

PARAGRAPH 31(I) OF THE DOHA MINISTERIAL DECLARATION

Submission by Malaysia

Paragraph 31(i)

I. INTRODUCTION

1. During the February 2003 meeting of the Committee on Trade and Environment in Special Session, there was a very informative exchange of views on specific trade obligations (STOs) set out in relevant Multilateral Environmental Agreements (MEAs).

2. A number of useful submissions contributed by several Members provided an illustration of the examples of specific trade obligations referred to in the Doha mandate of paragraph 31(i).

3. Malaysia would like to contribute to these negotiations by providing some views and observations on specific trade obligations and related issues under the paragraph 31(i) mandate. These views are preliminary and are intended to further facilitate the discussion of the issues under negotiation.

II. THE DOHA MANDATE

4. Paragraph 31(i) of the Doha Ministerial Declaration provides that "With a view to enhancing the mutual supportiveness of trade and the 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 any member that is not a party to the MEA in question."*

5. In Malaysia's view, the negotiations clearly centre on the relationship between existing WTO rules and specific trade obligations set out in MEAs. They cannot be undertaken in isolation without clarity of the parameters of the mandate. It is also clear from previous submissions that there are differing views on the terms used in the mandate, which could lead to differences in the determination of the scope and outcome of the negotiations.

6. For us, it is important that at the outset, the mandate itself has clarity, that it refers to the relationship between existing WTO rules and specific trade obligations as set out in multilateral environmental agreements.

7. Having said this, it is noted that the discussions so far have highlighted several aspects of the mandate which would need to be further examined and addressed as the negotiations progressed. These are:

- What are MEAs?
- Do the negotiations encompass only MEAs in force?
- What are specific trade obligations set out in MEAs?

III. MULTILATERAL ENVIRONMENTAL AGREEMENTS

8. Regarding what constitutes an MEA, Malaysia shares a number of views expressed in both the Argentinian paper (TN/TE/W/2) and the Indian paper (TN/TE/W/23) on the elements of an MEA. In our opinion, a multilateral environmental agreement under the paragraph 31(i) mandate should demonstrate the following characteristics:

- (a) Its multilateral character is demonstrated by the fact that:
 - It was negotiated under the auspices of the United Nations;
 - negotiations leading to this agreement were opened to countries from all regions and that there was active participation from both the developed and developing member countries;
 - membership in the agreements reflects the diversity of the UN/WTO membership;
- (b) its environmental character is defined by the objective of the agreement which is environmental protection; and
- (c) it has the character of an agreement when ratified and its provisions are in force.

9. In view of this, regional MEAs that do not possess the elements described in paragraph 8 would seem not to be relevant to the negotiations under paragraph 31(i).

IV. SPECIFIC TRADE OBLIGATIONS

10. An initial examination of STOs by some delegations points to some common elements. STOs involve the commitment to undertake a particular measure or to refrain from a particular action, and that they contain the elements of mandatoriness and specificity in terms of the measures prescribed for the conduct of trade. Argentina (TN/TE/W/2) noted that STOs have the features of an obligation that is both specific in its outcome and with regard to the measure employed to achieve the result. Korea (TN/TE/W/13) interprets STOs on the basis of its ordinary meaning, which also comes to the conclusion that STOs are binding trade obligations that set forth not only the result to be achieved but also the measures used to achieve the result. India (TN/TE/W/23) further stated that for a provision in an MEA to qualify as an STO, it must be specific and mandatory in character, and so precise in its direction that there can be no doubt about the action or restraint that a party to an MEA must adopt. The United States (TN/TE/W/20) also recognized that an STO is one that requires an MEA to take or refrain from taking a particular action as set out in MEAs.

11. Others like the European Communities (TN/TE/W/1) and Switzerland (TN/TE/W/21) also identified one category of trade obligations as trade measures that are explicitly provided for and mandatory under MEAs.

12. In Malaysia's view, STOs in the Doha mandate, by the use of such terms as "specific" and "obligations" and "trade" do provide indications that these are MEA provisions which have the character of a binding commitment set within a prescribed specific course of action or which prescribe a specific restriction, where they relate to the conduct of trade.

13. In this respect, the mandate is clear and precise and there can only be one category of specific trade obligations, where the trade obligations are mandatory and specific.

14. The issue has also been raised of whether decisions, resolutions, and recommendations of the Conference of Parties of MEAs, which may contain STOs should form part of the mandate of these negotiations. It has been argued that the mandate refers to STOs as set out in MEAs. Malaysia concurs that the phrase "as set out" is significant in reference to MEA provisions. Therefore, STOs only where they are contained in Annexes, Protocols and amendments to MEAs adopted by Parties and where they have been ratified by the broader membership, have the possibility of falling within the mandate of the negotiations. Decisions and resolutions of COP which are not set out in MEAs are not an integral part of the MEA itself and therefore would fall outside the mandate of the negotiations. Further views on this would be useful.

V. IDENTIFICATION OF SPECIFIC TRADE OBLIGATIONS

15. Many Members have submitted previous inputs contributing their views on examples of provisions in MEAs that constitute STOs. On the basis that we have outlined in the preceding paragraphs, Malaysia also attempts to identify STOs in three MEAs that are in force and contain the elements of an MEA thereof.

16. In examining MEA provisions contained in these three agreements, it is found that some provisions contained the binding element as illustrated by the use of the words "shall" and some are accompanied by the prescription of a specific prescribed course of action, but not all are related to trade.

17. Where the measures are mandatory and specific, but only prescribe administrative actions not directly linked to trade, we have indicated that these may not fit the profile of an STO.

18. The accompanying table provides some illustrations, but these are preliminary views, and we do not claim that these are exhaustive. In addition, we reserve the right to come back to these provisions at a later stage.

