WORLD TRADE ORGANIZATION

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Committee on Trade and Environment

REPORT OF THE MEETING HELD ON 22-24 SEPTEMBER 1997

Note by the Secretariat

1. The Committee on Trade and Environment (CTE) met on 22-24 September under the chairmanship of Ambassador Björn Ekblom of Finland. The agenda contained in WTO/AIR/632 and WTO/AIR/632/Add.1 was adopted.

2. The Chairman recalled the CTE's agreement to submit a brief factual report on its work in 1997 to the General Council and said he would circulate a draft report for consideration by Members prior to the CTE's meeting on 24-26 November 1997.

3. It was decided to extend observer status to the Latin American Economic System (SELA).

The linkages between the multilateral environment and trade agendas

4. In order to deepen the CTE's understanding of the linkages between the multilateral environment and trade agendas, the Secretariats of several multilateral environmental agreements (MEAs) and multilateral financial mechanisms were invited to participate.

5. Representatives of the following Secretariats made presentations and prepared background papers to contribute to the discussions: the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) (WT/CTE/W/63); the Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal (WT/CTE/W/55); the Montreal Protocol on Substances that Deplete the Ozone Layer (WT/CTE/W/57); the UN Convention on the Law of the Sea (UNCLOS) (WT/CTE/W/62); the Convention on Biological Diversity (WT/CTE/W/64); UNEP Chemicals (IRPTC) (WT/CTE/W59); the Multilateral Fund for the Implementation of the Montreal Protocol (WT/CTE/W/60); and the Global Environment Facility (GEF) (WT/CTE/W/58). The Secretariat of the UN Framework Convention on Climate Change was unable to participate at the meeting, but submitted a statement (WT/CTE/W/61).

6. Members welcomed the contributions from MEA and Secretariats and commented on the trade-related aspects of the agreements set out in their background papers and presentations.

7. Following a request by the Dutch Government, a report was presented and circulated on the Conference on the Implementation of MEAs in the Hague, 15-16 September 1997.

8. The observer of the UNEP introduced an Information Note which had been circulated to Members on UNEP's activities in the area of trade and environment.

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; & the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs

9. The representative of the European Communities said the MEA presentations had helped to improve an understanding of the use of trade measures in MEAs. The use of trade measures was usually part of a package which included positive measures, and which addressed the needs of developing countries. The need to improve national coordination between trade and environment experts was an issue which had emerged from the discussions; improved domestic coordination was the most effective way of preventing conflicts. It was also necessary to reinforce cooperation and dialogue between MEAs and the WTO; the WTO Secretariat had an important role to play in this respect. The CTE had done an impressive quantity of work in 1996, particularly on the relationship between trade measures pursuant to MEAs and WTO rules. The EC was committed to the principles advocated in its non-paper (19 February 1996) and to the need to devise solutions to accommodate trade measures pursuant to MEAs in the WTO. The necessary safeguards, particularly for MEA non-parties, were already contained in the chapeau to Article XX, which precluded the use of trade measures for protectionist purposes, and their arbitrary or discriminatory application. The EC would not accept the establishment of a framework concerning the use of trade measures in MEAs which would be more restrictive than current WTO rules. This would send the wrong signal to the international community, possibly creating an incentive for unilateral trade restrictions.

10. It was inappropriate to draw conclusions from WT/CTE/W/53 as the WTO dispute settlement practise continued to evolve. However, while environmental protection was not explicitly mentioned in Article XX, environmental measures could be justified under Article XX(b) and (g). Several GATT panel reports had recognised that the notion of exhaustible natural resources encompassed living resources. More recently, the Appellate Body Report on Reformulated Gasoline had recognised that clean air was an exhaustible natural resource. Unlike Article XX(b), Article XX(g) did not include the notion of necessity and measures falling under this exception were not, in principle, subject to a necessity test. Article XX(g) had a broader coverage than (b), and, thus, the chapeau to Article XX might become an important determinant of the scope to accommodate environment-related trade measures in the WTO. As recognised by the Appellate Body Report on Reformulated Gasoline, it is the measure which is to be examined under Article XX(g) and not the legal finding of less-favourable treatment. This implied that if a measure were covered by Article XX(g), the crucial test was whether the chapeau requirements were met in the implementation of the measure. In Tuna II, the panel had recognised there was no valid reason for concluding that either Article XX(b) or (g) applied only to measures relating to things located or actions occurring within the jurisdiction of the party taking the measure. Therefore, these exceptions may justify some measures taken to protect the global commons. The notion in the Appellate Body Report on Reformulated Gasoline that WTO Agreements should not be read in clinical isolation from public international law was also relevant.

11. Dispute settlement practice had confirmed, as noted in paragraph 175 of the 1996 CTE Report, that some Article XX exceptions provided scope for accommodating trade-related environmental measures. Unilateral enforcement of trade measures to coerce other states into taking certain actions or changing their legislation was not permitted under the chapeau of Article XX. Dispute settlement practise had determined that Article XX was a limited and conditional exception from WTO obligations, subject to a Member's interpretation. The party invoking Article XX bore the burden of proving the measure at issue met the relevant conditions. More detail on the scope of the requirements in the chapeau to Article XX may be needed. Whilst the dispute settlement process was performing a role in finding scope for accommodating environment-related trade measures in the WTO, Members should also address this matter directly. Beyond legal technicalities, political choices had to be made.

12. The representative of Japan suggested work on the relationship between the WTO and trade measures in MEAs be based on the differentiated approach, taking into account that MEAs were the desirable form of cooperation to deal with transboundary or global environmental issues. In providing a certain predictability for the use of trade measures pursuant to MEAs, the WTO would encourage such approaches and avoid unilateral trade restrictions. MEAs were negotiated for the purpose of environmental protection, and in the process of their negotiation the necessary expertise was utilized and trade measures were agreed by Parties. The objectives of MEAs should be widely shared and participation in MEAs should be open to all concerned countries. Japan supported the comment in WT/CTE/W/53 that measures should be examined under Article XX for their WTO-consistency and not based on the policy goal of environmental protection, public health or conservation. A panel should examine the discriminatory nature or trade impact of a measure's application. The interpretation of Article XX should not be left solely to the dispute settlement process. The CTE should establish a procedural framework, possibly improving the DSU, to accommodate and provide predictability for MEAs. The CTE should clarify the concept of "specificity" in the differentiated approach; whether a trade measure should be stipulated in an MEA provision; be provided for in a decision of the MEA Parties; or be mandatory or authorized to each Party. Japan hoped WTO Members, which were MEA Parties, would contribute to this discussion to achieve "win-win" trade and environment policies.

13. The representative of Switzerland said further sessions with MEA Secretariats would strengthen the dialogue between MEAs and the CTE. WT/CTE/W/53 highlighted that Article XX had been interpreted on a case-by-case basis, which had led to a certain legal insecurity, even if to date no party had invoked Article XX successfully. Paragraph 5 recalled that panels had noted Article XX was "a limited and conditional exception from obligations under other provisions of the General Agreement, and, as opposed to the positive provisions of the General Agreement, does not establish obligations in itself." This finding was not based on legal grounds. Article XX exceptions may be invoked as a right, with the holder of the right ensuring that they were not applied contrary to obligations in the chapeau; this view had been confirmed on page 25 of the Appellate Body Report on Reformulated Gasoline. For Switzerland, panels were not intended to study Article XX exceptions which had not been invoked by the defendant because of the limited and conditional nature of the exceptions but because of the general principle of judicial economy of law, the applicability of which had been confirmed by the Appellate Body Report on Measures Affecting Imports of Woven Wool Shirts and Blouses.

14. Switzerland had reservations concerning the panels' interpretation of the idea that measures were necessary pursuant to Article XX(b) only if there were no other measures less incompatible with the General Agreement which might have been used to obtain the desired result (the least trade restrictive measure). This interpretation of Article XX was not in conformity with the syntax of Article XX(b) in which "necessary" qualified the purpose of the protection, not the degree of WTO-conformity. This interpretation would also introduce an odd hierarchy between measures applied pursuant to Article XX(b) and those pursuant to Article XX(g), the least trade restrictive requirement being applicable to measures aiming at the protection of life and health and not to measures aiming at the conservation of non-renewable natural resources. Furthermore, such an interpretation would render the chapeau to Article XX useless when in fact Article 31 of the Vienna Convention and the general principle of "effect utile" required a treaty be interpreted so as to give meaning to all its terms. WT/CTE/W/53 correctly referred to the "jurisdictional" application of Article XX(b) and (g) rather than to their "territorial" application; the subtitle after paragraph 29 should refer explicitly to "unilateralism" as the problems reviewed dealt with that issue. Switzerland shared the interpretation of Article XX in the Appellate Body Report on Reformulated Gasoline which was a two stage approach to determine if the measure at stake fell within the list of Article XX exceptions, and, if so, whether its application conformed with the chapeau. In this respect, it was important to ensure that measures did not run counter to the objective and purpose of Article XX to avoid abuse of its listed

exceptions. He recalled Switzerland's non-paper (20 May 1996) on this Item and said his delegation was open to other proposals.

15. The representative of Norway said the dialogue with MEA Secretariats had contributed to increasing awareness of the issues and helping prevent disputes. The challenge was to clarify the relationship between the use of trade measures in MEAs and the WTO, which was not a unique task in the history of the trading system. One example was how negotiators had addressed the issue of international standards. Principles had been inserted in the TBT and SPS Agreements such that Members shall use international standards elaborated in competent standardizing organizations; if such standards were followed measures were presumed to be in accordance with the relevant WTO rules. International Commodity Agreements were another example mentioned in Article XX. The relationship between MEAs and the WTO was more complex. Further clarification of this relationship was needed to ensure predictability for environmental and trade decisionmakers on the use of trade measures in MEAs.

