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**THE RELATIONSHIP BETWEEN EXISTING WTO RULES AND SPECIFIC TRADE OBLIGATIONS (STOS) SET OUT IN MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAS):**

A Swiss Perspective on National Experiences and Criteria used in the Negotiation and Implementation of MEAs

Submission by Switzerland

Paragraph 31 (i)

The following communication, dated 5 July 2005, is being circulated at the request of the Delegation of Switzerland.

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## I. INTRODUCTION

1. Under paragraph 31 (i) of the Doha Mandate Ministers have agreed:

> *to negotiations on the relationship between existing WTO rules and specific trade obligations (STOs) set out in multilateral environmental agreements (MEAs) with a view to enhancing the mutual supportiveness of trade and environment. 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. Since the beginning of our work, basically two kinds of discussions have been held under paragraph 31(i) by the Committee on Trade and Environment in Special Session (CTESS): first, a pragmatic discussion of *specific trade obligations (STOs) in MEAs* with an exchange of views on the experience in the negotiations and implementation of MEAs, and secondly, a broader and more conceptual *discussion of the relationship between WTO rules and MEAs*.

3. Switzerland wishes to contribute to the discussion on national experiences by describing its consultation and coordination mechanism and the underlying principles and criteria for the development of national positions in MEA negotiations and the implementation of international provisions.

## II. SWISS NATIONAL EXPERIENCES IN CONSULTATION AND COORDINATION

4. Switzerland has a strong and institutionalized coordination and consultation mechanism for the preparation of negotiations relating to MEAs. Below is a short explanation of the intergovernmental coordination, of the consultation of stakeholders and of the participation of Federal Parliament.

5. With regard to intergovernmental coordination, the national positions prepared in view of negotiations of trade related issues in MEAs are subject to the same procedure of consultation as the implementation of international obligations following from such negotiations. Usually, the responsible agency prepares a proposal for negotiation or implementation. Following this proposal, all government agencies concerned have the possibility to submit their comments as well as to make amendments on the initial proposal. Such proposals are then usually discussed in meetings to which all agencies concerned are invited, in order to come to a common position. If, after repeated consultation, no agreement is found between different federal ministries, it is up to the federal government, that is the Federal Council, who decides on the mandates for the negotiation of international agreements, to take the final decision. It is also the Federal Council who decides on the implementing legislation of an international agreement. Such a decision is subject to approval by Parliament if the implementation is done through a formal law.

6. For issues of particular importance and when knowledge is spread in different ministries, more permanent inter-ministerial working groups are established. An example of such an issue was the clarification of the concept "precautionary principle". This discussion was not related to a specific international instrument, but rather to an issue which often had provoked discussions as to its definition and applicability. The work resulted in a synthesis paper from which the different federal agencies can draw when questions arise in the context of negotiations or implementation.

7. As to stakeholders' consultation, the "Federal Law on Environmental Protection" stipulates that interested parties are consulted in the preparation of international legal instruments and their implementation. With regard to the preparation of legal instruments, a comprehensive consultation procedure is carried out to invite comments from a number of constituents for a period of at least three months. Interested parties may also comment on the draft implementing legislation proposed by the Federal Council. These include the cantons, political parties, NGOs, and the private sector concerned. The Swiss Government strongly supports partnership with the industry to effectively implement environmental protection programmes (Article 41a of the Federal Law on Environment Protection). After having consulted the interested parties, the negotiating mandate or the implementing legislation is adapted accordingly by the responsible federal agency and decided by the Federal Council.

8. As regards negotiating mandates, though the Federal Council has the competence to take the final decision, it usually consults the Parliamentary commission responsible for the issue before taking such decision. In the case of implementing legislation, it is submitted to the Parliament for approval if necessary.

## III. CRITERIA USED IN THE NEGOTIATION AND IMPLEMENTATION OF STOS

9. According to Article 5, paragraph 4 of the Swiss Constitution, the Swiss Confederation and the Cantons must respect international law. This provision leaves it implicitly to jurisprudence and academic writings to develop the relationship and hierarchy between international and Swiss law and to formulate principles and rules applicable to constellations of potential conflicts between them.

10. In the Swiss Federal Administration, the following criteria are guiding MEA negotiators when considering trade provisions in MEA negotiations or the implementation of STOs domestically:

- Trade measures must serve an overriding public interest;
- Trade measures must not constitute arbitrary or unjustifiable discrimination nor disguised trade restrictions;
- Trade measures must be proportional to achieve the environmental goal (i.e. trade measures ought to be suitable, necessary including least-trade restrictiveness as well as proportionate); and
- Trade measures must be transparent (i.e. the process and the responsibilities are structured transparently and the measures are openly communicated).

