WORLD TRADE ORGANIZATION

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Committee on Trade and Environment
Special Session

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STATEMENT BY SWITZERLAND AT THE CTE SPECIAL SESSION ON 10 OCTOBER 2002

Paragraph 31(i)

Submission by Switzerland

1. We first of all wish to thank the delegations that have made new contributions regarding paragraph 31(i) of the Doha Declaration. This negotiation is important and the new submissions and corresponding presentations are both interesting and useful.

2. We should like to revert to the following points:

- Organization of the discussions;
- clarification of the terms of the mandate;
- the fundamental principles which, to our mind, govern the relationship between existing WTO rules and specific trade obligations set out in MEAs; and
- the question of what the outcome of this negotiation should be.

3. We also have a few preliminary remarks to offer on the items under discussion today.

I. ORGANIZATION OF THE DISCUSSIONS

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.

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.

II. CLARIFICATION OF CERTAIN TERMS OF THE MANDATE

6. Switzerland agrees with other delegations that the different categories of "**specific trade obligations**" set out in MAEs 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":

1. **Trade measures that are explicitly provided for and mandatory under MEAs** 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. **Other measures that are relevant and necessary to achieve an MEA objective** 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).

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:

- An "***obligation de résultat***", and

- 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).

8. In our view, the coverage of these two categories by paragraph 31(i) appears to enjoy broad consensus in this Committee.

III. FUNDAMENTAL PRINCIPLES WHICH, TO OUR MIND, GOVERN THE RELATIONSHIP BETWEEN EXISTING WTO RULES AND SPECIFIC TRADE OBLIGATIONS SET OUT IN MEAS

(a) General principles of no hierarchy, mutual supportiveness and deference

With your permission, we should now like to come back on a few questions and comments regarding our submission (TN/TE/W/4) at the latest CTE Special Session.

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.

(b) Principle of presumption of conformity with the WTO rules

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.

(c) Reversal of the burden of proof

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*).

(d) "Objectionable" practical implementation

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.

IV. WHAT SHOULD BE THE OUTCOME OF THE NEGOTIATION

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.

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.

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.