16. It was important to maintain flexibility in applying environmental policy. Norway raised the following issues: (a) Concerning the relationship between Parties and non-parties in view of the MFN principle, should a WTO Member, which was not a Party to an MEA, be treated like a Party provided it acted in accordance with the MEA's provisions; (b) Concerning dispute settlement, should the tests in Article XX, such as the necessity test, be carried out in the WTO or in the MEA when the measure was selected. If the WTO performed the necessity test, it could be said Members accepted that the WTO could overrule an MEA on trade-related environmental measures. However, if substantive tests were carried out by the MEA when selecting and applying measures, new WTO disciplines would have to be agreed. The issue was how to provide for protection of MEA non-parties; (c) It should be clarified how trade measures in MEAs based on non-product related production and process methods would be dealt with in the WTO; and (d) If a special regime in the WTO were established, it should be determined which MEAs should qualify for special treatment, taking into account the issues of specificity of trade measures, and participation and openness in MEAs. Norway sought the Chairman's guidance on how to clarify the relationship between MEAs and the WTO.

17. The representative of Hong Kong, China said WT/CTE/W/53 illustrated the requirements of the necessity test in Article XX(b) with reference to panel reports. The relevance of unadopted reports rested with Members. Some legal aspects of environmental exceptions were not covered by WT/CTE/W/53 as they had not yet been ruled on by panels. For example, Hong Kong, China's view was that Article XX(b) and (g) were mutually exclusive; they established different legal standards. Article XX(b) established "necessity" requirements, while (g) stipulated a measure be "related to" a stated objective. If there were an overlap in their coverage, then Article XX(b) would have fallen into disuse, since Members wanting to use Article XX would prefer the less stringent standard established by Article XX(g). The words "exhaustible natural resources" in Article XX(g) supported this view. "Exhaustible" meant "non-reproducible", whereas human and animal lives covered in Article XX(b) were "reproductive". This interpretation conformed with the principle of effective treaty interpretation in the Vienna Convention on the Laws of Treaties; no terms should become redundant in interpreting an Agreement. An interpretation that condoned an overlap in the coverage of Article XX(b) and (g) would run counter to this principle. He suggested WT/CTE/W/53 be regularly updated.

18. The representative of New Zealand welcomed the participation of MEA Secretariats, whose activities were central to the debate under this Item; the exchange of views between the CTE and MEA Secretariats served to enhance an awareness of the issues involved. Although discussions leading to the 1996 Ministerial had suggested a consensus on Item 1 would take time to evolve, the 1996 CTE Report provided the basis for further work. CTE work should focus on enhancing an understanding of the issues to set the scene for the evolution of conclusions. New Zealand felt the concepts guiding its proposal (WT/CTE/W/20) and the methodology of the "differentiated approach"

for analysing the issues should be kept in mind in further CTE work. New Zealand's proposal had identified five categories of environment-related trade measures: (a) measures between MEA Parties specifically mandated in an MEA; (b) measures between MEA Parties taken pursuant to an MEA but not specifically mandated; (c) measures imposed on MEA non-parties taken pursuant to an MEA but not specifically mandated; and (d) measures imposed by individual countries outside the context of MEAs. Whilst a discrepancy in views on how to deal with these categories was likely, focusing on categories would clarify the way forward. Some categories, particularly measures applied between MEA Parties which were specifically mandated, could be addressed easier than others. Non-specific measures applied under an MEA, and measures applied against MEA non-parties raised more complex issues.

19. Unilateral measures should be addressed based on existing WTO provisions. In this regard, WT/CTE/W/53 provided a useful summary of how panels and the Appellate Body had interpreted WTO provisions. To date, neither panels nor the Appellate Body had had to deal with a dispute involving the application of measures pursuant to an MEA. There was no guarantee this would remain the case and it would be useful to explore how to avoid conflicts. There were instances, as in the case of the UNCLOS, where the scope for potential conflict had been avoided. However, several MEAs had not been developed with WTO provisions in mind. An MEA Party, therefore, might be unable to fulfil both its WTO and MEA obligations. In addition there were concerns with respect to WTO Members that were MEA non-parties, but were affected by an MEA's application of trade measures. Better coordination between trade and environment constituencies at all levels through an open dialogue, such as the CTE session with MEA Secretariats, would broaden an understanding of the issues. It was in the shared interests of the WTO and the international environmental policymaking system for an understanding to be developed on the links between trade-related provisions of MEAs and WTO rules.

20. The representative of Singapore, on behalf of ASEAN, said, in addition to helping Members follow MEA developments, the dialogue with MEA Secretariats had facilitated coordination between WTO and capital-based officials. A balanced mix of trade and positive measures was necessary to achieve MEA objectives. ASEAN drew several points from WT/CTE/W/53: (a) Article XX's scope did not permit the use of extrajurisdictional or unilateral trade measures to protect extrajurisdictional environmental resources; (b) Article XX required Members to adopt the least trade restrictive measure available, applied in a non-discriminatory manner; (c) the necessity test in Article XX(b) set limits to the use of trade measures for public policy goals; and (d) WTO jurisprudence had not permitted import restrictions based on differences in environmental policies or processes and production methods.

21. The representative of Canada said the MEA issue was the fundamental institutional issue before the CTE. As had been demonstrated in the session with MEA Secretariats, the environmental agenda was as broad, varied and dynamic as the trade agenda. Whether delegates were trade negotiators or environmental negotiators, they had a shared interest in ensuring these two sets of international agreements and obligations complemented rather than conflicted. Canada welcomed Singapore's circulation of the statement of its Prime Minister at UNGASS (WT/CTE/W/54). This phase of the CTE's discussion should focus on further analysis of the approaches and proposals which had been submitted. Members had a shared interest in addressing the WTO-MEA interface. Whilst many CTE delegates approached this issue from a trade perspective, broader objectives should also be considered. Just as environmental officials participated in WTO work, trade officials participated in MEA negotiations. CTE discussion should result in greater WTO awareness of environmental policy, and greater awareness in environmental negotiations of trade policy. Although awareness had been increased by the information session with MEA Secretariats, there was scope for more. In Canada, environment officials contributed to the development of environment-related discussions in the CTE, TBT, and other WTO Committees; Industry Department officials also contributed to the development of positions in MEA negotiations. A parallel domestic consultation process with NGOs and the

Provinces also took place. This process had resulted in a greater understanding among trade and environmental officials of how best to achieve their policy objectives in a complementary manner.

22. The analysis of the *status quo* in WT/CTE/W/53 helped to advance the discussions. Whilst each dispute would be judged on its own merits and without creating formal precedents, WTO jurisprudence would evolve. Members should reflect on whether the MEA issue was best dealt with through evolving jurisprudence, or whether the CTE should provide policy direction. Given the cross-cutting nature of the MEA issue, Canada's preference was for Members to provide the latter rather than relying on the former. Since elements of Item 8 (TRIPs) and Item 7 (DPGs) were related to MEA issues, the analysis of MEAs would impact on their discussion.

23. The representative of Nigeria said the dialogue with MEA Secretariats should be repeated. Nigeria had noticed the difference between the dispute settlement mechanisms in MEAs and the WTO. Whilst the CTE had been acting on the assumption that the WTO would trump environmental law, for instance in MEAs, the MEA presentations had indicated this was not necessarily so. It was possible for an MEA to have a strong dispute settlement mechanism, such as in the UNCLOS. He felt WT/CTE/W/53 had furthered an understanding of how panels had interpreted measures taken under Article XX. In none of the disputes related to Article XX had the environmental policy objective of the country imposing the measures been questioned. In the six cases considered, panels had determined that Article XX provisions were limited and conditional exceptions from WTO obligations. He agreed that relying on the dispute settlement process was not a substitute for multilateral policymaking on trade and environment. Nine proposals had been submitted under Item 1, all of which were concerned with MEA trade measures; the motivation was to achieve predictability, and deal with MEA non-parties.

24. To further the discussion of how to accommodate MEA trade measures, positive measures should be addressed, even though this discussion seemed to go beyond the CTE's mandate. Concerning the suggestion for the CTE to determine which MEAs should be considered in terms of their use of trade measures, he inquired as to how the CTE would make this choice. There were several possibilities in paragraph 174 of the 1996 CTE Report upon which to base the discussion. Finding a balance among the issues on the CTE agenda, including positive measures, was the way to proceed. The CTE had reached the stage where Members should move away from formal statements and examining legal arguments. With respect to MEAs, the issues were not solely legal; political choices had to be made.

25. The representative of Korea said the "differentiated approach" proposed by New Zealand and Korea was a useful basis on which to advance discussions. Trade measures, applied with caution, were necessary to achieve MEA objectives. The specificity of trade measures should be clarified so that they were not disguised protectionism. The Montreal Protocol Secretariat representative had mentioned that in cases of non-compliance between Parties the response was to identify the reason for non-compliance and to assist compliance. Korea hoped the same spirit applied to non-parties.

26. The representative of Australia said the session with the MEA Secretariats had provided a basis for improving the understanding of the use of trade measures in MEAs. The discussion had illustrated the difficulty of drawing conclusions on how and why these measures had been used; MEAs used different approaches to deal with diverse environmental concerns and the use of trade measures differed between them. Experience in MEAs raised issues about the role of trade in promoting sustainable development, and how to ensure trade and environmental considerations were taken into account. Important economic and trade interests might be raised by MEA negotiations, which may impact on the WTO's assessment of environmental priorities, or raise differences of view on the nature of an environmental problem or the appropriate means of addressing it. The dialogue with MEA Secretariats helped to ensure the compatibility of environmental objectives and an open, equitable and non-discriminatory trading system. Effective environmental management may be

essential if trade were to be sustainable. International cooperation was vital to ensure environmental concerns were adequately addressed, for example, in the form of shared responsibility between importing and exporting countries to address transboundary movements of hazardous wastes, trade in potentially hazardous chemical, or in threatened or endangered wildlife. Shared responsibility may involve information exchange, prior informed consent or permit systems such as in CITES, the Basel Convention, or the PIC Convention negotiations. In some cases, trade may be a major part of the environmental problem, providing incentives to over-exploit endangered species. In these cases, action to monitor and regulate or prohibit trade may have a role to play, such as temporary bans or limitations on trade for some economically-valuable species until they had recovered and effective management was in place. In other cases, trade may be only a minor part of the problem; habitat loss and domestic wildlife use may be more of a threat to wildlife.

