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STATEMENT BY SWITZERLAND AT THE MEETING OF THE SPECIAL SESSION OF THE COMMITTEE ON TRADE AND ENVIRONMENT OF 1-2 MAY 2003

Submission by Switzerland

Paragraph 31 (i)

1. We would like to thank the delegations of Japan, Malaysia, the European Communities and Hong Kong, China for their contribution on this important issue, and the Secretariat for the revision of the two very valuable and useful working documents. We also welcome the presence of representatives of several MEAs at this session. We have had an interesting discussion on this issue during the last meetings, as well as at this meeting. At this stage, I would like to make a few comments on several aspects related to paragraph 31(i).

2. As discussions have shown, one of the main problems when dealing with paragraph 31(i) of the Doha Declaration is to know what exactly is a "specific trade obligation (STO) set out in a Multilateral Environmental Agreement (MEA)". As we have already pointed out several times, we do not favour the listing of provisions within specified MEAs as a means to define the scope of paragraph 31(i), but would rather like to develop criteria that allow the identification of STOs in a more conceptual way. We are of the opinion that a listing of provisions is not an adequate means to fulfil the mandate given to us in Doha because, *inter alia*, of the following reasons:

3. As Canada has pointed out in its last communication, as well as Japan in its contribution submitted in view of this meeting, an STO must not necessarily be provided for in one single article of an Agreement, but can result from a set of provisions of an MEA. Such cases could not adequately be dealt with by simply listing provisions. In the same context falls the question raised by Canada, and by the European Communities and other delegations at this meeting, of whether STOs can also be decided by the Parties of an MEA in the form of decisions of the relevant bodies of the agreement. This question cannot be answered in general since it depends on whether a specific agreement gives the authority to the Conference of the Parties or other bodies to take such decisions, and on the nature of the decision to be taken. In this context, the contribution by the European Communities is very useful, as it differentiates between different kinds of decisions and helps the clarification process. Switzerland is of the view that it is possible to create STOs by the means of a decision.

4. On the other hand, it seems very clear that, legally speaking, amendments to an MEA stand, once they enter into force, on the same level as the agreement itself and can therefore also contain STOs. Finally, we are of the opinion that the mechanism we should develop should enable us to take into consideration future developments of MEAs and new provisions to be negotiated within international environment fora. If we have to adapt the list every time a new measure is negotiated and has entered into force, this will result in a very cumbersome and inefficient procedure. In view of all these possibilities, a list enumerating provisions that contain specific trade obligations could never be complete. Therefore, Switzerland continues to favour a more conceptual approach which defines criteria that allow to identify STOs on a more general basis, as mentioned in our proposal regarding the categorization of STOs.

5. So let me turn now to the issue of categorization of STOs. Japan has made a very concrete proposal in this respect and my capital is studying it very carefully. It is a useful document and does not prejudice at all the outcome of the negotiation. At the last CTESS meeting in February, Switzerland presented two categories which should fall under the heading of "specific trade obligations", which are:

- (i) Trade measures that are explicitly provided for and mandatory under MEAs; and
- (ii) other measures that are appropriate and necessary to achieve an MEA objective.

6. With regard to the first category, there seems to be a general view among WTO Members that such measures are to be considered as STOs.

7. With regard to the second category proposed, we have illustrated this category last time by giving an example of the Kyoto Protocol, which contains a number of areas out of which specific trade measures can be taken in order to achieve the objective of reducing emissions of greenhouse gases. It was the wish of many delegations that Switzerland further elaborate on this second category of our typology by providing some more examples. We welcome this opportunity to provide some further examples to help clarify and illustrate concepts and principles at stake, but by doing this, we do not intend to provide an exhaustive list of examples.

