RESTRICTED

WT/CTE/M/7

22 March 1996

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WORLD TRADE ORGANIZATION

Committee on Trade and Environment

REPORT OF THE MEETING HELD ON 26-29 FEBRUARY 1996

Note by the Secretariat

1. The Committee on Trade and Environment met on 26-29 February 1996 under the chairmanship of Ambassador Juan Carlos Sánchez Arnau of Argentina. The agenda contained in WTO/AIR/253 was adopted.

2. The Chairman announced informal consultations were continuing on the Committee's rules of procedure, observership for intergovernmental organizations and Item 10 of the work programme.

3. It was agreed to derestrict WT/CTE/W/8 and the relevant excerpt of the report of the meeting held on 21 June 1995 (WT/CTE/M/3) at which this document had been discussed. The Secretariat, on its own responsibility, would forward these documents to the Secretariat of the Convention on Biological Diversity to assist in the preparation of a report on Biological Diversity and trade-related intellectual property rights.

Item 1: The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements

4. The representative of New Zealand placed his delegation's paper (WT/CTE/W/20) in the broader context of the Committee's work. Its purpose was to assist in formulating the Report to Ministers at the Ministerial Conference (the "Report"), which would hopefully reflect a consensus on a number of areas where work could be advanced. As part of such a consensus, he hoped there would be a shared interest in ensuring trade and environmental policies were mutually supportive in promoting sustainable development by providing for legitimate measures to protect the environment while also safeguarding the multilateral trading system. A responsibility existed to address the reality that governments were already responding to environmental concerns by agreeing to commitments which had obvious implications for WTO rules. The paper outlined an approach for formulating an Understanding to provide a structured and disciplined accommodation under WTO provisions for the use of environment-related trade measures. Reflecting the scope which existed in the WTO for Members to use trade-related policies to protect national environmental resources, the Understanding would focus on the use of trade measures for global and transboundary environmental problems, be applicable across the WTO and build on existing approaches for dealing with measures taken for non-trade objectives contained in GATT 1994. It would be dependent on conformity of measures with substantive and procedural criteria reflecting the policy context in which the measures had been taken. The conformity of particular measures with criteria specified in the Understanding could be examined, where this was provided for through dispute settlement procedures, on a case-by-case basis.

5. The procedural and substantive criteria should ensure legitimate environmental protection measures could be taken while safeguarding against protectionist abuse. The proposal covered a range of measures, including extrajurisdictional measures based on unincorporated process and production methods (PPMs) and agreements. He noted the distinction made between measures used in different policy contexts for which different solutions were proposed. For an MEA that met the specified criteria, specific and jointly notified measures applying between WTO Members which were parties to the MEA would prevail over WTO obligations between them to the extent of the mandated inconsistency; WTO

dispute settlement would not be available to the notifying Parties for trade action within the terms of the notified measures. This accommodation would apply to other consensually applied and jointly notified measures. The proposed solution also covered non-consensual measures, those taken between Parties pursuant to an MEA but not specifically mandated in it, and measures taken against non-parties which were specifically mandated in an MEA. These measures as well as those taken against non-parties would be testable through dispute settlement against necessity-based criteria, including effectiveness, least trade-restrictiveness and proportionality. The proposed accommodation was oriented around the identification of interested or concerned countries, which were sources of related production and consumption which contributed to an environmental problem and whose participation was required for any solution to be effective. This was a limited and well-defined group. Outside this group, the broader WTO membership would be unaffected.

6. The Understanding would not cover measures applied unilaterally or against MEA non-parties without being specifically mandated in an MEA. If countries wished to impose such measures in a manner inconsistent with WTO obligations that could not be justified under current WTO exceptions, a waiver could be sought. This conclusion was based on the fact that such measures would not be effective and could not be necessary to the achievement of the environmental objective. Citing the UNCED conclusions, he said a renewed political commitment to avoid unilateral or extrajurisdictional measures was an important part of any WTO outcome in this area. The attractiveness of trade measures needed to be weighed against their actual effectiveness. Referring to the lack of domestic coordination in the policy making process, he said there was a growing awareness between trade and environment policy makers of the contribution that each could make to the policy development of the other, to which the procedural and substantive criteria could contribute. New Zealand looked forward to delegations' views on its proposal and to developing a consensus Report.

7. The representative of the European Communities introduced his delegation's non-paper which represented a stocktaking of the debate on Item 1 in the EC and aimed to stimulate discussion. Positive and substantial recommendations should be elaborated on this Item for the Report. The presentation of only an analytical Report would be regarded as a political failure of the WTO. Any result of the Committee work must be balanced. The non-paper was subject to improvement and would benefit from other delegations' comments. His delegation was not suggesting the establishment of a special WTO dispute settlement mechanism for environmental matters. On the contrary, in its contribution the existing dispute settlement mechanism played a pivotal role and its potential to fight protectionist abuse should not be undermined in any way.

8. The representative of Egypt said Article XX was sufficiently flexible to allow for exceptions to accommodate environmental objectives and allow for the use of trade measures inconsistent with WTO obligations to achieve, *inter alia*, environmental protection. The conditions in Article XX reflected the checks and balances that prevented abuse of such exceptions. One of the key issues of Article XX was that there were safeguards to ensure fair and equitable treatment of WTO Members and any attempt to tamper with this balance entailed enormous risk. Her delegation supported an *ex post* approach, where granting a waiver under Article XXV:5 could provide a solution for MEAs that contained WTO-inconsistent trade measures, based on the rationale that no challenges had so far arisen in this regard. She acknowledged the arguments against such an approach. It could also be argued that an Article XX amendment would raise the problem of hierarchy between the WTO and MEAs, in favour of the latter. The WTO should not become an environmental organization nor be adapted to deal with structural environmental problems, which were the competence of MEAs.

9. Egypt felt an *ex post* approach would be sufficient to deal with situations arising from present MEAs as only a few of them contained trade provisions and the possibility that disputes might arise over their WTO-consistency was minimal. However, the right of WTO Members to challenge such trade provisions should remain. For future MEAs, coordination should take place at the national level by the parties to both the MEA and the WTO through the inclusion of trade experts in delegations negotiating MEAs. She supported the setting of criteria to examine the requirements for an eligible MEA and noted that each MEA was different and should be treated case-by-case. Additional discussion of necessity and

effectiveness was warranted. Whereas necessity in Article XX had been based on concepts such as least-trade restrictiveness, a definition of environmental necessity was evolving and might draw on a number of principles such as the precautionary principle which was referred to for lack of scientific evidence or the high costs involved. It was difficult to admit indefinite criteria in the WTO in this area. Another principle could be whether trade was the root cause of the environmental problem, which would make trade measures necessary to address them. Also, the necessity and effectiveness of trade measures for non-complying non-parties differed among MEAs and had been put into question. It was difficult to assess the effectiveness of the use of trade measures in MEAs, *per se,* in isolation from the package of positive measures in MEAs. Also, the persistence of illegal trade undermined the effectiveness of trade measures in MEAs. MEAs should preserve their comprehensive character and advocate positive measures. Giving a special status to trade measures went against the overall goals of MEAs and elevated the use of negative measures. For these reasons, her delegation was unconvinced of the necessity to elaborate new rules in this area.

10. The representative of Nigeria gave preliminary comments on the EC proposal. He said relaxing the rules for the use of trade measures which were exemptions to WTO rules would weaken the trading system and risk converting exceptions into new rules. Justification was required on the necessity of using trade restrictions, which were exceptions from WTO obligations and negative in character, to attain non-trade objectives, as opposed to positive measures. Given no disputes had arisen, he questioned the need to amend Article XX. A hierarchy of measures should be recognized, starting with positive measures, such as financial flows, transfer of technology, technical assistance, capacity building, and ending with trade restrictions as a last resort. He asked if the trade measures applied for environmental purposes were sufficiently precise to determine their effects and exclude unintended outcomes. He asked if a ban on trade in rhino horns or elephant tusks drove their price downward and reduced trade, or if it increased trade by making it more profitable; estimates on demand and supply elasticities in MEAs would assist in consideration of the EC proposal. Necessity and effectiveness of trade measures pursuant to MEAs needed to be assessed; measures could only be applied after a thorough assessment of their potential impact had taken place. Related to the EC proposal, which was based on a partial equilibrium model with a two-dimensional relationship between specified trade measures and environmental purposes in MEAs, he asked whether a linear relationship existed between specific trade measures and environmental objectives. He suggested a general equilibrium model merited consideration. Relaxing the conditions for the use of trade measures in MEAs might create a loophole for protectionism, a risk that needed to be weighed against the benefits of using trade measures. He asked for clarification of "overwhelming environmental importance" and "legitimate environmental objectives". In the proposal, environmental policy makers would have flexibility to judge the legitimacy of environmental objectives and the types of trade measures for achieving them; the absence of specificity could lead to distortion and abuse. Risk of mismatches of trade measures and environmental objectives raised the issue of proportionality. The flexibility for MEA negotiators to judge adequate trade measures might be at variance with the preferences of trade policy negotiators. He said any exceptions from the general rules should be precise. Also, it should be made clear whether an Understanding would be binding.

11. Commenting on the New Zealand proposal, he said paragraph 88 should be further explored. He asked how the effectiveness of measures could be assessed if they were non-specific. His delegation could not support the use of trade measures against MEA non-parties. Noting the advantages of the trend towards liberalization, globalization and international cooperation in addressing global environmental problems, he said, however, there were areas where national sovereignty should prevail. Nigeria did not accept the extraterritorial application of environmental standards. There were common objectives to accomplish, but the degree of responsibility differed. He observed that just as many countries were liberalizing trade, restrictive trade policies for non-trade reasons were being proposed. In this respect, the WTO should not send the wrong signal to its Member. He said a combination of positive measures with improved market access, such as the elimination of subsidies, further reduction of tariffs, and lowering of technical barriers to trade, were what was required as a first step forward.

