# WORLD TRADE ORGANIZATION

**TN/TE/S/3**
31 January 2003

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**Committee on Trade and Environment Special Session**

## COMPILATION OF SUBMISSIONS UNDER PARAGRAPH 31(i) OF THE DOHA DECLARATION

Note by the Secretariat[1]

1. This document has been prepared by the Secretariat at the request of Members in the CTE Special Session.[2] It provides a compilation of proposals submitted to date to the CTE Special Session under paragraph 31(i) of the Doha Declaration. This paragraph reads as follows:

> *"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. Section I provides the list of the proposals submitted under paragraph 31(i). Sections II-VIII are organized under the following headings:

- Section II: Process;
- Section III: Multilateral Environmental Agreements (MEAs);
- Section IV: Specific Trade Obligations (STOs);
- Section V: Relationship Between WTO Rules and Specific Trade Obligations in MEAs;
- Section VI: Party/Non-Party Issues;
- Section VII: Outcome; and
- Section VIII: MEAs Referred to in the Proposals.

3. Under each of these sections, a reference to the relevant paragraphs of the proposal is provided, and the text of the proposal explaining the Member's position is quoted. In Sections II-VII, the relevant extracts from the submissions are arranged in alphabetical order, by Member. Section VIII sets out the comments made by Members on MEAs and their respective provisions.

4. This document should be considered as a working document aimed at facilitating the discussions in the CTE Special Session under paragraph 31(i) of the Doha Declaration. It could be revised, as appropriate, in light of future proposals submitted in the CTE Special Session.

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[1] This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

[2] TN/TE/R/3, "Summary Report on the Third Meeting of the Committee on Trade and Environment Special Session, 10-11 October 2002", Note by the Secretariat.

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## I. LIST OF PROPOSALS SUBMITTED UNDER PARAGRAPH 31(i)

| Member | Document | Date |
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| Australia | TN/TE/W/7 | 7 June 2002 |
| Chinese Taipei | TN/TE/W/11 | 3 October 2002 |
| European Communities | TN/TE/W/1 | 21 March 2002 |
| Japan | TN/TE/W/10 | 3 October 2002 |
| Korea | TN/TE/W/13 | 8 October 2002 |
| New Zealand | TN/TE/W/12 | 3 October 2002 |
| Saudi Arabia (Observer) | TN/TE/W/9 | 23 September 2002 |
| Switzerland | TN/TE/W/4 | 6 June 2002 |
| Switzerland | TN/TE/W/16 | 6 November 2002 |

**Total Number of Proposals: 10**

## II. PROCESS

| Proposal | Position |
|---|---|
| **Australia**<br>TN/TE/W/7<br>paras. 3-11 | "3. Australia proposes a three-phase process. It should be up to Members to decide the appropriate time that the CTESS should spend on each phase.<br><br>*Phase One*<br><br>4. During the first phase, the CTESS should identify (a) the **"specific trade obligations in multilateral environmental agreements"** that are to be discussed, and (b) the **WTO rules** that are relevant to these obligations.<br><br>5. Previous CTE discussion on the relationship between WTO rules and MEA provisions has focused on "trade measures" for environmental purposes. However, as highlighted in the recent submission made by Argentina (TN/TE/W/2), the term "trade measures" is different from the phrase agreed by Ministers – "specific trade obligations" – in the Doha Declaration.<br><br>6. Bearing in mind the important distinction between these two terms, an efficient way to proceed would be examine the range of MEA trade measures summarized in the document prepared by the CTE Secretariat, "*Matrix of Trade Measures Pursuant to MEAs*" (WT/CTE/W/160/Rev.1) in order to identify which of these measures are "specific trade obligations".[3]<br><br>7. Once these specific trade obligations have been identified, the CTESS should identify any relevant WTO rules that have to be considered in relation to any action that might be taken by WTO Members pursuant to each obligation. |

[3] The Matrix summarizes trade-related measures in fourteen multilateral instruments.

| Proposal | Position |
|---|---|
| | 8. Early identification of the specific trade obligations and WTO rules covered by the mandate will ensure Members are able to focus discussion in subsequent phases, consistently with the mandate, on the applicability of WTO rules as among WTO Members that are parties to a MEA. By discussing particular specific trade obligations and particular WTO rules these negotiations can help ensure that the balance of rights and obligations under existing WTO agreements is maintained, including for WTO Members that are not parties to a particular MEA.<br><br>*Phase Two*<br><br>9. Once WTO Members have identified the specific trade obligations and the particular WTO rules at issue, information sessions with relevant MEA Secretariats can be used to seek information from these secretariats, and from WTO Members' own experiences, concerning these provisions. This process can be used to determine whether there have been particular implementation issues with these "specific trade obligations".<br><br>10. It will be important in this phase to identify any real issues being dealt with by those Members implementing their obligations under the relevant MEA and the WTO, as opposed to discussing theoretical or hypothetical scenarios.<br><br>*Phase Three*<br><br>11. The third phase would involve discussion of matters arising from the work undertaken in phases one and two, and focus on the outcome of the negotiations." |
| **Chinese Taipei**<br>TN/TE/W/11<br>para. 3 | "3. With respect to procedural approaches for the negotiations under the Doha mandate, the government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu joins with a group of Members[4] in support of the three-phased approach proposed by Australia.[5] In addition, if certain concepts, other than those identified in Australia's submission, contained in the mandate could be further refined, it would definitely facilitate the negotiations in this Special Session. …" |
| **Korea**<br>TN/TE/W/13<br>para. 1 | "1. At the second meeting of the Special Session of the Committee on Trade and Environment (CTESS) held from 11-12 June 2002, a number of Members expressed their support for the proposal by Australia that CTESS divide its work under Paragraph 31(i) into three phases, starting from identifying the specific trade obligations (STOs) in MEAs and WTO rules relevant to those obligations. Korea also supports the Australian approach. In particular, identifying specific trade obligations and the relevant WTO rules will help Members develop a perspective for the scope and orientation of discussion." |

[4] Members who extended their support were: the Philippines, Singapore, Brazil, Thailand, Indonesia, Malaysia, Mexico, Chile, New Zealand, Canada, India, Hong Kong, China, Peru, Cuba, Egypt, Kenya, Uruguay, Bolivia, Korea, Pakistan, and Colombia, paragraph 59, TN/TE/R/2.

[5] See TN/TE/W/7.

| Proposal | Position |
|---|---|
| **Switzerland**<br>TN/TE/W/16<br>paras. 4-5 | "**I. ORGANIZATION OF THE DISCUSSIONS**<br><br>4. **Not in three phases**: At the latest Special Session of this Committee, it emerged from the discussions on paragraph 31(i) that several delegations would prefer to adopt a step-by-step approach. The first step would be to identify and clarify the meaning of the different terms of the Doha mandate, the second would involve seeking and proposing solutions, and the third would be to examine the solutions put forward. Switzerland believes that the Doha ministerial declaration does not compel the Special Session to divide the work into the three phases suggested by Australia in its submission of 7 June 2002 (TN/TE/W/7), to which Chinese Taipei refers.<br><br>5. **In parallel**: Switzerland considers that it may indeed be necessary to clarify the terms in the Doha Ministerial Declaration but that this would not prevent the Special Session from conducting a ***parallel*** examination of the principles governing the relationship between the WTO rules and MEAs, and of the various categories of options proposed before the Doha Ministerial Conference (as set forth in note TN/TE/S/1 by the Secretariat). Such an approach would make it possible **to move ahead** within the framework of the negotiation mandate. Indeed, it is important **not** to get lost in an **analysis of the mandate** but to advance in the **search for solutions**, for this is how we understand the term "negotiations". The goal is to find solutions, with an eye to the long as well as the short term. Switzerland does not object, however, to the use of **existing information on MEAs** as a means of clarifying the debate and therefore welcomes **New Zealand**'s very useful submission, which at this stage constitutes an excellent working document." |

## III. MULTILATERAL ENVIRONMENTAL AGREEMENTS

| Proposal | Position |
|---|---|
| **Argentina**<br>TN/TE/W/2<br>paras.13, 17 (c) | "13. In addition to categorizing specific trade obligations, Members will have to agree upon the kind of agreements to be covered by the expression "*multilateral environmental agreements*". We are of the opinion that such agreements should meet the following guidelines:<br>• *in force*: the review should be restricted to agreements which are currently in force. Failure to do so would impair the Doha mandate, given that the negotiations cover only "*specific trade obligations*". No international obligation may be based on an agreement which is not in force;<br>• *multilateral*: the agreement should have been negotiated by more than two parties and under the aegis of the United Nations, its specialized agencies or the United Nations Environment Programme (UNEP), and have attained a certain degree of universality;<br>• *open*: countries which did not participate in the negotiations should subsequently be able to accede."<br>**"VII. SUMMARY**<br>17. … (c) The expression "multilateral environmental agreements" (MEAs) should cover only agreements which are currently in force, have been negotiated and signed under the aegis of the United Nations, its specialized agencies or the United Nations Environment Programme (UNEP), have attained a certain degree of universality and are open." |
| **Chinese Taipei**<br>TN/TE/W/11<br>para. 8 | "8. ***"[M]ultilateral environmental agreements (MEAs)":*** The points made by the EU in section III of its submission[6] in this regard are appropriate. However, currently there could be WTO Members which are not able to participate the MEAs. If only those MEAs open for "all" WTO Members are MEAs mentioned here, there could be a large proportion of MEAs not being able to acquire such status of MEAs. With this respect, we submit that all MEAS open for formal participation of any non-party to the MEAs should all be considered as MEAs and within the scope of our negotiations." |
| **European Communities**<br>TN/TE/W/1<br>paras. 6-8 | "6. The EU considers that an MEA is a legally binding instrument between at least three parties, the main aim of which is to protect the environment and which is open to all countries concerned from the moment negotiations begin. In the context of the WTO, an MEA should also be relevant to the aims set out in sub-paragraphs (b) or (g) and the headnote of GATT Article XX. To avoid lacunae, relevant regional agreements, such as fisheries organizations, should also be covered, provided that countries concerned outside the region are not prevented from participating.<br>7. It should be noted that the WTO would exceed its competence if it were to aim to define an MEA in general. Therefore, the only purpose of seeking within the WTO an agreed definition of an MEA is subsequently to clarify the circumstances under |

