END NOTES

1. The EMIT group was created by the GATT Council in 1971 but was inactive until November 1991 when it was Chaired by the then Ambassador of Japan Ukawa. Once reactivated, the EMIT group was not a negotiating forum and had an agenda limited to three issues:

i) trade provisions contained in existing multilateral environmental agreements vis-à-vis GATT principles and provisions;
ii) multilateral transparency of national environmental regulations likely to have trade effects; and,
iii) trade effects of new packaging and labelling requirements aimed at protecting the environment.

Notwithstanding the limited mandate, the EMIT group provided for the initial discussion of these "core" trade and environment issues that allowed for a more detailed elaboration of issues at Marrakesh and a Committee on Trade and Environment mandate that did not exclude negotiations on possible rule changes or modifications.

2. Ironically, the negotiations and preparations within NAFTA had limited crossover to policy deliberations in the WTO.

3. Particularly helpful was the clarification by the Appellate Body report of the criteria of the general exceptions (Article XX), particularly Article XX (g), as well as the discipline of the chapeau. The report made clear that the "necessity" test was limited to Article XX (b) in contrast to the less stringent test of "primarily directed at" test of Article XX (g). The report also made clear that a strict "effectiveness" test was inappropriate in the context of measures with long-term goals.

4. See WT/CTE/M/11 paragraph 52

5. Montreal Protocol, CITES and Basel Convention. NAFTA Article 104 only applies to the Basel Convention in the case of any dispute between Canada and Mexico, given that the USA has not ratified Basel.

6. Pending an agreed upon list or definition of hazardous materials, this meant that many materials such as scrap metals destined for recycling facilities in developing countries would be banned. From a WTO point of view, the distinction between OECD and non-OECD countries constitutes arbitrary discrimination.

7. Ironically, while there was interdepartmental agreement to drop the waiver in favour of guidelines, there was not explicit recognition that this would be in the context of Article XX. However, the point is somewhat academic given that the use of a guidelines approach would provide the guidelines under which an Article XX exception could be invoked.

8. While the advocates of the waiver approach noted that dispute settlement would still be available under a waiver as a "non-violation" case, in practice this would be meaningless given that any such waiver would have to be so explicit that non-violation would be virtually impossible to prove.

9. See Annex B.

10. This was in the context of lack of consensus on the definition of specific and non-specific measures.

11. The underlying trade-off in the MEA issue is between an accommodation for MEAs and a prohibition against unilateral measures (primarily by the USA). Again here as elsewhere, there was not enough on the negotiating table in terms of possible accommodation to allow for this trade-off to be put into play.