12. The representative of Singapore, speaking on behalf of the ASEAN countries, said any results for the Ministerial Conference should be balanced. He said trade promoting measures, not trade

restrictive measures, would help meet the goal of sustainable development. Given that ASEAN felt Article XX was broad enough to cover all legitimate trade-related environmental measures, it supported a case-by-case examination of measures in MEAs using an *ex post* waiver approach in the context of Article XX as: (i) only a few MEAs contained trade provisions; (ii) only a small number of trade measures in MEAs could be WTO-inconsistent; (iii) to date, no MEA had been challenged in the GATT/WTO; (iv) a genuine MEA should find broad support among WTO Members; and (v) it was not appropriate to formulate general criteria for trade measures in MEAs given that they addressed different environmental problems. ASEAN could not accept any attempts to amend WTO provisions to be compatible with trade measures in MEAs which placed the WTO in a secondary position to MEAs. The Committee was not mandated to provide leeway for MEA negotiators to introduce trade restrictive, WTO-inconsistent measures. Although ASEAN was conscious of the need to provide guidance to MEA negotiators, this process should not be hurried. Korea's proposal at the November 1995 meeting deserved elaboration. Korea had suggested a combined approach based on *ex post* procedures with some guidelines to enhance the predictability and compatibility of trade measures in MEAs. Also, he supported Egypt and India's suggestions at that meeting to define specific criteria for MEAs. While not agreeing with all the points made in the EC and New Zealand proposals, ASEAN felt both furthered an understanding of this Item. New Zealand's proposal gave a more balanced treatment of the issues and paragraph 88 should be elaborated. He said broadening the scope of Article XX would legitimize unilateral measures and the extrajurisdictional application of environmental laws, which would undermine the open, nondiscriminatory and rules-based nature of the WTO. Given the uncertainty about the effectiveness of trade measures in MEAs, ASEAN felt trade promotion through increased market access was a better policy measure to safeguard the environment. The WTO could best contribute to sustainable development by facilitating trade liberalization, not by condoning the use of trade-restrictive measures.

13. The representative of the United States said coordination between trade and environmental officials at the national level in support of multilateral negotiations could mitigate many concerns about the use of trade provisions relating to MEAs. The WTO was not the place to deal with insufficient coordination within governments. He noted that not all trade provisions considered for inclusion in MEAs raised WTO issues, and said that non-parties should receive treatment equivalent to that of MEA Parties where they took equivalent action. He referred to the issue raised in both proposals of the appropriate way for the WTO to support multilateral environmental cooperation. Thus far, discussions gave the impression that the negotiation of MEAs that included trade measures was seen with only slightly less concern than unilateral approaches. In this context he cited paragraph 32 of the New Zealand proposal which referred to fears of protectionist abuse of trade measures in MEAs, and discussions at the October 1995 meeting when many delegations had spoken of the need to ensure that any trade provisions in MEAs were effective, necessary and proportionate. He asked if MEA negotiators would negotiate trade provisions in MEAs that they viewed as ineffective, unnecessary, or disproportionate. He suggested a response might be that this concern only arose with respect to trade measures in MEAs and not with respect to MEAs *per se*. However, including trade measures in MEAs had been important for their environmental objectives; for example, it was difficult to deny trade measures were central to CITES. In light of the role of MEA-based trade measures, WTO rules should not serve to impede the appropriate use of such measures; equally, trade measures in MEAs should be sensitive to the norms of the trading system. He agreed with the EC that the necessity of trade measures in MEAs was best determined by MEA negotiators, while recognizing the importance of coordination between environmental and trade officials in capitals. He referred to the EC approach to balancing interests by presuming trade measures in MEAs to satisfy the necessity test of Article XX(b) while keeping them subject to the disciplines of the chapeau. Trade measures in MEAs might also be covered by Article XX(g) which set a different test. Noting the EC option that tracked Article 2101 of the NAFTA in which parties articulated their interpretation that Article XX(b) included environment, he felt there could be no question environment was already encompassed in Articles XX(b) and (g). He noted the New Zealand approach, similar to that agreed in Article 104 of NAFTA, for the case where parties were members of both the WTO and the relevant MEA.

14. He agreed with New Zealand that the WTO was not the competent body to question the environmental objective of MEA trade measure, but had doubts about its extrapolation of concepts from necessity in Article XX. Panels had interpreted necessity to mean that a measure was not necessary if there were other measures reasonably available to achieve the same objective that were consistent, or less inconsistent with the GATT. However, this interpretation was not universally accepted. He asked where least trade-restrictiveness, effectiveness and proportionality were found in Article XX. He was not aware of any panel that had asked if a measure taken under Article XX was the most effective that might have been taken. He had doubts about introducing necessity or effectiveness as criteria for MEA trade measures to be accommodated in the WTO. Referring to the panel interpretation described by New Zealand, to the effect that MEA negotiators would be expected not to use a trade measure if there were other measures that were consistent, or less inconsistent with the GATT that were reasonably available to the negotiators and would achieve the same objective, he asked what reasonably available meant in an MEA negotiation. Referring to CITES, he asked if as an alternative to trade measures, national capacity building to protect endangered species was a reasonably available option during the negotiations and if this would have been sufficient to achieve the conservation objective. The WTO did not have the technical competence to determine if alternatives met the MEA objectives.

15. He asked if the use of effectiveness meant MEA negotiators should not use trade provisions that would obviously not work, or that they must use the most effective approach available. If a measure that could not achieve its stated goal was argued to be necessary, then the objective could be legitimately questioned. However, there were differences of opinion among MEA negotiators over the most effective approach to be used. Also, a key tenet for MEA negotiators was the precautionary principle. He said questions on the legal analysis in paragraphs 80 and 81 would be taken up bilaterally. He asked if an accommodation of MEAs under the WTO meant MEA negotiators might use trade provisions, but only if they met criteria that went beyond those applied for unilateral actions and would still be subject to dispute settlement. He agreed with the EC that doing nothing on this issue was preferable to doing worse, i.e. subjecting MEA trade measures to additional disciplines that made it more difficult to use such measures for environmental goals in a WTO-consistent manner.

16. The representative of Japan said, considering the broad definition of environment, *ex ante* proposals to amend Article XX should ensure that Article XX exceptions could not be abused for protectionist purposes. Guidelines were necessary to judge whether an environment-related trade restriction could be regarded as an exception to WTO obligations. Guidelines would also be useful for an *ex post* waiver approach to ensure environment-related trade restrictions were predictable and compatible with WTO Agreements. They would also provide guiding principles for future MEAs. Regardless of whether an *ex ante* or *ex post* approach was taken, guidelines should include at least two types of requirements. First, requirements for MEAs to be considered legitimate: the MEA should be (i) based on international agreement; (ii) subscribed to by countries of significant interest; (iii) open to any country; (iv) deal with environmental protection of a transboundary nature or reflecting common values where the necessity of protection was recognized; (v) clearly state which trade measures could be taken, under which circumstances and following which procedures; (vi) prescribe trade measures based on sound scientific grounds; and (vi) prescribe trade restrictive measures based on the principles of national treatment and MFN. Second, requirements for trade restrictions in MEAs to be compatible with WTO Agreements were as follows: (i) as provided for in the chapeau of Article XX, such measures should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries, or a disguised restriction on international trade; (ii) there should not be any effective alternative measure to achieve the environmental objective; and (iii) the impact on trade should be minimal. The legal status of these guidelines would need to be examined. According to the EC proposal, MEAs were simply required to be open to all parties concerned and reflect the benefits of interested parties. Taking into consideration the development of guidelines, the WTO should be able to judge MEAs from the perspective of Articles 3.1 and 3.2 of the DSU.

17. The representative of Hong Kong supported a waiver approach which required no modification of WTO provisions. Only if waivers failed to ensure the compatibility of trade measures in MEAs was there a case to recommend modifications to WTO provisions. He recalled waivers were considered to

be sufficient to deal with important issues, including balance of payment restrictions. Acknowledging that dealing with MEAs on a case-by-case basis was time-consuming, he said the *ex ante* approach might not prove more expeditious. However, the definition of specific criteria for an Understanding or the negotiation of a collective interpretation also would be a long and not necessarily productive process. There was no certainty of consensus for criteria capable of catering to existing MEAs nor that, if agreed, they would meet the needs of future MEAs. A waiver approach could be used without delay. He noted that some felt waivers might inappropriately place the WTO in the position of passing judgement on environmental issues; the WTO could not avoid this. In the *ex ante* or combination approaches, negotiations on criteria for an Understanding also involved taking a view on environmental issues. Concerning the claim that only the collective interpretation of Article XX could cope with the anticipated increase in the use of trade measures in MEAs, he said an environmental window, once opened, might serve to invite an increase in trade measures which otherwise would not occur.

18. Commenting on the New Zealand proposal, he supported the importance attached to the terms necessary in paragraphs 35 and 36 and effectiveness in paragraph 36, which could be developed further. However, he expressed disappointment that necessity had only limited application. The accommodation of MEA non-parties through combined *ex ante* and waiver approaches and WTO dispute settlement was pragmatic but it was difficult to visualize how it would operate. A major concern was the use of joint notifications among MEA Parties which would prevail over inconsistencies with WTO provisions; this would create a plurilateral code of conduct among Parties whereby they would forgo WTO dispute settlement rights. Certain WTO Members could accept stricter disciplines, but by forgoing part of their WTO rights MEA Parties were discriminating against themselves and the legal implication were not clear. Risks were inherent in such a consensual approach, which might encourage bilateral pressures on individual WTO Members to join MEAs and relinquish their WTO dispute settlement rights. He had reservations about departing from the multilateral approach and recalled the example of the MFA. Given Hong Kong's preference for a waiver approach and the importance it attached to necessity, he had two comments on the EC proposal. By seeking special treatment for MEAs, the EC options seemed to be seeking exceptions to exceptions; such an accommodation did not appear to be the original intention of Article XX. In support of paragraph 16, Hong Kong favoured a special transparency regime for measures in MEAs through a WTO notification requirement. This would not require a recommendation as to whether modifications to WTO provisions were required and could be implemented on its own. He recalled Hong Kong's suggestion for an inventory of environmental notifications (WT/CTE/M/6).

19. The representative of the Korea, commenting on the EC proposal, said Korea did not consider it necessary or appropriate to amend Article XX and was not convinced of the gravity of future conflicts, given the impact of trade measures in future MEAs was unknown. As the EC proposal indicated, only 18 out of 180 MEAs contained trade measures and to date they had not been challenged. As for predictability and flexibility, existing practices and disciplines in MEAs and the WTO did not seem deficient. A legally-binding rule for legitimizing trade measures in MEAs might enhance predictability but at the cost of other concerns; predictability could be achieved in different ways. The most cautious approach should be followed in amending Article XX, since any derogation might compromise Members' rights and obligations.

20. The proposed EC Understanding would allow MEAs to legitimize trade measures based on non product-related PPMs and non-specified trade measures. Exemption of the necessity test for discriminatory trade measures agreed among MEA Parties would affect the rights of WTO Members which were MEA non-parties. The second option under Article XX(b) also opened the door to unilateral trade measures based on non product-related PPMs and had extraterritorial effects. The *ex post* part of the proposal had shortcomings since any challenge to trade measures could be handled under existing WTO procedures. Commenting on the New Zealand proposal, he said its analysis of necessity and specificity of trade measures in MEAs deserved further study. While environmental necessity was still evolving, WTO necessity was based on the concept of least trade-restrictiveness and least inconsistency with WTO obligations. He concurred with the analysis of necessity in paragraphs 35 and 36. In accommodating trade measures, specificity was important. He agreed with paragraphs 82-84.

