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Committee on Trade and Environment
Special Session

SUMMARY REPORT ON THE SEVENTH MEETING OF THE COMMITTEE ON TRADE AND ENVIRONMENT IN SPECIAL SESSION

8 JULY 2003

Note by the Secretariat

1. The Committee on Trade and Environment in Special Session (CTESS) held its seventh meeting on 8 July 2003 on the basis of the agenda set out in the convening airgram WTO/AIR/2131. Ambassador Yolande Biké of the Republic of Gabon chaired the meeting.

I. REPORT OF THE CHAIRPERSON TO THE TNC MEETING OF 14 JULY 2003

2. The CTESS discussed the report of the Chairperson to the TNC meeting of 14 July 2003 which provided the state of play of the trade and environment negotiations. The discussions were held on the basis of a draft text which had been faxed to delegations on 1 July 2003. The draft text was revised in light of the comments made. The Chairperson indicated that she would be sharing with the Committee certain personal remarks, which would be issued as a supplement to her report.

3. The CTESS took note of the Chairperson's report, which was subsequently transmitted to the TNC as document TN/TE/7.

II. PARAGRAPH 31(II) – INFORMATION EXCHANGE AND CRITERIA FOR OBSERVER STATUS

A. PROPOSAL BY THE EUROPEAN COMMUNITIES ON "MEA OBSERVERSHIP/INFORMATION EXCHANGE"

4. The European Communities (EC) presented its proposal, document JOB(03)/116, highlighting its political merit since the WTO continued to be perceived by the outside world as a closed organization. The proposal was being submitted in the spirit of the World Summit on Sustainable Development (WSSD) in which a clear call had been made for improved international governance. It would enable the CTESS to benefit from the expertise of the United Nations Environment Programme (UNEP) and multilateral environmental agreements (MEAs) in the course of the negotiations. The proposal was limited to observership in the CTESS, and to the granting of observership to the MEAs identified in the Secretariat Matrix. This was a pragmatic approach, particularly since no delegations had objected to that Matrix. On information exchange, the proposal simply endorsed an existing practice. It was not an attempt to influence paragraph 31 (i) discussions. Moreover, it did not address or seek to prejudice the issue of observership in the WTO as a whole. Rather, it was tabled in the spirit of paragraph 31 (ii), which called on the WTO to improve cooperation between the environmental and trade regimes. The EC was open to considering the observership of other organizations in the CTESS, such as that of the United Nations Conference on Trade and Development (UNCTAD).

5. A number of delegations, including Thailand, Malaysia, the Philippines, Pakistan, China, Indonesia, Brazil, Argentina, Kenya, Cuba, India, Nigeria, Ecuador, Egypt, and Hong Kong, China, expressed concerns with the proposal.

6. These ranged from: (1) not wanting it to circumvent the paragraph 31 (ii) mandate. A number of delegations argued that the link between the proposal and paragraph 31 (ii) was unclear; (2) not agreeing that the mandate was on the "granting of observer status," but rather on the "criteria" for the granting of such status; (3) not wanting to undermine the discussion being pursued on a horizontal basis in the WTO on the question of observership. One delegation indicated that the observership of the Convention on Biological Diversity (CBD) in the TRIPS Council needed to be considered, and two other delegations argued that a positive signal could not be sent on the observership question in the environment domain, when a negative signal was being sent in other areas (such as in development); (4) not seeing the necessity of granting observer status, given that an arrangement had been reached in the CTESS to invite certain organizations on an ad hoc basis. The ad hoc arrangement provided useful flexibility; (5) not viewing the Secretariat Matrix as an appropriate basis for the selection of observers. One delegation argued that the Matrix had not been developed in the CTESS, but rather in the regular CTE. Another argued that some of the organizations included in the Matrix did not view themselves as MEAs, such as the International Tropical Timber Agreement (ITTO), which was a commodity agreement; (6) not agreeing with the need to institutionalize information exchange. Several delegations argued that they did not want a legally binding commitment to hold information sessions, but preferred to call for them when the need arose. They feared an expansion of the terms of reference of the regular CTE. One delegation argued that if the CTESS were to agree to hold regular Information Sessions, then it would be necessary to revisit their agenda so that empty, repetitive meetings would not be held; to (7) not wanting to overburden Ministers in Cancún with unnecessary issues.

