

**THE RELATIONSHIP BETWEEN WTO RULES AND SPECIFIC  
TRADE OBLIGATIONS SET OUT IN MEAS**

Submission by Japan

Paragraph 31 (i)

**I. INTRODUCTION**

1. During the discussions in Special Sessions of the CTE during the year of 2002 and in the last Session in 2003, several Members presented the conceptual clarification of specific trade obligations, and others focused on specific provisions in MEAs which could be deemed as specific trade obligations. The Republic of Korea, the United States and India<sup>1</sup> submitted their analysis of specific trade obligations on the basis of trade measures described in Secretariat document WT/CTE/W/160/Rev.1 at the Special Sessions of the CTE last October and this February. Some Members also suggested the criteria and other issues to be taken into account in identifying specific trade obligations in their proposals. In particular, Canada's submission<sup>2</sup> provides good "food for thought" in this regard. Japan believes that such clarification of the concept of specific trade obligations is useful and should be undertaken in parallel with the analysis of specific provisions set out in MEAs.

2. Japan analyzed the trade measures set out in six MEAs<sup>3</sup> and tried to identify specific trade obligations according to their specificity and their obligations. The results are summarized in the matrix attached hereto. Then Japan distilled some observations through the analysis.

3. As noted in Japan's previous submission, with respect to the relationship between existing WTO rules and specific trade obligations set out in MEAs, it is of benefit to all WTO Members to ensure the legal stability and enhance predictability on the compatibility between both rules. The discussion of the CTE should contribute to this purpose and could achieve this end.

4. Japan submits this paper for the purpose of contributing to a further discussion of the CTE. This paper is meant neither to prejudice the rights of any Member enshrined in both WTO agreements

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<sup>1</sup> Republic of Korea (TN/TE/W/13), United States (TN/TE/W/20), India (TN/TE/W/23).

<sup>2</sup> TN/TE/W/22.

<sup>3</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol), Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), Stockholm Convention on Persistent Organic Pollutants (POPs). The analysis includes the MEAs which have already been adopted and/or signed but have not yet entered into force (Biosafety Protocol, PIC, POPs).

and MEAs to which it is a party, nor to present Japan's definitive interpretation of all provisions of both WTO rules and MEAs. Thus, the matrix is not an exhaustive list of all MEAs which are considered to contain specific trade obligations and Japan's submissions, as well as the proposals, interpretations and concepts presented therein, could also be amended and supplemented at a later stage in the negotiations.

## II. ANALYSIS OF SPECIFIC TRADE OBLIGATIONS SET OUT IN MEAS

5. In line with its preliminary consideration presented in its previous submission, Japan made its analysis on the basis of the classification of the trade measures taken under MEAs into the following four categories:

1. The trade measure in question is explicitly provided for as mandatory under an MEA;
2. "*Obligation de résultat*" is explicitly provided for in an MEA and the trade measure in question is identified in that MEA as potential means to meet that obligation;
3. "*Obligation de résultat*" is provided for in an MEA but the trade measure in question is not identified in that MEA, while the decision on the measure(s) to be taken to fulfil that obligation is left at the full discretion of each Party thereto;
4. The trade measure in question is not mentioned in an MEA but the Parties to that MEA are obligated to take that measure in accordance with relevant decisions made under the framework of that MEA.<sup>4</sup>

Japan considers that the trade measures corresponding to category 1 above could be deemed as specific trade obligations compatible with WTO rules among MEA Parties. With regard to the trade measures corresponding to category 2, Japan considers that they could be rebuttably presumed to be the specific trade obligations consistent with WTO rules, if such substantial requirements as indicated below are to be introduced:

- The trade measure in question, pursuant to an MEA to achieve its environmental objectives, is based on scientific principles.
- The scope of the trade measure in question is proportional in range and degree in the pursuit of the MEA objectives (Proportionality).

On the other hand, trade measures categorized in 3 and 4 above should be deemed to be outside the scope of the mandate provided in the Doha Ministerial Declaration. Each trade measure classified in these two categories, if necessary, should be deliberated on a case-by-case basis.