[6] See page 2 of TN/TE/W/1.

| Proposal | Position |
|---|---|
| | which specific trade obligations set out in an MEA should be given explicit recognition under WTO rules. In this context, the elements mentioned below are in our view of particular relevance:<br><br>(a) The agreement should have been negotiated under the aegis of the UN or one of its agencies or programmes, such as UNEP, or under procedures for negotiation open for participation of all WTO Members;<br><br>(b) the agreement should be open for accession by any WTO Members on terms which are equitable in relation to those which apply to original Members;<br><br>(c) if the agreement is regional in nature, the elements above should apply to all countries in the region, i.e. openness in negotiation and accession. Moreover, the agreement should also be "open" to any countries outside the region whose interests may be affected by the agreement.<br><br>8. The EU believes WTO Members could usefully solicit input on this specific issue from UNEP and MEA secretariats." |
| **Japan**<br>TN/TE/W/10<br>para. 10 | "10. It may be difficult to develop a definition of an "MEA". However, we need to clarify to what extent the term of "MEA" covers, in order to identify the scope of "specific trade obligations", which is being negotiated as mandate.[7] In this regard, Japan believes that the following elements are appropriate criteria for such a definition, which were submitted as part of Japan's proposal in 1996 and are now modified as then discussed.<br><br>(i) An MEA is open to any country sharing the environmental objective of the agreement.<br><br>(ii) An MEA, developed and agreed, taking into account works including those under the aegis of the United Nations or its specialized agencies and with the participation of a substantial number of the countries, reflects the interests of major Parties concerned, such as Parties with substantial trade interests, actual and potential major producers and consumers of materials concerned.<br><br>Other than MEAs in force, for practical reasons it would be necessary to include in the discussion MEAs which have already been signed and adopted in due course but yet entered into force." |

[7] In terms of definition of an MEA, the following elements are indicated.
(1) EC proposal (TN/TE/W/1)
(i) Environmental objectives
(ii) Open to all Members, legally binding documents
(iii) At least 3 Parties are participating including regional agreements.
(2) Argentina proposal (TN/TE/W/2)
(i) in force,
(ii) more than 3 countries, under UN or UNEP,
(iii) open to all Members.

## IV. SPECIFIC TRADE OBLIGATIONS

| Proposal | Position |
|---|---|
| **Argentina**<br>TN/TE/W/2<br>paras. 6-7 | "6. The reference to *"specific trade obligations"* covers the provisions of multilateral environmental agreements which entail an "obligation". All non-mandatory trade measures, non-trade obligations and non-specific trade obligations in an MEA are therefore excluded. The meaning of the expression *"specific trade obligations"* should be borne in mind when determining which such obligations in the MEA should be considered.<br><br>7. In accordance with paragraph 31(i) of the Doha Declaration, it is a question of the provisions of multilateral environmental agreements that contain *"specific trade obligations"*, which should be understood as follows:<br><br>- *"obligation"* means a provision which prescribes "the enforceability of an act or omission imposed by a rule of law"[8];<br><br>- *"trade"*, that is to say, such action is related to an import or export operation;<br><br>- *"specific"*, that is to say, the obligation has a singular feature distinguishing it from the general category. This requirement means that only obligations which have been explicitly identified as mandatory within the framework of an MEA may be included in this category. It should be noted that an analysis of the different MEAs revealed that some establish a particular outcome as mandatory (e.g., protection of the ozone layer), whilst allowing countries the possibility of employing different measures to achieve this objective. In that respect, the action taken with a view to achieving such an outcome is not legally covered by the Doha mandate given that:<br><br>• The obligation does not relate to a particular type of behaviour to be adhered to by a country, rather to a result which must be achieved. That is to say, the MEA does not require countries to implement a particular measure, rather to achieve an outcome, with the result that countries are entitled to achieve this objective using different measures.<br><br>• The obligation in this case is not specific since the only thing explicitly identified by the MEA is a particular outcome, the measures used to achieve it being left to the countries' discretion." |
| **Australia**<br>TN/TE/W/7<br>paras. 5-6 | "5. Previous CTE discussion on the relationship between WTO rules and MEA provisions has focused on "trade measures" for environmental purposes. However, as highlighted in the recent submission made by Argentina (TN/TE/W/2), the term "trade measures" is different from the phrase agreed by Ministers – "specific trade obligations" – in the Doha Declaration. |

[8] Diez de Velázco, Manuel, "Instituciones del Derecho Internacional Público", (Tecnos, 1991), page 667.

| Proposal | Position |
|---|---|
| | 6. Bearing in mind the important distinction between these two terms, an efficient way to proceed would be examine the range of MEA trade measures summarized in the document prepared by the CTE Secretariat, "*Matrix of Trade Measures Pursuant to MEAs*" (WT/CTE/W/160/Rev.1) in order to identify which of these measures are "specific trade obligations"."[9] |
| **Chinese Taipei**<br>TN/TE/W/11<br>para. 7 | "7. ***"[S]pecific trade obligations"*** should include those trade measures which are required, expected or legally binding pursuant to the MEAs and their associated legal instruments, including annexes, amendments, decisions, resolutions, and recommendations." |
| **European Communities**<br>TN/TE/W/1<br>paras. 21-28 | "21. Existing MEAs have a variety of objectives, for example, protection of a particular species (flora, fauna…), protection of ecosystems and human health from harmful substances that could, for instance, bioaccumulate in the food chain (hazardous waste, dangerous chemicals, pesticides…) or protection of the "global commons" (ozone layer, biodiversity, global climate…).<br><br>22. Trade measures might not always represent the best available option to address a global environmental problem. However, they represent undoubtedly one mean to reach the objective(s) of MEAs, either self-standing or combined with other types of measures, and in some cases have been key to the success of the MEA. For instance, the trade obligations contained in the Montreal Protocol on Substances that deplete the Ozone Layer have been universally recognized as being instrumental to the effective and early implementation of the Protocol.<br><br>23. The Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal has also been key in the reduction and elimination of the dumping of hazardous waste on developing countries. This has enabled the Convention to shift its original scope towards the one of minimising the hazardous waste generation at the source (Ministerial declaration on environmentally sound management, December 1999). Another example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) thanks to which none of the species protected by it have become extinct as a result of trade. As became clear during exchanges of views and dialogue between MEAs secretariats and the CTE, the use of trade measures should not necessarily be regarded in a static way. In fact, their application should rather be considered in a dynamic context insofar as the nature of trade measures in a specific MEA might evolve over time depending on the effectiveness of the initial trade measure and/or the need to take other considerations into account.<br><br>24. It is also worth noting that some MEAs, such as CITES and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), contain the terms "international trade" in the name of the Convention itself and trade measures are the key instrument to reach the ultimate objective of the MEA in question. |

[9] The Matrix summarizes trade-related measures in fourteen multilateral instruments.

| Proposal | Position |
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| | 25. Trade obligations under MEAs can cover a wide spectrum of possibilities, ranging from trade bans to notification procedures or labelling requirements. For the purpose of illustration and discussion, the EU has identified four categories of measures arising from trade obligations. These are listed below. Some examples of MEAs are given in order to provide a better illustration of "trade obligations".[10] They do not cover trade measures applied exclusively *vis-à-vis* non-Parties.<br>• Trade measures explicitly provided for and mandatory under MEAs: this is the case in CITES where trade in some species threatened with extinction which are or may be affected by trade (listed in Appendix I) can only be permitted in exceptional cases, and trade in other species which may become extinct unless trade in these species is subject to strict regulation in order to avoid utilisation incompatible with their survival (listed in Appendix II) requires an export permit or a re-export certificate. This is also the case in the Stockholm Convention on Persistent Organic Pollutants (POPs) which will *inter alia* prohibit the import and export of certain POPs with some exceptions such as their environmentally sound disposal or a specific use/purpose, such as insecticides, on the request of some Parties. The same applies to the Cartagena Protocol on Biosafety as regards obligatory advanced informed agreement procedure for the first shipment of living modified organisms.<br>• Trade measures not explicitly provided for nor mandatory under the MEA itself but consequential of the "*obligation de résultat*" of the MEA. This category covers cases where an MEA identifies a list of potential policies and measures that Parties could implement to meet their obligations.<br>• Trade measures not identified in the MEA which has only an "*obligation de résultat*" but that Parties could decide to implement in order to comply with their obligations. In contrast to the previous category, the MEA does not list potential policies and measures so countries have greater scope as regards the exact nature of the measures they might decide to deploy to reach the objectives of the MEA.<br>• Trade measures not required in the MEA but which Parties can decide to implement if the MEA contains a general provision stating that parties can adopt stringent measures in accordance with international law. This is the case with the Montreal Protocol (Art. 2.11) and PIC (Art. 15.4). In some cases, the MEA may explicitly recognize the right of Members to apply specific trade measures.<br>26. The EU considers that the above categories have to be analysed in detail in order to determine where any cut-off point (or points) between "specific" and "non-specific" trade obligations exist. |

[10] Some MEAs contains several categories of "trade obligations" and examples given are not exhaustive.