7. Argentina and Pakistan also argued that a discussion of the criteria for the granting of observer status needed to be undertaken. The MEAs to be invited needed to be truly multilateral, to be negotiated under United Nations (UN) auspices, etc. Mexico indicated that while it agreed with the message that the EC was trying to send with its proposal, it believed that the proposal needed to be reviewed in light of delegations' comments.

8. A number of delegations, including Norway, New Zealand, Australia, Canada, Chile, Colombia, Chinese Taipei, Switzerland, the United States, Japan, Korea, and the Czech Republic, supported the EC proposal. Several of them believed that it represented a practical way forward that would spare the CTESS time-consuming discussions at the end of each meeting on who to invite. Most of them agreed that the proposal was not the answer to the paragraph 31 (ii) mandate, which needed further discussion. In fact, many recommended that the EC clarify, at the end of its proposal, that it was also being made without prejudice to the paragraph 31 (ii) mandate.

9. Norway was of the view that Ministers could endorse the ad hoc decision taken to invite six MEAs and UNEP, indicating that it was open to adding more observers. New Zealand and Australia agreed that the CTESS' ad hoc invitees could be a good starting-point for this proposal, and suggested that other observers be agreed on, on a case-by-case basis. Canada argued that it did not see the proposal as being linked to the paragraph 31 negotiations. It was simply a practical solution to a practical concern. It did not believe that the CTESS had applied a rigorous test to deciding what constituted an MEA in its extension of the ad hoc invitations, since the ITTO was not an MEA. However, it was flexible on this issue, and believed that UNCTAD could also be invited. Ecuador agreed that UNCTAD's participation would be useful. Canada did not believe that there was a need at this stage to confirm the MEA Information Sessions.

10. Chile agreed with the EC proposal on the need to consolidate the ad hoc invitations and send out a strong political signal in Cancún. However, it shared the concern expressed by some delegations about the link between this proposal and paragraph 31 (ii). It could not accept that this

mandate be regarded as an "early harvest" under 31 (ii), since that mandate had to do with the negotiation of "criteria" rather than the actual granting of observership. With respect to the MEAs to be considered under the proposal, it suggested, as a way forward, that the Committee consider those MEAs that had expressed an interest in its work.

11. Colombia specified that the observers should be allowed to attend paragraph 31 discussions in their entirety. Chinese Taipei wished to see MEA Information Sessions held twice, not just once, a year, with the possibility of regional sessions being organized. Switzerland supported the use of the Secretariat Matrix as a basis for the identification of the observers, but since some delegations were uncomfortable with the Matrix, it believed that the rationale should be that all MEAs that had an interest in the discussions should be invited. The United States supported the EC proposal, adding that it should be without prejudice to going beyond the Agreements identified in the Matrix.

12. The European Communities agreed with delegations that the ad hoc decision taken by the CTESS had been a significant development, but reiterated the importance of sending a political signal to the outside world on the openness of the WTO. It considered progress on the observership issue everywhere in WTO as necessary, but argued that such a "balance" was for Ministers to ensure. The CTESS could only look at its share of the issue. It believed that its proposal did not undermine the horizontal aspect of the discussions, which delegations needed to continue to pursue. Its proposal was important enough to go to Ministers, since it had to do with transparency and accountability. The EC would reflect on an approach that did not reduce the flexibility under the ad hoc arrangement. Furthermore, it suggested adding an additional sentence to state that its proposal was "without prejudice to paragraph 31 (ii)." The proposal had nothing to do with the CTESS' mandate to look for a permanent solution under 31 (ii), and, in fact, it could explicitly state that it would only apply until the end of the negotiations in December 2004. It explained that the Secretariat Matrix had only been used as a practical way forward. On information exchange, it would reflect on how Information Sessions could be made more interactive, whether they could take place regionally, or focus on certain themes. The EC would consider the ideas proposed and return to Members.