Trade measures in MEAs could be handled under existing WTO disciplines even though potential conflicts existed between two legal systems pursuing different objectives. The merits of the *ex ante* approach (predictability and flexibility), could be achieved through waivers; it was unnecessary to make amendments for the sake of *de jure* compatibility. Information exchange could be improved through enhancing WTO transparency. He said priority should not be given to specific Items until discussion of all Items of the work programme had been completed. Here, paragraph 88 was also relevant.

21. The representative of India recalled the Report would have to deal with all ten Items of the work programme. He felt that only the limited number of existing MEAs should be considered under Item 1. Criteria for assessing a genuine MEA should include whether: (i) it had been negotiated under the aegis of the United Nations: (ii) its procedures stipulated that participation was open to all countries; (iii) it allowed for participation in the negotiations by countries of different geographical regions and at different stages of economic and social development; and (iv) it provided for accession of countries which were not original parties on equitable terms. He made the point that focusing only on one aspect of MEAs (trade measures) would contribute to distorting their essence; this aspect should be further examined. Although it was not the Committee's mandate to examine environmental issues, trade measures in MEAs represented only part of an integral, negotiated package which included positive measures (financial flows and technical and technological assistance). Focusing on trade measures might encourage dependence on them to achieve environmental objectives. Various factors influenced the formulation of MEAs and there could not be an *a priori* assumption that trade measures in MEAs would pass the tests of necessity, effectiveness, least trade distortion and proportionality. Even though it was not his intention to judge MEA negotiators, it could not be taken for granted that they had assessed in depth the need to incorporate trade measures. Trade measures for achieving environmental objectives should be addressed under Article XX to ensure non-discrimination.

22. Trade provisions in MEAs should be compatible with WTO provisions. The concepts of flexibility/freedom and security/certainty in the EC proposal were important to those countries wishing to use trade restrictions to legitimise their use by seeking exemption from WTO provisions. He said it was better to give such flexibility and certainty by requesting environmental experts to ensure trade measures in MEAs were consistent with WTO provisions *ab initio*. The "legitimate goal of environmental protection" and "the expression of international consensus and cooperation" could only be present when the MEA incorporated all the above-mentioned elements. The EC approach differed and this matter had to be further discussed. He was concerned that trade measures taken pursuant to specific provisions of certain MEAs should be accorded special treatment, given that Article XX was capable of dealing with all legitimate concerns. This had implications for other non-trade issues. The core element of the proposal was that if a trade measure was specified there would not be scope for judging its necessity under Article XX (b), nor jurisprudence regarding effectiveness, least trade distortion and proportionality. Any proposal which waived the necessity test or limited Members' dispute settlement rights concerned India. Also, he was unclear about the implications of the proposed cooperation between WTO and MEA dispute settlement mechanisms and the idea of mandating WTO Secretariat involvement during MEA negotiations and subsequent amendments.

23. He made preliminary observations on the New Zealand proposal. He said the procedural and substantive criteria for MEAs were similar to India's approach. Paragraph 34 and 35 followed accepted criteria like necessity, effectiveness and proportionality. Paragraph 88 contained new ideas which should be studied further, in particular their implications for the interface between sustainable development and the TRIPs Agreement. Paragraph 8 clearly stated measures which were consistent with fundamental obligations like national treatment, MFN and elimination of quantitative restrictions, whether taken for environmental or other non-trade purposes, were not vulnerable to WTO challenge. Paragraph 9 noted that Article XX provided, in exceptional circumstances, for otherwise WTO-inconsistent measures. Even the EC proposal acknowledged Article XX was broad enough to encompass all environmental objectives. He referred to the fact that no dispute involving trade measures in MEAs had arisen, and said the Committee was trying to solve a problem which did not exist or at least had been exaggerated. From an environmental or economic efficiency perspective, it was difficult to assert that trade measures in place in some MEAs were necessary. However, even assuming certain trade measures were necessary,

if they were taken for genuine environmental reasons, on a non-discriminatory basis, and fulfilled the test of necessity, effectiveness and proportionality, they were fully protected under existing WTO provisions. Amending Article XX, either directly or through an Understanding, would set a dangerous precedent and jeopardize the trading system.

24. The representative of Switzerland shared the EC's way of approaching the problem through an *ex ante* phase which aimed at preventing disputes from arising and an *ex post* phase which aimed at settling disputes which arose despite the *ex ante* consultation mechanism. In certain cases trade measures might be an effective tool to attain environmental objectives. However, their potential should not be overestimated and they should be used with caution and in a way that least affected the functioning of the trading system. Setting up a consultation mechanism amongst competent bodies of MEAs and the WTO should promote the appropriate use of trade measures. The requirement to notify trade measures that could be included in a future MEA or in an amendment to an existing MEA should be elaborated to avoid conflicts. It could be imagined that competent MEA authorities adopting trade measures and the WTO could conclude agreements which could specify modalities for cooperation. If conflicts arose despite the *ex ante* phase, a means of settling potential disputes should be envisaged which preserved, as far as possible, the domains of trade and environment. Consistency between efforts to protect the environment and WTO rules should be ensured. He agreed with the EC that a special dispute settlement panel should not be concerned with the legitimacy of MEA objectives nor the necessity of the measures taken to attain them; the WTO should deal with trade conflicts. For that reason, he agreed with New Zealand that the WTO should not be used to remedy shortcomings in MEAs. To contribute to legal security, MEAs should benefit from special treatment as proposed by the EC. Criteria to be applied by panels to determine if an MEA would benefit from special treatment were crucial. He referred to the importance of avoiding recourse to unilateral measures which were incompatible with WTO provisions. He expressed interest in New Zealand's proposal that any solution should concern all Annex I WTO Agreements. Concerning New Zealand's proposal to notify MEA trade measures, he asked how considerable the administrative work involved would be and to what extent these were already covered by notification provisions.

25. The representative of Canada said WTO rules already provided broad support for domestic and international environmental policies. In exceptional circumstances, where it was necessary and effective to include WTO-inconsistent trade provisions in an MEA, an MEA Party could decide not to exercise its WTO right to challenge another Party's measures in a particular MEA. Parties could not collectively override the WTO rights of non-parties through the MEA as any limitation of WTO rights could only be achieved by Members. The WTO had a legitimate interest in MEAs containing trade provisions. A distinction needed to be made between specific trade measures that were negotiated and required to implement an MEA and those not negotiated but introduced pursuant to MEAs. The latter included domestically-developed trade measures to advance MEA objectives or taken pursuant to domestic legislation. He felt trade-related provisions that might be taken pursuant to, rather than required by, an MEA had a greater potential to be used for protectionist reasons and were more likely to be subject to dispute. Canada supported a case-by-case approach; it could not relinquish formally its WTO right to challenge action taken under the trade provisions of an MEA. A waiver should be sought if MEA Parties wanted an absolute assurance that trade measures would not be challenged in the WTO.

26. There was a practical need for the WTO to address the question of how trade provisions in MEAs should be developed, formulated, and applied to minimize the likelihood of challenges in the WTO. Whether this should be done in the WTO or jointly with a multilateral body like UNEP required further consideration. The WTO should set out guidelines to assist MEA negotiators should they determine trade measures were necessary to ensure these measures conformed, as far as possible, to WTO disciplines. They would also serve as the basis on which the WTO Secretariat could provide technical advice to MEA secretariats and negotiators on trade measures. The guidelines should indicate a preference for trade measures that were: chosen only when other alternatives were ineffective; necessary to accomplish the environmental goal; non-discriminatory; directly related to the environmental problem (coverage of the trade measures should match the product(s) and not be applied to unrelated products); no more trade-restrictive than necessary; and, where applicable, science-based

and measurable. The WTO should also establish principles related to the MEA negotiating process that would increase the legitimacy of any trade measures that might be included in an MEA. The WTO could indicate its preference for an MEA negotiating process that was: open on an equitable basis to all countries; reflected international consensus (with participation by affected countries, those at different levels of development and in different parts of the world); had clear, binding environmental obligations; had effective compliance procedures, including for dispute settlement; did not treat MEA non-parties that provided environmental protection equivalent to that required by the MEA less favourably than Parties; detailed how the measures were to be implemented; and explicitly considered the guidelines set out above. If MEA trade provisions adhered to these principles, they would be presumed necessary and effective and thus justifiable and non-arbitrary. Given the consensus such principles would reflect, the risk of trade disputes would be low and the need for waivers small. The qualifying principles to determine if an MEA reflected international consensus were important in the context of disputes among Parties. While recognizing the need for flexibility for regional arrangements, the EC proposal required more precision. Provided an MEA met the qualifying principles, any challenge would focus on whether the implementation of the measure conformed with the chapeau of Article XX. Disputes between Parties and non-parties had the potential to become a more important issue. Given the evolving nature of MEAs, Parties could decide not to ratify amendments, thereby becoming a non-party. For example, Canada would not ratify the recent Basel Convention amendment if trade in non-hazardous recyclables was jeopardized. He felt the New Zealand proposal outlined a variant of Article XX which provided for greater oversight by a WTO panel on trade measures in MEAs than that of the EC, but this would have to be considered further. He hoped progress on Item 1 was possible by Singapore.

27. The representative of Australia said a notable aspect of the New Zealand proposal was its attention to unilateral measures to advance environmental objectives, especially when these attempted to change the domestic policies of other countries. Concerning the MEA issue, the proposal highlighted there were other approaches which did not fit easily into an *ex ante* or *ex post* solution, but which deserved consideration. It drew attention to ensuring WTO Agreements dealt with MEA issues in a consistent manner. He asked if specific measures only included those mandated in an MEA which all Parties were required to implement; if specifically detailed but not mandatory measures were considered to be specific or non-specific measures; where the line was drawn between a non specific measure referred to in an MEA and a measure which was essentially unilateral, although the country taking it claimed it was intended to advance an MEA objective; and whether measures taken pursuant to decisions or recommendations of MEA bodies could be adequately dealt with through use of the specific and non-specific categories, or whether another category was needed. Terms should be defined and should cater to a range of situations as MEAs were elaborated over time through amendments, protocols and the adoption of decisions and recommendations. He noted the use of necessity and the related issues which needed to be explored, such as the effectiveness of the trade measure in achieving the environmental objective, the use of the least trade-restrictive measure, and proportionality. In further discussion of these issues, the principles and rules suggested in Agenda 21 as applicable to trade measures necessary for enforcing environmental policies should be examined. Expertise and institutional competence required for evaluating the necessity of trade measures in MEAs was also required. Any criteria should provide security to MEA negotiators. Australia would need to examine the EC proposal further in the light of its implications for other WTO Agreements, the criteria for trade measures in MEAs and MEAs themselves, and the nature of any rules to ensure the criteria were in fact followed, including how dispute settlement should be conducted where disputes concerned a trade measure pursuant to MEA provisions.