27. In some cases, trade measures may contribute to an effective response strategy, but would also need to be complemented by other actions at the national, regional or multilateral levels. Trade could play a positive role in advancing environmental objectives. For example, sustainably managed trade could provide incentives and the financial means for local communities to participate in wildlife and habitat conservation. Trade could have a role to further the CBD's objectives; it could facilitate access to substitutes to substances subject to production and consumption phase-outs; and contribute to technology transfer to facilitate cleaner production processes and to the diffusion of environmentally-sound recycling technologies. Where trade led to resource over-exploitation, appropriate resource management may be the only way to ensure sustainable trade at non-detrimental levels. The WTO and MEAs thus provided a framework for sustainable trade that delivered both trade and environmental benefits.

28. There was scope for enhancing the role trade played in providing incentives for sustainable resource management, technology transfer, and environmentally-preferable products. Of key importance was how to ensure environmental concerns were addressed effectively while continuing to gain trade benefits. Information exchange between importers and exporters, and the use of the PIC procedure would promote a shared responsibility. Administrative controls on trade should be carefully designed and well-targeted without unnecessarily inhibiting trade. This could be an area for further work. Flexibility was evident in the use of instruments under CITES, such as quotas, ranching and split-listing of species under its Appendices to ensure that the measures used were the most appropriate in addressing specific situations. The Basel Convention provided that Parties could enter into bilateral, multilateral or regional agreements with Parties or non-parties on transboundary movements of hazardous wastes, if these agreements were based on rules no less environmentally-sound than those in the Convention. Predictability, certainty and transparency of the conditions which applied to trade were important, such as the Basel Convention's work to classify hazardous wastes.

29. Another issue was the role of MEAs in developing technical guidelines, providing technical assistance, facilitating technology transfer and improving national capacities to manage environment concerns, such as trade in hazardous chemicals, hazardous wastes or the phase-out of ozone-depleting substances. If international trade were only one aspect of an environmental problem, then these measures would be essential to ensure the environmental objectives were advanced. There was also a role for development assistance to promote a positive interaction between MEAs and the WTO and to help developing countries meet international environmental obligations, while facilitating trade and reducing poverty. Improved dialogue between the trade and environment communities was vital to build consensus and find environmentally-effective solutions. WTO rules had a role in advancing environmental objectives, while maintaining the benefits of trade. WT/CTE/W/53 thus served as a reference point for the discussions. Australia's national coordination processes was similar to Canada's.

30. The representative of India said the unanimity in the CTE that trade measures were not the best way to address environmental problems was reassuring for developing countries for whom

positive measures in MEAs were important. Trade measures were only part of a package of measures in an MEA. It was not in the CTE's mandate to go into the environmental objectives that such a negotiated package sought to address. If the CTE were to focus on trade measures only, it would distort an MEA's essence. Even if the CTE were to address the nature of trade measures in MEAs, questions would be raised about their necessity, effectiveness and proportionality. Trade measures, which in MEAs were by definition restrictive, must respect WTO rules; their use to achieve environmental objectives, even if pursuant to an MEA, should be dealt with under Article XX to ensure the foundations of the WTO were not undermined. As Article XX was capable of dealing with legitimate environmental concerns, trade measures taken pursuant to specific provisions of certain MEAs need not be accorded "special treatment". The idea of "special treatment" would have serious implications as some WTO Members might request "special treatment" for other non-trade issues. To serve as a guide to dispute settlement, a reiteration of the scope of Article XX might be required.

31. WT/CTE/W/53 noted that in only one of the seven "environmental disputes" in the GATT/WTO had the Panel questioned the environmental policy choices underlining the measures concerned. As stated in the 1996 CTE Report, WTO competence was limited to trade policies and those trade-related aspects of environmental policies with significant trade effects. Paragraph 17 of WT/CTE/W/53 referred to the Appellate Body Report on Reformulated Gasoline, whereby the requirement to avoid arbitrary or unjustifiable discrimination in international trade in the chapeau of Article XX should be understood as a different *sui generis* type of non discrimination which did not overlap with Articles I and III. Concerning the necessity test, panels had not accepted the necessity of measures otherwise inconsistent with other WTO provisions. Paragraphs 27-31, on the jurisdictional application of Article XX(b), were important. As the two Tuna Panels had not been adopted, the issue remained unresolved. WT/CTE/W/53 highlighted the difference in approach between the two Panels. Tuna I had noted the concerns of the drafters of Article XX(b), which focused on the use of sanitary measures to safeguard human, animal or plant life or health in the importing country's jurisdiction. Tuna II had observed that: "the text of Article XX(b) did not spell out any limitation on the location of the living things to be protected". However, the Panel had found the policy to protect the life and health of dolphins in the Eastern Tropical Ocean, which the U.S. pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(b). It was necessary to understand the nuanced approach of Tuna II on the jurisdictional application of Article XX(b). India was convinced that the correct approach was to be guided by the negotiating history.

32. Tuna I had rejected any extrajurisdictional application of Article XX(g) based on the negotiating history. Tuna II adopted, in respect of Article XX(g), an approach similar to that adopted by Article XX(b), emphasizing that the U.S. had pursued its policy within its jurisdiction over its nationals and vessels. This Panel clearly stated that Article XX should be interpreted narrowly and found if: "Article XX were interpreted to permit Contracting Parties to take trade measures so as to force other Contracting Parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among Contracting Parties, in particular the right of access to markets, would be seriously impaired". The Panel had concluded that: "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption in the meaning of Article XX(g)". WT/CTE/W/53 highlighted that the WTO was capable of dealing with trade measures arising from environmental concerns. Experience thus far had shown that trade measures taken for allegedly environmental reasons had not fulfilled the requirements of Article XX. The treatment of the issues in WT/CTE/W/53 confirmed India's position that it was not necessary to amend Article XX and that trade measures taken for environmental objectives had to pass the scrutiny of Article XX. India would participate in any further CTE work on the basis of the position contained in its non-paper (23 July 1996).

33. The representative of Mexico appreciated the exchange of views with MEA Secretariats, which confirmed the conclusions in the 1996 CTE Report of the importance of promoting cooperation between environmental and trade authorities and between the WTO and MEA Secretariats. In this regard, the Conference organised by the Netherlands had allowed a deeper analysis of the issues raised by the MEA/WTO interface. Although the negotiation and implementation of trade measures in MEAs raised a diversity of issues which went beyond legal considerations, the CTE had often limited the discussion to the legal aspects. Political, economic and developmental factors had been raised in environmental decisionmaking as to when to include trade measures in MEAs. Economic interests were particularly at stake, as seen in the discussions on climate change. Countries had different powers to act on markets and to make use of trade measures in MEAs; for some it was a matter of not abusing the use of trade measures. The role of positive measures in MEAs should be considered as MEAs involved issues which could not necessarily be settled through legal arrangements or an allocation of jurisdiction. Given the complexities involved, it should not *a priori* be taken for granted that reordering the legal aspect of trade measures in the WTO would solve the substantive problems with MEAs. Mexico supported Norway's reference to the relevance of the TBT Agreement. The WTO had found a place for certain international standards in the SPS and TBT Agreements. However, the process of the first triennial review of the TBT Agreement had indicated definitions of what constituted an international standard were important; likewise, it was necessary to define what was meant by an MEA. Mexico felt the concepts of necessity, effectiveness and proportionality of trade measures should be addressed in order to find a solution. WT/CTE/W/53 was a basis for understanding these concepts.

34. The representative of Egypt said unilateral actions to achieve environmental objectives were not covered in Article XX, and the burden of proof was on the Member invoking such measures. Concerning the concept of necessity, Switzerland's comments were valid with regard to the importance of differentiating between exceptions under Article. In this context, he referred to the 1996 CTE Report and the importance of positive measures for developing countries to enhance their capacity to achieve environmental objectives. Unilateral action to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Trade measures addressing transboundary or global environmental problems should, as far as possible, be based on international cooperation.

35. The representative of Morocco said, when implementing trade measures, MEAs should take into account the principle of proportionality of trade measures applied in accordance with the necessity of imposing trade restrictions, and that trade measures were WTO-consistent. Trade measures should be combined with positive measures to assist developing countries in attaining sustainable development. The session with MEA Secretariats had increased the CTE's awareness of MEA dispute settlement mechanisms. Article XX did not allow for discriminatory, extrajurisdiction or unilateral measures. To promote a dialogue between the WTO and MEAs, Morocco proposed that the CTE examine the transparency of trade measures in MEAs. In order to prepare for CTE meetings, Morocco would appreciate receiving CTE documents translated in all WTO official languages.

36. The representative of the United States said the MEA Secretariat presentations had contributed to the CTE's work. The discussion had underlined the important role trade measures could play in achieving MEA objectives. This did not mean trade measures were always needed in MEAs, but that they were a tool that must be available when needed. In this respect, the U.S. was perplexed by India's reference to a broad agreement that trade measures were not the best way to deal with issues in MEAs. India had been supportive of trade measures in various agreements such as the Basel Convention and the current negotiations on PIC and Bio-Safety. Experience showed that, in some cases, trade measures were the best tools available to achieve an MEA's goals; this should be determined on a case-by-case basis. MEAs covered diverse subject matter, and the trade measures included in each MEA reflected the particularities of that MEA. This fact accounted for the difficulty the CTE had had in agreeing on how to approach this issue. The discussion had shown that MEAs did

not apply trade measures to non-parties if they acted in accordance with the MEA; Article 11 of the Basel Convention permitted trade with non-parties if they treated wastes in an environmentally-sound manner. A number of MEA Secretariats had noted the absence of a dichotomy between trade and positive measures, such as in the PIC Convention negotiations and the Basel Convention. Broad agreement existed on the importance of coordination between trade and environment officials. The WTO Secretariat had played a role by cooperating with MEA Secretariats and by providing information to the CTE on trade-related developments in MEAs. The U.S. encouraged the Secretariat to continue this work and noted with disappointment that the WTO had not been represented at the UNGASS.

