions cited in India's non-paper as impediments to technology transfer were the backbone of the framework established to ensure

governments did not abuse patent owners' rights. India's non-paper suggested that parties seeking to license patented technology and trade secrets should be able to go first to their government, rather than to the owner of the technology, and that governments should be given the authority to ignore the economic significance of their actions. This would likely result in a decrease in the amount of R&D devoted to EST development. India's non-paper suggested a "win-win" situation if the TRIPS Agreement were modified to permit Members to reduce the term of protection for EST patent owners to less than the 20 years from the filing date required by Article 33. This would serve neither the patent owner nor the public's interest. The patent owner would have a shorter period of exclusive rights in which to recoup the cost of R&D and would have to increase the price of the product or face a loss of revenue for further R&D. The public would pay higher prices or would discover fewer EST&Ps being developed. It was not apparent that the issue of indigenous rights referred to in Australia's non-paper was one which involved the TRIPS Agreement. This view should not be prejudiced in the Report.

36. The representative of Switzerland said that the TRIPS Agreement had only recently come into force and its provisions would only be fully applicable to developing country Members after a transition period of five years. The TRIPS Agreement's objective was not to protect the environment. Nevertheless, Article 27.3 permitted the exclusion from patentability of invention which could cause serious environmental damage. This provision would be reexamined in January 1999. IP protection was essential to encourage the development of new technologies and ESTs and would facilitate technology transfer by offering a degree of certainty to firms investing abroad or exporting their most recent products. The obligation to replace certain environmentally-damaging technologies with ESTs, such as contained in certain MEAs, might entail implementation costs for developing countries and SMEs. The solution to any such difficulties was not to decrease IP protection, but lay in positive measures, such as those included in the Montreal Protocol, including financing the substitution and transfer of appropriate technologies. The transfer of new, more environmentally-sound technologies might be encouraged through diverse measures which would favour investment independently of IP systems. Switzerland felt that there was no contradiction between the TRIPS Agreement and the CBD and that nothing in the TRIPS Agreement went against Principle 2 of the Rio Declaration. As such, there was no need to modify the TRIPS Agreement to take into account environmental concerns.

37. The representative of India referred to comments on his delegation's non-paper on the transfer of EST&Ps (dated 20 June 1996). He referred to the comment that problems did not exist for EST&P dissemination for countries which had established a TRIPS-consistent IP system and that these problems tended to occur due to impediments to foreign investment and trade in such products. The question was whether a country which had the domestic capability to use certain technologies and was self-sufficient in the production of certain products which then were mandated to be phased out by an MEA should become dependent on imports and change its industrial and trade structure in these sectors because of the MEA. He asked what then was the meaning of "common but differentiated responsibilities", or "fair and most favourable terms". He asked how these terms were to be operationalized except through the TRIPS Agreement, which was the only relevant international trade law on this subject. The true source and solution to these problems lay in the TRIPS Agreement and the CTE provided Members with the opportunity to reconcile environmental and IP protection. The interface between these two objectives had to be facilitated. There were many factors affecting technology transfer, but in the case of proprietary EST&Ps the key factor was IP protection. Demanders sought and obtained global protection through the TRIPS Agreement as IP protection was considered important. If the EST&Ps involved were in the public domain, such IP protection might not be a key factor. However, when technologies were closely held, a solution needed to be found to make them available for environmental protection to countries which did not have access to them on "fair and most favourable terms".

38. India's non-paper highlighted the contradictions between MEA provisions and the TRIPS Agreement and suggested that where certain EST&Ps were mandated to be used by national or international law, copying or reverse-engineering should be encouraged for their wider dissemination, especially if no obligation existed to transfer it on "fair and most favourable terms". Compulsory licensing provisions of the TRIPS Agreement could be used for this purpose. India's intention was to weave the CBD's objectives into the TRIPS Agreement and to discuss technology transfer in the context of the

TRIPS Agreement as it had not been a central issue in the negotiations. India's non-paper on the TRIPS Agreement and the CBD (dated 19 July 1996) tried to incorporate the concerns of the CBD into the TRIPS Agreement in order to reconcile their objectives. It addressed issues related to the CBD other than the issue of technology transfer, which was discussed in India's revised non-paper on the TRIPS Agreement and technology transfer (dated 20 June 1996). The issue was whether a country's sovereign rights over its genetic resources were adequately protected by the TRIPS Agreement, which was the only agreement that could address the issue of what happened to the benefits obtained from commercial exploitation of indigenous biological material and traditional knowledge in developing countries. This was the issue that India wished to deal with in the context of Article 27.1 of the TRIPS Agreement. Australia's non-paper raised similar issues to those raised by his delegation but from a different perspective. India supported the last paragraph of Australia's non-paper and the Report should try to accommodate the ideas it contained.

39. The representative of the United States said that in the context of an MEA, there might be a shared objective that a particular technology was environmentally-harmful and should be phased out. The MEA was not addressing a country's comparative advantage, but had reached a conclusion that there was an environmental problem. In effect, this changed the market because an environmentally-damaging pattern of behaviour needed to be changed. It was difficult to accept that the WTO should deal with market changes which resulted from the realization of environmental objectives differently than other market factors which led to market changes. It was difficult to accept India's proposal to put elements of the CBD into the TRIPS Agreement. The WTO should be supportive of activities in other organizations and not hamper efforts to deal with environmental challenges multilaterally, but the WTO was not an environmental organization and it lacked the competence to insert MEA goals in WTO Agreements.

40. The representative of Cuba said that as a preliminary comment on Australia's non-paper his delegation supported its last paragraph.

Item 10 Input to the relevant bodies in respect of appropriate arrangements for relations with non-governmental organizations referred to in Article V of the WTO

41. Following the Decision of the General Council on 18 July 1996 on "Guidelines for observer status for intergovernmental organizations in the WTO" (WT/L/161/Rev.1), the CTE decided to extend observer status on a permanent basis to those intergovernmental organizations which it had previously granted observer status on an *ad hoc* basis.

42. The representative of the United States attached importance to this Item and welcomed the Decision of the General Council (WT/L/160) on "Guidelines for arrangements on relations with non-governmental organizations (NGOs)" in order to enhance the interaction between the WTO and NGOs, particularly in the environmental area.

43. The Chairman recalled that the Secretariat would organize two informal briefing sessions for NGOs involved with issues related to trade and environment on 26-27 September and 3 October.

44. The Chairman recalled the agreement of the CTE that a draft of Section III of the Report be circulated by the Chairman for discussion and in preparation for the CTE's adoption of the Report as a whole at the 24-25 October meeting.