28. The representative of Mexico said there should be a balanced treatment of all the Items of the work programme. As trade measures were not the best solution for environmental problems and there was no evidence of a real conflict between MEAs and the WTO, it was inappropriate to change WTO provisions. Furthermore, trade measures were only one alternative among many others in the package of instruments that could be used to achieve MEA objectives; positive measures and incentives were more efficient and effective. Mexico felt proposals to derogate from WTO rules to accommodate MEA trade measures were an unbalanced and isolated approach as long as there was no parallel commitment to first use and enforce positive measures. There was no justification for the use of trade sanctions vis-a-vis non-parties, nor even between MEA Parties. Commenting on the EC proposal, she agreed with

Korea that predictability for MEA negotiators could be ensured in different ways, notably within MEAs themselves. She supported the United States' comment that greater national coordination would help mitigate problems of perception regarding the relationship between trade and environment. The Committee's Report would contribute to clarifying the MEA issue. She asked for clarification from the EC as to how it defined legitimacy (was it based on science, consensus, or the political weight behind the environmental aim of the MEA); measures taken pursuant to an MEA; and necessity. She felt the New Zealand proposal dealt with the latter two concepts in a more balanced manner. Mexico was against waiving measures not specified in an MEA, either between Parties or against non-Parties.

29. On specific measures between Parties, she clarified the NAFTA Article 104 provisions for cases of inconsistency between NAFTA and specific trade obligations in CITES, the Montreal Protocol and the Basel Convention. Two conditions were explicitly mentioned to ensure the supremacy of the MEA obligations over NAFTA: the measure must be the least trade restrictive and be specifically prescribed in the MEA. This was applicable only in cases where NAFTA Parties were also MEA Parties. The possibility of adding other agreements to the list required the unanimous consent of NAFTA Parties. The New Zealand proposal referred to the similarity of its proposal in paragraphs 45-47 to NAFTA Article 104. It differed in that notification was required. Under NAFTA, unanimity was required to define an MEA whose specific measures would have supremacy over NAFTA and recourse to its dispute settlement mechanism was not hindered. In the WTO context, Mexico would not renounce its right to use the WTO dispute procedures. Necessity was the first criterion which should be defined in any attempt to seek an accommodation of MEA trade measures. Use of necessity in the WTO had been based on the condition that the measure be the least trade restrictive or least-inconsistent with WTO obligations. However, the definition of environmental necessity was still evolving. She agreed with New Zealand that necessity included the consideration of criteria linked to the effectiveness and proportionality of measures; the necessity test could not be taken for granted. Citing the recent Basel Convention amendment, she said the decision to use trade measures in MEAs might depend more on political pressure than actual necessity. Also, paragraph 88 of the New Zealand proposal should be elaborated.

30. The representative of Norway gave preliminary comments on the proposals. Environment related trade measures should not be subject to a disproportionate number of criteria under Article XX. In this respect, both the EC options based on an amendment to Article XX and an Understanding met Norway's concerns. She noted New Zealand's proposal covered GATT, GATS and TRIPs, not only Article XX. However, she felt all these Agreements could not be covered at the same time. In order to have a recommendation by Singapore, work should concentrate on Article XX. Then the feasibility of a horizontal solution covering all three Agreements could be considered. Although both the New Zealand and the EC proposals elaborated criteria like openness, specificity and necessity, the latter put forth rather few criteria. New Zealand's proposal was more detailed and distinguished between those MEAs which mandated specific trade measures and those which did not. The non-party issue could be a problem, especially if MEA dispute settlement procedures were insufficient. Here the issue was whether trade measures were specifically mandated in an MEA. Concerning the extent of specificity, flexibility should be kept in mind. An important aspect would be to interpret terms like adequate or significant cover. New Zealand used the criterion: "adequate representation of consumer and producer nations", while the EC proposed broader wording: "reflects, through adequate participation, the interest of parties concerned, including parties with relevant significant trade and economic interest". She enquired if New Zealand's definition of necessity was correct and if the Secretariat could comment on this interpretation. In view of New Zealand's emphasis on necessity, she asked if it agreed with the EC that if an MEA fulfilled the criteria then necessity considerations were assumed to be fulfilled by that MEA. Norway would have more concrete reactions at a later date.

31. The representative of Morocco said crucial issues under this Item related to accommodating MEA trade measures which were applied extraterritorially or on MEA non-parties. He felt an Article XX amendment could contribute to a solution. However, he recalled trade measures for environmental purposes were not the best solution and, if applied, should be adequately justified and precisely identified in the MEA. He said the advantages of environmental measures should be commensurate with the costs involved in implementing them, i.e. the principle of proportionality. He referred to the importance for

developing countries of positive measures in MEAs, such as the transfer of technology. Morocco could not accept the application of extraterritorial trade measures for environmental purposes. Guidelines to assist MEA negotiators on the use of trade measures should be developed. Panels could examine any divergence from these guidelines and should include experts from the MEA secretariat or UNEP.

32. The representative of Brazil said although it was natural to avoid creating environment-related trade barriers in the WTO, references in the preamble to the Final Act and the Decision on Trade and Environment stated sustainable development was the framework for debate on trade and environment. The Report should cover all Items and, even considering the little progress achieved so far, it would be difficult to accept a selective agenda. Caution characterized delegations' attitudes, which could be attributed to the rule-oriented nature of the WTO. Any acceptable result for Singapore would have to be a package deal. Underlying the reluctance of some delegations' to engage in negotiation of new disciplines was a concern to safeguard the Uruguay Round achievements, particularly on market access in the TBT and SPS Agreements; environmental concerns should not lead to new market access restrictions. WTO effectiveness in regulating disputes involving these issues should be examined before moving into a new exercise. He said the recommendations in the Report should be non legally-binding. The establishment of the Committee on a permanent basis with a negotiated mandate could be considered as a major achievement for Singapore. Certain issues would be more mature than others by Singapore and two types of recommendations could be envisaged for the Report: for more mature Items (i.e., MEAs and eco-labelling) operational results, and for others, procedural recommendations. Preventing unilateralism was central and MEAs containing trade provisions could be made compatible with WTO disciplines if they followed certain criteria or were negotiated under particular guidelines. Procedural guidelines were linked to either Article XX or Article XXV through a case-by-case approach. The lack of jurisprudence on Article XX might lead to the belief that current provisions were sufficient to cover MEAs, which might not create an adequate framework for the interaction between the WTO and MEAs. He said the far-reaching EC proposal was premature and unwarranted. Brazil was still considering the implications of the New Zealand proposal since even an Understanding could entail risks for the Uruguay Round achievements.

33. The representative of Argentina said the proposals under this Item would assist in the preparation of the Report which should represent part of a balanced package of recommendations. Both proposals contained aspects which deserved precision and could form the basis of further work. Argentina had a flexible attitude on this Item that did not exclude any possible outcome, a position he hoped would be reciprocated when other Items of the work programme were considered. To progress on Item 1, he proposed a methodology consisting of three phases: identification of the problem; identification of possible solutions; and selection of solutions based on their feasibility of being adopted. Based on discussion to date, there was no common vision of the problem. As Canada had stated, it was not clear what the problem was. He asked if the issue was that environmental objectives had not been sufficiently set out in Article XX, or related to the appropriateness of adopting guidelines for future MEA negotiations. A definition of the issues was a crucial step in order to be able to determine appropriate solutions.

34. The representative of Cuba gave preliminary comments on the New Zealand proposal. He supported the necessity of eliminating unilateral measures in trade in general and related to trade and environment in particular. He would also consider favourably the EC proposal. He shared the views expressed by ASEAN, in particular related to preserving an open, non-discriminatory multilateral trading system and contributing to sustainable development by improving market access. Referring to Principal 12 of the Rio Declaration, he rejected the use of measures which were discriminatory and unilateral.

Item 5: The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements

35. The representative of the European Communities recalled the EC statement at the April 1995 meeting that the Committee's task in addressing this Item would be easier if consensus had been achieved on rules regulating the relationship between the WTO and MEAs. Noting that the EC had developed

its position on this issue, he said the DSU should be applied in such a way as to ensure the use of relevant legal and technical environmental expertise in environment-related trade disputes. Environmental expertise was essential to test if environment-related trade measures were necessary and to assess scientific evidence. Members' rights, especially those which were MEA non-parties, to discourage protectionist abuse through the WTO dispute settlement mechanism should be preserved to safeguard against the application of unnecessary restrictions. Disputes related to implementation of an MEA between MEA Parties should be settled in the MEA dispute settlement mechanism. WTO Members which were MEA Parties should not resort to the WTO dispute settlement mechanism to circumvent or impair the obligations they had accepted by becoming MEA Parties. The EC felt efficient dispute settlement mechanisms, including enforcement mechanisms, should be developed in MEAs, particularly those including trade provisions. This would help dispel the risk that if trade disputes arose between Parties resort would be made to the WTO. If a WTO panel was requested to examine a complaint against a trade measure taken pursuant to an MEA it should proceed according to the results of the discussion on Item 1. He recalled the EC proposal under Item 1 that trade measures taken pursuant to specific MEA provisions be granted special treatment. Technical expertise under DSU Article 13 should be requested by a panel judging the legality of a trade measure in an MEA, if necessary in consultation with the relevant MEA secretariat.

36. The representative of Japan said this Item should be further examined after discussion of Item 1 had been concluded. However, Japan's provisional position was that even when parties to a dispute were MEA Parties, their right to WTO dispute settlement procedures should not be denied. Given dispute settlement procedures were contained in both MEAs and the WTO, an examination was required as to which procedures should be used in disputes related to trade measures taken pursuant to MEAs. When one of the parties to the dispute was a non-party to the MEA in question, WTO dispute settlement procedures should be used. In this case, it would be reasonable that an environmental expert participate in the expert review group in the panel process. However, it was not appropriate to make it a rule that one of the panellists be an environmental expert.

37. The representative of the United States said mechanisms by which WTO panels could be informed about relevant MEA provisions related to a dispute should be explored, including the application and interpretation of an MEA or judgements on environmental matters in MEAs. The WTO process would benefit if panels, where appropriate, sought expert advise on environmental, scientific and technical matters in environment-related disputes. It was essential DSU Article 13 procedures operated effectively. To some degree, the DSU suffered in comparison to MEA dispute settlement procedures in terms of public accessibility. Greater opportunities existed in some MEAs for the public to have knowledge of and observe the proceedings.