37. Paragraph 23 of WT/CTE/W/53 had inappropriately dealt with the jurisprudence by referring to panels' findings on the necessity test as "the least trade restrictive test". This term had not been used in either report. Interpretations of whether the jurisprudence had created a least trade restrictive test existed. It was not the CTE's role to interpret WTO rules; the value of opinions on the interpretation of WTO Articles was limited, and carried no legal weight. Hong Kong, China had commented that Article XX(b) and (g) were mutually exclusive and had different tests, and that the application of Article XX(g) to subject matter covered by XX(b) would deprive the latter of meaning because XX(g) had less stringent tests. This raised Switzerland's question as to the appropriate interpretation of Article XX and whether it should be assumed that GATT drafters had thought it should be easier to take action to conserve minerals than to protect life and health. Article XX(g) had its own requirements, which it could not be assumed were easier to meet than those of Article XX(b). The Vienna Convention stipulated that the terms of a treaty should be interpreted in accordance with the "ordinary meaning to be given to the terms in their context and in light of its object and purpose". Nothing in the text or context limited Article XX(g) to measures involving the conservation of minerals.

38. The U.S. disagreed that Article XX could not be used with respect to measures dealing with environmental challenges located outside a country's territory or jurisdiction. Tuna II had pointed in the opposite direction. India seemed to suggest that Tuna I had examined the negotiating history of Article XX more thoroughly than Tuna II. The record showed the reverse was true. While both Panels had dealt with this issue, only Tuna II had had an extensive discussion of the negotiating history. As these issues were being dealt with elsewhere, the U.S. refrained from responding at length.

39. The representative of Argentina felt the analysis of this Item had been oversimplified, with too much attention given to the compatibility between trade measures in MEAs and the WTO. Discussions should reflect on the CTE's achievements in 1996 and consider the context in which trade measures were adopted in MEAs. Trade measures in MEAs were not an end in themselves and should be seen alongside positive measures, such as technical cooperation and financial and technology transfer. Trade measures were important in a negotiated package of measures to further an MEA's objectives; it would not be useful to continue limiting the discussion to one element of the package, i.e. trade measures. He agreed with Canada's comment on the evolution of WTO jurisprudence, and the need for political will to move the process forward. The CTE should be able to make some recommendations on the relationship between WTO rules and MEAs, taking into account principles of international law.

40. The representative of Brazil said MEAs were the best forum to tackle global environmental problems; multilateral environmental cooperation would avoid unilateral actions and prevent protectionist and discriminatory measures. Trade measures might be necessary to address environmental concerns, but they could also be harmful to environmental interests. In this respect, WTO legal scope might be sufficient to deal with trade-related environmental matters. The CTE should analyze the WTO-compatibility of trade measures for environmental purposes. In this respect, Brazil was prepared to explore the proposals which had been submitted. The CTE should have further

sessions with MEA Secretariats to help understand the rationale behind environmental negotiations, and further an understanding of the legal framework in which the CTE was deliberating. WT/CTE/W/53 should be revised as jurisprudence evolved.

Item 7 The issue of exports of domestically prohibited goods

41. The representative of Nigeria recalled the 1982 GATT Decision (BISD 29S/19) that Contracting Parties shall notify DPGs, which had been reaffirmed in 1984 (BISD 31S/14). These Decisions remained valid. Nigeria agreed with the analysis in WT/CTE/W/43 that indicated there was not much information on DPGs in notifications under the TBT and SPS Agreements, and the Notification System on Quantitative Restrictions (QRs). TBT notifications rarely addressed exports and the TBT Agreement was not designed to give information on domestic production for export. Although Members were obliged to notify the domestic sale or restrictions on use for products, they were under no obligation to address production or exports. Under the TBT Agreement, Members should notify technical regulations, or domestic bans; other product restrictions did not need to be reported. In response to the 1996 CTE Report to determine what information existed in the WTO on trade-related environmental measures which related to DPGs, WT/CTE/W/43 illustrated that existing WTO notifications were not helpful.

42. The CTE should request Members to recommence notification of DPGs pursuant to the 1982 GATT Decision. The CTE should also address the conclusion on DPG product coverage in paragraph 27 of WT/CTE/W/43. DPG producers and exports were aware of what was produced and prohibited domestically, yet exported. Exports of these DPGs should be notified to the WTO, if they had not already been notified under other instruments. An indicative list of these instruments was contained in Nigeria's proposal (WT/CTE/W/32). Although a definition was not central to DPG notification, the 50 notifications pursuant to the 1982 and 1984 GATT Decisions demonstrated the need for a shorter, standardized format. Notifications should include the reasons for defining a product as a DPG and allowing it to be exported.

43. The representative of the United States questioned the weaknesses in DPG notification requirements set out in WT/CTE/W/43, such as the fact that TBT and QR notifications did not provide information on whether the notifying country banned exports. What was important for countries to know was whether a Member had found a product to present a serious risk to health or safety. Even if a country had banned the export of this product, other exporting countries would not necessarily view the risks identified as presenting the same hazard and may permit domestic sale and export. Thus, the utility of knowing that one notifying country had banned a product was limited given that this product could also come from other countries and could impart a false sense of security. Concerning the significance of the fact that the TBT Agreement did not require notification of measures covered by international standards, there was little to be gained from information already available through international standardsmaking bodies. WT/CTE/W/43 would have befitted from a discussion of the SPS Agreement, as it covered a broader array of measures, including specific coverage of bans. The U.S. agreed that, while notification instruments could be a valuable source of information, the existence of national standards and their effective enforcement was the most important form of protection for developing countries against undesirable products.

44. The representative of Canada said the DPG issue should also be seen in the context of MEAs, given the number of MEAs that had been or were in the process of being negotiated to address DPG-related issues. The information session with MEA Secretariats had indicated the degree to which the international community was addressing DPG-related issues. WT/CTE/W/43 had noted that DPGs which were based on international standards or did not affect trade would not be notified. The practical impact of such exceptions was limited. The development of international standards was based on consensus building and information sharing. The result was that any such "multilateral"

DPGs were identified through this process and parallel notification to the TBT Agreement would be duplication. DPGs that did not impact on trade were less likely to arise in the context of increased globalization and trade flows. Based on Canadian technical regulations in this area, it would appear that virtually all DPGs impacted on trade and would be captured by TBT or SPS notifications. The issue of product definition described in paragraphs 29 and 30 was germane, particularly given how contentious the lack of product definition had been in the amendment to the Basel Convention. Without a product definition, the scope for potential disputes could only increase. Canada supported the emphasis in paragraph 32 on the need to build capacity to address the effective development and enforcement of domestic standards as the most important form of protection for developing countries. Without improved enforcement, more information would not be effective to address the concerns raised by many developing countries.

45. The representative of the European Communities recognized the importance to developing countries of making progress on this Item; the establishment of a WTO notification system would contribute to achieving the objectives in the WTO preamble. The EC would play a constructive role in the discussion of Item 7, although it was aware of the practical and political obstacles that needed to be overcome to devise solutions. If the existing DPG Notification System were to be revived, its product coverage should be defined; a notification system lacking a precise definition could not be enforced and would have a limited response from Members. Although some DPG product categories were already subject to international disciplines, such as hazardous wastes, chemicals and pesticides, a WTO notification system could operate as a "safety net" covering DPG exports from WTO Members which were not Parties to other DPG-related agreements. The Secretariat could explore this issue in cooperation with relevant international instruments to avoid duplication.

46. Paragraph 32 of WT/CTE/W/43 noted that while the development of domestic health and environmental standards by importing WTO Members was essential in addressing the issue of the export of DPGs, it was clear that cooperative efforts involving importing and exporting countries were also needed. This was the reason international control regimes were being developed. The role of technical assistance should be considered to assist developing countries to establish and enforce domestic regulations to protect human, animal or plant life or health and the environment. This aspect was being addressed in several international agreements and could also be taken into account in the implementation of existing WTO provisions on technical assistance, notably Article 11 of the TBT Agreement.

47. The representative of Egypt recalled that the 1982 GATT Decision was still in force. Egypt agreed with the conclusions in WT/CTE/W/53 that a precise definition of DPG product coverage was necessary. In this respect, it was important to revive the DPG Notification System to provide sufficient and timely information on DPGs. The Secretariat should cooperate with intergovernmental organisations to help define DPG product coverage, to provide technical assistance for developing countries and to assist in enhancing and strengthening their capacity to monitor DPGs.

48. The representative of India said further work should be undertaken on the need for adequate information, including the format of notifications, and technical assistance. As the EC had referred to Article 11 of the TBT Agreement, he suggested the TBT Committee should be informed of the CTE's discussion so that this issue could be reflected in the TBT triennial review.

49. The representative of Japan said DPG notification should be based on a format designed for DPGs. This was impeded by an inadequate definition of DPG product coverage. To help define DPGs, Japan suggested using the categories in WT/CTE/W/43. Members might consider notifying products in category (a) whose export was not addressed by domestic laws and regulations; and category (b) which could be exported in accordance with the importing country standards and the importing country had been notified and approved the transaction. Notification of categories (c) and (d) would also increase transparency. To have a comprehensive DPG notification system, it would be

necessary for notifying Members to understand what information DPG importing countries sought. Examples of actual problems concerning DPGs would improve Members' ability to notify useful information. In addition to providing information on DPG exports through a notification system, the CTE had also discussed providing technical assistance to DPG importing countries, although there had not been a request for such assistance. The development and enforcement of domestic health and environmental standards by DPG importing countries, capacity building, and technical assistance were necessary. In addition, DPG importing countries could, for example, request information from the relevant exporting country.

50. The representative of Nigeria said issues had been raised on the need for importing countries to identify the type of information which would be useful concerning DPGs. It was not helpful to reverse the responsibility from Members who produced and exported DPGs to importing countries who were not aware these imports were DPGs. On the issue of DPG product definition, some DPGs were now recognized given scientific and technological developments. The responsibility to notify DPG exports to the WTO should lie with Members who produced and exported DPGs, if they had not done so under another instrument. In the Montreal Protocol, recommendations were being made for products that may contain CFCs to be licensed to improve monitoring and tracing illegal trade. Bearing in mind these suggestions, Nigeria's proposal to notify DPG exports was a lesser request. Nigeria inquired as to the purpose technical assistance would serve. At this stage, notification was all that was necessary to increase transparency. As illustrated by the problem of illegal trade in ozone-depleting substances in the Montreal Protocol, trade in DPGs was a cross-cutting issue that was relevant to developed and developing countries.