11. At the last CTESS meeting, Canada described very similar criteria that MEA negotiators in Canada consider in examining the potential for trade provisions. These were:

- That trade measures were chosen when effective and when alternative measures were ineffective in achieving the environmental objective, or when other measures were ineffective without trade measures as part of the MEA;
- that trade measures be no more trade restrictive than required to achieve the environmental objective; and
- that trade measures did not constitute arbitrary or unjustifiable discrimination.

12. The United States (TN/TE/W/40) suggested some conditions which favourably contribute to the mutual supportiveness of the relationship between WTO rules and MEAs for the case of a specific trade obligation (i.e. export restriction). The conditions suggested are;

- a good national as well as international cooperation of trade and environmental experts to tailor STOs in order for them to meet particular environmental objectives, as well as take into account Parties' trade-related rights and obligations;
- a careful design of export restrictions; and
- science-based procedures as well as procedures for changes to contribute to a mutually supportive relationship between MEAs and WTO rules.

13. Switzerland thinks that it is useful to pursue the discussion on the criteria which could be used in the negotiation of STOs in MEA's because this would enhance the understanding of how STOs relate to WTO provisions and help to prevent future conflicts between MEAs and WTO rules.

14. However, we should be aware of two caveats: firstly, we have to bear in mind that we are here in a WTO context and that any recommendation with regards to the criteria for the negotiation of MEAs would have to be endorsed by our MEA negotiators. Secondly, although negotiators of both MEA's and WTO provisions should certainly strive to ensure mutual supportiveness so that no dispute arises, there is no guarantee that we actually succeed in avoiding any conflict at the implementation stage. The mere fact that no conflict has arisen between the two sets of rules as of today does not automatically imply that there will be none in the future, especially given the steady growth of interface between the two sets of law.

## IV. THE CONCEPTUAL APPROACH – A SYNTHESIS

15. The above said shows the importance of a broad consultation process on a national level and of guiding principles and criteria in the negotiation and implementation of MEAs, in order to ensure mutual supportiveness of WTO provisions and MEAs.

16. However, what about a better coordination at the international level? Is there room for improvement taking examples which worked especially well? Given the fact that both systems – i.e. the MEAs and the WTO – are dynamic and evolving continuously over time, it is important to clarify the principles governing the relationship in order to ensure mutual supportiveness. Both systems should not evolve in isolation from each other. Whether it is in order to improve international cooperation when devising a new STO, or in order to ensure that an STO is implemented in a manner consistent with international obligations, Switzerland is of the view that a discussion and clarification of the principles governing the relationship between WTO and MEAs is useful and necessary and in fact responds to the mandate that we were given by Ministers in Doha.

17. The following principles are in Switzerland's view central to the discussion in the CTESS:

(a) The principle of "**no hierarchy**" is based on the idea, that both legal systems are equal and there is no hierarchy between trade and environmental regimes. This is something which is taken into account in the interagency process cited above.

(b) The principle of "**mutual supportiveness**" is based on the assumption that the overall objective of both environmental and trade regimes is the same, namely the promotion of wellbeing. The two sets of rules are concerned with different areas of policies, focus on different issues and have different competences. However, in focusing on their own tasks and competencies, the trade and environmental regimes must ensure mutual supportiveness.

This can be illustrated by taking the example of the Climate Convention and relate it to WTO objectives: the overall objective of the Climate Convention is to stabilise Green-House-Gas (GHG) concentrations at a level that would prevent dangerous anthropogenic interference with the climate system. The objectives of the WTO focus on growth in economic welfare, employment and production of and trade in goods and services. Sustainable development is also recognised in the WTO as a key objective (*see DDA, para 6*). The Climate Convention is coherent with upholding an open and non-discriminatory international economic system. At the same time, the Climate Convention contributes to the overall goal of well-being by establishing rules, principles and institutions for the protection of the environment.

Another example points to a growing and more general commitment to mutual supportiveness between global environmental objectives and the WTO: the Plan of Implementation of the WSSD, which says in para 98: *"Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments"*.

(c) The reference to the importance of maintaining the integrity of both sets of instruments brings us to the third principle, i.e. the principle of **"deference**", namely that each framework should remain responsible and competent for the issues falling within its primary area of competence and accept the competence and decisions of the other regime. We should not fall into the pitfall of wanting to deal with issues in the wrong forum, just because it may be more convenient for

one or the other reason (like the availability of an effective dispute settlement system).

## V. CONCLUSION

18. Switzerland welcomes the discussion on the sharing of experiences with respect to the negotiation and implementation of STOs in MEAs, be it on a national level or on an international level, in order to get insights into the different practices. In Switzerland's view, however, the CTESS needs to go further than sharing experience and draw conclusions in order to fulfil the mandate Ministers have given us in Doha and to ensure that both systems can develop and evolve in a mutually supportive way.

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