38. The representative of Chile said most MEAs contained dispute settlement procedures which emphasized the need for conciliation, consultation and cooperation. To date, there had not been a significant number of cases where mandatory dispute settlement procedures had been invoked. In future, environmental legislation might emphasize standards rather than elaborate doctrines for dispute settlement. However, increases in trade would maintain the necessity of resorting to the WTO dispute settlement procedures. In order to avoid conflicts of jurisdictional competence between MEAs and the DSU, it might be necessary to examine the similarities between these two systems. In principle, concepts like notification of measures, prior consultation, conciliation, investigation, mediation, and arbitration were common to both. It was to be expected, however, that the DSU would have greater scope for application than MEA dispute settlement procedures as WTO rules and principles were clear standards which had already been interpreted and allowed for retaliation in the event of non-compliance. He inquired as to what type of trade-related disputes which arose from MEA rules should be submitted to the DSU: all possible disputes including those in which parties had exceeded the standards permitted in the MEA, or only those arising from the application of trade-related environmental standards which interfered with basic WTO provisions; and, could the parties to the dispute include in a panel's terms of reference the trade-related standards of the MEA, and if so would this mean that panels would be interpreting standards contained in another international instrument. Would the Appellate Body then be inhibited, which meant reducing its importance as a body designed to preserve the unity and coherence

of WTO rules. Recourse to arbitration in DSU Article 25 should be considered as the appropriate means of resolving trade and environment disputes. A rapid and flexible arbitration procedure might be an efficient instrument to settle disputes without interfering with the relative spheres of jurisdiction.

39. The representative of Switzerland said this Item was linked to progress under Item 1. Considering trade provisions were included in MEAs as negotiators felt them necessary to achieve the environmental objectives, he said it was not up to the WTO to call into account the need or the appropriateness of such decisions. The WTO dispute settlement mechanisms should focus on trade disputes and be limited to examining the compatibility of such measures in relation to WTO rules. Concerning the participation of environmental experts in resolving trade disputes, he recalled DSU Article 8.1 did not state that the parties to a dispute could nominate such an expert to serve on a special panel, although this would be possible if an expert was well-versed in WTO rules. Also, DSU Article 13 provided that a panel could make use of any expertise it considered necessary. He felt the WTO dispute settlement mechanism provided guarantees that ensured environmental expertise could be included when necessary.

40. The representative of India said the DSU covered the trade issues involved in considering the interface between dispute settlement in MEAs and the WTO. Concerning the EC proposal under Item 1 to extend special treatment to MEAs, this was not contained in the DSU and any limitation of Members' rights should be raised in the DSB. DSU Article 13 covered any additional technical expertise which would be required by a panel.

41. The representative of Norway said this Item was linked to Item 1. She felt disputes between MEA Parties should be settled in the MEA dispute settlement mechanism. To date, binding environmental dispute settlement had not been widely used. Thus, Norway felt further elaboration and strengthening of MEA dispute settlement was important; however, this was not part of the WTO concern. A consensus on third parties was what was needed. The environmental and trade aspects of the dispute should be adequately addressed and required environmental and trade competence. The DSU had general provisions for the inclusion of environmental expertise, but did not ensure environmental expertise would be always part of the panel or called upon in connection with panel proceedings. She referred to Japan's comment against the right of environmental expertise to be included in panels. Environment expertise should always be consulted in WTO dispute settlement proceedings concerning MEA trade provisions. Provision should be made to secure this participation, for example through binding obligations to include such expertise. In this respect, she cited GATS provisions that, for example, provided for financial services experts to be on a panel. Beyond the framework of an MEA, environmental expertise should also be included if a dispute touched on elements relevant to environmental protection.

42. The representative of Singapore, speaking on behalf of the ASEAN countries, questioned the rationale of drawing a linkage between WTO and MEA dispute settlement procedures. MEA obligations should have no bearing on WTO rights and obligations. In accordance with Article 1 of the DSU, that it applied only to disputes brought pursuant to provisions of WTO Agreements, discussion should be limited to trade measures in MEAs which affected WTO rights and obligations. As the Committee had not been mandated to contemplate changes to the DSU to accommodate MEAs, ASEAN could not accept its modification. ASEAN saw merit in the suggestion the WTO dispute settlement process would benefit if panels on environment-related disputes sought expert advice on environmental, scientific and technical matters. The DSU Article 13 provided for this. However, he supported India's comment that it was the panellists' task to judge a dispute and the DSU gave clear guidelines about how they should carry out their work. Panel independence should not be compromised and the DSB should not undertake to resolve environmental issues *per se* nor to interpret MEA provisions.

43. The representative of Japan clarified that, although he did not deny that in some cases a panellist could be an environmental expert, it was not appropriate for it to be a rule that one of the panellists should be an environmental expert.

44. The representative of Korea endorsed the statements of India and ASEAN.

45. The representative of Nigeria said this Item was related to Item 1. Caution should be used in drawing linkages between WTO and MEA obligations. DSU Article 1 was of overriding importance, i.e. the DSU applied only to disputes brought pursuant to WTO provisions. This mandate should not be stretched beyond its agreed legitimate objectives. If environment-related disputes arose, the dispute settlement mechanism would benefit if panels sought the relevant expert advice on environmental, technical and scientific matters as permitted under DSU Article 13. However, panels should seek such views taking into account the diversity of views on environmental matters. He endorsed the statements of India and ASEAN.

46. The representative of the European Communities said the current DSU provisions should be applied in such a way as to ensure the use of relevant legal and technical expertise in environment-related disputes. Members' rights, especially those which were MEA non-parties, to discourage protectionist abuse through the dispute settlement mechanism should be preserved.

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

47. The representative of Canada, introduced his delegation's proposal in WT/CTE/W/21. Eco-labelling could be an important tool for encouraging resource and manufacturing industries to adopt higher standards of environmental protection. Granting eco-labels to environmentally preferable products and services was designed to influence consumer purchasing behaviour and provide opportunities for increased market share. Eco-labelling programmes were valid environmental policy instruments which must be developed and implemented in a manner consistent with fundamental WTO disciplines of non-discrimination and national treatment. He said that many delegations were concerned about the possible introduction of unincorporated (i.e., non-product related) PPMs into the WTO. The best way to handle this concern was to limit the possible cover of unincorporated PPMs to voluntary eco-labelling programmes, i.e., standards. His delegation was not proposing to interpret the definition of technical regulation. Some had argued that unincorporated PPMs-based measures were not consistent with non-discrimination and national treatment obligations of the GATT 1994 and the TBT Agreement. However, while there was no scope for technical regulations based upon unincorporated PPMs, the situation was less clear with respect to standards. He thought that voluntary eco-labelling programmes should not be excluded from TBT coverage only on the basis that the life-cycle approach (LCA) might result in a standard that might or might not fall within the scope of the TBT.

48. From an environmental perspective, LCA was an integral part of eco-labelling programmes. LCA considered the environmental impact at each stage of the product's life, and eco-labelling programme criteria were developed accordingly. Where the greatest impact was at the consumption (i.e., energy or water consumption of home appliances) or final disposal (e.g., batteries, lubricating oil) stage the resulting eco-labelling criteria would be largely product-related and characteristic or performance-based. These criteria were no different from other voluntary standards and should be subject to existing TBT disciplines. Where, however, the LCA indicated that significant environmental impact was at the production stage (e.g., paper products), the resulting eco-labelling criteria could have a strong component of unincorporated PPMs. From a trade perspective, it was important that eco-labelling programmes be subject to disciplines to reduce the potential for protectionist abuse. Referring to principle (d) of the paper, he proposed that the TBT Agreement be interpreted to cover the use of certain standards based on unincorporated PPMs in voluntary eco-labelling programmes, provided these programmes were developed according to multilaterally-agreed guidelines consistent with the basic obligations of the GATT 1994 and of the TBT Agreement. Guidelines such as those under development in the ISO and the Global Eco-labelling Network (GEN) and complementary work carried out by UNEP would reduce the possibility of protectionist abuse and trade discrimination. These guidelines were expected to be more on the level of procedures and methodologies rather than specific benchmarks. This approach thus

acknowledged that specific environmental standards might vary as a function of local environmental absorptive capacities.

49. With respect to the implementation of the guidelines, he said his delegation's analysis was still incomplete. However, he suggested that the basic transparency disciplines of the TBT Agreement and the Code of Good Practice should apply. The use of LCA made it more important for foreign and domestic producers to participate in the development of such standards from the earliest stage and the requirement under the Code of Good Practice for semi-annual publication of the work programme would provide this opportunity. This could reduce the risk that standards reflected unique national production factors or technologies. Furthermore, the requirement to allow sixty days for comments would reinforce the opportunity to provide a final "check" on the draft standard. While respecting the integrity of LCA and thus the possibility for standards based on unincorporated PPMs, the preference should be for performance-based standards as stated in Article 2.8 of the TBT Agreement and Paragraph I of the Code of Good Practice. He believed the work carried out in GEN and ISO was in line with these disciplines. According to the current draft of ISO Guiding Principles and Procedures on Environmental Labelling, such environmental guidelines "shall be capable of demonstrating that products meeting the criteria fulfil the labelling objective of reducing environmental impact; the development and selection of criteria for environmental labels shall be based on scientific methodology; and the establishment of criteria, as well as their review and revisions, should be the result of impartial decisions". He reiterated his proposal that the joint CTE/CTBT should consider interpreting the scope of the TBT Agreement to cover the use of certain standards based on unincorporated PPMs for voluntary eco-labelling programmes and looked forward to continuing discussions of the issue. The comments, concerns and queries of other delegations would assist in the further refinement of his proposal.

50. The representative of Brazil stated that eco-labelling schemes fell under the scope and the disciplines of the TBT agreement. His delegation had traditionally held the position that unincorporated PPMs were not under the scope of the TBT Agreement. However, it recognized that LCA in eco-labelling programmes was based also on unincorporated PPMs, and it had not yet decided whether this was a sufficient reason to interpret the TBT Agreement to accommodate unincorporated PPMs. He supported the conclusions contained in sections (a), (b), and (c) of the Canadian proposal. However, he reserved his position on the ambiguity of the definition of "standard" in the TBT Agreement, as stated in Canada's proposal, since, in his view, it did not leave any room for accommodating unincorporated PPMs. He said that results in this area should not be taken in isolation but were conditioned on an overall understanding of other Items of the work programme.

51. The representative of Argentina said there were risks implied in Canada's proposal to interpret the scope of the TBT Agreement to cover the use of certain standards based on unincorporated PPMs by eco-labelling programmes, provided these standards were developed according to multilaterally agreed guidelines. At present, Members could not agree on whether unincorporated PPMs were covered by the TBT Agreement. Canada's proposal implied that Members would lose the benefit of the doubt and, as other delegations indicated, probably lose the right to challenge under the dispute settlement mechanism. However, the Canadian proposal also had some benefits. It relied on the "equivalency" aspect, the possibility to question unincorporated PPMs when not consistent with internationally agreed guidelines, and the possibility to limit unincorporated PPMs expanding into the rest of the system, particularly into technical regulations. The Canadian proposal would not imply that unincorporated PPMs should not comply with other TBT principles such non-discrimination, national treatment, avoidance of unnecessary obstacles to trade and transparency. Therefore, he looked at it with sympathy.