| Proposal | Position |
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| | 27. The EU welcomes the work carried out by the CTE Secretariat in cooperation with several MEAs Secretariats and considers that document WT/CTE/W/160/Rev.1 *"Matrix on Trade Measures Pursuant to Selected MEAs"* provides valuable input for WTO Members' reflection on this aspect of the issue."<br><br>"28. As a point of departure it is worth recalling the fact that any specific trade obligation in an MEA is negotiated and agreed by consensus in a multilateral context and that this should be, in principle, a guarantee against discriminatory and protectionist action. …" |
| **Japan**<br>TN/TE/W/10<br>para. 11 | "11. … Japan believes that the approach proposed by the EC, which categorizes various trade obligations according to their specificity, is helpful. Reviewing the definition of "trade obligations" is a premise of this process. Certain provisions, which do not explicitly stipulate trade obligations but only allow for Parties to take appropriate measures, do not fall within the scope of "trade obligations". In view of these criteria, Japan tried to classify trade measures stipulated in MEAs, reviewing a list of MEAs in document WT/CTE/W/160/Rev.1 prepared by the secretariat. The following preliminary results are only for illustrative purpose and this paper does not intend to prejudge the outcome of future work in this negotiation. Moreover, this categorization, needless to say, does not affect the legal status of each MEA, which is established through due process.<br><br>1. Trade measures to be taken are explicitly provided for and mandatory under MEAs;<br><br>- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Articles 3 to 6 (regulation of trade in specimens of species included Appendix I-III).<br><br>- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Article 4.1 (Import prohibition of hazardous waste, notification, export prohibition), Articles 6 to 9, Article 13, etc.<br><br>2. "Obligation de résultat" is explicitly provided for in an MEA and a trade measure is identified as potential means taken by Parties to meet the obligation of that MEA;<br><br>- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Article 8.1<br><br>3. "Obligation de résultat" is specified in an MEA but a trade measure to be taken for the obligation is not identified in the MEA, while the MEA leaves Parties to decide measure to be taken to fulfil the obligation; and<br><br>- Montreal Protocol on Substances that Deplete the Ozone Layer, Article 2A to 2H |

| Proposal | Position |
|---|---|
| | 4. Trade measures are not mentioned in MEAs but Parties can take trade measures in accordance with relevant decisions made under the MEA framework.<br><br>- A number of regional fisheries agreements such as ICCAT, CCAMLR, and so forth." |
| **Korea**<br>TN/TE/W/13<br>paras. 4, 6-9, 11-14 | "4. Section 2 [i.e. paras. 6-9] of [Korea's] submission presents Korea's view with regard to the criteria for identifying the STOs. The premise is that those trade obligations, which allow for Parties' discretion as to the acceptance of the obligations as well as the implementing measures, should not be regarded as STOs. …"<br><br>"6. In order to identify STOs, it is necessary first to have a clear idea on what STOs stand for. Korea believes that the term, "specific trade obligations," should be interpreted on the basis of its ordinary meaning. In this regard, this submission begins its analysis by quoting the Webster Dictionary's definitions of the three key words of "specific," "trade" and "obligation" to look for their ordinary meanings.<br><br>7. First, the Webster Dictionary[11] defines "obligation" as "something which a person is bound to or not to do as a result of an agreement or responsibility." An obligation binds Parties to abide by their agreement and renders them liable to coercion and punishment for neglecting it. An obligation does not allow for discretion on the part of the Parties. In this light, Korea believes that provisions of MEAs that allow for Parties' discretion as to whether to implement them do not constitute obligations. In other words, Korea is of the view that trade measures authorized, not required by MEA, cannot be considered as obligations envisaged in Paragraph 31(i).[12]<br><br>8. Second, the Webster Dictionary defines "specific" as "clearly distinguished, stated or understood." "Specific" does not leave room for ambiguity, discretion or misunderstanding. To be "specific," therefore, a provision must be precise, definite and explicit in its totality. In this light, Korea believes that "specific" trade obligations are trade obligations that set forth not only a result which must be achieved (*obligation de résultat)* but also measures which must be used to achieve it *(obligation de comportement*). In other words, the obligations that lay out only the objective, while leaving the implementing measures to Parties' discretion, cannot be regarded as STOs. In this respect, Korea agrees to Argentina's interpretation of the "specific obligations." |

[11] The New International Webster's Dictionary for the English Language, 1995 Edition, Trident Press International.

[12] Reference is made to OECD's categorization of trade measures as contained in OECD study "Typology of trade measures based on environmental product standards and ppm standards" (COM/ENV/TD/93/89). The study classifies trade measures into four types: MEA-obligation measures, MEA-authorization measures, MEA-related measures and national law measures. According to the study, MEA-authorization measures are taken by individual counties based on an authorization in an MEA; MEA-related measures are measures which are discretionary or suggested in the MEA.

| Proposal | Position |
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| | 9. Lastly, the Webster Dictionary defines "trade" as "the business of distribution, selling and exchange." Of course, "trade" in the context of Paragraph 31(i) does not refer to ordinary trade but international trade. For practical purposes, however, it would be convenient to presume that all of the measures listed in WT/CTE/W/160/Rev.1 would meet the trade-relatedness requirement without going into further analysis of the meaning of international trade."<br><br>"11. … in some cases, the criteria established in [paras. 6-9] alone are not sufficient enough to provide guidance for identifying STOs. Those cases mostly involve COP decisions or resolutions, which suggests that identifying STOs is closely linked to the definition of MEAs.<br><br>12. For example, Article 4.2.e and 8 of the Basel Convention contain the ambiguous words "environmentally sound way," which is not operational by itself. However, a COP decision elaborates it. Further, Article 18 of the Cartagena Protocol on Biosafety provides for basic elements of "behavioral obligation," while mandating the COP to elaborate more on those obligations.<br><br>13. There are differing opinions on whether trade obligations contained in COP decisions should be treated as STOs. If Members follow a strict interpretation of "set out in MEAs," trade obligations stipulated in COP decisions should not be regarded as STOs. Yet COP decisions are playing an increasingly important role since most MEAs lay out only a basic framework and concrete rights and obligations of the Parties take shape through COP decisions. In addition, there are cases where the MEAs concerned declare that COP decisions are their integral part.<br><br>14. Among COP decisions, the Marrakesh Accord is a unique case. Articles 6, 12 and 17 on the Flexibility Mechanisms in the Kyoto Protocol to the UNFCCC do not stipulate any specific obligations. Specific elements of the Mechanisms are provided in the Marrakesh Accord, which future COP is expected to adopt. It seems that the Accord is not mandatory in legal point of view, but in particpating in the Flexibility Mechanisms, the Parties to the Kyoto Protocol cannot avoid abiding by the specific trade obligations set out therein. Then, the question arises whether such *"de facto"* obligations stipulated in the Accord are STOs. " |
| **Switzerland**<br>TN/TE/W/4<br>paras. 3-4 | "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). |

| Proposal | Position |
|---|---|
| | 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." |
| **Switzerland**<br>TN/TE/W/16<br>paras. 6-8 | "6. Switzerland agrees with other delegations that the different categories of **"specific trade obligations"** set out in MEAs should be examined in order to be able to make a distinction between specific and non-specific trade obligations. Different categories were identified and discussed by several delegations in the framework of the latest debate. New categories also emerged with the latest contributions in particular by Japan, Korea, New Zealand and Chinese Taipei, which we found useful in preparing our submission. Having studied these analyses, Switzerland considers that the following **two categories** come under the heading of "specific trade obligations":<br><br>**1. Trade measures that are explicitly provided for and mandatory under MEAs**<br><br>This is the case of the CITES, for example, under which trade in species threatened with extinction which are or may be affected by trade is permitted only in exceptional circumstances. To illustrate our point, let us take plant X included in Appendix I to the CITES, which lists the species that are affected by trade and are subject to strict regulation. If Member A prohibits the import of plant X pursuant to Appendix I of the CITES, such a measure should be regarded as a specific trade obligation and would hence be covered by the solution negotiated among the WTO Members under paragraph 31(i).<br><br>**2. Other measures that are relevant and necessary to achieve an MEA objective**<br><br>These encompass the different categories of measures and policies adopted in pursuit of a specific objective such as that of the Kyoto Protocol, which is to reduce emissions of greenhouse gases. Such measures may relate to a number of spheres – taxation, rules and standards, and so forth (Article 2.1 of the Protocol). Let us take Member A, which is listed in Annex I to the Protocol along with the other countries that have undertaken greenhouse gas reduction commitments. If Member A prohibits the importation and use of emission filters for industry on the grounds that they do not meet national standards in terms of retention of substances that adversely affect the concentration of greenhouse gases, such a measure should be regarded as a specific trade obligation covered by the solution negotiated among the WTO Members under paragraph 31(i). Indeed, it contributes to the implementation and achievement of the object of the Protocol, which provides for an "*obligation de résultat*" (obligation to achieve results). |

| Proposal | Position |
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| | 7. Here we should underline that our analysis is **similar** to that of **Japan**. The first two categories identified by Japan in paragraph 11 of its submission are covered by our own categories. Our second category is slightly broader than Japan's, however, in that it encompasses MEAs which specify:<br><br>- An "***obligation de résultat***", and<br><br>- the **spheres** in which a measure may be taken. Measures that may be adopted to achieve the "*obligation de résultat*" target are thus **not explicitly named** but **implicitly derive from the sphere** in which they should be taken (e.g. the fiscal sphere implies fiscal measures).<br><br>8. In our view, the coverage of these two categories by paragraph 31(i) appears to enjoy broad consensus in this Committee." |

