

**MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAs):  
IMPLEMENTATION OF THE DOHA DEVELOPMENT AGENDA**

Submission by Switzerland

Paragraph 31(i)

**I. INTRODUCTION**

1. Switzerland believes that the multilateral trading system has a key role to play in the achievement of global sustainable development. In the framework of multilateral environmental agreements (MEAs), the use of trade measures can, in certain circumstances, enable environmental objectives to be achieved. The relationship between WTO rules and principles and MEA trade provisions is one of the core issues of the debate on trade and the environment. Clarifying the relationship between WTO rules and MEAs would provide greater legal security, make both systems more efficient and enable the necessary links to be established between the legal provisions governing international trade and the environment. It is for this reason that this issue has been formulated as a negotiating mandate in paragraph 31 (i) of the Doha Declaration, which provides that:

*" With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:*

*(i) the relationship between existing WTO rules and **specific trade obligations** set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules **as among parties to the MEA** in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question."*

2. Switzerland considers that the terms used in the Doha Declaration need to be clarified (part II). Moreover, there is also a need to examine the principles governing the relationship between WTO rules and specific trade obligations in MEAs (part III) in order to reach a consensus on that relationship (part IV). In this respect, Switzerland supports the submission by the European Communities (TN/TE/W/1).

**II. CLARIFICATION OF THE TERMS IN THE DOHA DECLARATION**

A. "SPECIFIC TRADE OBLIGATIONS"

3. Trade obligations under MEAs can cover a wide spectrum of possibilities, ranging from trade bans to notification procedures or labelling requirements. According to the European Communities (TN/TE/W/1), four categories of measures arise from trade obligations: (1) *mandatory trade measures explicitly provided for under MEAs*: this is the case of CITES, whereby trade in some species

threatened with extinction which are or may be affected by trade can only be permitted in exceptional circumstances; this is also the case of the Cartagena Protocol on Biosafety as regards the obligatory advanced informed agreement procedure for the first shipment of living modified organisms; (2) *trade measures not explicitly provided for nor mandatory under the MEA, but consequential of the "obligation of result" of the MEA*: MEAs identify a list of potential measures for implementation; (3) *trade measures not identified in nor mandatory under the MEA, but consequential of the "obligation of result"*: the MEAs do not list measures; (4) *trade measures not identified in nor mandatory under the MEA, but which parties can decide to implement*: this is the case of the Montreal Protocol (Article 2.11).

4. Switzerland feels that there is a need to define the different categories of specific trade obligations set out (or explicitly provided for) in MEAs. This requires a detailed analysis of these categories to establish the distinction between specific trade obligations and non-specific trade obligations. Moreover, Switzerland believes that it is also important to determine under what conditions specific trade obligations are automatically in conformity with WTO rules. This is particularly significant since the implementation of specific trade obligations may not be consistent with WTO rules.

B. "AMONG PARTIES TO THE MEA IN QUESTION"

5. As the European Communities recalled in its submission (TN/TE/W/1), any specific trade obligation in an MEA is negotiated and agreed by consensus in a multilateral context and challenges between Parties are, therefore, highly unlikely. Accordingly, if parties have agreed specific trade obligations, they should have no reason to challenge them afterwards. However, were such a case to arise, the Parties involved should endeavour to solve the issue through the MEA dispute settlement mechanism. The measures taken by a WTO Member to implement the specific trade obligations under an MEA should, in such a case, be recognized as legitimate by the WTO; and yet their concrete implementation might still be challenged if a Member has used its discretion in a manner which infringes WTO obligations.

6. The notion of "among parties to the MEA" raises another issue: sometimes both parties to a dispute have acceded to an MEA, but one has not subscribed to all of the annexes or amendments, as is possible with the Montreal Protocol. Would this Member be considered a party to the MEA in question and, as such, affected by the applicability of existing WTO rules? Does the dispute qualify as "among parties to the MEA"? Or, is it, rather an MEA - non-MEA relationship? Switzerland believes that there is a particular need to clarify whether "among parties to the MEA" means that both parties which have acceded to an MEA must be parties to the MEA and its annexes in exactly the same way or whether it is enough that they should be parties to a framework convention without taking the annexes into consideration. This would involve specifying whether or not the party to the MEA in question which has not subscribed to the specific annexes could be affected by the applicability of WTO rules in the same way as an MEA party which has subscribed to the annexes.

**III. PRINCIPLES GOVERNING THE RELATIONSHIP BETWEEN WTO RULES AND SPECIFIC TRADE OBLIGATIONS IN MEAs**

7. In accordance with its submissions in documents WT/CTE/W/139 and WT/CTE/W/168, Switzerland maintains that the relationship between WTO rules and specific trade obligations in MEAs is governed by the approach based on the general principles of no hierarchy, mutual supportiveness and deference. In focusing on their own tasks and competencies, the multilateral trading system and environmental regime are mutually supportive. In order to maintain this mutual supportiveness, each should remain responsible and competent for the issues falling within its primary area of competence. WTO Members, when negotiating an MEA, therefore make sure that trade measures are not included in the MEA if they are unnecessary, arbitrary, protectionist or unjustifiably

discriminatory. It is for this reason that determination of whether specific measures constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade should clearly fall within the competence of the WTO. Moreover, it is in the competence of the MEAs to determine the legitimacy of environmental measures and the necessity and proportionality of trade measures taken under an MEA, insofar as the MEA expressly provides for such verification.