51. The representative of Morocco said a clear definition was needed for DPGs. He agreed with Nigeria on the increasing importance of illegal trade in DPGs. Studies had shown that in Africa more than FF 6 million had been paid in one year for expired pharmaceutical products. The responsibility for DPG exports lay with the exporting country. This responsibility was already found in several international instruments, such as the Basel Convention and the PIC Convention negotiations. The CTE should analyze issues such as illegal DPG trade, responsibility and liability. There was a need to build capacity in developing countries to deal with DPG exports, to identify relevant DPG products, and encourage their notification to the WTO. Morocco suggested the Secretariats should prepare a paper on illegal trade.

52. The representative of the United States said work on pharmaceuticals was ongoing in the WHO as set out in the Information Note on WHO activities related to the DPG issue which had been circulated to Members; this work should not be duplicated. The CTE had discussed whether it should deal with categories of DPG products which were not environment-related, such as foodstuffs and would have to reflect on how a such a definition of DPGs would fit into its mandate.

53. The representative of Nigeria said DPGs should be notified to provide sufficient and timely information. Notification could be a starting point, or the end of the process. Any further CTE role could be based on examining DPG notifications.

54. The representative of the European Communities also expressed concern about undertaking work on illegal trade.

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

55. The representative of India presented his delegation's submission (WT/CTE/W/65), which addressed the relationship between the TRIPs Agreement and MEAs containing IPR-related obligations, specifically the Convention on Biological Diversity (CBD) which contained several IPR-related obligations. The paper kept in view the 1996 CTE Report, particularly paragraph 208. As the CBD and the TRIPs Agreement were intrinsically linked, the CTE should discuss: (a) the relationship between the provisions of the CBD and the TRIPs Agreement; and (b) how to reconcile any contradictions therein, in line with the CBD, or with the objective of conservation of biological resources. India felt the TRIPs Agreement could incorporate an obligation on patent owners to execute Material Transfer and Transfer of Information Agreements (MTA/TIAs) for traditional knowledge which was in the public domain or was a part of publicly accessible knowledge as a specific form of IP. This would give shape to the CBD's objective of benefit sharing. The CTE could also examine a system for patenting of indigenous knowledge and local, contemporary innovations of traditional groups.

56. The representative of Colombia felt the relationship between the TRIPs Agreement and the environment was important, particularly its compatibility with the CBD and with respect to technology transfer and protection of the knowledge acquired by traditional communities. Knowledge acquired by indigenous groups whose social, cultural and economic conditions distinguished them from other strata of the national community. After two years of negotiations, in July 1996 the Andean Group, Bolivia, Colombia, Ecuador, Peru and Venezuela, had approved the Andean Decision 391 on access to genetic resources. This Decision had considered the necessity to recognise the historical contribution made by indigenous communities to biodiversity, its conservation and development, and to the sustainable utilisation and benefits of its intangible components. There existed a strong link between traditional communities and biological resources that must be reinforced to conserve biodiversity, and the economic and social development of these communities in Andean countries.

57. The Decision's objectives were to provide conditions for an equitable and active participation in the benefits deriving from access to genetic resources in Andean countries; to establish a basis for the recognition and valuing of genetic resources and its intangible components, especially with respect to the involvement of indigenous Afro-American or local communities; and to promote the conservation of biodiversity and the sustainable use of biodiversity that contains genetical resources. An intangible component was any knowledge, innovation, individual or collective practice with real or potential value associated with genetic resources, protected or not by IP regimes. The Decision gave traditional communities the right to decide on their own knowledge, innovations and practices associated with genetic resources and productions. When agro-industrial pharmaceutical companies wished to have access to genetic resources, derived products, or associated knowledge in the Andeas, the general conditions they should adopt were established in cooperation with traditional communities and approved by Colombia's Ministry of the Environment. When access to biodiversity resources, genetic resources, or their intangible components was requested, contracts would have an annex which set out a fair and equitable distribution of benefits accruing from the use of such components. No rights would be recognised, even IPRs, for genetic resources derived or synthesised from biodiversity products that did not comply with the Decision. Colombia was in the process of implementing this Decision and determining the terms of the first contract for access to genetic resources.

58. The representative of the United States recalled that Article 16.5 of the CBD, which called on Parties to cooperate to ensure IPRs were supportive of, and did not run counter to its objectives, had been negotiated at UNCED in 1992. The TRIPs Agreement, which had been negotiated subsequently, had taken into account the obligations in Article 16.5 of the CBD and had comprehensively dealt with all types of IP. Although India's paper noted the need to reconcile the TRIPs Agreement with the

CBD, and referred to contradictions between them, the U.S. did not see any such contradictions. India had suggested that the TRIPs Agreement could be modified to help achieve the CBD's objectives, but had not indicated that anything in the TRIPs Agreement worked against these objectives. This was an interesting approach. India had stated under Item 1 that no changes to the WTO were necessary to accommodate MEAs. However, India's paper on Item 8 set out that India was prepared to examine if the TRIPs Agreement could be changed to support the CBD's objectives. In this respect, it could be considered what changes to WTO Agreements would be supportive of the Climate Change Convention, or the PIC Convention. This introduced a new dimension to the discussions. It would help to understand India's proposal on indigenous knowledge if there were an indication of which mechanisms, such as had been provided by Colombia, were in place to ensure indigenous knowledge was protected and rewarded; the TRIPs Agreement built on national approaches to IPR issues.

59. The representative of Malaysia, on behalf of ASEAN, supported the view set out in paragraph 7 of India's paper, that the fair and equitable sharing of benefits arising from patenting and commercial exploitation of genetic resources had not been dealt with in the TRIPs Agreement. This was relevant to the CTE particularly in light of Article 8(j) of the CBD. ASEAN also supported the need for the CTE to examine issues related to Article 16.5 of the CBD, and concerning the CBD's emphasis on the need to share the benefits of biodiversity utilization with developing countries, including technology development and transfer.

60. The representative of Canada welcomed the paper from the CBD Secretariat (WT/CTE/W/64), which contributed to orienting Canada's discussion of TRIPs-related issues. IPRs served various functions, including the encouragement of innovations and artistic creations and the disclosure of information on inventions. IP laws reflected the need to balance rights to exploit creative endeavours with the principle of free exchange and information use to meet socio-economic goals. The CBD was the MEA that dealt with the interface between IPRs and sustainable development; it did not derogate from the TRIPs Agreement. The CBD Secretariat and Conference of Parties should work with the WTO and WIPO on related IP issues. Canada welcomed the decision to extend observer status to the CBD Secretariat, and efforts to enhance information exchange between the WTO and the CBD. Many of the IP issues related to the CBD's goals could be addressed through existing mechanisms under the TRIPs Agreement, WIPO and domestic legislation. Discussions were taking place between the Canadian government and Aboriginal groups on issues such as: (a) the suitability of existing IP regimes for protecting traditional knowledge; (b) alternative mechanisms to IP systems, such as codes of conduct relating to access to traditional knowledge; and (c) equitable sharing of the benefits arising from its use. Canada had noted the relevance of this dialogue in the context of forests, which would influence the development of its position on these issues. Empirical evidence should be developed on the implications of IPRs for biodiversity conservation and the results of national research on related IP issues distributed through the CBD's clearing-house mechanism.

61. Canada welcomed the establishment of a Code of Conduct on bioprospecting and ethnobotany by several companies. At a recent meeting of the CBD's Subsidiary Body for Scientific, Technical and Technological Advice, Canada had stressed the importance of WTO Secretariat collaboration and government contributions in this initiative. Contributions by WTO Members and cooperation between the CBD and WTO Secretariats would help to identify issues related to the latter issue and trade liberalization and agricultural biodiversity. Further clarification by the CBD Secretariat on the process, expected output and timetable of this exercise was necessary. As an observer, the CBD Secretariat could provide the CTE with regular updates of its work. Possible topics for CTE discussion included: (a) cost internalization of conservation and sustainable use of biodiversity in agriculture; (b) subsidies for "biodiversity-friendly" agricultural practices; and (c) trade liberalization and genetic erosion.

62. On biotechnology and biosafety, Canada's regulatory policy did not distinguish between products produced from conventional means or biotechnology; it was the effect of the end product in terms of regulatory objectives that was important. Canada had an active biotechnology industry that continued to develop innovative products. Some agricultural products required reduced pesticide use and were thus more environmentally-friendly than conventional crops. In this respect, it was important for Parties to the Biosafety negotiations to reflect on IPRs, as well as TBT and SPS considerations (i.e., science-based risk assessments). Canada amongst others had notified technical regulations related to genetically modified organisms under the TBT Agreement. Scientifically unjustified restrictions against genetically modified products could not only impact on existing market access opportunities, but impair the ability to exercise IPRs. Canada had taken note of the CBD Secretariat's request for efficient mechanisms that ensured a greater understanding of CBD developments impacting on the WTO through information exchange between the WTO and CBD Secretariats.

63. The representative of Norway said the interface between the TRIPs Agreement and environmental issues was being discussed in several fora, including the CBD and the FAO. Consistency between developing and interpreting different IPR-related instruments was important; the interpretation and application of one agreement should not undermine the interpretation of others. The complex issues covered by the linkages between the TRIPs Agreement and biodiversity issues were reflected in WT/CTE/W/64 and WT/CTE/W/50, as well as in the 1996 CTE Report; opinions differed on their scope and substance, and on how work to address them should proceed. This should not prevent further discussion and empirical analysis. In the meantime, it was essential to maintain the flexibility provided by the TRIPs Agreement for IPR legislation relating to life and biological material. Any interpretation restricting this flexibility would send the wrong signal, particularly as the conservation and sustainable use of biodiversity, and the fair and equitable sharing of the benefits arising from its use were considered to be one of the main challenges. The CBD Secretariat's paper (WT/CTE/W/64) identified issues for the CTE, including the need for cooperation between the WTO and the CBD. Issues raised by India's paper (WT/CTE/W/65) were also relevant to the discussion.