VI. CONCLUSION

19. Malaysia welcomes the discussions that have been taking place to achieve a greater understanding of what constitutes an STO. This will assist us further with the mandate of paragraph 31(i) negotiations. We are of the view that based on the submissions so far, the vast majority of Members share the view that the STOs in the paragraph 31(i) mandate refer to provisions in MEAs that involve an obligation for the conduct of a specific measure directly relevant to trade.

ANNEX

MEA	ARTICLES	OBLIGATIONS	SPEC. MEASURES/ ACTIONS IN TRADE	STO
CITES	Article II.4	Mandatory not to allow trade in species included in Appendices I, II and III	No specific measure prescribed. Action to be in accordance with the provisions. Not all provisions specific and trade-based. Principle rather than operative provision	No
	Article III.2, 3 and 4	Mandatory requirement of the prior grant of a permit/certificate before export, import and re-export	Specific measure in terms of prior grant and presentation of an export/ import permit/ re-export certificate for trade subject to certain conditions	Yes
	Article III.5	Mandatory requirement of prior grant of certificate for introduction of any specimen of species in Appendix I	Specific trade measure in terms of prior grant of certificate for trade	Yes
	Article IV.2, 4, 5	Mandatory requirement of the prior grant of a permit/certificate before export, import and re-export	Specific trade measure in terms of prior grant and presentation of an export permit/ re-export certificate subject to certain conditions	Yes
	Article IV.6	Mandatory requirement of prior grant of certificate for introduction of any specimen of species in Appendix II	Specific trade measure in terms of prior grant of certificate for trade	Yes
	Article V.2, 3, 4	Mandatory requirement of the prior grant of a permit/certificate of origin/ certificate before export, import and re-export	Specific measure in terms of prior grant and presentation of an export permit/re-export certificate/certificate of origin, subject to certain conditions	Yes
	Article VI.2, 3, 4, 5, 6	Requirement of certain information in the permits/certificates	Specific measure – to include specified information in the export permit/ certificate and procedures for copies of permits/certificates and their cancellation	Yes
	Article VIII.1	Mandatory requirement to enforce penalty provisions and prohibit trade	No specific measure provided	No
	Article VIII.2	Non mandatory obligation for reimbursement of expenses	Non-specific measure – discretionary method of reimbursement	No

MEA	ARTICLES	OBLIGATIONS	SPEC. MEASURES/ ACTIONS IN TRADE	STO
	Article VIII.3	Non-mandatory obligation to ensure minimum delay in trade formalities for passage of specimens	Measure to designate ports not obligatory, measures on properly cared for not prescribed	No
	Article VIII.6	Mandatory to maintain trade records	Records of trade in specimens included in Appendices I, II and II shall include specific information	Yes
	Article IX	Designation of Management and Scientific Authorities	Procedures governing the designation of these authorities not specific to trade	No
Basel Convention	Article 3	Mandatory to inform of wastes under domestic legislation other than those listed in Annexes I and II	Provide information to the Secretariat, not trade specific	No
	Article 4.1 (a),	Mandatory to inform on prohibition of wastes	Exercise of right under national legislation	No
	Article 4.1 (b), (c) (via Article 13 procedures	Mandatory to prohibit import/export of hazardous wastes	Through information/ notification in accordance with Article 13 procedures	Yes
	Article 4.2 (a-d)	Mandatory measures	Measures not specified – only appropriate measures	No
	Article 4.2 (e-f)	Mandatory prohibition of wastes exports to countries that have ban them or are unable to manage in an environmentally sound manner	Ban is not specific, depending on criteria yet to be determined	No
	Article 4.6	Mandatory – no export permitted to designated area	Export of hazardous wastes prohibited to areas south of 60 degrees latitude	Yes
	Article 4.7 (b)	Mandatory requirement of packaging, labelling in conformity with international rules and standards and due account paid to international practices	Packaging procedures, but not based on specific international rules, standards and practices – not specific trade measure	No
	4.7(c)	Mandatory requirement of a movement document	Movement document shall contain information from point at which transboundary movement commences to the point of disposal	Yes

MEA	ARTICLES	OBLIGATIONS	SPEC. MEASURES/ ACTIONS IN TRADE	STO
	Article 6.1	Mandatory for exporting party to notify any transboundary movement of wastes	Notification by exporting party of proposed transboundary movement of wastes containing information specified in Annex V.A	Yes
	Article 6.2	Mandatory for importing party to respond to notification in writing	Response shall be provided either to grant consent or deny permission or to request information	Yes
	Article 6.3	Mandatory requirement that the exporting party cannot export unless with written confirmation from importing party	Written confirmation from importing party to contain specific information on consent, existence of contract	Yes
	Article 6.4	Requirement for party of transit to acknowledge receipt of notification. Exporting party shall not proceed with transboundary movement subject to conditions	Acknowledgement by party in transit and need for exporting party to receive consent or otherwise as provided. However, include other discretionary measures	No
	Article 6.9	Mandatory requirements of prescribed actions by persons involved in the transboundary movement	Various actions to be taken by persons involved are specified such as signing of movement document by the person in charge and information regarding receipt of wastes. Needed in the export/import process	No
	Article 6.10	Mandatory requirement to transmit notifications and responses to parties	Acts relating to notification and responses – administrative procedure	No
Montreal Protocol	Article 4A	Mandatory requirement to ban export after phase-out date	Specify date of ban and what types of exports should be banned	Yes
	Article 4B	Mandatory to establish a system of licensing for import and export and report to the Secretariat	Specify the type of licensing system for import and export for substances in Annexes A, B, C and E	Yes