8. The fact that the WTO and MEAs should each focus on their primary competence does not mean, however, that the WTO cannot adopt principles and rules that affect the environment. At the same time, MEAs are not, and should not be prevented from adopting rules and principles that affect trade. Rules and principles on international trade may indeed affect the environment; similarly, environmental regulations may have an impact on trade. Thus, if the international community indicates in an MEA that implementation of a trade measure is necessary in order to achieve an environmental goal, such a measure must also be deemed to be necessary within the WTO context (principle of the presumption of WTO conformity: the trade measures provided for in an MEA are presumed to be necessary to protect the environment). Moreover, on account of the principle of the presumption of WTO conformity, when a Member, pursuant to an MEA, prohibits the sale of a product for environmental reasons, this ban would be considered to be WTO compatible and the Member would no longer have to show that its measure was covered by the exceptions of Article XX(b) or (g) of the GATT 1994, namely that it is necessary to protect the environment and neither arbitrarily discriminatory nor protectionist. Therefore, while each regime should focus on its primary competence, it is not prevented from adopting measures which affect the other regime. In so doing, the concerns and interests of the other regime should be taken into account and deference paid to its competence.

#### **IV. OPTIONS FOR REGULATING THE RELATIONSHIP BETWEEN WTO RULES AND SPECIFIC TRADE OBLIGATIONS IN MEAs**

9. In accordance with the Note by the WTO Secretariat (TN/TE/S/1), several approaches were proposed prior to the Doha Ministerial Conference for clarifying the relationship between the rules and provisions of the WTO system and those of MEAs which were most likely to prove incompatible: (A) leave the issue to be settled by the dispute settlement mechanism; (B) amend Article XX of the GATT 1994 by introducing a reference to the environment; (C) adopt an interpretative decision. These three options, then, can provide appropriate means of clarifying the relationship between WTO rules and MEAs.

##### **A. DISPUTE SETTLEMENT MECHANISM**

10. The first proposed solution is to let this issue be settled in a specific case by a Panel or by the Appellate Body in a dispute settlement proceeding. It is sometimes said that, although WTO Members have not been able to clarify this relationship, the Appellate Body has done so in its decision on the Shrimp-Turtle case. In any case, this decision clarified the order in which recourse could be made to the exceptions under Article XX of the GATT 1994: the Appellate Body began by assessing whether one of the exceptions in Article XX(a) to (j) of the GATT 1994 could be cited, and then went on to assess whether such a measure generally met the requirement in the introductory clause of Article XX of the GATT 1994, namely whether the measure was arbitrarily discriminatory or protectionist. Moreover, this decision clarified the term “exhaustible natural resources” in Article XX(g) of the GATT 1994 and held that, according to that Article, living natural resources, such as turtles, could be “exhaustible natural resources”.

11. In Switzerland's view, however, the Shrimp-Turtle decision did not deal with the question of the relationship between WTO rules and MEAs; it merely clarified the conditions to be met by national environmental trade measures. In fact, WTO Appellate Body decisions are unable to

establish a definite clarification of the relationship between the WTO and MEAs. This Appellate Body decision merely determines the legal situation of a specific case in relation to two WTO Members, but does not constitute a general rule for the relationship between the WTO and MEAs. Thus, the Appellate Body may amend its case law in a new ruling by not necessarily following previous ones.

**B. REFERENCE TO THE ENVIRONMENT IN ARTICLE XX**

12. The second solution proposed is the adoption of an environmental clause which would explicitly define the relationship between WTO rules and MEAs. Such a clause would enable the principles governing the coexistence of the two systems, namely the trade and environmental systems, to be defined. Introducing an environmental clause would mean reviewing Article XX of the GATT 1994, and more particularly, amending Article XX(b) and (g) of the GATT 1994, and inserting a new provision in that Article.

13. Switzerland believes that a review of Article XX of the GATT 1994 would reopen the debate on that Article at the risk of having to reconsider the whole Article; and while such an approach does not seem to meet with the favour of WTO Members at this stage, Switzerland does not oppose it.

**C. INTERPRETATIVE DECISION**

14. Adoption of an interpretative decision by WTO Members to settle the issue of the relationship between WTO rules and specific trade obligations in MEAs is the third proposed solution. An interpretative decision would be able to indicate clearly that the relationship between the trade and environmental systems is governed by the general principles of no hierarchy, mutual supportiveness and deference.

15. Switzerland is of the opinion that the relationship between the WTO and MEAs is a fundamental issue which WTO Members must resolve themselves through an interpretative decision rather than requiring the Appellate Body to do so. Moreover, an interpretative decision neither adds to or diminishes the rights and obligations of Members, but simply clarifies the texts. Finally, this approach would also underscore the WTO's commitment to taking environmental needs into consideration.

**V. CONCLUDING REMARKS**

16. In view of the foregoing, Switzerland is of the view that the first option, namely to let this issue be settled as a specific case by a panel or by the Appellate Body in the framework of a dispute settlement proceeding, cannot constitute a solution given that under the Doha Declaration, WTO Members agreed to hold negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs. In so doing, they underscored their determination to find a solution to this issue and not to leave it to dispute settlement bodies. Nor, as far as Switzerland is concerned, does the second option, namely revising Article XX of the GATT 1994, constitute a solution either, given that the Doha Declaration requires that the negotiations carried out under paragraph 31(i) should be compatible with the open and non-discriminatory nature of the multilateral trading system and should not add to or diminish the rights and obligations of Members under existing WTO Agreements. Thus, Switzerland believes that the only possible solution is to adopt an interpretative decision. Consequently, it recalls that MEAs and the WTO are equal legal entities and that the relationship between WTO rules and specific trade obligations in MEAs can only be governed by the general principles of no hierarchy, mutual supportiveness and deference, for which purpose an interpretative decision is necessary.

17. Switzerland presents this submission, which outlines the various options discussed to date that could regulate the relationship between WTO rules and MEAs, as a basis for discussion at a special session of the Committee on Trade and Environment.

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