## V. RELATIONSHIP BETWEEN EXISTING WTO RULES AND SPECIFIC TRADE OBLIGATIONS

### A. GENERAL

| Proposal | Position |
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| **Chinese Taipei**<br>TN/TE/W/11<br>paras. 1-2 | "1. … The government recognizes the importance of improving policy coherence between trade and environment. In our view, a consensus among WTO Members on the issue could more easily be reached step by step. The negotiation mandate set out by the ministers in paragraph 31(i) of the Doha Declaration clearly aims at a certain part of the overall relationship between WTO rules and trade measures taken for environmental purposes. The government believes that the mandate is an appropriate first step in the right direction.<br><br>2. WTO rules and MEAs are bodies of public international law governing cross-border trade and environmental measures. Greater compatibility and fewer inconsistencies between the provisions of each body of law would doubtlessly enhance the mutual supportiveness of trade and environment. In order to pursue this goal, better coordination and cooperation between trade and environmental policymakers and negotiators at both the national and international levels will be crucial. The government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu suggests that in the future, when negotiating a new MEA, participating WTO Members who are in those negotiations shall ensure that the specific trade obligations provided for in that particular MEA will be WTO-consistent and they shall avoid possible conflicts." |
| **European Communities**<br>TN/TE/W/1<br>paras. 9-17 | "9. For many years, the EC has consistently taken the view that there is a need to address the relationship between MEAs and WTO rules so as to ensure that it is based on mutually supportive grounds. We consequently welcome the possibility given by the DDA to address the issue and move forward "with a view to enhancing the mutual supportiveness between trade and environment" in the realm of the WTO.<br><br>10. Considering the growing interface between trade and environment, and, in particular between MEAs and WTO agreements, the EU believes that there is an urgent need for all WTO Members to arrive at a consensus about the way forward in this area through agreement on our shared interests and the desirable outcomes that can accrue from addressing the trade and environment relationship for the benefit of all. In particular, it is important that the relationship between WTO rules and trade measures pursuant to MEAs is the result of a political consensus arising out of a process of negotiation between WTO Members rather than simply being left to potential dispute settlement and the results it imposes.<br><br>11. Like the vast majority of WTO Members, the EU believes that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus, as stated in Principle 12 of the Rio Declaration on Environment and Development. Indeed, unilateral action by one country is unlikely to be effective in solving such issues. Moreover, the way in which trade measures in MEAs are negotiated and agreed, i.e. by consensus in a multilateral context, should be an effective guarantee against discriminatory action and their use for protectionist purposes. |

| Proposal | Position |
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| | 12. MEAs also represent a concrete implementation of the "common but differentiated responsibility" principle (Principle 7 of the Rio Declaration on Environment and Development). While trade measures may be needed in certain cases to achieve the environmental objective, co-operation provisions, and notably financial, technology transfer, technical assistance and capacity building are an at least equally important part of the MEA package, which can clearly be critical, notably for developing countries, for the effective implementation of the MEA<br><br>13. The EU believes that these considerations provide sound reasons for WTO Members to strive towards and to reach a consensus on the relationship between WTO rules and trade measures taken pursuant to MEAs.<br><br>14. The MEA issue is not a zero sum game: clarification of the relationship between WTO rules and MEAs would provide gains to all WTO Members and Contracting Parties to MEAs. It is clear that clarification would provide greater legal security for both MEAs and for the WTO, making both systems more effective and making sure that policy formulation within both systems was improved by the mere fact that neither would operate in isolation of the other. In this sense, the EU views the MEA/WTO relationship as an international governance issue, i.e. relating to the functioning of the global governance system and, in particular, to the necessary links between bodies of law dealing with international trade and environment which both form part of a global system.<br><br>15. Clarifying the relationship would also create a clearer policy making environment for both trade policy makers and negotiators of MEAs alike and help prevent conflicts from happening in the first place because clearer parameters would mean that MEAs would take WTO rules into account and WTO law would give due weight to obligations arising under MEAs.<br><br>16. Of particular importance, though, is the fact that clarification would render multilateralism de facto more attractive than unilateralism without changing WTO rules: a more explicit and clearer status than exists at present as regards specific trade obligations under MEAs could confirm the positive status of such measures under WTO. Such measures are more secure than similar measures taken unilaterally and without any form of international frame of reference, endorsement or debate.<br><br>17. These factors should bode well for reaching a consensus among WTO Members on the relationship between WTO rules and trade measures taken pursuant to MEAs. Indeed, the EU considers that a positive stance among WTO Members and an open spirit focussed on the objectives of legal clarity and security could enable negotiators to clarify and interpret the WTO/MEA relationship in such a way as to further improve policy coherence between both bodies and ensure that they operate in a mutually supportive way." |
| **Japan**<br>TN/TE/W/10<br>paras. 6-8 | "6. When trade measures are taken, there may be the danger of these measures being used in a manner that would constitute a means of arbitrary, unjustifiable discrimination or a disguised restriction on international trade. In particular, unilateral trade measures which are not consistent with WTO rules, seriously undermine the multilateral trade system and they should be strictly avoided. Even if trade measures are taken in order to achieve the environmental objectives, these measures should be based on multilateral framework, as far as possible. |

| Proposal | Position |
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| | 7. From such a viewpoint, in order to ensure the mutual supportiveness of trade and environmental policies, it is essential for the international community to develop common understanding on the relationship between specific trade obligations set out in MEAs and WTO rules, though the negotiations are limited to the relationship among Parties to the MEAs in question.<br><br>8. Up to now, many countries have been discussing the relationship between WTO rules and trade measures stipulated in MEAs. However, Members have not so much focused on the specificity of the trade measures and the applicability of existing WTO rules among the Parties to the same MEA." |
| **Switzerland**<br>TN/TE/W/4<br>paras. 1, 10-11 | "1. … 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. …"<br><br>"10. … 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".<br><br>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. TERMS

| Proposal | Position |
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| **Argentina**<br>TN/TE/W/2<br>para. 5 | "5. The reference to *"existing WTO rules"* encompasses all the provisions of agreements which are currently in force, known as "covered agreements". |

| Proposal | Position |
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| **Chinese Taipei**<br>TN/TE/W/11<br>paras. 5-6 | "5. *"[E]xisting"* should be understood as agreements that are currently in force.<br>6. *"WTO rules"* should encompass the Marrakesh Agreement Establishing the World Trade Organization and all of the agreements and associated legal instruments included in the Annexes thereto." |

C. PRINCIPLES

| Proposal | Position |
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| **Argentina**<br>TN/TE/W/2<br>paras. 8-12, 17 (b) | "8. Furthermore, criteria will have to be established for determining the kind of relationship between the *"specific trade obligations"* and the rules of the multilateral trading system.<br>9. The problem of the relationship between different legal provisions which relate to a single issue is not unfamiliar to the WTO, the legal system of which is itself made up of several multilateral and plurilateral agreements all coming under one international treaty: the Marrakesh Agreement. Indeed, the Marrakesh Agreement comprises a series of independent agreements negotiated both in earlier rounds ("Codes") and throughout the history of the GATT. The existence of provisions which often wholly or partially overlap rules in other agreements or which appear to constitute an implicit derogation can therefore be easily confirmed.<br>10. The work of the Panels and the Appellate Body of the dispute settlement system has involved addressing situations in which several legal rules were applicable to a single issue. In that respect, the following "criteria" - which, moreover, stem from international legal practice - were adopted to identify the kind of relationship established between them:<br>• *complementarity*: meaning that concurrent obligations in two different, but complementary, international agreements, if not mutually exclusive, should be complied with at the same time.[13] Commonly referred to as the "principle of cumulation", this is what generally occurs at international level when a State is bound by several international treaties[14];<br>• *express derogation*: occurring when compliance with an obligation under one convention - compliance with which would be incompatible with a provision of another international agreement – is covered by an express exception in the latter[15]; |

[13] The report "European Communities - Regime for the Importation, Sale and Distribution of Bananas" (WT/DS27/R/USA) of 22 May 1997 states that "…the obligations arising from the former (the Agreements listed in Annex 1A) and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement" (paragraph 7.160).

[14] The Appellate Body Report "Canada - Certain Measures Concerning Periodicals" (WT/DS31/AB/R) of 30 June 1997 states that "The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other" (page 21).

[15] The Appellate Body Report "European Communities - Regime for the Importation, Sale and Distribution of Bananas" (WT/DS27/AB/R) of 9 September 1997 states that "The Agreement on Agriculture

| Proposal | Position |
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| | • *conflict*: occurring in situations where compliance with one obligation necessarily entails failure to comply with another, and the two cannot be reconciled.[16]<br><br>11. The above-mentioned criteria would allow a series of relationships between the "*specific trade obligations*" in the MEAs and the provisions of the Marrakesh Agreement to be identified. This, in turn, would enable us to assess the need for, and form which should be taken by, a possible regulatory solution within the purview of the WTO to achieve greater complementarity between environmental and free-trade objectives.<br><br>12. We feel that this experience, which is characteristic of the WTO, constitutes a reference which could serve as guidance when reviewing the relationship between existing WTO rules and specific trade obligations in MEAs, given that both multilateral environmental agreements and the Marrakesh Agreement, in their capacity as international treaties, belong to the same international legal system."<br><br>**"VII. SUMMARY**<br><br>17. … (b) The criteria for identifying the relationship between the "specific trade obligations" in MEAs and "existing WTO rules" can be drawn from the experience of the Panels and the Appellate Body of the dispute settlement system." |
| **Chinese Taipei**<br>TN/TE/W/11<br>paras. 9, 14 | "9. The government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu considers that "the applicability of such existing WTO rules as among parties to the MEA in question" should be understood from the following perspectives:<br><br>• The government shares the same view expressed by certain Members[17] that a specific trade obligation (STO) provided for in an MEA should not be automatically presumed to be in conformity with WTO rules. With a view to upholding and safeguarding an open and non-discriminatory multilateral trading system, the legitimacy of a trade measure implemented pursuant to a particular MEA should be examined in light of the principles of necessity, proportionality, and transparency, and in light of whether it is based on sufficient scientific evidence and whether it conforms to the chapeau of GATT Article XX. …" |

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contains several specific provisions dealing with the relationship between articles of the Agreement on Agriculture and the GATT 1994. For example, Article 5 of the Agreement on Agriculture allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the Agreement on Safeguards…" (paragraph 157).

[16] The Appellate Body Report "Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico" (WT/DS60/AB/R) of 2 November 1998 states that "A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them. An interpreter must, therefore, identify an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement before concluding that the latter prevails and that the provision of the DSU does not apply" (paragraph 65) (emphasis added).

[17] Members who have expressed similar views include: Australia (paragraph 20, TN/TE/R/1), Chile (paragraph 24, TN/TE/R/1), Hong Kong, China, (paragraph 35, TN/TE/R/1), Pakistan (paragraph 43, TN/TE/R/1), the United States (paragraph 9, TN/TE/R/2) Brazil (paragraph 17, TN/TE/R/2), and Cuba (paragraph 56, TN/TE/R/2).

