

**MANDATE UNDER PARAGRAPH 31(i) OF THE DOHA DECLARATION  
ON TRADE AND ENVIRONMENT**

Submission by the Argentine Republic

Paragraph 31(i)

**I. INTRODUCTION**

1. Argentina wishes in this document to comment on some of the issues arising from the interpretation of the Doha Declaration on trade and environment, with a view to presenting criteria to help structure the discussions and work of the Special Session of the Committee on Trade and Environment, in accordance with the mandate under paragraph 31(i) of this Declaration.

2. The Committee on Trade and Environment (CTE) has given - and will continue to give - great consideration to "*the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs)*", under Item 1 of the agenda, and, under Item 5, to "*the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs*". However, we feel that the task set by the Ministers in paragraph 31(i) of the Doha Declaration is more **precise and specific**.

**II. MANDATE UNDER PARAGRAPH 31(i) OF THE DOHA DECLARATION**

3. The task set by the Ministers in Doha (14 November 2001), albeit in the context of the work of the Committee, is clear and eloquent. It is not a question of addressing the relationship between trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs) in general, but rather, and in particular, the relationship between "*existing WTO rules*" and "*specific trade obligations*" set out in multilateral environmental agreements (MEAs).

4. Paragraph 31(i) of the Doha Declaration 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". (emphasis added)*

This text reflects the Ministers' will and intention to establish a mandate for negotiations - without prejudging their outcome - on a specific and concrete aspect of the relationship between MEAs and the Marrakesh Agreement.

The first sentence of paragraph 31(i) identifies the provisions to be taken into consideration: "*existing WTO rules*" and "*specific trade obligations set out in multilateral environmental agreements (MEAs)*".

The second sentence of paragraph 31(i) limits the scope of the negotiations 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*".

### III. EXISTING WTO RULES AND SPECIFIC TRADE OBLIGATIONS

5. The reference to "*existing WTO rules*" encompasses all the provisions of agreements which are currently in force, known as "covered agreements".

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.

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:

- "obligation" means a provision which prescribes "the enforceability of an act or omission imposed by a rule of law"<sup>1</sup>;
- "trade", that is to say, such action is related to an import or export operation;
- "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:
  - 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.
  - 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.

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<sup>1</sup> Diez de Velázco, Manuel, "Instituciones del Derecho Internacional Público", (Tecnos, 1991), page 667.

#### IV. APPLICABILITY OF EXISTING WTO RULES AMONG PARTIES TO THE MEA IN QUESTION

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.

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.

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:

- *complementarity*: meaning that concurrent obligations in two different, but complementary, international agreements, if not mutually exclusive, should be complied with at the same time.<sup>2</sup> 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<sup>3</sup>;
- *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<sup>4</sup>;
- *conflict*: occurring in situations where compliance with one obligation necessarily entails failure to comply with another, and the two cannot be reconciled.<sup>5</sup>

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<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 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 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).

<sup>5</sup> 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).

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.

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.

## V. MULTILATERAL ENVIRONMENTAL AGREEMENTS

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:

- *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;
- *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;
- *open*: countries which did not participate in the negotiations should subsequently be able to accede.

## VI. MEMBERS THAT ARE NOT A PARTY TO AN MEA

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.

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.

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:

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;

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.

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:

- (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.
- (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.

## VII. SUMMARY

17. The following conclusions may be drawn from the above:

- (a) The mandate under paragraph 31(i) of the Doha Declaration is clear and precise both as regards the subject matter of the negotiations (existing WTO rules and specific trade obligations in MEAs) and their scope (the implementation of WTO rules).
  - (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.
  - (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.
  - (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.
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