52. The representative of Nigeria welcomed the presentations of eco-labelling programmes made by delegations in the CTE/CTBT informal meeting. He agreed with principles (a), (b) and (c) outlined in Canada's proposal but not with (d). LCA was an integral part of eco-labelling programmes but, in his view, only segments of the life cycle dealing with product-related characteristics, such as performance, were covered by WTO rules. Unincorporated PPMs were not. WTO rules, such as the TBT Agreement, had been drafted to address specific concerns and should not be stretched beyond those limits. He expressed concerns about the issues contained in paragraphs 3(d) and 16 of Canada's paper.

First, since the TBT Agreement only addressed product-related PPMs, Canada's proposal to accommodate LCA-based eco-labelling programmes in it could be incompatible with basic WTO principles. Second, the issue of multilaterally agreed guidelines needed to be further discussed. He thought the ISO's lack of global representation could have effects on its work. In addition, ISO's work focused more on the promotion of national regulations than on the development of global guidelines. He also recalled concerns about decision-making procedures within ISO. More information was required on the subject. Third, he noted that Canada's proposal to interpret the TBT Agreement to cover the use of certain standards based on unincorporated PPMs had provoked differing reactions and there was need for more dialogue on the issue. Referring to Canada's statement, he asked for an explanation on the possible benefits, and disadvantages, if any, of such an extensive interpretation of the TBT Agreement. His delegation recognized the validity of the need for guidelines, for instance, on the equivalency and mutual recognition of national standards. The Canadian proposal was slightly different since it proposed equivalency of standards and mutual recognition on a case-by-case approach. However, despite their difference, proposals for guidelines on equivalency and mutual recognition of standards on the one hand, and proposals for equivalency and mutual recognition on a product or case-by-case basis on the other, could be reconciled.

53. The representative of the European Communities said the first issue to be addressed before any view could be reached on the adequacy of existing rules or the need for further ones was the extent to which existing rules in fact applied to eco-labelling schemes. With respect to the application of the TBT Agreement to voluntary eco-labelling schemes based on a LCA, such as the EC eco-labelling scheme, he recalled that his delegation at the meeting of the CTE in October, had expressed the view that there were legal uncertainties concerning the full coverage of voluntary eco-labelling schemes based on a LCA under the TBT Agreement. Other delegations at that meeting, in contrast, had argued that the TBT Agreement applied fully to schemes of this type. He thought the Canadian proposal, whilst concluding that the application of the TBT Agreement was not absolutely clear, supported the view that the TBT Agreement applied fully to schemes of this type. The main issue to be considered was whether or not voluntary eco-labelling schemes based on LCA fell within the definition of "standard" in Annex I to the TBT Agreement. The inclusion of the word "related" before "processes and production methods" could, in fact, be interpreted as having the effect of excluding from the scope of the Agreement those rules, guidelines and characteristics which concerned unincorporated PPMs. Document WT/CTE/W/10 confirmed that the intention of negotiators of the TBT Agreement was to exclude from its coverage PPM-based specifications which did not affect the product as such.

54. However, others argued that the labelling requirements concerning unincorporated PPMs were still covered by the TBT Agreement in view of the fact that the second sentence of the definition of "standard" did not specify, as regards terminology, symbols, packaging, marking or labelling requirements, that the process or production methods to which such requirement applied must be "related" to the products. Some delegations had also declared that pursuant to the decision adopted by the TBT Committee that mandatory labelling requirements were subject to TBT provisions regardless of the kind of information provided on the label, by implication voluntary eco-labelling standards should also be subject to all relevant TBT provisions. However, the EC considered that this position resulted from a misconception about the true nature of eco-labelling schemes. Eco-labelling schemes were not merely labelling regulations for standards but a mark of conformity to a series of substantive criteria, each of which had the potential of being a standard or a technical regulation on its own. The Mexican regulation which had prompted the decision of the TBT Committee was a pure labelling requirement and not a mark of conformity to a substantive standard or technical regulation. Accordingly, its only implication was that any requirements concerning the eco-label itself were subject to the TBT Agreement, regardless of their content.

55. It could thus be argued that eco-labelling schemes based on LCA, which by definition included both product-related and unincorporated PPM criteria, were not entirely covered by the TBT Agreement. A partial coverage of eco-labelling schemes based on LCA excluding unincorporated PPMs criteria was possible in theory, if each of the criteria established for a category of products was considered as a separate rule, guideline or characteristic. According to this approach, those criteria which concerned product

characteristics or product-related PPMs would be considered as falling outside the scope of the Agreement. However, a partial coverage would not make sense as an outcome to the discussions on the issue. In the operation of many eco-labelling schemes, including the EC eco-labelling scheme, all the criteria established for a specific category of products - whether related to the product itself or to the PPM used - had to be taken jointly into account when awarding the labels. Furthermore, it would not meet the concerns expressed in the CTE's deliberations on the application of PPM-related criteria to imported products. The EC therefore remained of the view that there was legal uncertainty about the extent to which the TBT Agreement applied to eco-labelling schemes based on LCA. He repeated his delegation's proposals at the October meeting to (i) ensure transparency in the operation of eco-labelling schemes as the first priority; (ii) avoid trade distortions; (iii) allow the continued use of LCA, and (iv) take into account the specific needs of developing countries.

56. The representative of the United States said it was generally accepted that eco-labels not involving unincorporated PPMs were covered by the TBT Agreement. Since most eco-labels were of a voluntary nature, they would be considered to be standards. Delegations who had suggested that eco-labels involving unincorporated PPMs fell outside the scope of the Agreement relied on the first sentence of the definition of standard. However, his delegation believed that, following the second sentence of the definition, eco-labels based on unincorporated PPMs fell under the TBT Agreement. He recalled the Tokyo Round TBT Committee decision on the coverage of the Agreement with respect to labelling that labelling was covered regardless of the content of the label. The WTO TBT Committee had subsequently reaffirmed that Decision. The TBT Agreement provided sufficient flexibility to cover unincorporated PPMs and WTO rules could permit the application of innovative environmental policy tools. It was important to find a common understanding of the relevant applicable rules since it was difficult to discuss the adequacy of disciplines from a trade and environment perspective without an agreed baseline. With respect to the EC statement that eco-labels were not merely labelling regulations for standards but a mark of conformity, he pointed out that the second sentence of the definition of standard in the TBT Agreement covered marking requirements.

57. The discussions in the CTE had so far focused on eco-seals granted by a third party on the basis of life-cycle considerations. However, there were other types of programmes such as manufacturers' claims, report card type labels, and "single issue" eco-labels such as "recyclable". It would be useful for Members to reflect and share views on the implications of various types of eco-labelling programmes and on the considerations that designers and implementers of eco-labelling schemes might take into account; for example, to adequately recognize differing environmental conditions in the home country and other parts of the world, and to accommodate different approaches that produce an equivalent, environmentally beneficial result. He believed that eco-labelling schemes should be designed to ensure they provided sufficient, accurate information to consumers on the relative environmental impacts of competing products. In this respect, the principles of truthfulness, scientific basis and substantiability were particularly relevant; labels should not mislead consumers by making claims that could not be "substantiated".

58. Transparency of eco-labelling programmes was essential in avoiding potential trade difficulties and had important benefits from the environmental perspective since it increased participation by interested parties in such programmes. Therefore, it would be useful for the CTE and TBT Committee to develop a common understanding of how eco-labelling programmes were covered under current WTO disciplines, to identify areas associated with the development of eco-labelling programmes with gaps in existing transparency provisions, and, as appropriate, amplify current WTO transparency requirements. He proposed transparency, with an opportunity for public input, at each critical stage of the programme's development: (i) the establishment or existence of a programme; (ii) the selection of products considered for criteria development; (iii) the development of any life cycle and scientific considerations used to underpin criteria development; (iv) the draft criteria for product groups, whether new or substantially revised; (v) the development of any interpretive or explanatory documentation, including scientific documentation, necessary to understand how the criteria were to be implemented; and (vi) the means by which non-domestic environmental protection practices would be taken into account in determining product eligibility.

59. The TBT Agreement contained specific transparency obligations for both mandatory and voluntary measures (publication, notification and comment period). However, a key question was at what stage an eco-labelling programme was considered by Members to be "draft" and whether that incorporated the six elements identified for eco-labelling programmes. He recalled that according to the Decision taken by the TBT Committee on the timing of notifications, "a notification should be made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account". For instance, in developing eco-labelling programmes based on life-cycle considerations, it would be necessary to define the product subject to an eco-label, perform a life-cycle inventory of the environmental impacts of the product and prepare a draft standard based on that inventory. In fact, once the draft standard had been developed, the opportunity for meaningful input could be significantly narrowed by decisions taken at each of the previous stages. If the first opportunity for comment came only after a draft standard has been prepared it could be impossible to influence the decision on product definition because the standards body would have already made a significant investment in time and resources in the preparation of the life-cycle information. There was no standard methodology for performing life-cycle inventories and thus considerable room existed for honest disagreement on the results. It would be useful for the CTE and CTBT, meeting jointly or separately, to provide and early opportunity for delegations to exchange views as to at what point in the process of development of an eco-label the transparency obligations of the TBT Agreement required that an opportunity be provided for input from all interested parties. If a view arose that critical points in the development of eco-labels might not be covered by such obligations, it might be useful for the Committees to consider whether it would be desirable to clarify or add to existing transparency obligations.

60. The representative of Mexico agreed with points (a), (b) and (c) of Canada's proposal but expressed concern on point (d). She shared the views expressed by Brazil and Australia regarding the issue of unincorporated PPMs, and sought clarifications from Canada on the definition of multilaterally-agreed guidelines on eco-labelling. Canada's proposal to create a kind of derogation for legitimizing the use of unincorporated PPMs in eco-labelling based on multilaterally-agreed criteria, was parallel to the proposals made under item 1 of the CTE's agenda. One of the criteria proposed in the context of MEAs was that trade measures be contained in agreements representing multilateral consensus. Chile had pointed out that it had a label based on standards based on MEA-agreed objectives. She asked for clarifications as to whether Canada was considering something similar or, if not, what type of standardizing body representing multilateral consensus would be the one referred to in the Canadian proposal. ISO was basically a non-governmental forum, where decisions were not taken by consensus and doubts remained regarding the multilateral representation of this organization due to limited representation of developing countries' interests. While ISO standards were recognized in the TBT Agreement as international standards, technical standards were different from environmental standards, particularly when based on unincorporated PPMs. Technical standards could be more easily multilaterally-agreed since they were based on quality, durability or performance of products. On the contrary, environmental standards, particularly those based on unincorporated PPMs, were founded on values and judgements which could vary even within a country. Therefore, she considered it difficult to agree on multilateral environmental standards on unincorporated PPMs. Rather than harmonization or multilateralization of standards, she suggested that the Committees focus on the question of equivalence of standards and the possible development of guidelines to ensure mutual recognition for countries having eco-labelling systems, and equivalence of standards for countries not having eco-labelling programmes.