6. In picking up the provisions from six MEAs, we excluded the provisions that are applied exclusively to trade between Parties and non-Parties, such provisions being outside the mandate given in the Doha Ministerial Declaration.<sup>5</sup> For example, Article 4.5 of the Basel Convention provides for the restriction on import and export of hazardous wastes or other wastes in the relation with a non-Party. Japan understands that Article 4.6 of Basel Convention is also outside the scope of the mandate, because this article regulates the transport of hazardous wastes to the Antarctic area which does not fall in the meaning of "trade" as is generally understood under WTO rules. On the other hand, Article 4 (from 1 to 4ter.) of the Montreal Protocol should be considered as specific trade obligations within the Doha mandate as long as they are applied among those States which are parties both to the original Protocol and its 1992 amendment (London Amendment). Article 4.9 of the

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<sup>4</sup> TN/TE/W/10, paragraph 11. The wording of the definition of four categories is modified for syntactic reasons.

<sup>5</sup> The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question.

Protocol, which was introduced by the 1992 amendment, stipulates that: “For the purposes of this Article, the term “State not party to this Protocol” shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance.” and thus should always be read in combination with other provisions of Article 4 as among Parties to the 1992 amendment. In the same vein, Article 3.2(b)(iii) of POPs should be deemed as within the Doha mandate as long as it is applied among Parties to POPs pursuant to the provisions of Article 3.2(d).

7. Provisions conferring rights on the contracting Parties, which are not specific trade “obligations” by definition, are excluded. For example, Japan has excluded Article 4.1(a) of the Basel Convention from the matrix.

8. Subject to the criteria outlined in the preceding paragraphs, Japan has picked up the provisions from six MEAs which fall within category 1 or 2 in accordance with the classification proposed in paragraph 5 above. Japan believes that they could be considered as illustrations of trade obligations, as summarized in the matrix attached hereto. Following are some of the points identified during the conduct of this exercise which merit the deliberation of the Committee.

#### A. DEGREE OF DISCRETION

9. One of the most important factors to be examined in this exercise is the degree of discretion allowed for each Party to an MEA in taking trade measures pursuant to the MEA in question. The classification in four categories of trade obligations suggested by Japan is intended to incorporate this factor into the framework to assess the compatibility of MEA obligations with WTO rules. In examining the concrete provisions of six MEAs, Japan has observed the following:

- (1) The provisions of MEAs which clearly obligate Parties to achieve a trade ban and/or restriction should be recognized as constituting specific trade obligations. Such recognition seems to be shared by all WTO Members in view of the past discussions on this subject. For example, sub-paragraphs (e) and (g) of Article 4.2 of the Basel Convention clearly require the ban on trade in specified circumstances and thus should be sufficiently specific, although the main sentence of the Article seems, at first glance, to allow discretion in the choice of concrete modalities to achieve them (“shall take appropriate measures to...”). Article 4.9 of Basel Convention, Articles 3.1(a)(ii) and 6.1(d)(iv) of POPs, Article 11.1(b) of PIC and Article 8.1 of CITES should also be understood in the same vein.
- (2) Article 4.2(e) of the Basel Convention seems to allow a certain room for discretion as to when to trigger the stipulated trade measure (“if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner”). However, the trade measure which shall be taken is stipulated in a very concrete manner (“Not allow the export of hazardous wastes or other wastes to an economic and/or political integration organization that are Parties, particularly developing countries,”) and the requirements for triggering this trade measure are also circumscribed by the criteria developed by the deliberating organ created by the Convention (“... in an environmentally sound manner, according to criteria to be decided on by the Parties at their first meeting”. See also paragraph 14 below.); accordingly, the Article should be deemed as setting out a trade obligation in a sufficiently specific manner. Such analysis could also be relevant to Article 4.2(g) of the Basel Convention.
- (3) Article 18.1 of the Biosafety Protocol allows each Party a certain degree of discretion as to concrete modalities to achieve the result. However, the Article sets out the

result to be achieved in a fairly clear manner (“living modified organisms that are subject to intentional transboundary movement ... are handled, packaged and transported under conditions of safety”) and complements it with the reference to other international instruments (“taking into consideration relevant international rules and standards”. See also paragraph 10 below), thus circumscribing considerably room for discretion in choosing specific methods of handling, packaging and transport. Such provisions could possibly be considered as sufficiently specific.

- (4) It is to be noted that the provisions which should or could be considered as sufficiently specific in line with the considerations outlined in (1), (2) and (3) above correspond to the provisions falling within categories 1 or 2.

