

**CONTRIBUTION ON PARAGRAPH 31(1) OF THE DOHA MINISTERIAL DECLARATION**

Submission by the Separate Customs Territory  
of Taiwan, Penghu, Kinmen and Matsu

Paragraph 31(i)

**I. OVERVIEW**

1. The government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu notes that discussions on "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs)" in the Committee on Trade and Environment have been ongoing for years.<sup>1</sup> 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.

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.

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<sup>2</sup> in support of the three-phased approach proposed by Australia.<sup>3</sup> 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. These additional concepts are discussed below.

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<sup>1</sup> See the first paragraph of the introduction section of TN/TE/S/1.

<sup>2</sup> 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.

<sup>3</sup> See TN/TE/W/7.

## II. THE MANDATE

4. In paragraph 3 1 (i) of the Doha Declaration, the ministers stated that:

"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)"

## III. IMPLICATIONS OF THE MANDATE

A. "[T]he relationship between *existing WTO rules and specific trade obligations* set out in *multilateral environmental agreements (MEAs)*."

5. "[E]xisting" should be understood as agreements that are currently in force.

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.

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.

8. "[M]ultilateral environmental agreements (MEAs)": The points made by the EU in section III of its submission<sup>4</sup> 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.

B. "The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question."

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:

- The government shares the same view expressed by certain Members<sup>5</sup> 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

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<sup>4</sup> See page 2 of TN/TE/W/1.

<sup>5</sup> 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).

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.

- 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.
- 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.

C. "The negotiations *shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.*"

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.

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.

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."

#### IV. SUMMARY

13. A consensus among WTO Members on the overall relationship between WTO rules and trade measures taken for environmental purposes could more easily be reached through a step-by-step approach. The government acting on behalf of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu believes that the mandate is an appropriate first step in the right direction. With respect to procedural approaches for negotiations under the mandate, the government agrees with the three-phased approach proposed by Australia.

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.

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 decision or the understanding for examining the legitimacy of a trade measure instituted pursuant to an MEA.

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.

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