64. The representative of the European Communities recalled that paragraph 208 of the 1996 CTE Report noted work should be undertaken on whether and how the TRIPs Agreement related to several issues. The Secretariat could identify the relationship between the TRIPs Agreement and environmental protection, including relevant objectives in MEAs, such as biodiversity conservation, its sustainable use and equitable sharing of the benefits arising from its use. Parties to both the TRIPs Agreement and the CBD should implement them in a manner consistent with both Agreements to prevent conflict. The CBD called on Parties to cooperate with the WTO to ensure patents and IPRs were supportive of its objectives, whilst also stipulating that, in the case of technology subject to patents and other IPRs, access to and transfer of technology to developing countries "shall be provided on terms which recognise and are consistent with the adequate and effective protection of IPRs". The relationship between both Agreements should be kept under review in the CTE, if possible in cooperation with the CBD Secretariat in view of its work on access to genetic resources and on the implementation of Article 8(j). Decision III/17 of the CBD provided ideas for studies.

65. The representative of India thanked Colombia for its presentation; benefit sharing contracts related to genetic resources with indigenous communities in the Andean Decision illustrated that India's proposal in WT/CTE/W/65 on MTA/TIAs had already been operationalized. The CTE would benefit from studying models of MTA/TIAs. India intended to share its national system and suggested the CTE request the CBD Secretariat to provide information on the operation of national systems.

66. The representative of Argentina said there were two issues which the CTE could examine without having to discuss changes to the TRIPs Agreement. First, the CTE could work on the basis of Articles 16.3 and 16.4 of the CBD, which provided for Parties to introduce regulations in their

domestic legislation. Article 63 of the TRIPs Agreement provided for IPR-related legislations to be notified. Consequently, the Secretariat could review notifications to the TRIPs Agreement to see if legislation had been notified pursuant to Article 16 of the CBD. Second, the CTE could consider the built-in agenda of the TRIPs Agreement, whereby Article 27.3(b) would be reviewed in 1999. In this context, the TRIPs Council may consider environment-related issues under discussion in the CTE and might look to it for guidance.

Other Items

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

67. The representative of Norway suggested one way to reconcile trade and environment policies was to identify "win-win" situations, where trade liberalisation met both economic and environmental objectives. A more liberal agricultural policy might have negative environmental effects in countries where agricultural production expanded, for instance due to a shift to more fertiliser-intensive production. However, the agricultural sector also contributed to environmental benefits, including preservation of cultural landscape, securing biodiversity and sustainable resource use. Reduced agricultural production could lead to a reduction of these environmental benefits. In this respect, OECD work had broadened the discussion of these issues. Analysis should include all environmental aspects, taking into account the multi-functional role of agriculture, and recognised country-specific and socio-economic conditions. With reference to fisheries, some subsidies contributed to maintaining or increasing overcapacity in the fishing fleet. From a global perspective, this was not only a fisheries management problem, but an environmental problem. Norway supported observations made by the U.S. and New Zealand in their submissions on fisheries. The UNGASS had agreed that all aspects of fisheries subsidies should be studied before drawing any conclusions on their effects. Whether or not trade liberalisation affected the fisheries sector was an important question. Norway supported the results of OECD studies, which pointed towards trade liberalisation having a small impact in the fisheries sector; environmental effects were the result of sustainable resource management. The OECD distinguished between overexploited and efficiently managed stocks. Although resource management was outside the WTO's scope, trade in fish products was affected by tariff and non-tariff barriers (such as quotas, embargoes, licence requirements, sanitary standards) and the environmental effects of their removal should be evaluated.

68. Concerning energy-related policies which might be environmentally-harmful, it was likely that such measures which interfered with market mechanisms had led to global energy consumption that was not optimal from an economic and environmental perspective. The World Bank had concluded that price reforms were necessary in the energy sector. In implementing price reforms, environmentally-friendly energy sources should be taxed less than polluting sources; it should be a policy goal to reduce and eliminate subsidies relating to polluting energy sources. Whilst the World Bank confirmed that fossil energy subsidies had been cut by 50 percent during the last five years, subsidy rates remained high in several countries.

69. The representative of Switzerland asked if the studies referred to in the agricultural section of the informal Secretariat paper had taken into account the intensification of trade in goods that accompanied trade and its environmental impact. Commenting on the graph in the Secretariat's informal paper, taken from the 1996 Swiss trade policy review, he said the PSE equivalent in the footnote was incorrect and the correlation drawn between the PSE figure and fertilizer use needed to be scientifically proven. Experience had shown that in the Swiss regions benefitting from the highest degree of support, i.e. mountainous regions, fertilizer was used less than in other regions; data on fertiliser use per acre was not comparable between countries. Although the environmental benefits

resulting from the elimination of some forms of agricultural support could not be denied, in many countries policies were geared to encourage environmentally-beneficial production methods, taking into account the benefits of agriculture, particularly on preserving landscape and biodiversity.

70. The representative of Brazil said the 1996 CTE Report recognized that the WTO could contribute to making trade and environmental policies mutually supportive through trade liberalization, accompanied by appropriate development and environmental policies determined at the national level. An open, equitable and non-discriminatory multilateral trading system and environmental protection were essential to promote sustainable development. Also, the 1996 CTE Report referred to the linkage between poverty alleviation and improved environmental quality and the role of increased trade and market access opportunities in this regard. In paragraph 198, Members had agreed to broaden and deepen the discussion of market access through a more focused sectoral analysis. Sectoral work in Brazil demonstrated that concerns existed about the effects of some environmental measures on market access opportunities for Brazilian exports. Despite the voluntary nature of many environment-related measures, they could limit market access. For developing country industries, especially SMEs, compliance with certain measures in the importing market was unfeasible. For example, in the footwear and leather sectors, the costs associated with compliance might be so high as to discourage companies from participating in environmental programmes. For textiles, the incremental costs related to compliance may be greater than the benefits. In the pulp and paper sector, there was a tendency for some measures to reward production patterns that prevailed in the importing countries, which were not relevant or impacted to the detriment of environmentally-friendly methods of production in developing countries. For developing country industries, particularly SMEs, compliance was difficult given a lack of funds for technological innovation.

71. To be less detrimental to developing economies, environmental measures with trade effects should be transparent, be based on consensus, and should not be unilateral or discriminatory. The development and implementation of environmental standards should observe certain multilateral rules, such as the TBT Agreement and its Code of Good Practice; be flexible enough to accommodate different forms and timings of implementation; and take into account the principle of "common but differentiated responsibilities". As recognized in the 1996 CTE Report, further work should focus on the environmental benefits of enhancing market access opportunities for developing countries; the environmental benefits of removing subsidies, tariff escalation and other trade restrictions or distortions. Subsidies negatively affected trade and could also be environmentally-harmful. Tariff escalation also imposed obstacles to economic diversification and barriers to the production of value-added goods. It reinforced economic dependence on a few commodities and weakened developing countries' capability to increase foreign exchange earnings. The removal of trade distortions, such as subsidies and tariff escalation, would contribute to achieving the objectives of sustainable development. A sectoral analysis should include leather, textiles, forestry and agriculture.

72. The representative of Australia said the Singapore Ministerial Declaration had emphasised that the CTE should continue to examine the scope of the complementarities between trade liberalization, economic development and environmental protection, in which work on Item 6 was a key part. In its 1996 Report, the CTE had agreed to broaden and deepen its analysis of this Item, including for agriculture, natural resource-based products, textiles and clothing, fisheries and non-ferrous metals. Concerning subsidies use in the fisheries sector, in 1994 the FAO had suggested that US$124 billion had been spent worldwide annually to catch US$70 billion worth of fish. Most of the US$54 billion difference appeared to be made up by governments through measures such as low-interest loans and direct subsidies for boats and operations. Given this situation, the papers tabled by the U.S. and New Zealand were a welcome contribution to the CTE's work; they drew attention to the role subsidies may play in the overcapacity of industrial fishing fleets. A range of problems posed threats to world fisheries, including degradation of aquatic and coastal environments through pollution and habitat destruction, wasteful fishing practices, and overfishing. The harvest of many capture fisheries probably exceeded their long-term sustainable levels. As mechanisms to reduce the

overcapacity of fishing fleets were necessary, the CTE could highlight the scope to reduce subsidies creating both trade and environmental distortions.

73. The fisheries sector offered an opportunity to promote reforms that would have trade and environment benefits. Further CTE work on the fisheries sector could: (a) review existing information on the provision and use of subsidies; (b) examine WTO rules and their adequacy in disciplining these subsidies; (c) review existing studies on the use of other trade and trade-related measures (e.g. high tariffs, tariff escalation, non-tariff access barriers); (d) review the information on the environmental effects of subsidisation and other trade measures; and (e) identify trade reforms which would have environmental benefits. It would be useful for UNEP to provide more information for the CTE's next meeting on its workshop on *The Role of Trade Policies in the Fisheries Sector*, case studies it had reviewed on the impact of fisheries subsidies, and its policy recommendations on the phasing-out of subsidies. CTE work in this area should recognize the complexities involved in investigating the links between trade reform and environmental change. Trade reform could offer opportunities for strengthening the WTO's role in promoting sustainable development, particularly for fisheries and agricultural subsidies, and high tariffs, tariff escalation and non-tariff barriers on products of interest to low-income commodity-dependent countries. Such an examination should also recognize that the implementation of appropriate environmental policies determined at the national level were necessary for the full benefits of trade reform to be realised.

74. The CBD Secretariat had drawn attention to Decision III/11 adopted at the third Conference of the Parties, which related to the conservation and sustainable use of agricultural biodiversity; this Decision deserved CTE consideration under Item 6 as well as under Item 8. The Decision noted the impact of biodiversity on agriculture, including the role of indigenous and local communities, and the impact of agriculture on biodiversity. The Decision also identified actions necessary to promote sustainable agricultural production, including action to redirect support measures which ran counter to the CBD's objectives concerning agricultural biodiversity. The Decision highlighted the need for the CTE to explore the links between trade measures and the environment, and identify concrete steps which could deliver environmental benefits. Although some subsidies may have environmental benefits, such issues could not be confined to considering the direct environmental effects of subsidies or other measures in the countries which used them. Indirect effects should also be considered, such as those on the trading opportunities of other countries. A key issue was the scope for trade and trade-related policy reform to reduce subsidies and other forms of assistance to sectors including fisheries and agriculture, and to change the forms of assistance.