13. The Secretariat announced that the list of organizations that had applied for observer status in the CTESS had been circulated to participants in document TN/TE/S/4.

14. The Chairperson indicated that while the EC proposal had been supported by some delegations, there was clearly no consensus on transmitting it to Cancún as a recommendation by the Committee. She invited the EC to revisit its proposal in light of delegations' comments, indicating that informal consultations on a revised version of the proposal could be held before Cancún if delegations so desired.

B. PARTICIPATION OF THE AD HOC INVITEES TO THE MEETINGS OF THE CTESS

15. The Chairperson recalled that the CTESS had agreed, at its informal meeting on 22 May 2003, to discuss the modalities for the participation of the ad hoc invitees.[1] The decision to invite certain organizations on an ad hoc basis had been taken at the 12-13 February meeting of the CTESS. The record of that meeting, contained in document TN/TE/R/5, stated that the invitees would be:

> *" invited on an ad hoc basis to meetings of the CTESS when their expertise was considered necessary to the discussions. Such a decision would be taken by*

[1] The following organizations had previously been invited on an ad hoc basis to attend the meetings of the CTESS: the United Nations Environment Programme (UNEP), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species (CITES), the International Tropical Timber Organization (ITTO), the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), and the United Nations Framework Convention on Climate Change (UNFCCC).

consensus at the end of each meeting, and would only concern the following meeting. This would be without prejudice to the negotiations currently under way in the CTESS, in particular in relation to paragraph 31(ii) and the criteria for the granting of observer status to MEAs in relevant WTO committees. Furthermore, since the issue of observer status was before the General Council and the TNC, such an approach would be without prejudice to a solution to this issue in the General Council and the TNC."

16. Thus, three conditions had already been set in February 2003 for the participation of invitees: (1) they would participate on an ad hoc basis when their expertise was considered necessary; (2) the decision would be taken by consensus at the end of each meeting; and (3) this would be without prejudice to negotiations under way in the CTESS, or to discussions on observership in the General Council (GC) and the TNC.

17. The Chairperson suggested that two additional conditions be agreed to for the participation of invitees: (1) that they be invited to participate on paragraph 31 (i) discussions and the *information exchange* part of paragraph 31 (ii). If their participation on paragraph 31 (iii) were to be deemed useful by delegations, it could be considered at a later point; and (2) that the ad hoc invitees only be given the floor after delegations have spoken, to either respond to questions by delegations or to clarify the way in which their environmental agreements operated. The Chairperson emphasized that these suggestions were being made with a view to facilitating the work of the CTESS, and the workings of the temporary arrangement to which the Committee had agreed. They were without prejudice to CTESS negotiations or to broader discussions of the observership question at the TNC/GC level.

18. The CTESS took note of the suggestions made.

C. CRITERIA FOR THE GRANTING OF OBSERVER STATUS AND PROCEDURES FOR REGULAR INFORMATION EXCHANGE

19. There was no discussion of this part of the mandate at this meeting.

III. PARAGRAPH 31(I) - WTO RULES AND SPECIFIC TRADE OBLIGATIONS IN MEAS

20. Three new papers had been submitted under this item: document TN/TE/W/35/Rev.1 by China, TN/TE/W/36 by Chinese Taipei, and TN/TE/W/37 by Australia. China, Chinese Taipei, and Australia presented their papers. Several delegations thanked Australia for the background information it had provided on the APEC workshop.

21. Japan commented on the Chinese Taipei paper, in which scepticism had been expressed on Japan's conclusion in document TN/TE/W/10, that STOs were compatible with WTO rules. Japan clarified that its paper did not say that. In fact, paragraph 17 of TN/TE/W/10 clearly stated that even if certain STOs were deemed to be consistent with WTO rules, there could be no automatic compatibility. The way in which trade measures were implemented had to remain subject to the tests of the Chapeau of GATT Article XX. Furthermore, as the Chinese Taipei delegation had itself pointed out, WTO jurisprudence needed to be considered in discussing consistency. Document TN/TE/W/10 had also pointed out that for category (2) measures, two substantial requirements would have to be met for the rebuttable presumption of conformity to apply. The two requirements were based on WTO jurisprudence, for instance in the Shrimp/Turtle case. The paper from Chinese Taipei had also questioned in paragraph 11 whether the CTESS had a mandate to assess the consistency of STOs with WTO rules. This put into question the proposal made in the Japanese paper on the development of an interpretative understanding, pursuant to Article IX.2 of the Marrakesh Agreement Establishing the WTO. However, Japan clarified that it had only proposed that interpretative

understanding as a potential outcome of the negotiations, and not as the definitive answer. It could be flexible.