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| | "14. The government shares the same view expressed by certain Members that an STO provided for in an MEA should not automatically be presumed to be in conformity with WTO rules." |
| **European Communities**<br>TN/TE/W/1<br>paras. 19, 29 | "19. … the EU considers that the relationship between WTO rules and MEAs in the context of a global governance system should be based on the following principles:<br>• The importance and necessity of MEAs: global environmental problems need a multilateral approach and solutions; accordingly unilateral action should be avoided as far as possible.<br>• Multilateral environmental policy should be made within multilateral environmental fora, and not in the WTO, in accordance with each body's respective expertise and mandate.<br>• When governments around the world develop positions for MEAs negotiations it is desirable that they give consideration to relevant WTO rules so as to ensure a mutually supportive relationship between both sets of rules. When the trade and environment interface raises novel trade-related questions, these could usefully be a subject of information exchange between the MEA secretariat and the relevant WTO Committees.<br>• MEAs and WTO are equal bodies of international law. They should recognize each other with a view to being mutually supportive, in order to meet the common goal of sustainable development.<br>• WTO rules should not be interpreted in "clinical isolation" from other bodies of international law and without considering other complementary bodies of international law, including MEAs."[18]<br>"29. Building on this and the principles set out above, the following points are worth bearing in mind as we consider the co-existence of WTO rules and MEAs:<br>• The conclusion of an MEA can have considerable relevance for the application of WTO rules in a particular dispute, even in relation to non-parties. The jurisprudence of the Appellate Body in environment-related cases strongly suggests that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT. Indeed, the Appellate Body has made clear that good-faith efforts to negotiate such an agreement can, provided certain other conditions are met, be sufficient to justify that a trade measure meets the criteria of the "chapeau" to article XX. In addition, the Appellate Body also confirmed that GATT Article XX *"must be read by a Treaty interpreter in the light of contemporary concerns of the Community of nations about the protection and conservation of the environment*" and that, in general, WTO agreements should not be interpreted in clinical isolation from other parts of international law such as MEAs. It is clear that the existence of an MEA should be taken into consideration in applying WTO rules. |

[18] Appellate Body in *Reformulated Gasoline* case.

| Proposal | Position |
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| | • WTO rules and MEAs are two bodies of public international law with equal status. As a general principle, countries should aim at fulfilling in good faith both sets of rules and, in the event of adjudication, the first task would be to seek to interpret each set of rules in a manner which avoids potential conflicts. This should normally be sufficient to avoid such conflicts, particularly bearing in mind that – as stated above – general WTO provisions have been interpreted giving due weight to the conclusion of an MEA, even in cases where non-parties are involved.<br><br>• In those rare cases in which interpretation is not sufficient to avoid a potential conflict, there is a need to determine – under rules of public international law – which is the applicable body of law. This is a complex issue which merits further discussion. At this stage, it may suffice to say that an important consideration could be not so much the application of the *lex specialis* test but which of the two sets of rules provides for a more specific regulation of the issue under dispute. In this connection, the discussion above on the extent to which an MEA contains a specific trade obligation may well be of particular relevance.<br><br>• It would appear that, in those cases in which an MEA provides a specific trade obligation and this is the basis for the trade measures under dispute, parties should in the first instance seek to resolve their dispute within the MEA in question, notably under any dispute settlement mechanism provided." |
| **Japan**<br>TN/TE/W/10<br>paras. 3, 8-9, 12-15 | "3. The purpose of this paper is to present an idea on "specific trade obligations". That is, those which are highly specified in MEAs should be deemed to be consistent with WTO rules, while other relevant measures specified in MEAs should be presumed to be WTO consistent on condition that those measures meet certain substantial requirements."<br><br>"8. Up to now, many countries have been discussing the relationship between WTO rules and trade measures stipulated in MEAs. However, Members have not so much focused on the specificity of the trade measures and the applicability of existing WTO rules among the Parties to the same MEA.<br><br>9. Some may argue that it would be possible to minimize the risk of overlooking the abuse of these trade measures, if such measures are defined sufficiently specifically. They may also point out the lex posterior principle, which is partly incorporated in Article 30 of the Vienna Conventions on the Law of Treaties, can be invoked so as to clarify the relation between MEAs and WTO rules. However, it would be difficult to sufficiently clarify such relations by applying this principle since MEAs and WTO rules do not necessarily address the same concerns. Therefore, it is useful and beneficial to all the members to develop some common understanding to clarify the relationship between MEAs and WTO rules."<br><br>"12. Japan considers that, with regard to trade measures explicitly provided for and mandatory under MEAs …, such trade obligations could be deemed as compatible with WTO rules among MEA Parties, since those obligations had been negotiated under the existence of WTO or GATT rules and implementation procedures for these trade measures had been agreed. |

| Proposal | Position |
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| | 13. If an MEA provides for "obligation de résultat" and indicates the relating trade measures in the MEA …, Japan also considers that there is common understanding on the needs for the measures among MEA Parties.<br><br>14. In the case referred to in paragraph 13, though the MEA Parties have common acknowledgement of needs and relevance of the trade measures, those measures could not be automatically deemed as compatible with WTO rules, since specificity of individual measure would not be so clear as category (1). Therefore, in this case, Japan considers that it would be rebuttably presumed to be consistent with WTO rules[19], if substantial requirements could be introduced such as indicated as below. For instance, in terms of GATT Article XX, following substantial requirements are appropriate[20],<br><br>1. The trade measures, pursuant to an MEA to achieve its environmental objectives, are based on scientific reasons, the trade measures are reasonably related to the objectives.<br><br>2. The scope of trade measures has proportional range and degree in the pursuit of MEA objectives (Proportionality).<br><br>15. On the other hand, trade measures categorized in (3) & (4) of the paragraph 11 above are deemed to be outside the scope of this mandate. Each trade measure categorized in the latter two groups, if necessary, should be deliberated on a case-by-case basis. Furthermore, if a Party takes certain trade measures based on a MEA categorized in (3) or (4) of paragraph 11 above, such measures could be subject to consultation between affected Parties of the MEA in question through information exchange mechanism. Thus, a linkage between paragraph 31 (i) and (ii) could contribute to enhance the legal stability of the application of MEA-related trade measures." |
| **Switzerland**<br>TN/TE/W/4<br>paras. 4, 7-8 | "4. … 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."<br><br>"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 |

[19] Article 2.5 of the TBT Agreement refers to a method of rebuttable presumption.

[20] These requirements were previously referred to in Japan's proposal to the CTE in 1996. Japan reviewed the requirements in light of relevant jurisprudence thereafter. See paragraphs 137-142 of the Appellate Body Report of the US-Shrimp case (WT/DS58/AB/R).

| Proposal | Position |
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| | 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.<br><br>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." |
| **Switzerland**<br>TN/TE/W/16<br>Section III | **"III. FUNDAMENTAL PRINCIPLES WHICH, TO OUR MIND, GOVERN THE RELATIONSHIP BETWEEN EXISTING WTO RULES AND SPECIFIC TRADE OBLIGATIONS SET OUT IN MEAS**<br><br>**(a) General principles of no hierarchy, mutual supportiveness and deference**<br><br>… Concerning the principles that govern the relationship between the WTO rules and specific trade obligations set out in MEAs, Switzerland, as stated in document TN/TE/W/4, endorses the approach based on the general principles of no hierarchy, mutual supportiveness and deference. In focusing on their own tasks and spheres of competence, the multilateral trading system and the environmental protection regime are mutually supportive. In this connection, we were extremely pleased to see that one of the outcomes of the Johannesburg World Summit on Sustainable Development (paragraph 92 of the Plan of Implementation) confirms, at the global level, our position/approach of promoting mutual supportiveness between the multilateral trading system and multilateral environmental agreements. Our approach is specifically geared towards this mutual supportiveness goal. |

| Proposal | Position |
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| | **(b) Principle of presumption of conformity with the WTO rules**<br><br>According to the principle of presumption of conformity with the WTO rules, trade-related measures in MEAs are assumed to be necessary for the protection of the environment. Switzerland thus endorses paragraph 12 of **Japan**'s submission, stating that, as regards trade measures that are **mandatory** and **explicitly** provided for under MEAs, such trade obligations **may be deemed to be consistent** with the WTO rules among MEA parties. This principle obviously requires Members negotiating an MEA to make sure that the MEA does not include unnecessary, arbitrary, protectionist or unjustifiably discriminatory trade measures.<br><br>**(c) Reversal of the burden of proof**<br><br>Under the principle of presumption of conformity with the WTO rules, when a Member, pursuant to an MEA, prohibits the marketing of a product for environmental reasons, such a ban is considered to be WTO-consistent and the Member would no longer have to show that its measure was covered by the exceptions under Article XX(b) (*reversal of the burden of proof*)<br><br>**(d) "Objectionable" practical implementation**<br><br>Notwithstanding the above, it should be pointed out that the *practical implementation* of trade measures might still be challenged where a Member has used its discretion in a manner which infringes WTO obligations. Here the burden of proof would lie with the complaining party, however, and not with the Member having adopted the measure. This should answer the question from Chile. To illustrate the problem, let us start from the hypothesis that an MEA expressly prohibits the production and importation of substance S because of its harmful effects on the environment in general. In accordance with the presumption of WTO conformity, the import ban imposed by Member M would be regarded as WTO-consistent. Thus, a WTO Panel would not have to examine whether the import ban is necessary under Article XX(b) but should consider that the measure as such is covered by the exception under Article XX(b). Complainant P could still claim, however, that the manner in which Member M applies the ban is not consistent with WTO obligations, if the measure constitutes, for example, arbitrary or unjustifiable discrimination or a disguised restriction on international trade. This particular situation does not reflect a conflict between the WTO rules and an MEA but a traditional conflict between the WTO rules and a domestic measure. " |