75. Although reference had been made to subsidies which could be environmentally-beneficial, particularly in the fisheries and agricultural sectors, the CTE should distinguish between what might be valid policy objectives and the particular policy instruments used to achieve these objectives. More effective policy instruments may be available to provide income assistance to farmers or achieve other policy objectives with fewer adverse side-effects, whether directly in the country involved or in its trading partners. Trade distorting policies that might conflict with environmental objectives and promoting development opportunities should be identified. Reform of such policies may contribute to achieving more environmentally-friendly domestic policies whilst providing the benefits of more open trade policies.

76. The representative of the European Communities said the discussion of market access was an opportunity to examine potential "win-win" situations, where trade liberalisation could yield benefits for both trade and the environment. A sectoral analysis could also address environmental services, the only sector listed in paragraph 198 of the 1996 CTE Report which had yet to be addressed. The removal of trade restrictions and distortions would increase the efficiency of the global economic system and reduce incentives for environmentally-damaging activities. As trade liberalisation did not automatically result in environmental benefits, greater efforts may be necessary to implement effective environmental policies and sustainable development strategies to ensure trade liberalisation

was environmentally-beneficial. Adverse production and consumption externalities should be integrated into decision making processes, and reflected in the price of goods and services. Developed countries should improve their market access, particularly for LDCs. Although environmental standards were not necessarily market access barriers, implementing sustainable development required giving priority to the needs of developing countries. To this end, transparency, technical assistance and differentiated schedules for the phasing-in of requirements would contribute. It was also necessary to consider how to ensure exports from developing countries with a well-assessed environmental advantage over other products benefited from the premiums ensuing from developed countries' environmental-related consumption patterns. A report of the International Institute for Environment and Development (IIED), *Unlocking Trade Opportunities*, illustrated how environmental policies and awareness in developed countries could enhance their export opportunities.

77. Subsidies were not automatically trade-disruptive or environmentally-damaging; some were designed to overcome the market failure to account for environmental benefits. Well-designed subsidies could play a role in environmental policies by providing positive incentives to encourage sustainable production and consumption. Where subsidies were linked to environmentally-harmful activities, steps could be taken to reduce and eliminate them. Although agricultural trade liberalisation implied a modification in agricultural intensity affecting resource use and the environment, such linkages were not automatic. In certain circumstances, liberalisation might lead to an increase in intensity. Sustainable agriculture required an integrated approach combining environmental, social and economic factors in a framework corresponding to agriculture's various functions. Beyond the need to integrate environmental externalities, flanking policies may offset market failures, better incorporate environmental considerations into agricultural policy and support environmentally-friendly farming practices. Without flanking support, liberalisation might have environmentally-harmful effects linked to land abandonment in marginal areas. In areas which had been farmed for centuries, biodiversity was often linked to traditional practices and, as noted at the 1996 OECD Seminar on the Environmental Benefits of Sustainable Agriculture, in many countries farming was an environmental asset. A distinction should be made between market distorting agricultural subsidies and those which, by off-setting market failures, were designed to preserve common environmental utilities.

78. An analysis of the forestry sector should consider the work of the Intergovernmental Panel on Forests. Trade *per se* was not the central issue for deforestation; burning wood for fuel played a more significant role. Emphasis should be given to the market advantages which could be gained through certification. The IIED study was a useful reference. Concerning fisheries, there had been a dramatic decline in global fish stocks recently mainly due to overfishing. National and international efforts to reverse this situation had not been entirely successful. The EC asked whether the CTE should address in detail issues relating to resource management as these were already being considered in other fora, such as the FAO, OECD and UNEP, and was not covered by the CTE's mandate. The EC welcomed the declaration of the Third Conference of Fisheries Ministers in September which called on international organisations with a competence in fisheries and trade to find solutions to work towards fisheries trade which complemented responsible fishing. The CTE should focus on trade-related aspects, including whether WTO rules were supportive of initiatives to achieve sustainable fisheries management.

79. There was no direct link between subsidies and overfishing. As recognized in the U.S. paper, subsidies could have both negative and positive impacts on sustainable fisheries management and they could be a policy tool for environmentally-beneficial measures. As recognized by UNGASS, they could also support sustainable fisheries management, aquaculture and traditional fishing methods. Information on other foras' work on subsidies should be obtained before the CTE decided to undertake an in-depth analysis to avoid duplication and identify opportunities for cooperation. The EC supported New Zealand's proposal for the Secretariat to prepare a factual paper on WTO Articles

bearing on fisheries subsidies. This analysis should be extended to other sectors, particularly energy. New Zealand's proposal for the CTE to examine the extent to which WTO rules adequately regulated subsidies went beyond the CTE's mandate.

80. Energy was an important sector, in view of the UNGASS and the December 1997 Conference of the Parties to the Climate Change Convention. Whilst in some cases negative impacts on competitiveness could be viewed as a natural corollary of national priorities, in other cases environmental priorities responded to multilaterally-agreed objectives such as combatting climate change. A relevant question was whether the WTO should develop mechanisms to address competitiveness concerns related to the introduction of measures to promote internalisation of global and transboundary environmental externalities. As environmental externalities were not effectively internalised, renewable energy sources were at a price disadvantage compared to conventional energy sources. Incentives to promote the development of renewable energy sources should be promoted. International cooperation to develop environmental taxation, especially to address global environmental problems, would reduce the risk of distortions and the need to rely on border tax adjustment to overcome the competitiveness impacts of environmental taxes. Scope for internalisation differed between sectors. The EC would submit further suggestions on all sectors to the Secretariat in preparation for the Item 6 paper.

81. The representative of Argentina said, although his delegation had focused on the environmental benefits of removing agricultural trade distortions, Argentina was ready to broaden the analysis for the sectors listed in the 1996 CTE Report. In a market economy, prices were the arbitrators between factors intervening in production and signalling their shortage or abundance. If prices were distorted by subsidies, they would not reflect the shortage of a given factor and consequently this factor could be overexploited. Environmental factors might be undervalued or not reflected in such a market system. In the case of environmental factors, such as land, air, water, or natural resources, the effects may be irreversible. Government interventions, such as subsidies or domestic support, and distorted market prices had negative environmental impacts. Conversely, their removal could yield environmental benefits. Argentina was not suggesting trade liberalisation would bring about environmental benefits, *per se*. However, if market interventions led to international price distortions, the government had the responsibility for the environmental consequences that this could generate elsewhere. Whilst Argentina placed a high value on rural landscape, for example, it failed to see the link between protecting rural landscape and distorting practices, such as export subsidies. In effect, trade distorting practises could lead to rural poverty and urban migration, contributing to environmental and landscape deterioration. Argentina's proposal on the environmental benefits which would ensue from agricultural trade liberalization (WT/CTE/W/24) had set out trade distorting practices already subject to reductions in so far as they affected production; other measures such as those in the "Green Box" had been excluded as long as they did not affect production or trade. It would be useful for the CTE's discussions if UNEP could hold workshops similar to *The Role of Trade Policies in the Fishing Sector*, particularly for the agricultural sector.

82. The representative of India presented his delegation's submission (WT/CTE/W/66) on the relationship of the TRIPs Agreement to the development, access and transfer of environmentally-sound technologies and products (EST&PS). The question of easy access to, and wide dissemination of proprietary EST&Ps through the transfer of such technologies and sale of such products on "fair and most favourable terms" was of particular interest to developing countries. The paper limited the discussion to three situations: (a) where proprietary EST&Ps were mandated to be phased-in directly or indirectly by an MEA (an MEA in terms of the definition under Item 1); (b) where proprietary EST&Ps were related to national environmental standards or measures affecting imports into a country having such standards, especially imports from developing countries; and (c) where proprietary EST&Ps were related to multilaterally-agreed environmental standards or measures affecting imports into a country having such standards, especially imports from developing countries, even if they were voluntary. The proposal brought out the relationship between WTO provisions on

IPRs and the environment, and addressed the need for the CTE to examine and recommend positive measures to achieve the environmental objective of encouraging the global use of EST&Ps that benefitted the environment, at least in the limited cases where these were mandated to be used under an MEA.

83. The representative of Morocco felt a discussion of the market access impacts of environmental measures should take into account different country-specific natural and socio-economic conditions and refer to the links between poverty and environmental degradation. Although the U.S. and New Zealand had dealt with fisheries, other sectors and issues merited attention. The needs of commodity dependent and net food importing countries should be considered, as well as the conditions to allow SMEs to benefit from environmentally-beneficial market opportunities in textiles, leather and forest products. Developing countries were not generally in a position to incur the costs of environmental protection. Elimination of tariff escalation would facilitate income gains in developing countries by increasing the value-added component of their exports. Morocco supported a case-by-case sectoral analysis to determine in which sectors the removal of trade restrictions and distortions could yield both economic and environmental benefits.

84. The representative of Canada supported New Zealand's proposal for a study on the impact of subsidies on the conservation of renewable fish stocks, which could be broadened to include tariffs and non-tariff measures. Trade restrictions could impede conservation of fisheries resources by artificially inflating domestic fish prices, leading to overfishing and impeding the adjustment process necessary for fisheries conservation. Removing tariffs, non-tariff measures and subsidies could assist fish resource conservation by reducing fish prices and incentives to over-invest in the fisheries industry. For example, market reforms would help reduce the 25 per cent of world fish catch currently wasted.

85. The representative of Japan said the nature of the environmental effects of trade measures varied according to the natural and socio-economic conditions in each country. Thus, the claim that all trade measures preventing trade liberalisation should be removed was unacceptable. Agricultural policies should be based on a mix of socio-economic and environmental goals. Implementing appropriate environmental policies was essential, without which trade liberalisation could be environmentally-harmful. Trade measures designed to encourage environmental benefits should also be considered. The U.S. and New Zealand's submissions noted that subsidies removal in the fisheries sector would result in environmental benefits based on their understanding that subsidies contributed to overfishing. Overfishing was a result of inadequate conservation management and could not be assumed to be the direct result of subsidies. This issue should be clarified based on a case-by-case analysis of the fisheries sector.

86. The representative of Mexico said the structure of the U.S. paper would serve as a guide for the Secretariat's sectoral paper on Item 6. In principle, Mexico supported New Zealand's proposal to study WTO Articles that had a bearing on fisheries subsidies, which could include market access-related issues and take into account work in other fora, such as the OECD.