61. The representative of Hong Kong, noted that, according to Canada's analysis, eco-labelling schemes, whether mandatory or voluntary, fell within the scope of the TBT Agreement to the extent they were based on requirements related to product characteristics or related PPMs. However, he recognized that the trend of eco-labelling schemes was to use LCA with the result that eco-labelling schemes would not be fully covered by the TBT Agreement due to the inclusion of non-product related PPM requirements. According to WT/CTE/W/10, the intent of the negotiators of the TBT Agreement was clearly to exclude unincorporated PPMs from the coverage of the Agreement. From the WTO perspective, the proposal to extend the coverage of the TBT Agreement to unincorporated PPMs could

lead to a differential treatment for imports of like products based on non-product related criteria. The subject needed careful examination. He recalled that pursuant to principle 12 of the Rio Declaration "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided" and stated that unilateralism and extra-territoriality were incompatible with the multilateral system.

62. The representative of Switzerland recalled his delegation's preference to use the term voluntary labels rather than eco-labelling, since voluntary labels were not only limited to environmental issues but could be used as a means to achieve other common interests. In his delegation's view, the TBT Agreement and the Code of Good Practice covered voluntary labels based on product characteristics or product-related PPMs through the definition of "standard" and "conformity assessment procedures" in Annex 1. Standards were documents with which compliance was voluntary and dealt particularly with labelling requirements. Conformity assessment procedures included all types of conformity assessment procedures required by voluntary labelling measures. Therefore, voluntary labels based on product characteristics or product-related PPMs were subject to the transparency disciplines of the TBT Agreement and the Code of Good Practice. Voluntary labels should be notified according to the rules of the Code of Good Practice and should also respect the basic TBT principles of national treatment, avoidance of unnecessary obstacles to trade and promotion of the use of existing international standards. The principles of Articles 5, 7 and 8 of the TBT Agreement should apply to conformity assessment procedures. With respect to voluntary labels based on unincorporated PPMs, he noted that most voluntary labelling integrated unincorporated PPMs through LCA. However, the question of the coverage of PPMs by the TBT Agreement still represented a very sensitive issue and he was concerned that an extensive interpretation of the notion of standard to include, for voluntary labels, unincorporated PPMs could create precedents that could have an impact on the trading system. Furthermore, since the second sentence of the definitions of "standard" and of "technical regulation" was identical, any interpretation of the definition of standards could affect the interpretation of the definition of a regulation. The issue needed to be further discussed.

63. The representative of Korea said that voluntary eco-labelling programmes often included criteria based on unincorporated PPMs. As a result, these programmes could have discriminatory trade effects by limiting the market access of foreign suppliers, in particular small and medium enterprises. His delegation had carefully studied ways to address them. He believed that the TBT Agreement as well as other WTO Agreements accommodated only product and product-related PPMs. As indicated by the negotiating history of the TBT Agreement, the definitions in Annex 3 did not cover technical regulations and standards based on unincorporated PPMs. He believed that even if voluntary eco-labelling programmes based on unincorporated PPMs were developed according to multilaterally agreed guidelines, such programmes could hardly be covered by the Code of Good Practice of the TBT Agreement for three reasons. First, if eco-labelling schemes were covered by WTO rules the effects of extra-territoriality needed be addressed. In particular, Korea had difficulties with the argument stated in Canada's paper that it was excessive to suggest that eco-labelling programmes should not be viewed as compatible with the WTO simply because one of their essential tools, the LCA, used some components that might or might not fall within the scope of the TBT Agreement. It was hardly reasonable to attempt to conclude that TBT disciplines were applicable to eco-labelling programmes simply because unincorporated PPMs were only one component of LCA without giving due regard to extraterritoriality. In his view, unincorporated PPMs were a critical component in reviewing the compatibility of eco-labelling programmes with the TBT Agreement.

64. Second, eco-labelling programmes were considered to be unilateral measures for domestic environmental policy. Mandatory unilateral measures based on unincorporated PPMs were apparently outside WTO rules. The voluntary nature of eco-labelling was precisely the reason why efforts were made to explore the possibility of accommodating the criteria of unincorporated PPMs in WTO rules. However, Canada's proposal was not clear on this aspect and seemed to suggest that the mandatory eco-labelling based on unincorporated PPMs also fell within the scope of WTO rules. Third, Canada's proposal to consider ISO 14000 standards as appropriate multilaterally-agreed guidelines raised questions about the ISO as a "recognizable body", transparency of ISO meetings, representation of the interests of

small and medium enterprises in developing countries and the trade impact of eco-labelling schemes. He said that the WTO rules accommodated eco-labelling programmes inadequately, despite their potential trade effects. The discriminatory effects of eco-labelling programmes arose when programmes adopted criteria which were more favourable to domestic producers and inappropriate to foreign producers. Such forms of discrimination could be countered by strengthening the prior consultation mechanism and introducing a sophisticated safeguard mechanism to eliminate any extra-territorial criteria. Another way to prevent discriminatory eco-labelling programmes was to further develop the concepts of equivalence and mutual recognition. As existing WTO disciplines lacked those concepts, he suggested guidelines be developed to grant equivalence of each criterion and mutual recognition of eco-labelling programmes, taking into account the experience of other relevant organizations.

65. The representative of Singapore, speaking on behalf of the ASEAN countries, wished to reflect on the principles contained in paragraphs (a), (b) and (c) of the Canadian proposal and expressed strong reservation on paragraph (d). He shared Hong Kong's concern related to the concept of unincorporated PPMs in eco-labelling schemes and the views expressed by Mexico and Korea on the ISO's appropriateness as a negotiating forum for standards related to these schemes. ASEAN opposed any attempt to include any reference to unincorporated PPMs in the discussion of this issue. Thus, it did not favour any interpretation or extension of the scope of the TBT Agreement to cover the use of criteria based on unincorporated PPMs for three reasons. The acceptance of the concepts of PPMs and PPM-based criteria would have the effect of endorsing the extrajurisdictional application of domestic environmental laws, thus encouraging the imposition of one Member's domestic environmental norms and standards on other Members. In addition, the use of criteria based on unincorporated PPMs would have discriminatory effects on market access leading to protectionist abuses of these criteria. Finally, ASEAN believed that unincorporated PPMs concept violated Articles I and III of the GATT. ASEAN recognized the potential role for mutual recognition and equivalence in increasing transparency and alleviating discriminatory trade effects of eco-labelling schemes and encouraged the CTE to continue to elaborate ways to complement the TBT Agreement with these principles. ASEAN also pointed out that eco-labelling schemes imposed a burden on developing countries and that this should be taken into account in their elaboration.

66. The representative of Japan noted that eco-labelling schemes, if applied in a non-transparent and arbitrary manner, could cause discriminatory effects on imports. Even if transparent and not implemented arbitrarily, these schemes could still have trade impacts if they reflected environmental conditions or ecological preferences peculiar to an importing country and included PPMs standards that might discriminate between imports. Therefore, it was imperative that bodies implementing eco-labelling schemes set the scientifically-based standards and considered ways to promote mutual recognition of eco-labelling. Furthermore, for transparency purposes it was important that the implementation or the modification of eco-labelling schemes be notified *ex ante* by governments or that access to the relevant information be provided to interested countries or organizations. Referring to the Canadian proposal, he said that even if the TBT Agreement was extended to cover eco-labelling schemes, some issues remained to be addressed. First, the problem of justifying eco-labelling schemes based on unincorporated PPMs under WTO rules. Second, the question of eco-labelling programmes developed by unrecognized non-governmental organizations. Third, simple labelling requirements prescribing the re-collection of products fell outside the coverage of the TBT Agreement. Finally, with respect to eco-labelling programmes implemented by local or non-governmental bodies, it was necessary to consider whether notification on conformity assessment procedures would be appropriate.

67. The representative of Norway said that eco-labelling was a high-priority area for her Government. Eco-labelling based on LCA would play an important role in future efforts to combat environmental problems. She was aware that a high degree of transparency was required in eco-labelling schemes to avoid them becoming an unwarranted trade restriction. However, she noted that the very nature of eco-labelling was to change production and consumption patterns, and, implicitly, trading patterns towards a more sustainable direction. With respect to the issue of coverage of eco-labelling by the TBT Agreement, she stated that the Agreement covered both mandatory and voluntary measures, whether governmental or non-governmental, and that eco-labelling criteria of non-governmental schemes based

on unincorporated PPMs did not fall under the TBT Agreement nor under GATT 1994. She suggested that the preparation of a code of conduct on voluntary eco-labelling schemes, on the model of the TBT Code of Good Practice, would be more practical than interpreting the scope of the TBT Agreement to cover the use of standards based on unincorporated PPMs. The code could include notification procedures, the right for interested Members to comment, with a special mention of the accommodation of foreign suppliers, and should take into account the specific needs of developing countries. However, even if transparency of eco-labelling schemes was ensured, foreign producers or suppliers would have to take into account the risk of not getting the eco-label. Referring to the Canadian proposal, she said that it was premature to decide whether the ISO 14000 standard series could be used as a reference for the development of multilaterally-agreed guidelines since the contents of these guidelines was yet known. However, the concerns of many Members on eco-labelling could be met by following the TBT transparency provisions. Finally, she suggested that some delegations or the WTO Secretariat draw up the main elements of a draft code of good conduct on eco-labelling to assist further discussions on the issue.

68. The representative of Australia said the basic principles of the TBT Agreement of non-discrimination, avoidance of unnecessary obstacles to trade, promotion of the use of international standards where appropriate, equivalence, mutual recognition, and transparency deserved consideration in examining eco-labelling schemes. In particular, the transparency and procedural requirements of the TBT Code of Good Practice - publication and notification of work programmes by standardizing bodies, sixty days comment period on draft standards, and prompt publication of adopted standards - could provide a good basis to address some of the concerns raised about eco-labelling schemes and contribute to their effectiveness. These requirements could play a useful role in maintaining public confidence in the integrity of schemes complying with them. He believed it was useful to develop a set of multilateral guidelines or disciplines on means to ensure that the legitimate interests of exporters in other countries be taken into account and provide them with the opportunity to influence the development of eco-labelling schemes. In fact, the criteria used in one country's eco-labelling scheme could be inappropriate for the environmental and developmental needs of other countries. The transparency and procedural requirements and other aspects of the TBT Agreement could assist in addressing this issue. In this respect, he asked for clarification of the meaning of the principles of non-discrimination and avoidance of unnecessary obstacles to trade for eco-labelling schemes involving LCA. He recalled that the TBT Agreement, already in its preamble, recognized that developing countries might encounter special difficulties in the formulation of technical regulations, standards and conformity assessment and emphasized the need to assist them in their endeavours in this regard. If eco-labelling schemes were to genuinely make a contribution to global sustainable development, the particular concerns of developing countries needed to be fully taken into account. Moreover, the TBT Agreement's encouragement to develop and adopt international standards was an important pointer to the need for international cooperation to ensure that eco-labelling schemes realized their potential to contribute to the promotion of sustainable development. The active participation of relevant bodies in all countries was thus necessary.