22. Korea indicated that it was not seeking a consensus on those measures that could be considered STOs. However, it believed that the identification of STOs in MEAs was an essential prerequisite for discussions on the relationship between WTO rules and STOs. While numerous delegations were delving into the definition of MEAs, Korea believed that it would be more useful to focus on the identification of STOs in those MEAs identified in the Secretariat Matrix in order to develop a common understanding of those measures. STOs were trade measures that were mandatory and specific, and excluded those measures for which parties could exercise discretion in their implementation. In that regard, the distinction drawn in China's paper between trade restrictions or bans, and importing and exporting procedures and measures, was useful. Since the trade effect of these two different categories of measures was not the same, different approaches could be taken to addressing them in the final outcome of the negotiations. With respect to Conference of Parties (COP) decisions, these had to be reviewed on a case-by-case basis, as set out in paragraph 8 of China's paper. However, as Malaysia had previously pointed out in its paper, STOs contained in the annexes, protocols and amendments to MEAs that were adopted by the parties and ratified by the broader membership had the possibility of falling within the negotiating mandate. In addition, paragraph 6 of the Chinese Taipei paper on COP decisions deserved further attention.

23. Canada expressed concern with attempts to define an MEA. Since the paragraph 31 (i) mandate was limited to disputes between parties to an MEA, countries that were both WTO Members and parties to an MEA would not be likely to put into question an MEA that they had signed. The main issue that would be likely to arise between two parties to an MEA would be that of the implementation of an STO. Canada was therefore interested in discussing STOs. Amendments that were adopted by parties had the same standing as the original agreement, and not a subordinate status. However, COP/Meeting of the Parties (MOP) decisions were not always legally binding. If they were not specifically set out in the agreements concerned, Canada did not consider itself legally bound by them. Nevertheless, some agreements had provisions for amendments that were legally binding through COP or MOP decisions, and Canada accepted those. Canada found China's definition of an STO, or the criteria-based approach, to be overly narrow, although it could see benefits in categorizing STOs. It had certain concerns with the reference to COP decisions in the Chinese Taipei paper, but would further reflect on this.

24. India commented on the EC paper, document TN/TE/W/31, submitted at the last meeting. COP decisions formed part of public international law. They offered a platform for reviewing the implementation of MEAs, and for enabling MEA Secretariats to carry out their duties. COP decisions related to the administration of MEAs fell outside the purview of the negotiations. MEAs sometimes invested their COPs/MOPs with the power to adopt amendments to their agreements, protocols or annexes. MEAs also contained procedures to amend their texts and annexes, which tended to specify the required quorum for the adoption of these amendments and their entry into force. They typically stated that amendments only entered into force for those parties that ratified them. This had to be taken into account when interpreting the paragraph 31 (i) mandate. A specific example would illustrate the need for a close scrutiny of each MEA, and of individual COP decisions within MEAs. For instance, during the 2nd COP of the Basel Convention in 1994, parties had agreed to ban the export of hazardous waste from Annex 7 to the non-Annex 7 countries. At the 3rd COP in 1995, it was proposed that the ban be incorporated into the Convention as an amendment. However, the amendment had not entered into force, since only 27 countries had ratified it out of the 62 required. Hence, the new Article 4 (a) of the Convention had not become legally binding on parties, since it had not entered into force. Countries that had not ratified it upon its entry into force would not be considered parties to it.

