

SPECIFIC TRADE OBLIGATIONS (STOS)

Submission by the Republic of Korea

Paragraph 31(i)

I. INTRODUCTION

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.

2. This submission is intended to help facilitate further discussion by making preliminary identification of the STOs as set out in MEAs and ascertaining some issues for further consideration.

3. This submission does not intend to address the issues of the definition of MEAs or the consistency of STOs with WTO rules. Without prejudice to Korea's position on these issues, this submission employs as its basis of analysis the list of MEAs contained in the Secretariat document entitled as "Matrix of Trade Measures Pursuant to Selected MEAs" (WTO/CTE/W/160/Rev.1). Thus some MEAs, which have been adopted but not in force yet, are included in this analysis. Some MEAs, which are regional in terms of objectives and participation, are also included.¹

4. Section 2 of this 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. Section 3 contains the summary result of the identification of STOs on the basis of the criteria discussed in Section 2. Section 4 will discuss some issues related to how to treat Conference of Party (COP) decisions which Korea believes need further discussion at the CTESS in the process of identifying STOs.

5. The methodology and the results of the analysis in this submission are preliminary in nature. Korea reserves the right to amend or supplement them at a later stage.

¹ It should be noted that at the second meeting of the CTESS, Korea expressed a view that MEAs covered by paragraph 31(i) need to have global status comparable to that of the WTO. Korea also stated that it would be easier for participants to agree on MEAs with a global objective than on the ones which are only relevant in a regional context (Paragraph 28, TN/TE/R/2).

II. CRITERIA FOR IDENTIFYING STOS

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.

7. First, the Webster Dictionary² 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).³

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.”

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.

III. IDENTIFICATION OF STOS

10. Using the criteria set out above, Korea carried out a preliminary exercise of identifying STOs in the MEAs listed in WT/CTE/W/160/Rev.1. The results are summarized in the following table:

² The New International Webster’s Dictionary for the English Language, 1995 Edition, Trident Press International.

³ 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 countries based on an authorization in an MEA; MEA-related measures are measures which are discretionary or suggested in the MEA.

MEA	Article(s)	STO	Why
IPPC	7(1)	No	Gives Parties a sovereign right to regulate plant importing.
	7(2)	Yes	Stipulates Parties' obligation to take precisely specified measures such as publishing and transmitting phytosanitary requirements.
ICCAT			ICCAT does not contain trade measures, but resolutions taken by the Parties do contain trade restrictions, which can be STOs (See Paragraph 11).
CITES	2	No	Describes only the general principles of the Convention
	3, 4, 5, 6	Yes	Stipulate precise and obligatory requirements concerning export and import documentation.
	8, 14	No	Allow for Parties' discretion as to the implementation measures to be taken.
CCAMLR			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.
MP	4	Yes	Stipulates precisely the measures to be taken, namely import and export ban of trade in ozone-depleting substances.
Basel Convention	4.1.b, 4.1.c	Yes	Describe very specific and mandatory PIC procedure.
	4.1.a	No	Describes Parties' right.
	4.2.e, 8	?	The term "environmentally sound manner" is not specific. However, Conference of the Parties (COP) decision elaborates on the term (See Paragraph 12).
	4.5, 4.6	Yes	Stipulate precise, obligatory measures (restriction on import and documentation requirement).
	6	Yes	Stipulates Parties' obligation to prohibit or restrict trade with specific procedural requirements.
CBD	8(j)	No	Gives a general description of the objectives of the Convention; allows for Parties' discretion regarding implementation measures.
	10(b)	No	Is mandatory in nature but not specific, as Parties can have discretion concerning implementation measures relating to the use of biological resources.
	15	No	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	No	Are currently not specific. However, future COP decision can elaborate them.
	22	No	Stipulates general principles.

Bio-safety Protocol	2.4	No	Gives Parties a general authorization.
	7, 8, 9, 10,11 (1,2,5), 15	Yes	Describe specific and mandatory Advance Informed Agreement (AIA) procedures.
	11.4	No	Leaves specific measures for Living Modified Organisms – Food/Feed Processing (LMO-FFP) to Parties' domestic law.
	10.6,11.8	No	Give Parties a right.
	13, 14, 26	No	Are non-mandatory, since the Party of import "may" take measures.
	16	No	Is not specific in comparison to Article 15, which is elaborated by Annex III.
	18	?	Describes relatively specific obligation regarding documentation but leaves more specific elements to COP decision (See Paragraph 12).
UN FCCC	4.2(a)	No	Allows for Parties' discretion regarding implementation measures, with a broadly stated requirement to adopt national policies and corresponding measures.
Kyoto protocol	2.1, 2.3	No	Allow for Parties' discretion regarding implementation measures for quantified emission limitation and reduction commitment.
	6, 12, 17	?	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).
ITTA	1	No	Allows for Parties' discretion regarding implementation measures.
UN Fish Stocks Agreement	17.4	No	Lacks specificity in types of implementation measures to deter activities of fishing vessels.
	23.1, 23.3	No	Offer a port State options for implementation measures.
PIC	5, 6, 7, 8, 10.4, 10.9, 11.2, 12.1, 13.2	Yes	Describe precise and mandatory PIC procedures.
	13.3	No	Is not mandatory since Parties "may" require labeling.
	9	No	Describes the procedure for de-listing a chemical from Annexes.
	13.3	No	Is not mandatory since Parties "may" require labeling
	15.4	No	Gives full discretion to Parties in taking "stricter measures."
POPs	3.1, 3.2	Yes	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	No	Stipulates register of specific exemptions.
	8	No	Describes Party's right to list POPs in the Annexes.

*For the full titles of the MEAs, please refer to WT/CTE/W/160/Rev. 1

IV. ISSUES FOR FURTHER CONSIDERATION

11. The analysis above shows that, in some cases, the criteria established in Section 2 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.

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.

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.

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.