## B. REFERENCE TO OTHER INTERNATIONAL INSTRUMENTS

10. Regarding the trade obligation referring to other related international instruments, it could be considered as a specific one if such other instruments themselves are sufficiently specific and if the compliance with such instruments is mandatory. For example, Article 4.7(b) of the Basel Convention clearly obligates its Parties to comply with “generally accepted and recognized international rules and standards in the field of packing, labeling and transport ” and thus could be considered as a specific trade obligation. On the other hand, further consideration would be needed on whether the provisions of MEAs which obligate their Parties only to “take into account” other instruments, could also be considered as specific trade obligations. Examples are such as the latter part of Article 4.7(b) of the Basel Convention (“due account is taken of relevant internationally recognized practices”), Article 3.2(b) of POPs<sup>6</sup> (“taking into account any relevant provisions in existing international prior informed consent instruments,”) and Article 16.1 of the Biosafety Protocol.

## C. FORM OF SPECIFIC TRADE OBLIGATIONS

11. As pointed out in paragraph 10 of Canada’s submission<sup>7</sup>, there is no doubt that the provisions including bans and restrictions on transboundary movement of goods constitute specific trade obligations. The scope of specific trade obligations should also cover the provisions including notifications, technical regulations, packaging and labeling requirements, which could affect trade and accordingly whose compatibility with WTO rules (such as Articles VIII and XI of GATT, the TBT Agreement, the SPS Agreement, etc.) should be clarified. For example, Article 4.7(b) of the Basel Convention and Article 12 of PIC fall within the latter category.

12. A specific trade obligation may take the form of either one specific article or a combination of several articles which should be read together. For example, Japan considers that the provisions regarding notifications on trade transactions, though purely procedural ones, should be deemed as falling within the scope of the category 1 mentioned above (in paragraph 5) if such notifications are mandatory requirements for realizing those transactions (for example, Articles 6.1, 6.2 and 6.3 of the Basel Convention). Article 15.1 of the Biosafety Protocol (risk assessment), which could seem at first glance to refer to purely domestic procedures related to the regulation of living modified organisms, should be read together with other articles of the Protocol and also be deemed as a specific trade obligation because the Protocol requires its Parties to take any decision either allowing or prohibiting the import of living modified organisms on the basis of the risk assessment mentioned thereto (Articles 10.1 and 15.2 of the Protocol). In such case, the full range of provisions which could constitute a specific trade obligation should be considered as a whole. Each article should not be

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<sup>6</sup> The Article is classified as category 1 because sub-paragraphs (i), (ii) and (iii) specify in a sufficiently specific manner the conditions under which the chemicals shall be exported.

<sup>7</sup> TN/TE/W/22.

considered in isolation, which would lead to the misleading conclusion that the article is not a specific trade obligation.

13. Questions could be raised as to whether the obligation to re-import (for example, Articles 8 and 9.2(a) of the Basel Convention) is a “trade” obligation subject to WTO rules, or should be conceived as a kind of cooperation in the enforcement of the importing State’s domestic regulations. Japan considers that such obligation should be considered as a specific trade obligation, as it seems to merit examination in light of Articles I and XI of 1994 GATT.

#### D. DECISIONS OF THE DELIBERATING ORGAN

14. Regarding the relation between the provisions of an MEA and the decisions adopted by the deliberating organ (Conference of the Parties, Meeting of the Parties, Commission, etc.) created under the MEA, two distinguished cases could be envisaged:

1. The trade measure in question is explicitly provided for in an MEA and the elaboration of the details for implementation of the measure is explicitly entrusted to the deliberating organ;
2. The trade measure in question is not provided for in an MEA and the decision of adopting the measure lies with the deliberating organ.

Japan considers that, in the case (1), the relevant provisions of the MEA fall within the category 1 and the trade measure in question could be deemed as the measure in accordance with the specific trade obligation consistent with WTO rules. Further discussion may be necessary to clarify that relation if additional requirements need to be introduced to evaluate the conformity of such case with WTO rules. For example, questions could be raised as to whether the corresponding trade measure taken by a Party to the MEA prior to the adoption of, or in case of failure in adopting, the implementing documents should be considered not to be the implementation of a “specific” trade obligation. Japan considers that such measure could be deemed as the measure implementing a “specific” trade obligation and thus could be seen to be consistent with WTO rules if the provisions in question set out substantial requirements in a sufficiently clear manner (as is the case for the first sentence of Article 18.2(a) of Biosafety Protocol) and if the measure is in compliance with these requirements.