25. A country's right to express reservations on certain provisions of an environmental agreement needed to be scrutinized under each MEA. Article 23 of the Convention on International Trade in

Endangered Species (CITES) specified the provisions of the agreement on which reservations could not be expressed. Reservations could only be expressed with respect to Appendices 1, 2 and 3 of the Convention. Articles 15 and 16 clarified that the amendments adopted at COPs entered into force for all parties, except those which had expressed reservations. Under the Basel Convention, a party could accept a COP decision, while putting its reservations on the record. However, reservations on the Convention itself or its protocol could not be expressed. Hence, COP decisions containing STOs that were aimed at amending a Convention or its annexes, and that had entered into force, could be considered to be assimilated within the body of the Convention or its annexes. At that point, one could consider STOs to have been "set out in MEAs" for the parties that accepted the COP decisions without reservations. Therefore, the contention of the EC that legally binding COP decisions qualified as STOs was misleading, since it first had to be established that they contained STOs. A legally binding decision was not necessarily an STO, but an STO had to be legally binding. Therefore, India did not wish to use the term "legally binding" in classifying STOs. It believed that COP decisions that contained an STO and that had formally amended the text of a Convention or its annexes would have to be subjected to the same STO threshold as the provisions of the MEA. It referred to its previous submission in which it had specified that an STO needed to contain a trade element, to be specific, and to be a prerequisite for an obligation.

26. Chinese Taipei had proposed, in addition to the different types of COP decisions proposed by the EC, COP/MOP decisions authorizing trade measures under compliance procedures. However, India cautioned against expanding the scope of the mandate, pointing to the term "set out in MEAs." China, in its submission, had expressed similar views to India on STOs and MEAs.

27. New Zealand agreed with the Chinese Taipei paper that certain decisions by COPs or MOPs could be legally binding, depending on the particular circumstances. But this, in turn, raised the question of the circumstances in which Members believed COP decisions to be binding. Chinese Taipei had provided one example in the form of the Annex to the Montreal Protocol. New Zealand was interested in Members' views on this, and believed that it was important to bear in mind that any COP decision that was deemed legally binding would still have to pass through the STO filter in order to be relevant to the group's discussions. It would, for example, have to meet other relevant criteria such as that of specificity, and would have to be trade-related and mandatory. The second point made in the Chinese Taipei paper was that it could not always be assumed that STOs would be implemented in a WTO-consistent way. On this point, New Zealand reiterated the importance that it attached to implementing MEA and WTO obligations in a mutually supportive manner, as a means of minimizing the potential for disputes being brought to the WTO. On China's paper, the criterion related to assessing the trade impact of a measure in defining an STO introduced an unnecessary layer of complexity. It would require that the CTESS devise a way of measuring the trade impact of a measure. New Zealand wondered if China was suggesting that it would be necessary to show a substantial trade impact for a provision to qualify as an STO, or if trade impact would be used as a means of differentiating between provisions that otherwise qualified as STOs.

28. The United States believed that Chinese Taipei's discussion of COP/MOP decisions needed to be viewed in the context of the particular parameters of the Doha mandate, and noted that its paper made no reference to the phrase "set out in MEAs." It was interested in Chinese Taipei's views on how COP/MOP decisions related to that part of the mandate. Chinese Taipei also made an important distinction between MEA obligations and actual implementation. The US certainly viewed implementation as being an important issue that could involve action that was not specifically required under an STO in an MEA. It welcomed the case-study provided on the Montreal Protocol.

29. Switzerland wondered why China believed that an MEA had to include a majority of WTO Members to be considered universal. The concept of universality had been previously addressed by other Members. For instance, Japan had defined universality to mean a substantial number of countries that reflected the interests of the major parties concerned. For India, it meant participation in the negotiations by countries belonging to different geographical regions and at

different stages of economic and social development. Argentina had focussed more on the definitional aspect, rather than universality per se. It had addressed the idea of an MEA being "multilateral," arguing that for an agreement to qualify as an MEA, it should be negotiated by more than two parties under the aegis of the UN or its specialized agencies, and it should have attained a certain degree of universality.

