

**THE RELATIONSHIP BETWEEN WTO RULES AND MEAS**

Submission by Switzerland

Paragraph 31 (i)

Statement by Switzerland at the CTESS Meeting of 15-16 September 2005

The following communication, dated 7 October 2005, is being circulated at the request of the Delegation of Switzerland.

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1. In relation to our submission in document TN/TE/W/58, which was presented at the CTESS meeting in July, New Zealand and other delegations asked how the principles of no-hierarchy, mutual supportiveness, and deference, which should in our view govern the relationship between WTO rules and MEAs, relate to the rules of international law. As promised at the last meeting, we are pleased to respond to this important question now in more detail.
  2. In principle, international law does not create a hierarchy between agreements. The only exceptions in this regard are the following:
    - (a) First, *jus cogens* always precedes. According to the Vienna Convention on the Law of Treaties, *jus cogens* are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted. The prohibition of genocide, for example, is recognized as *jus cogens*. WTO law certainly does not have the status of *jus cogens*. Neither are MEAs perceived as *jus cogens*.
    - (b) Second, according to the principle of *jus posterior*, newer law precedes over older law. This rule only applies if the countries involved in a conflict are parties to the old and new law.
    - (c) Third, more specific law precedes over more general law (*lex specialis*). This rule only applies between countries that both are parties to the conflicting rules.

3. According to these general principles it is clear that there exists no hierarchy between WTO rules and MEAs. This has been confirmed by the international community, e.g. by UN General Assembly decisions or at the World Summit on Sustainable Development (WSSD), where it was clearly stated that States should "[p]romote 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." This reference to mutual supportiveness and the recognition of maintaining the integrity of the WTO and the environmental regimes, are a clear recognition of the principles of no hierarchy, mutual supportiveness and deference. In fact, the integrity of each system can only be maintained by paying deference to each other. By stressing these principles, it is also acknowledged that there is no need to introduce, in new MEA's for example, provisions dealing with the relationship of the treaty in question to other treaties (so-called savings clauses).

4. Furthermore, as long as different international rules can be interpreted in a compatible and consistent manner, there is no need to establish an artificial hierarchy between them. In that sense WTO rules should, according to international law, always be interpreted in a manner that they do not constitute a conflict with MEA rules. And vice versa, MEAs rules must be interpreted in a way that they do not create a conflict with WTO rules. This is a reflection of the general principle *pacta sunt servanda*, that requires that states should try to fulfil their obligations resulting from one treaty without violating their other obligations. Hence, treaties should generally be construed so as not to create a conflict with other rules of international treaty law. Thus, if in a specific situation both rules, those of WTO and those of an MEA, apply, the provisions of each instrument should be construed – if possible – in a manner not creating conflicts with the applicable rules and principles of the other instruments. This implies an approach according to which a measure provided for by an MEA should be held as WTO-compatible. And this also implies that in the context of the WTO, the word "necessity of a measure provided for in an MEA" should not be re-examined, thus questioning the fulfilment of obligations under an MEA but WTO should use deference with regard to this issue.

5. Finally, let me conclude by indicating that the decisions of international courts such as the International Court of Justice, but also the decisions of the WTO appellate body are reflecting the above mentioned principles. We hope that with these clarifications the question could be answered satisfactorily.

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