### III. TOWARD FUTURE DISCUSSIONS

15. Japan has picked up the provisions from six MEAs, which fall within category 1 or 2 according to the classification suggested in its previous submission and thus should be considered as specific trade obligations consistent with WTO rules. Japan invites Members to discuss, share and exchange views on points identified and to analyze illustrative examples of specific trade obligations.

16. It would be useful for MEAs secretariats to attend the CTE Special Session and share their relevant experience and expertise. Members, in order to facilitate examination of specific trade obligations thoroughly, could compile specific questions with environmental experts’ inputs and transmit them for clarification from MEAs secretariats prior to each CTE Special Session.

## SPECIFIC TRADE OBLIGATIONS SET OUT IN MEAS

N.B. This matrix is meant neither to prejudice the rights of any Member enshrined in both WTO agreements and MEAs nor to present Japan's definitive interpretation of all provisions of both WTO rules and MEAs. Thus, the following is not a definitive list of all MEAs which are considered to contain STOs. Japan also reserves the right to amend and supplement the following categorization at a later stage.

(Note) Under the Column of trade measures category:

1 denotes the trade measure in question is explicitly provided for as mandatory under a MEA; and

2 denotes "*Obligation de résultat*" is explicitly provided for in a MEA and the trade measure in question is identified in that MEA as a potential means to meet that obligation.

Name of MEA	Trade Measures Category	Articles and Comments
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel)	1	Art.4(1)(b), (c), 4(2)(e), (f), (g), 4(7), 4(9), 4A Art.4(2)(f), Art.6: describe the obligations of notification. Art.8: describes the obligation to re-import. Art.9(2), (5): describe the obligations concerning illegal traffic.
	2	Art.4(2)(d): The achievement of a certain result (minimization of the transboundary movement of hazardous wastes and other wastes/protection of human health and the environment) is obligated and some trade-related measures are considered to be indispensable to achieve the result.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	1	Art.2(4), Art.3, Art.4(1), (2), (3), (4), (5), (6), Art.5 Art.6(1), (2), (3), (4), (5), (6): describe the obligations concerning permits and certificates.
	2	Art.8(1): The achievement of a certain result (enforcement of, and prohibition of trade in specimens in violation of, the provisions of CITES) is obligated and some trade-related measures are explicitly stipulated as means to achieve the result.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)	1	Art.4A, Art.4B Art.4(1), (1bis), (1ter), (1qua), (1quin), (1sex), (2), (2bis), (2ter), (2qua), (2quin), (2sex), (3), (3bis), (3ter), (4), (4bis), (4ter): describe the obligations regarding control among Parties, read in combination with Art.4(9)
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Stockholm Convention on Persistent Organic Pollutants (POPs)	1	Art.3(1)(a)(ii), 3(2)
	2	Art.6(1)(d)(i), (iv): The achievement of a certain result (handling, collection, transport and storage of POPs wastes in an environmentally sound manner/prevention of transboundary transport of POPs wastes without taking into account relevant international rules, standards and guidelines) is obligated and some trade-related measures are considered to be indispensable to achieve the result.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol)	1	Art.7(1), Art.10(1), (2), (3) ,(4), Art.11(5), Art.15, Art.21 Art.8, Art.9(1), (2), Art.12(1), (3), Art.13(2): describe the obligations regarding notification. Art.18(2): describe the obligations regarding documentation. Art.25: describe the obligation regarding illegal transboundary movements.
	2	Art.16(1), (2): The achievement of a certain result (regulation, management and control of risks associated with the transboundary movement of living modified organisms to the extent necessary) is obligated and some trade-related measures are considered to be indispensable to achieve the result. Art.18(1) : The achievement of a certain result (handling, packaging and transport of the living modified organisms subject to intentional transboundary movement under conditions of safety) is obligated and some trade-related measures are considered to be indispensable to achieve the result.
Rotterdam Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade (PIC)	1	Art.10 (9), Art.11 (1)(a), (b), (c)(i), 11(2) Art.12(1), (2), (3), (4): describe the obligations regarding notification. Art.13(1), (2), (4): describe the obligations regarding documentation.
	2	