30. Switzerland asked China to clarify the "substantial impact on trade" criterion, wondering if this meant that if a trade measure did not have a substantial impact, it could not be considered an STO. What threshold would be used to determine whether or not a measure had such an impact? It also enquired about the concept of "effectiveness," since it seemed clear to Switzerland that a dispute could only occur between parties to an agreement that was in force. This issue had nothing to do with having the outcome of the negotiations apply only to those MEAs that had entered into force. On the categorization of STOs proposed by China in paragraphs 9-11, China distinguished between two categories, A and B, and Switzerland invited China to explain the treatment it envisaged for measures under each of these two groups. Switzerland indicated that it intended to respond to the questions posed on its own paper at the next meeting of the CTESS. It welcomed the submission by Chinese Taipei and supported the argument that MEAs and the WTO were working well together, and that delegations could not jump to the conclusion that no conflict would ever arise. That was why Switzerland had submitted a proposal on how to clarify the relationship between MEAs and WTO rules. It supported the conclusion of the paper that whatever clarification might be elaborated in the WTO, this would not prevent a WTO Member from challenging any arbitrary or unjustifiable discrimination in the implementation of an STO.

31. Norway explained that it did not see a need for a definition of an MEA as called for in China's paper, mainly because the mandate was limited to parties to MEAs. The mandate applied neither to non-parties, nor to parties that had reserved their rights under certain provisions of an MEA. Norway saw merit in the openness criterion, which could prevent discrimination on the basis of non-membership. However, it failed to see the need for an assessment of a measure's trade impact. The consideration of the possible trade effects of a measure had to be examined by the parties to an MEA, in the negotiation of the MEA itself, and not in the WTO. Moreover, on STOs having to respond to the objective of an MEA, Norway believed that the objective of an MEA would have to be defined by the parties to that MEA. What the CTESS was mandated to consider was the relationship between STOs in MEAs and WTO rules.

32. Norway was at a loss with respect to the proposed categories of STOs. It did not agree that an STO could be identified on the basis of where it appeared in the MEA, and whether or not it had an impact on import or export. An STO had to be explicitly provided for and clearly defined in an MEA, and should include well-defined alternative measures; it should also be trade-related, and obligatory. An article, or a combination of articles, could together be considered an STO.

33. Norway agreed with Chinese Taipei that the term STO was a WTO invention, with no comparable expression in MEAs. It shared the view that binding trade measures under MEAs had to be considered STOs, and that COP decisions were STOs if they created obligations among contracting parties to an MEA and had a binding effect. As the mandate clearly stated, the negotiations could not alter the balance of rights and obligations under WTO rules. Therefore, Norway agreed with Chinese Taipei that Members could not accept all forms of implementation of an STO unconditionally. The balance of rights and obligations would also be altered if a list of STOs were to be devised so that they could be deemed automatically compatible with WTO rules. While the negotiations could not limit the right of Members to bring disputes to the WTO, Norway believed that disputes between parties to an MEA had to be settled within the framework of the MEA. Therefore, countries would not expect such disputes to be brought to the WTO. Norway hoped that these negotiations would raise awareness of WTO rules and objectives in MEAs, and of MEA objectives in the WTO. The aim should be to enhance national coherence in order to prevent conflicts from arising.

34. Hong Kong, China shared several of the criteria in China's paper, such as those of universality, openness for an MEA, and mandatoriness and specificity for an STO. However, it asked China to elaborate on the "impact on trade" criterion. In addition, there was a need to discuss the types of measures that fell into the fourth category of paragraph 10. These were measures which were intended to facilitate trade. It asked, therefore, how a trade conflict could ever arise in their regard. On the Chinese Taipei paper, Hong Kong, China agreed that the binding effect of a measure was very important, but there were other equally important criteria, such as that of specificity. It believed that there was a need for further discussion of provisions that provided for binding commitments, but which did not specify the precise measure to be taken to achieve those commitments.