## VI. PARTY/NON-PARTY ISSUES

| Proposal | Position |
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| **Argentina**<br>TN/TE/W/2<br>paras. 14-16, 17 (d) | "14. The mandate under paragraph 31(i) establishes that the negotiations shall not prejudice the WTO rights of any Member that is not a party to an MEA. That is to say, the "intangibility" of the rights of WTO Members that are not a party to an MEA has been established by the Ministers regardless of the final outcome of the negotiations.<br><br>15. Negotiating in such circumstances raises questions about the legal effects and situations which would result from a decision to adopt rules as a response to ensure compliance with "*specific trade obligations*" which are potentially inconsistent with WTO principles.<br><br>Compliance with "*specific trade obligations*" which could come into conflict with WTO provisions or principles would involve diminishing the rights currently enjoyed by WTO Members which are also a party to an MEA. Two categories of WTO Members would therefore be established:<br><br>Members which are a party to an MEA: their rights would be diminished to ensure compliance with specific trade obligations which are potentially inconsistent with the Marrakesh Agreement;<br><br>Members which are not a party to an MEA: they would enjoy more extensive rights under the Marrakesh Agreement since they would not be affected by the outcome of the negotiations, as expressly stated in paragraph 31(i) of the Doha Declaration.<br><br>16. Were this to be the final outcome, the legal situations and implications for WTO Members which are a party to an MEA would be as follows:<br><br>(a) Some environmental agreements have been signed with a special safeguard clause which protects rights and obligations under other international agreements, including the Marrakesh Agreement. Any modification of the WTO rights of Members which are a party to an MEA would therefore involve a radical change in the normative context in which the agreement was signed. That is to say, it would alter the conditions in which a WTO Member consented to be bound by an MEA.<br><br>(b) A change in the WTO rights of States which are a party to an MEA in order to comply with "*specific trade obligations*" which may prove contrary to the Marrakesh Agreement would involve modifying the scope of MEA obligations. In other words, an amendment of the Marrakesh Agreement would quite simply mean altering the scope and extent of the obligations in the MEA, with consequent effects on the parties thereto."<br><br>**"VII. SUMMARY**<br><br>17. … (d) In the event of a normative solution being chosen to ensure compliance with the specific trade obligations in multilateral environmental agreements, the legal implications for Members party to the MEA should be taken into consideration since this would involve a radical change in the normative context in which the agreement was signed and a modification of the extent and scope of the specific trade obligations in the MEA." |

| Proposal | Position |
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| **Chinese Taipei**<br>TN/TE/W/11<br>paras. 9-12, 16 | "9. The government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu considers that "the applicability of such existing WTO rules as among parties to the MEA in question" should be understood from the following perspectives: …<br>• When there is a specific trade dispute arising between WTO Members/Parties to the MEA in question, the complaining Member alone shall have the right to bring the case to the dispute settlement mechanism under the WTO regime or the regime of the MEA in question, subject to the provisions of Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which contemplate that disputes arising under WTO rules will be brought to the Dispute Settlement Body for resolution. However, if the trade dispute is between a WTO Member/Party and a WTO Member/Non-party to the MEA in question, the case shall only be settled according to WTO rules and procedures as stipulated in the DSU.<br>10. Because negotiations under the mandate are limited to the applicability of existing WTO rules as among WTO Members/Parties with respect to MEAs, it follows that such negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question. *The WTO rights* should be interpreted as encompassing substantive as well as procedural rights conferred upon every WTO Member by the existing WTO rules. Substantive rights include legitimate trade interests guaranteed to a WTO Member under any of the WTO agreements, while procedural rights include the right to resort to the WTO dispute settlement mechanism.<br>11. Further, in our view, when a Member is not able to participate in the decision-making procedure of a particular MEA and if a trade dispute arises between a WTO Member/Non-party and a WTO Member/Party to such an MEA, a panel established according to the DSU shall, if applicable, give weight to the fact that the WTO Member/Non-party to the MEA in question was precluded from participation in the negotiations of such an MEA.<br>12. In this context, it is important to recall that the ministers also stated in paragraph 32 of the Doha Declaration that "the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries."<br>**"IV. SUMMARY**<br>… 16. If a trade dispute arises between a WTO Member/Party and a WTO Member/Non-party to an MEA, such dispute shall only be settled according to rules and procedures as stipulated in the DSU of the WTO Panels and the Appellate Body shall, if applicable, give weight to the fact that the WTO Member/Non-party to the MEA in question was precluded from participation in the negotiations of such an MEA." |

| Proposal | Position |
|---|---|
| **European Communities**<br>TN/TE/W/1<br>paras. 28-29 | "28. As a point of departure it is worth recalling the fact that any specific trade obligation in an MEA is negotiated and agreed by consensus in a multilateral context and that this should be, in principle, a guarantee against discriminatory and protectionist action. Challenges between Parties over specific trade obligations are, therefore, highly unlikely from both a political and legal point of view. Accordingly, if Parties have agreed specific trade obligations, they should have no reason or ground to challenge them afterwards. The EC is also of the view that, were such a case to arise, the Parties involved should make every effort to solve the issue through the MEA dispute settlement, as recommended by the CTE in its report to Singapore.[21] If such a course of action were not followed and a case were brought in the WTO without any effort to resolve the issue in the MEA's dispute settlement mechanism, or if the MEA in question did not have such a mechanism, the WTO panel should take due account of the MEA when addressing the case, as has been consistently confirmed by successive panels. It could be legitimately argued that the measures taken by a WTO Member to implement specific trade obligations 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.<br><br>29. Building on this and the principles set out above, the following points are worth bearing in mind as we consider the co-existence of WTO rules and MEAs:<br><br>• The conclusion of an MEA can have considerable relevance for the application of WTO rules in a particular dispute, even in relation to non-parties. The jurisprudence of the Appellate Body in environment-related cases strongly suggests that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT. Indeed, the Appellate Body has made clear that good-faith efforts to negotiate such an agreement can, provided certain other conditions are met, be sufficient to justify that a trade measure meets the criteria of the "chapeau" to article XX. In addition, the Appellate Body also confirmed that GATT Article XX *"must be read by a Treaty interpreter in the light of contemporary concerns of the Community of nations about the protection and conservation of the environment*" and that, in general, WTO agreements should not be interpreted in clinical isolation from other parts of international law such as MEAs. It is clear that the existence of an MEA should be taken into consideration in applying WTO rules.<br><br>• WTO rules and MEAs are two bodies of public international law with equal status. As a general principle, countries should aim at fulfilling in good faith both sets of rules and, in the event of adjudication, the first task would be to seek to interpret each set of rules in a manner which avoids potential conflicts. This should normally be sufficient to avoid such conflicts, particularly bearing in mind that – as stated above – general WTO provisions have been interpreted giving due weight to the conclusion of an MEA, even in cases where non-parties are involved. |

[21] Paragraph 178 : "While WTO members have the right to bring the dispute to the WTO dispute settlement mechanism, if a dispute arises between WTO members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanism available under the MEA".

| Proposal | Position |
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| | • In those rare cases in which interpretation is not sufficient to avoid a potential conflict, there is a need to determine – under rules of public international law – which is the applicable body of law. This is a complex issue which merits further discussion. At this stage, it may suffice to say that an important consideration could be not so much the application of the *lex specialis* test but which of the two sets of rules provides for a more specific regulation of the issue under dispute. In this connection, the discussion above on the extent to which an MEA contains a specific trade obligation may well be of particular relevance.<br><br>• It would appear that, in those cases in which an MEA provides a specific trade obligation and this is the basis for the trade measures under dispute, parties should in the first instance seek to resolve their dispute within the MEA in question, notably under any dispute settlement mechanism provided." |
| **Switzerland**<br>TN/TE/W/4<br>paras. 5-6 | "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.<br><br>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." |

## VII. OUTCOME OF THE NEGOTIATIONS

| Proposal | Position |
|---|---|
| **Argentina**<br>TN/TE/W/2<br>paras. 16, 17 (d) | "16. Were this to be the final outcome [see paragraph 15], the legal situations and implications for WTO Members which are a party to an MEA would be as follows:<br><br>(a) Some environmental agreements have been signed with a special safeguard clause which protects rights and obligations under other international agreements, including the Marrakesh Agreement. Any modification of the WTO rights of Members which are a party to an MEA would therefore involve a radical change in the normative context in which the agreement was signed. That is to say, it would alter the conditions in which a WTO Member consented to be bound by an MEA.<br><br>(b) A change in the WTO rights of States which are a party to an MEA in order to comply with "*specific trade obligations*" which may prove contrary to the Marrakesh Agreement would involve modifying the scope of MEA obligations. In other words, an amendment of the Marrakesh Agreement would quite simply mean altering the scope and extent of the obligations in the MEA, with consequent effects on the parties thereto."<br><br>**"VII. SUMMARY**<br><br>17. … (d) In the event of a normative solution being chosen to ensure compliance with the specific trade obligations in multilateral environmental agreements, the legal implications for Members party to the MEA should be taken into consideration since this would involve a radical change in the normative context in which the agreement was signed and a modification of the extent and scope of the specific trade obligations in the MEA." |
| **Australia**<br>TN/TE/W/7<br>para. 12 | "12. Ministers have made clear the context for the negotiations under paragraph 31 – that they are being undertaken to enhance the mutual supportiveness of trade and environment. Ministers have expressly provided in paragraph 32 that the outcome of the negotiations carried out under paragraph 31(i) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations." |
| **Chinese Taipei**<br>TN/TE/W/11<br>paras. 9, 15 | "9. The government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu considers that "the applicability of such existing WTO rules as among parties to the MEA in question" should be understood from the following perspectives: …<br><br>• WTO Members could negotiate an interpretative decision or an understanding that explicitly set out conditions and principles for the WTO-consistency of certain trade obligations provided for MEAs. This decision or understanding could be used to examine the legitimacy of trade measures instituted to implement such MEA requirements. Furthermore, the decision or understanding could also provide meaningful guidance for WTO Members negotiating new MEAs. …" |