69. The representative of Egypt, referring to Canada's paper, said her delegation did not agree with any proposal on the standardization of eco-labelling or introduction of PPMs into WTO rules. The question of whether the TBT Agreement already included unincorporated PPMs was still open and the Canadian paper itself cast doubts on this issue. With regard to the proposal on multilaterally-agreed guidelines and the reference to ISO guidelines, she questioned ISO's representation of international consensus and decision making. It was not the appropriate body to deal with environmental standards. Unlike technical regulations, environmental standards were not based on criteria such as performance, durability and quality. Environmental standards included PPMs and were exposed to pressure groups. Therefore, it would be difficult to attempt to internationalize environmental standards based on PPMs since PPMs were based on values which differed from one society to another. On the other hand, she did not oppose product-related environmental standards, such as disposal and handling. She favoured disciplines on eco-labelling schemes based on equivalence and mutual recognition, where each country could set its own standards according to its own values as stipulated by Agenda 21. Aiming at the harmonization or internationalization of PPMs on the basis of any set of multilateral guidelines practically

contradicted rules unanimously agreed by the international community. She believed it useful to start investigating the concepts of equivalence and mutual recognition with the assistance of other organizations and perhaps consider an appropriate forum to negotiate guidelines on equivalency and mutual recognition. She said that the enhancement of transparency in the preparation and application of eco-labelling, through notification and comment requirements similar to those in the TBT Agreement, was necessary to prevent eco-labelling schemes from being unilateral and extraterritorial.

70. The representative of India said that labelling requirements placed a disproportionate burden on the trade of developing countries; thus his delegation attached great importance to the issue of eco-labelling. He said that PPMs were excluded from the coverage of the Tokyo Round TBT Agreement. The Uruguay Round TBT Agreement clearly covered product-related PPMs. However, in his view no provisions could be found which extended the scope of the Agreement to cover unincorporated PPMs. PPM standards could not be justified under Article XX of GATT 1994 as legitimate trade measures. These issues raised the subject of extra-territoriality, questioning the sovereign right of countries, as recognized by the Rio Declaration, to decide on their environmental quality in their own jurisdictions. Technical standards were completely different from environmental standards. In fact, while there was no role for PPMs in technical standards, environmental standards had to respond to social pressures. Therefore, while ISO had a role to play in the field of technical standards, its role in the field of environmental standards remained to be defined. Since in the TBT Agreement there were no provisions extending coverage to unincorporated PPMs, the only presumption should be that these were not included in the Agreement. However, even if they were included, the purpose they would serve was not clear. It would have to be clearly specified how the objective of environmental protection was served as no relevant information would be forthcoming to consumers to make real environmental choices. Further, such PPMs would lock producers into choices of technology for specified periods of time hindering technological innovation and competitiveness.

71. With respect to the Canadian proposal to include in the TBT Agreement only unincorporated PPMs based on multilaterally agreed guidelines, there were no multilateral institutions developing universally-agreed environmental standards. ISO was not yet the right forum. However, even if Members agreed to any such international organization there was no role for harmonization since environmental standards were based on values which differed between countries, and if only guidelines were to be formulated they would be so general as to have little value. He believed that it was not enough to seek equivalence of standards on a case-by-case approach, subject to mutual recognition. Countries having their own eco-labelling programmes would have to set standards based on their own environmental values and priorities and it would be unfair to expect other standards to conform to these. Finally, he stressed the need for greater transparency of eco-labelling schemes on the basis of existing TBT provisions of non-discrimination and avoidance of unnecessary obstacles to trade. He reiterated that while labelling regulations were mandatory, it would be difficult to impose mandatory compliance provisions on standards since compliance with labelling standards was voluntary under the TBT Agreement.

72. The representative of the European Communities said that there were two alternative approaches that the CTE could follow in addressing the issue of voluntary eco-labelling schemes based on LCA. The first option was to seek their full coverage under the TBT Agreement. The second was to negotiate *ad hoc* instruments, i.e. a code of conduct on eco-labelling. Both approaches had advantages and disadvantages and deserved full consideration. The advantage of the first approach, which was similar to the Canadian proposal, was its simplicity since transparency provisions were already operating under the TBT Agreement. The second option could in some respects solve the problem of the remaining legal uncertainty of the applicability of the TBT Agreement to eco-labelling schemes based on LCA. A code of conduct could introduce additional transparency provisions to those existing in the TBT Agreement. This option would then effectively address the concerns expressed by some delegations about the use of unincorporated PPMs in areas other than eco-labelling. The TBT transparency requirements contained in Annex 3 constituted a good reference for the preparation of a code of conduct.

73. The representative of the United States stated that eco-labelling was currently covered by the provisions of the TBT Agreement so that option two envisaged by the EC served no purpose. However, he sought clarification of whether the preparation of a code on eco-labelling would involve it being excluded from the coverage of the TBT Agreement or it being subject to two different regimes depending on whether it contained PPM elements. He said it was difficult for a country preparing an eco-label to assess whether it would contain PPM elements and, if two regimes were to apply, there would be confusion on the obligations to follow from the development stage. He wondered whether a standard, including both covered and non-covered areas, would fall under the scope of the TBT Agreement. This was an important issue which deserved the Committee's attention.

74. The representative of Canada noted that a large number of delegations had agreed with principles (a), (b) and (c) of his proposal. He said that the reactions provoked by principle (d) reflected the discussions in his own country. The EC suggestion of a code of conduct on eco-labelling was attractive. However, he considered the preferable approach was to recognize explicitly that eco-labelling programmes were fully covered by the TBT Agreement. This approach would have, in fact, the advantage of providing clear disciplines on the use of unincorporated PPMs and solved the problem of the ambiguity of the definition of "standard". He welcomed the presentation by ISO and suggested that ISO give at a future CTE meeting a detailed presentation of ISO draft Guidelines and Principles and on ISO 14000. He proposed that further discussions on the issue be held, formally or informally, in joint sessions of the CTE and the CTBT.

75. The observer from the International Organization for Standardization said the ISO was a technical, non-governmental organization comprising national standards bodies from 118 countries. In developed countries, the national standards institute members of ISO were mostly recognized private organizations. In most developing countries the ISO member bodies were governmental agencies or departments. The technical work of ISO was carried out in a hierarchy of approximately 3000 technical committees, sub-committees and working groups. ISO's work resulted in international agreements which were published as International Standards. All these standards were international, voluntary, and developed by consensus. The decision making process ensured industry-wide access for all interested parties. Although ISO standards were voluntary, they were developed in response to market demand and were widely used. ISO had published some 400 environmental standards, mainly relating to testing and measuring the levels of air, soil, water and noise pollution. He stated that at the international level, the voluntary standardization process was essentially coordinated under the auspices of three apex organizations, the International Electrotechnical Commission (IEC), covering the electrotechnical field, the International Telecommunications Union (ITU), covering the field of telecommunications, and ISO which covered all other subjects of voluntary standardization.

Item 9: The work programme envisaged in the Decision on Trade in Services

76. The representative of the European Communities recalled the mandate under this Item and reiterated his delegation's statement at the June 1995 meeting. The EC had based its consideration of how the issues under Item 9 could be addressed on whether it was determined by the stocktaking exercise to be a priority issue. The result was that this Item had not been considered to be a priority. Nevertheless, the Committee had to fulfil the mandate of clarifying whether there was a need to provide for more than what was contained in GATS Article XIV(b). Until analytical evidence demonstrated the need for an analysis on the issue separate from that being developed on GATT Article XX, discussion should be limited to analysing the need to modify GATS Article XIV in light of parallel work on Article XX. He outlined three possible scenarios for the Report: (i) no result was achieved on Item 1. In this case it would be difficult to imagine positive recommendations on GATS Article XIV; (ii) results were achieved on Article XX, but no parallel recommendations figured in the Report because the Committee needed further analytical work; or (iii) results were achieved on Article XX and parallel recommendations were made in the Report. It would not be difficult to include results of the work on Item 1 in the recommendations on Item 9. However the lack of analytical work rendered difficult this semi-automatic link. If it was necessary to further study this issue in the post-Singapore process, then sectoral studies could be conducted in order to identify the environmental impact trade in certain services

might have, complementing other international fora's work (e.g. the environmental effects of liberalization of transport in goods), and the impact that certain environmental legislation might have on trade liberalization (e.g. conditions applicable to service suppliers in the field of waste management or in the supply of environmental services).

77. The representative of the United States said this Item was not as well developed as others as the GATS was a new agreement, which was still evolving. The GATS included concepts which the GATT did not. This Item would need to be examined in light of these differences. It could not be assumed that conclusions reached on goods would automatically apply to services. Improved market access for environment services and technology was a win-win situation, which overlapped with Item 6.

Item 7: The issue of exports of domestically prohibited goods

78. The representative of Nigeria recalled his proposal which had been tabled by Egypt, on behalf of the African Group, for a framework on draft rules on domestically prohibited goods (DPGs). The African Group was working on a revised draft proposal, taking into account delegations' comments. He requested the Secretariat to assist, in cooperation with relevant organizations and interested delegations, in determining product scope and coverage to better identify the gaps to be covered by possible DPG rules.

79. The representative of Singapore, speaking on behalf of the ASEAN countries, supported multilateral disciplines on DPGs. He recalled Nigeria had clearly stated that any DPG disciplines should build on previous GATT work in this area and that they should be WTO-consistent, non-discriminatory, least trade-restrictive and primarily aimed at increasing transparency without leading to extraterritorial application of national measures and cover the export of products banned or severely restricted in domestic markets. ASEAN supported the African Group's proposal on the basis of these four elements, in the hope that a consensus decision on this Item could be adopted at Singapore. However, duplication with other organizations should be avoided; product coverage in related MEAs should be examined; and coverage gaps should be identified. Work to identify gaps should also use the expertise in UNCTAD and other fora and build on previous GATT work, starting with the 1991 draft Decision. A Decision should contain maximum transparency provisions, including publication and notification obligations and a prior informed consent element. ASEAN supported Nigeria's proposal that exporting countries should establish enquiry points to provide on request information on notified products. In this regard, discussion under Item 4 was relevant. The Decision's provisions should not condone or lead to any unnecessary trade restrictions. Given the wide membership of the WTO, ASEAN felt it was the appropriate forum to deal with the DPG issue. He agreed with India's comment at the June 1995 meeting that each country should assume full responsibility for decisions regarding its imports, but this involved cooperative action by the exporting country.

80. It was agreed the Secretariat would assist delegations on this Item.