35. The European Communities was pleased to see in the Chinese Taipei paper an endorsement of the need to pursue the conceptual and analytical approaches in parallel. It was also in agreement with paragraph 2 of the paper, that any discussion of STOs touched on the basic design of MEAs, and that was why it had always argued that paragraphs 31 (i) and 31 (ii) should feed into each other. The paper raised an interesting point regarding compliance measures which would need to be looked at further. On paragraph 11, the EC wondered what was meant by looking at the "legality" of STOs. For the EC, the mandate was on the relationship between two bodies of law, MEAs and WTO rules.

36. On China's paper, the EC was not convinced that the definition of an MEA would be useful to the discussion. Criteria such as that of universality could exclude regional agreements which could have a significant impact on trade. It asked China to explain the need for the "trade impact" and "relevance" criteria. In addition, it wanted clarity on why a distinction had been drawn between different types of trade measures at the end of their paper, i.e. restrictions and bans on the one hand, and export and import procedures on the other. While it would be useful to address packaging, labelling, transportation and other such provisions in the negotiations, the EC wondered why a specific category needed to be set up for these measures. With respect to the Japanese submission discussed at the last meeting (TN/TE/W/26), the EC enquired about the conditions for the rebuttable presumption of conformity, namely the requirements for science and proportionality. It also wished to return later to the point raised in that paper under paragraph 10 on "other international instruments."

37. Chile thanked China for an extremely useful and structured contribution. It agreed with China that STOs could not cover provisions which allowed for a whole range of measures to be taken. It requested further clarification on Categories A and B of the Chinese paper. Chile was aware that the concept of STOs was created in Doha, and differed from that of trade measures that had previously been discussed in the regular CTE. As suggested by Chinese Taipei, COP decisions and compliance procedures needed to be considered in relation to STOs, but Chile did not have a definitive position on this point yet. For the time being, it was inclined to agree with paragraph 8 of China's document on STOs.

38. Brazil supported the definitions set out by China in its paper for the identification of an MEA and the categorization of STOs. It did not agree with Chinese Taipei that STOs had to be understood in the broad sense, since the term STO had a clear meaning which had been agreed on by Ministers. Brazil believed that the only COP decisions which were binding were the amendments to MEAs. STOs also had to be specific, trade-related and mandatory.

39. Australia thanked China for its contribution, which included annexes that provided the CTESS with a solid, practical base on which to approach its mandate. It was useful to compare the similarities as well as the differences in the STOs identified in the Basel Convention by China, India, Malaysia and the US. However, Australia took a different view to China on the sources of STOs it had included in its categorization. It would not have included COP decisions. Also, it had reservations about categorizing exporting and importing procedures and measures as STOs, which corresponded to Category B in China's paper. Some procedures were required to fulfil STOs, but Australia viewed these as administrative obligations.

40. Turning to Chinese Taipei's paper, there was much in Section 3 of the paper that Australia could agree with. However, it considered it premature to have a discussion on possible outcomes before the earlier stages of the discussion had been completed. The CTESS first needed to establish whether there was a problem in the STO-WTO relationship which needed to be addressed. Australia saw no such problem. Australia was concerned that Section 2 of the paper on STOs took the CTESS outside its mandate, as was the case with the EC paper on this topic. It did not agree that COP decisions were necessarily set out in MEAs. Moreover, it did not agree that the legally binding character of a COP decision should determine whether it qualified as being "set out in" an MEA. Like Canada, Australia did not agree that COP decisions could be, of their own accord, legally binding. There was an exception, as noted by Canada, where the MEA specifically provided that a COP decision was legally binding. However, such exceptions tended to be few.

41. The EC had referred to COP decisions amending MEAs as an example of legally binding COP decisions that qualified as STOs, pending the STO filter that New Zealand had referred to. However, it was not the COP decision in this example that was legally binding. This was evident from the fact that amendment procedures laid out in treaty texts had to be followed before the amendment adopted by COP decisions entered into force. These procedures involved ratification of the amendment by parties, or the need for a period of time to elapse before parties which did not opt out became automatically bound. It was the amended treaty, once the amendment entered into force, which was legally binding, not the COP decision. Therefore, Australia did not consider COP decisions taken under MEA compliance procedures to be part of the mandate.