| Proposal | Position |
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| | **"IV. SUMMARY**<br><br>… 15. WTO Members could negotiate an interpretative decision or an understanding that sets out conditions and principles for the WTO-consistency of an STO provided for in an MEA. The principles of necessity, proportionality, and transparency - as well as a requirement of sufficient scientific evidence and conformity with the chapeau of GATT Article XX – should be incorporated into the interpretative derision or the understanding for examining the legitimacy of a trade measure instituted pursuant to an MEA." |
| **Japan**<br>TN/TE/W/10<br>paras. 16-17 | "16. With respect to the relationship between existing WTO rules and specific trade obligations set out in MEAs, the above-mentioned classification could be considered as a criterion to assess compatibility with the WTO Agreement. When we have to find a way out at the end of the negotiations, Japan could propose to adopt a binding interpretative understanding pursuant to Article 9.2 of Marrakesh Agreement Establishing the WTO on the relationship between existing WTO rules and specific trade obligations set out in MEAs among MEA Parties. It is true that there have been few disputes over trade measures between MEA Parties that are also Members of the WTO. However, we could suggest establishing such an interpretative understanding, because such indication would ensure the legal stability and enhance predictability on the compatibility between both jurisprudence.<br><br>17. Even if "specific trade obligations" pursuant to MEAs are deemed as consistent with the WTO rules, each trade measure actually taken by a WTO Member is not automatically consistent with the WTO rules. If a certain interpretative understanding, as mentioned above, can be adopted, an issue to be examined in the dispute settlement would be presumably "whether the measure in question has been taken in pursuant to relevant provisions of MEAs or not"." |
| **Switzerland**<br>TN/TE/W/4<br>paras. 9-16 | "**IV. OPTIONS FOR REGULATING THE RELATIONSHIP BETWEEN WTO RULES AND SPECIFIC TRADE OBLIGATIONS IN MEAs**<br><br>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.<br><br>A. DISPUTE SETTLEMENT MECHANISM<br><br>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 |

| Proposal | Position |
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| | requirement in the introductory clause of Article XX of the GATT 1994, namely whether the measure was arbitrarily discriminatory or protectionist. Moreover, this decision darified 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".<br><br>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.<br><br>B. REFERENCE TO THE ENVIRONMENT IN ARTICLE XX<br><br>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.<br><br>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.<br><br>C. INTERPRETATIVE DECISION<br><br>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.<br><br>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.<br><br>**V. CONCLUDING REMARKS**<br><br>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 |

| Proposal | Position |
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| | 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." |
| **Switzerland**<br>TN/TE/W/16<br>paras. 9-11 | **"IV. WHAT SHOULD BE THE OUTCOME OF THE NEGOTIATION**<br><br>9. **An interpretative decision** would, in Switzerland's opinion, clearly indicate that the relationship between the trade and the environmental protection systems is governed by the general principles of no hierarchy, mutual supportiveness and deference. Switzerland is convinced that the adoption of an interpretative decision is the only probable solution so far. Indeed, this would meet the WTO Members' wish to find a solution to the issue of the relationship between the WTO rules and MEAs which neither adds to nor diminishes the rights and obligations of Members, but simply clarifies the texts. We therefore welcome **Japan**'s endorsement of our option.<br><br>10. **If we do not adopt a interpretative decision**, responsibility for determining the relationship between the WTO rules and the specific obligations in MEAs – an area which has eminently **political** implications – will **de facto** lie in the legal, and not the legislative, sphere.<br><br>11. Switzerland is convinced that the decisions of the Appellate Body are designed to determine the legal circumstances specific to a case involving two WTO Members but **not to establish general rules** as would be required for the relationship between the WTO and MEAs. Moreover, Switzerland re-emphasizes that under the Doha Ministerial Declaration, the WTO Members agreed to hold negotiations on the relationship between the WTO rules and MEAs. In so doing, they underscored their determination to find a solution to this issue and not to leave it to the dispute settlement bodies. Indeed, what is at stake is the predictability of the WTO legal system. An interpretative decision would thus pursue two objectives. On the one hand, it would clarify the scope of WTO law (which will be useful in negotiating the development of trade rules in MEAs) and, on the other, it would provide guidance for the WTO Dispute Settlement Body." |

## VIII. MEAS REFERRED TO IN THE PROPOSALS

### A. INTERNATIONAL PLANT PROTECTION CONVENTION (IPPC)

| Provision | Proposal | Comments |
|---|---|---|
| **7(1)** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Gives Parties a sovereign right to regulate plant importing." |
| **7(2)** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STO: "Stipulates Parties' obligation to take precisely specified measures such as publishing and transmitting phytosanitary requirements." |

### B. INTERNATIONAL COMMISSION FOR THE CONSERVATION OF ATLANTIC TUNAS (ICCAT)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **Japan**<br>TN/TE/W/10<br>para. 11 | Japan used ICCAT as an example of an MEA which contains "[t]rade measures [that] are not mentioned in MEAs but [that] Parties can take … in accordance with relevant decisions made under the MEA framework." |
| | **Korea**<br>TN/TE/W/13<br>paras. 10, 11 | 10. "ICCAT does not contain trade measures, but resolutions taken by the Parties do contain trade restrictions, which can be STOs …".<br><br>"11. The analysis above [i.e. in para. 10] shows that, in some cases, the criteria established in Section 2 [i.e. in paras. 6-9] alone are not sufficient enough to provide guidance for identifying STOs. Those cases mostly involve COP decisions or resolutions, which suggests that identifying STOs is closely linked to the definition of MEAs." |

### C. CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES (CITES)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **European Communities**<br>TN/TE/W/1<br>paras. 23, 24-25 | The European Communities refers to CITES as an example of an MEA for which trade measures have been key to its success:<br><br>"23. … Another example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) thanks to which none of the species protected by it have become extinct as a result of trade…".<br><br>"24. It is also worth noting that some MEAs, such as CITES …, contain the terms "international trade" in the name of the Convention itself and trade measures are the key instrument to reach the ultimate objective of the MEA in question. |

| Provision | Proposal | Comments |
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| | | 25. … [CITES contains] [t]rade measures explicitly provided for and mandatory under MEAs: … in CITES … trade in some species threatened with extinction which are or may be affected by trade (listed in Appendix I) can only be permitted in exceptional cases, and trade in other species which may become extinct unless trade in these species is subject to strict regulation in order to avoid utilisation incompatible with their survival (listed in Appendix II) requires an export permit or a re-export certificate. …" |
| | **Switzerland**<br>TN/TE/W/16<br>para. 6 | "6. … Switzerland considers that the following **two categories** come under the heading of "specific trade obligations":<br><br>1. **Trade measures that are explicitly provided for and mandatory under MEAs**<br><br>This is the case of the CITES, for example, under which trade in species threatened with extinction which are or may be affected by trade is permitted only in exceptional circumstances. To illustrate our point, let us take plant X included in Appendix I to the CITES, which lists the species that are affected by trade and are subject to strict regulation. If Member A prohibits the import of plant X pursuant to Appendix I of the CITES, such a measure should be regarded as a specific trade obligation and would hence be covered by the solution negotiated among the WTO Members under paragraph 31(i)." |
| **2** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Describes only the general principles of the Convention." |
| **3, 4, 5, 6** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STOs: "Stipulate precise and obligatory requirements concerning export and import documentation." |
| | **Japan**<br>TN/TE/W/10<br>para. 11 | CITES contains "[t]rade measures to be taken [that] are explicitly provided for and mandatory under MEAs." |
| **8, 14** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not STOs: "Allow for Parties' discretion as to the implementation measures to be taken." |
| **8.1** | **Japan**<br>TN/TE/W/10<br>para. 11 | Japan refers to CITES Article 8.1 concerning the case where an "'"[o]bligation de résultat" is explicitly provided for in an MEA and a trade measure is identified as potential means taken by Parties to meet the obligation of that MEA." |

D. COMMISSION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES (CCAMLR)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **Japan** TN/TE/W/10 para. 11 | Japan used CCAMLR as an example of an MEA which contains "[t]rade measures [that] are not mentioned in MEAs but [that] Parties can take … in accordance with relevant decisions made under the MEA framework." |
| | **Korea** TN/TE/W/13 para. 10 | 10. "CCAMLR does not contain trade measures, but trade-related measures have been adopted in the Conservation Measures that are binding to contracting parties. Most conservation measures are precisely mandated obligations, which can be STOs." |

E. MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER (MONTREAL PROTOCOL)

| Provision | Proposal | Position |
|---|---|---|
| **General** | **European Communities** TN/TE/W/1 para. 22 | "… the trade obligations contained in the Montreal Protocol on Substances that deplete the Ozone Layer have been universally recognized as being instrumental to the effective and early implementation of the Protocol." |
| | **Switzerland** TN/TE/W/4 para. 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. …" |
| | **Japan** TN/TE/W/10 para. 5 | "5. … [A] certain number of MEAs with trade measures such as the Montreal Protocol on Substances that Deplete the Ozone Layer indicates that there are certain cases where trade measures are considered to be necessary and effective means for achieving the environmental objectives. …" |
| **2A to 2H** | **Japan** TN/TE/W/10 para. 11 | Japan refers to Articles 2A to 2H of the Montreal Protocol concerning the case where an "“[o]bligation de résultat” is specified in an MEA but a trade measure to be taken for the obligation is not identified in the MEA, while the MEA leaves Parties to decide measure to be taken to fulfil the obligation." |
| **2.11** | **European Communities** TN/TE/W/1 para. 25 | This provision corresponds to a trade measure which is "not required in the MEA but which Parties can decide to implement if the MEA contains a general provision stating that parties can adopt stringent measures in accordance with international law." |

| Provision | Proposal | Position |
|---|---|---|
| **4** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STO: 'Stipulates precisely the measures to be taken, namely import and export ban of trade in ozone-depleting substances." |

F. BASEL CONVENTION ON THE TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL (BASEL CONVENTION)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **European Communities**<br>TN/TE/W/1<br>para. 23 | "The Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal has also been key in the reduction and elimination of the dumping of hazardous waste on developing countries. This has enabled the Convention to shift its original scope towards the one of minimising the hazardous waste generation at the source (Ministerial declaration on environmentally sound management, December 1999)." |
| **4.1** | **Japan**<br>TN/TE/W/10<br>para. 11 | Japan used this provision as an example where the trade measure to be taken is "explicitly provided for and mandatory" under the MEA. |
| **4.1.b, 4.1.c** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STO: "Describe very specific and mandatory PIC procedure." |
| **4.1.a** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Describes Parties' right." |
| **4.2.e, 8** | **Korea**<br>TN/TE/W/13<br>paras. 10, 12 | 10. Unclear: "The term "environmentally sound manner" is not specific. However, Conference of the Parties (COP) decision elaborates on the term (See Paragraph 12)."<br><br>"12. … Article 4.2.e and 8 of the Basel Convention contain the ambiguous words "environmentally sound way," which is not operational by itself. |
| **4.5, 4.6** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STOs: "Stipulate precise, obligatory measures (restriction on import and documentation requirement)." |
| **6** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STO: "Stipulates Parties' obligation to prohibit or restrict trade with specific procedural requirements." |

| Provision | Proposal | Comments |
|---|---|---|
| **6-9** | **Japan** TN/TE/W/10 para. 11 | Japan used these provisions as examples where the trade measures to be taken are "explicitly provided for and mandatory" under the MEA. |
| **13** | **Japan** TN/TE/W/10 para. 11 | Japan used this provision as an example where the trade measure to be taken is "explicitly provided for and mandatory" under the MEA. |

G. CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

| Provision | Proposal | Comments |
|---|---|---|
| **8 (j)** | **Korea** TN/TE/W/13 para. 10 | 10. Not an STO: "Gives a general description of the objectives of the Convention; allows for Parties' discretion regarding implementation measures." |
| **10 (b)** | **Korea** TN/TE/W/13 para. 10 | 10. Not an STO: "Is mandatory in nature but not specific, as Parties can have discretion concerning implementation measures relating to the use of biological resources." |
| **15** | **Korea** TN/TE/W/13 para. 10 | 10. Not an STO: "Is not specific concerning the PIC procedures (in comparison to those in the Basel Convention and the PIC Convention). COP decision on the Bonn Guidelines is not mandatory." |
| **16, 19** | **Korea** TN/TE/W/13 para. 10 | 10. Not STOs: "Are currently not specific. However, future COP decision can elaborate them." |
| **22** | **Korea** TN/TE/W/13 para. 10 | 10. Not an STO: "Stipulates general principles." |

H. CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIOLOGICAL DIVERSITY (BIOSAFETY PROTOCOL)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **European Communities** TN/TE/W/1 para. 25 | The Biosafety Protocol contains trade measures "explicitly provided for and mandatory under MEAs", "as regards obligatory advanced informed agreement procedure for the first shipment of living modified organisms." |

| Provision | Proposal | Comments |
|---|---|---|
| **2.4** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Gives Parties a general authorization." |
| **7, 8, 9, 10, 11 (1,2,5), 15** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STOs: "Describe specific and mandatory Advance Informed Agreement (AIA) procedures." |
| **11.4** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Leaves specific measures for Living Modified Organisms – Food/Feed Processing (LMO-FFP) to Parties' domestic law." |
| **10.6, 11.8** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not STOs: "Give Parties a right." |
| **13, 14, 26** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not STOs: "Are non-mandatory, since the Party of import "may" take measures." |
| **16** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Is not specific in comparison to Article 15, which is elaborated by Annex III." |
| **18** | **Korea**<br>TN/TE/W/13<br>paras. 10, 12 | 10. Unclear: "Describes relatively specific obligation regarding documentation but leaves more specific elements to COP decision (See Paragraph 12)."<br><br>"12. … Article 18 of the Cartagena Protocol on Biosafety provides for basic elements of "behavioral obligation," while mandating the COP to elaborate more on those obligations." |

I. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **Saudi Arabia (Observer)**<br>TN/TE/W/9<br>paras. 8, 11 | "8. … [I]t should be noted that the development and policing of trade-related environmental policies is not part of the WTO's remit. Such a task falls under the jurisdiction of other multilateral frameworks, such as the United Nations Framework Convention on Climate Change (UNFCCC). …" |

| Provision | Proposal | Comments |
|---|---|---|
| | | "11. The UNFCCC is considered as the most relevant MEA to this paper [on Energy Taxation, Subsidies And Incentives in OECD Countries and Their Economic and Trade Implications on Developing Countries, in Particular Developing Oil Producing and Exporting Countries] and reference is made to direct trade-related impacts upon developing energy producers and exporters such as Saudi Arabia where necessary." |
| **4.2 (a)** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Allows for Parties' discretion regarding implementation measures, with a broadly stated requirement to adopt national policies and corresponding measures." |

J. KYOTO PROTOCOL TO THE UNFCCC

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **Switzerland**<br>TN/TE/W/16<br>para. 6 | "6. … Switzerland considers that the following **two categories** come under the heading of "specific trade obligations":<br><br>**2. Other measures that are relevant and necessary to achieve an MEA objective**<br><br>These encompass the different categories of measures and policies adopted in pursuit of a specific objective such as that of the Kyoto Protocol, which is to reduce emissions of greenhouse gases. Such measures may relate to a number of spheres – taxation, rules and standards, and so forth (Article 2.1 of the Protocol). Let us take Member A, which is listed in Annex I to the Protocol along with the other countries that have undertaken greenhouse gas reduction commitments. If Member A prohibits the importation and use of emission filters for industry on the grounds that they do not meet national standards in terms of retention of substances that adversely affect the concentration of greenhouse gases, such a measure should be regarded as a specific trade obligation covered by the solution negotiated among the WTO Members under paragraph 31(i). Indeed, it contributes to the implementation and achievement of the object of the Protocol, which provides for an "*obligation de résultat*" (obligation to achieve results)." |
| **2** | **Saudi Arabia (Observer)**<br>TN/TE/W/9<br>para. 30 | "30. Policy areas for existing and proposed policies and measures to mitigate for example, climate change, are given under Article 2 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)." |
| **2.1, 2.3** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not STOs: "Allow for Parties' discretion regarding implementation measures for quantified emission limitation and reduction commitment." |

| Provision | Proposal | Comments |
|---|---|---|
| **6, 12, 17** | **Korea**<br>TN/TE/W/13<br>paras. 10, 14 | 10. Unclear: "Provide general principles of the Flexibility Mechanisms. Detailed elements of the Mechanisms are provided in the Marrakesh Accord, which future COP will adopt (See Paragraph 14)."<br><br>"14. Among COP decisions, the Marrakesh Accord is a unique case. Articles 6, 12 and 17 on the Flexibility Mechanisms in the Kyoto Protocol to the UNFCCC do not stipulate any specific obligations. Specific elements of the Mechanisms are provided in the Marrakesh Accord, which future COP is expected to adopt. It seems that the Accord is not mandatory in legal point of view, but in participating in the Flexibility Mechanisms, the Parties to the Kyoto Protocol cannot avoid abiding by the specific trade obligations set out therein. Then, the question arises whether such "de facto" obligations stipulated in the Accord are STOs." |
| **Annex B** | **Saudi Arabia (Observer)**<br>TN/TE/W/9<br>paras. 18 | "18. Most Annex B Parties also provide some form of incentive - either as investment credits or tax offset - for petroleum exploration and development. …" |
| **Marrakesh Accord** | **Korea**<br>TN/TE/W/13<br>paras. 14 | "14. Among COP decisions, the Marrakesh Accord is a unique case. Articles 6, 12 and 17 on the Flexibility Mechanisms in the Kyoto Protocol to the UNFCCC do not stipulate any specific obligations. Specific elements of the Mechanisms are provided in the Marrakesh Accord, which future COP is expected to adopt. It seems that the Accord is not mandatory in legal point of view, but in participating in the Flexibility Mechanisms, the Parties to the Kyoto Protocol cannot avoid abiding by the specific trade obligations set out therein. Then, the question arises whether such "de facto" obligations stipulated in the Accord are STOs." |

## K. INTERNATIONAL TROPICAL TIMBER AGREEMENT (ITTA)

| Provision | Proposal | Comments |
|---|---|---|
| **1** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Allows for Parties' discretion regarding implementation measures." |

## L. UNITED NATIONS FISH STOCKS AGREEMENT

| Provision | Proposal | Comments |
|---|---|---|
| **17.4** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Lacks specificity in types of implementation measures to deter activities of fishing vessels." |

| Provision | Proposal | Comments |
|---|---|---|
| **23.1, 23.3** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not STOs: "Offer a port State options for implementation measures." |

M. ROTTERDAM CONVENTION ON THE PRIOR INFORMED CONSENT PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE (ROTTERDAM CONVENTION)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **European Communities**<br>TN/TE/W/1<br>para. 24 | "24. It is also worth noting that some MEAs, such as … the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), contain the terms "international trade" in the name of the Convention itself and trade measures are the key instrument to reach the ultimate objective of the MEA in question." |
| **5, 6, 7, 8, 10.4, 10.9, 11.2, 12.1, 13.2** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. STOs: "Describe precise and mandatory PIC procedures." |
| **9** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: 'Describes the procedure for de-listing a chemical from Annexes." |
| **13.3** | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Is not mandatory since Parties "may" require labeling" |
| **15.4** | **European Communities**<br>TN/TE/W/1<br>para. 25 | This provision corresponds to a trade measure which is "not required in the MEA but which Parties can decide to implement if the MEA contains a general provision stating that parties can adopt stringent measures in accordance with international law." |
| | **Korea**<br>TN/TE/W/13<br>para. 10 | 10. Not an STO: "Gives full discretion to Parties in taking "stricter measures"." |

## N. STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (STOCKHOLM CONVENTION)

| Provision | Proposal | Comments |
|---|---|---|
| **General** | **European Communities** TN/TE/W/1 para. 25 | The Stockholm Convention contains "trade measures that are explicitly provided for and mandatory under MEAs": "[the Convention] *inter alia* will prohibit the import and export of certain POPs with some exceptions such as their environmentally sound disposal or a specific use/purpose, such as insecticides, on the request of some Parties." |
| **3.1, 3.2** | **Korea** TN/TE/W/13 para. 10 | 10. STOs: "Stipulate explicit and mandatory restrictions. In addition, "environmentally sound disposal" mentioned in Article 3.2 is specified in Paragraph 1(d) of Article 6." |
| **4** | **Korea** TN/TE/W/13 para. 10 | 10. Not an STO: "Stipulates register of specific exemptions." |
| **8** | **Korea** TN/TE/W/13 para. 10 | 10. Not an STO: "Describes Party's right to list POPs in the Annexes." |