87. The representative of the United States said other fora were addressing fisheries subsidies; the CTE should not duplicate these efforts and should remain within its terms of reference. The attention being given to trade distorting measures in the fisheries sector, including subsidies, was indicative of the importance of this issue. In response to Japan, the U.S. had not suggested that subsidies were the only issue in the fisheries sector; to the extent trade reform could contribute to achieving environmental objectives, the CTE should examine this issue. Commenting on India's paper (WT/CTE/W/65), he asked if references made to MEAs mandating the use of certain technologies stemmed from practical experience. Although certain MEAs prohibited the use of particular environmentally-damaging technologies, it was unusual for MEAs to require specific proprietary technology. The U.S. could not support the solutions which India had identified. With

respect to compulsory licensing and reductions of terms of patentability for environmentally-friendly products, care was needed in finding such solutions. If a situation were created with less incentives to produce environmentally-sound technologies, such as reduction in patent terms or compulsory licensing, the private sector would invest elsewhere. This would not be environmentally-beneficial. He did not understand the linkage made by India between market access and technology transfer.

88. The U.S. intended to submit a paper on market access for environmental services. Environmental services included implementation of new or existing systems for environmental clean-up; pollution prevention; source reduction and monitoring; implementation of environmental quality control and pollution reduction services; maintenance and repair of environmental-related systems; on-site environmental investigations; evaluation monitoring; and consulting relating to each of these sectors. Estimates were that this sector would grow from approximately US$420 billion in trade to US$600 billion by 2010. Survey work had suggested that, apart from a small number of large firms which were active in a few market segments, the environmental service industry was predominantly made up of SMEs, which would benefit from liberalization in this sector. Market access for environmental services could increase the availability of these services, thereby creating environmental benefits. All countries would benefit from cheaper and more efficient environmental services, particularly developing countries. Trade liberalisation in this sector would also encourage technology flows to help build domestic capacity to improve environmental performance. In the session with MEA Secretariats, the GEF had identified a lack of knowledge on the availability of environmentally-sound technologies. In this respect, trade liberalisation in environmental services would result in benefits for both trade and environment.

89. The representative of New Zealand felt more information on the UNEP Workshop on *The Role of Trade Policies in the Fisheries Sector* would contribute to the CTE's understanding of the issues involved. It was uncertain whether the distinction between positive and negative subsidies could be made in the fisheries sector. Positive payments to the fishing industry were not likely to achieve good environmental outcomes. For example, vessel buyback schemes designed to reduce fishing capacity and overexploitation of fisheries resources could result in old, inefficient vessels being replaced by new, efficient ones. Views differed and no conclusion should be made regarding positive fisheries subsidies contributing to fish conservation. Since UNCED, several international mechanisms had been negotiated, such as the FAO Code of Conduct on Responsible Fisheries, and the UN Agreement on Straddling Fish and Highly Migratory Fish Stocks. Although these instruments set out rules to assist fisheries conservation and management, none addressed subsidies and WTO rules directly. Mexico and Canada's suggestions to broaden the scope of the Secretariat study proposed by New Zealand were useful. As the EC had noted, only Members could determine how adequate WTO rules were in regulating fisheries subsidies. This matter could be examined after a Secretariat background paper had set out the issues. Argentina had had difficulty seeing the link between trade distorting policies and landscape preservation; an environmental rationale should not be constructed for what appeared to be, in a number of cases, trade distorting or restrictive measures. He welcomed the U.S. intention to submit a paper on environmental services.

Item 2 The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes

90. The representative of the United States said the U.S. experience should be considered as an example of approaches to conduct environmental reviews of trade agreements. In the NAFTA and WTO reviews, the analysis had used existing government resources. While both reviews had drawn on published private sector analyses on the possible environmental impacts of liberalized trade and on public input, the bulk of the analysis had drawn on U.S. government expertise. The NAFTA review had been a two-stage process, while the WTO review had been conducted in a single stage. For NAFTA, an initial review had been conducted at the outset of the negotiations to identify the

environmental issues raised, assess the possible environmental impacts, and develop recommendations for U.S. negotiators on ways in which these issues might be addressed. The WTO review had been conducted at the end of the negotiations, and identified possible environmental impacts of the WTO Agreements.

91. A two-stage review required more resources than a single-stage review. The resources required were linked to the number and complexity of environmental issues raised. Most of the resource for a two-stage review were associated with the initial review which identified the issues and proposals to address them. The second stage required fewer resources, as it involved an assessment of the agreement in light of the issues initially raised. This had been the case for NAFTA; the initial review had taken eight months, and the follow-up eight weeks. By conducting an initial review early in the negotiating process of NAFTA, the U.S. had been able to respond to critical environmental issues and address public concerns at an early stage.

92. Both the NAFTA and WTO reviews had involved legal analyses of the impacts of the agreements on U.S. laws on health, safety and environment, which had not required significant additional resources, since U.S. negotiators had engaged in this analysis to determine their negotiating positions. The NAFTA review had required more analysis of the potential environmental impacts of changes in trade flows on environmental factors (such as air and water quality, and species conservation), particularly on the U.S.-Mexico border. While the WTO review also examined certain environmentally-sensitive sectors, the analysis was more general.

93. The NAFTA review had used a two-scenario model ("NAFTA" and "no NAFTA"). Existing private sector analyses had been used to predict potential effects. This model had not required significant additional resources. The extent of public input had had a large impact on the cost of the reviews. For NAFTA, public comments had been solicited (through publication of a Federal Register notice, as well as public hearings) on the potential environmental impacts, and a draft of the initial review had been issued for public review in October 1991. The final version of this review had been issued in February 1992. Written comments had been solicited from the public (through a Federal Register notice) at the outset of the WTO review. The public comment process had been useful in addressing potential environmental implications.

94. The initial NAFTA review took 8 months to complete (from June 1991 to February 1992), while the follow-up required two months (from September to November 1993). The WTO review required six months to complete (February to August 1994). While it was more difficult to estimate the number of employee hours to produce these reviews, USTR and EPA each had contributed about 3/4 and 1 1/2 person/years to prepare the NAFTA reviews, while more than a dozen other agencies had contributed a total of two person years. The WTO review had required only around two person years as the analysis was not as complicated as for NAFTA and the government had performed the substantive analysis. For NAFTA, EPA had contracted out the printing of both reviews, which had amounted to $60,000 for the initial review, and $17,000 for the follow-up. There had not been any extra costs for the WTO review as its production had been accomplished in-house.

95. The representative of Norway asked how the U.S. had dealt with the confidentiality of negotiations when consulting the public during the negotiations.

96. The representative of the United States replied that reviews solicited input into the development of U.S. negotiating positions and determined the environmental issues. Follow-up reviews provided an explanation to the public as to how their comments had been incorporated in the negotiating positions and how environmental issues had been addressed.

Item 3(a) The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes

97. The representative of the Federal Office of the Environment of Switzerland made a presentation on the Swiss incentive tax on volatile organic compounds (VOCs), which was an example of progress in environmental policy focusing on economic instruments. This tax aimed to achieve efficient environmental protection by offering price-based financial incentives, and supplementing conventional command and control instruments. A summary of the slide presentation and explanation of the VOC tax was circulated to Members.

98. The representative of Canada asked Switzerland to clarify how the tax was calculated and to give examples of products containing VOCs.

99. The representative of Switzerland replied that the tax was levied according to the VOC content of a product, by calculating the per cent of VOC to the product's total mass. For example, if a 100 kg product contained 20 per cent of VOCs, 20 kgs would be taxed. The main VOC products were organic solvents, such as paints, varnishes and many cleaning products. Cosmetics also contained a minimal VOC content of under 1 per cent. The tax was not levied on products with lower than 3 percent VOC content to simplify its application at the border.

100. The representative of the European Communities said eco-taxation was an increasingly important issue as recognized by the UNGASS, and in view of its wide use in OECD countries. This was a positive development as eco-taxes were less trade-restrictive, more market-friendly, and their operation more transparent than conventional command and control instruments. The relationship between eco-taxation and the WTO raised complex issues, particularly on border tax adjustment. WTO rules on taxation applied to instruments irrespective of their policy purpose. The ability to devise and enforce *ad hoc* disciplines for a specific category of charges and taxes, such as environmental ones, was difficult as taxes responded to a variety of objectives. As noted in the OECD Report on *Environmental Taxes and Green Tax Reform*, the definition of what constituted an eco-tax had not been agreed. Another issue which deserved attention was the relationship between eco-taxes and competitiveness. Although policy choices in eco-taxation should not be unduly determined by competitiveness concerns, this was a factor which impacted on the debate, both nationally and internationally. Although the use of economic instruments was based on the fact that they were more effective and less costly than other instruments, proposals to introduce eco-taxes had been opposed by industry on competitiveness grounds. The analysis in WT/CTE/W/47 was useful, but parts would benefit from refinement, such as the statement in paragraph 19 that, for reasons of competitiveness, it may prove difficult for governments to tackle production-related pollution. The EC's experience had shown that environment policy had successfully dealt with industrial production-related pollution.

101. The need to tackle other environmental problems played a role in the development of eco-taxes, such as resource use, consumption, waste disposal and environmental cost internalization. Parallel application of price-based instruments might offer economic gains by reducing the risk of double taxation and addressing competitiveness concerns. The OECD Report indicated that international coordination could minimise the risk of competitiveness effects in some sectors. The CTE could recommend increased coordination on eco-taxation in appropriate international fora. The suggestion in paragraph 22 of WT/CTE/W/47 to consider the establishment of rules and principles for standardisation of policies in eco-taxation similar to the TBT Agreement might go beyond the CTE's mandate.

102. The representative of the United States said the EC had raised some interesting issues related to border tax adjustment. However, this was only part of a debate being developed in another forum. One issue was the extent to which multilateral agreements could coordinate policies and measures

such as taxation. Coordination on taxation was a complex process whether within a country or between countries. The U.S. did not feel the CTE could reach consensus on the EC's proposed recommendation.

Item (3b) 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

103. The representative of Canada welcomed Japan's notification of its eco-labelling programme. Canada understood such notifications were under the terms of paragraph 185 of the 1996 CTE Report.