42. Thailand shared the criteria set out by China on an MEA. However, with respect to the scope of STOs, and whether COP decisions were STOs, it preferred to address this matter on a case-by-case basis. There was a need for certain criteria in this discussion, for instance that COP decisions be adopted by consensus, be mandatory and legally binding, and already in force. It concurred with Chinese Taipei that it was premature to conclude that STOs were consistent with WTO rules.

43. Mexico pointed out the complexity involved in the term "set out in MEAs," and shared Australia's views on this term. It expressed its doubts regarding some of the criteria in China's paper, such as that of trade impact. It did not agree with paragraph 8 of the document. Paragraphs 9 and 10 and the annexes were still being considered.

44. Indonesia supported several of the criteria set out by China for the identification of an MEA and an STO. It had previously stated that MEAs had to be negotiated under UN auspices, to have a large membership, and to be open to all countries that shared the same environmental objective. It agreed with China that trade impact needed to be considered. Indonesia was of the view that STOs were measures that were trade-related, mandatory and specifically set out in an MEA. They had to be taken to achieve the objectives of an MEA. It believed that STOs in MEA provisions, annexes or amendments formed part of these negotiations. Indonesia had reservations with respect to the inclusion of COP decisions, which would create too much uncertainty in the coverage of the mandate. However, decisions that amended MEAs and that were ratified by parties, were relevant to the negotiations. The decisions referred to by Chinese Taipei were not part of the negotiations.

45. Malaysia shared China's views that an MEA had to be negotiated under UN auspices, had to have a broad membership, to be in force, and to contain specific trade measures. It was important to define an MEA, since the mandate could eventually have an impact on non-parties. Malaysia sought clarification from China on whether all the provisions listed in the annex to its paper qualified as STOs. It wished to study further China's categorization of STOs. On the Chinese Taipei paper, it could not agree that the legally binding nature of a COP/MOP decision was a sufficient criterion for the identification of an STO. However, it reiterated its previous position that amendments, annexes and protocols that were ratified by the broader membership could be covered by the mandate. STOs needed to be examined on a case-by-case basis. Commenting on the Swiss and Japanese proposals,

Malaysia believed that it would be counterproductive to argue that STOs could cover measures that were not specific. It also felt that it was premature to discuss a rebuttable presumption of conformity.

46. Chinese Taipei was pleased that China shared its view that STOs included not only treaty texts, but annexes, amendments and COP decisions. However, it had some concerns with respect to the criteria set out by China for MEAs, such as that of authoritativeness. The criterion of MEAs being negotiated under UN auspices was also too limiting. In addition, the way that China defined the openness criterion conflicted with the criterion of universality.

47. China thanked delegations for their comments. It believed that MEAs had to be agreements that had entered into force, and called on delegations to focus on those agreements which were considered by the majority of Members to be MEAs. On the impact of an STO on trade, China was open to reviewing the word "substantial" which it had only chosen for simplicity's sake. It only wished to express the idea that the impact on trade should be explicit. It believed that categories A and B in its paper needed to be merged into one paragraph for clarity's sake.

IV. PARAGRAPH 31 (III) – ENVIRONMENTAL GOODS AND SERVICES

48. The Chairperson indicated that two new documents had been circulated under this item by the United States: documents TN/TE/W/34 and TN/TE/W/38. In addition, a paper by the Organization for Economic Cooperation and Development (OECD) on environmental goods had also been circulated for Members' information (document TN/TE/W/33). The United States presented its papers. It indicated that while the first one was on the definition of environmental goods, and sought to compare the Asia Pacific Economic Cooperation Forum (APEC) and OECD approaches, the second addressed the possible modalities for negotiations on those goods. It sought to establish a flexible approach for the negotiations. The European Communities and Switzerland welcomed the US papers and the flexibility which they introduced, stating that they merited further consideration.

V. OTHER BUSINESS

49. The CTESS agreed to extend ad hoc invitations to UNEP and all MEAs previously invited to its meetings, with the exception of the ITTO, on which the Chairperson indicated that she would consult with some delegations. It was also agreed that UNCTAD would be invited to the next meeting.

50. The next meeting of the CTESS will take place on 30-31 October 2003.