8. Before turning to these examples, let me first reiterate briefly the reasoning behind this second category. Trade obligations in MEAs may be designed in a way so as to leave a large "*marge de manoeuvre*" to the members of the MEA with regard to the measure that can be taken. Contracting Parties to such MEAs, which are in almost all cases also Members of the WTO, negotiated this "*marge de manoeuvre*" so that each Party can implement the MEA in a way it considers appropriate to achieve the MEA's objectives. Such "*marge de manoeuvre*" has been explicitly provided for in the MEA by the parties who have negotiated it. It is precisely because the parties to this MEA have decided to leave to the parties such "*marge de manoeuvre*" that we, as Members of the WTO, must develop a mechanism which ensures that WTO rules do not interfere with the sovereign right of a party to make use of this "*marge de manoeuvre*". However, a WTO Member should be able to intervene in the framework of the WTO, if another WTO Member misuses this "*marge de manoeuvre*" by choosing to implement a measure in a protectionist or unjustifiably discriminating manner.

9. Let me now illustrate this second category by giving two other examples of MEAs. First, let us take the Stockholm Convention on Persistent Organic Pollutants (POPs). While Article 3.1 of the POPs Convention is considered by some delegations, including ours, as referring to an STO, by mentioning explicitly that "*each Party shall (a) prohibit and/or take the legal and administrative measures necessary to eliminate its production and use of the chemical listed in the Annex and necessary to eliminate its import and export of the chemicals listed in Annex B...*", Article 3.2 of this same Convention does not refer in the same explicit and specific manner to STOs, but gives Parties some latitude with regard to the trade-related measures to be adopted, namely by mentioning that "*each Party shall take measures to ensure (a) that a chemical listed in Annex A or B is imported only for the purpose of environmentally sound disposal as set forth in paragraph 1(d) of Article 6.*" According to our typology, such an STO falls into our second category and should therefore be regarded as an STO covered by the mechanism to be negotiated among WTO Members under paragraph 31(i).

10. Second, let us turn to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. While Article 4.1, which "*obliges Parties to prohibit export of covered waste to Parties that have banned such imports*", is considered by a majority of delegations as an STO and belongs to our first category, Article 4.7 of the Basel Convention refers to specific

areas where Parties must take measures in order to safely handle the transboundary movement of hazardous wastes by specific packaging, labelling and transport measures. This provision would not seem to pass the test of an STO according to some delegations' view. It is our understanding, however, that this provision is an STO and should be covered by the solution negotiated among WTO Members under paragraph 31(i).

11. In conclusion, this brief illustration and the various views among delegations on STOs indicate that the exercise of elaborating a definitive list of STOs, which would be subject to the mechanism we should elaborate, does not seem to be an efficient and useful way to move forward. Some of the submissions presented at this meeting, containing very different views on the very same provisions, illustrate this point. It is therefore not futile at all to continue to dwell on more conceptual issues. Indeed, besides the fact that the negotiation of such a list would probably never be concluded, a list enumerating provisions that contain specific trade obligations could never be complete and would thus need to be adapted continuously. This is why we continue to favour a more conceptual approach which defines criteria that allow to identify STOs on a more general basis, and will also enable us to take into consideration the developments of MEAs in the future.

12. I would like to briefly recapitulate here the mechanism we would like to elaborate under paragraph 31(i) as we think that we should pursue the discussion on what is an STO in parallel with the discussion of the mechanism which should be adopted.

13. As Switzerland has pointed out in previous statements and submissions, the fact that an STO is set out in an MEA clearly shows that the Parties to this MEA considered the relevant trade measures to be necessary to achieve the objectives of the Agreement. It would, therefore, in our view, not be adequate if the necessity of a specific trade measure based on an STO set out in an MEA could be examined again within the WTO. There has to be a presumption that any such measure, if it is covered by an STO, is necessary to achieve the objectives of the MEA. This presumption does mean that if a party is able to show that its trade measures are covered by the provisions of an MEA, the necessity of this measure cannot be objected any more under Article XX of GATT. It would still be possible to examine the question of whether a specific measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised trade restriction. If it cannot be proved that a measure constitutes a mean of arbitrary or unjustifiable discrimination or a disguised trade restriction, this measure has to be considered to be in conformity with Article XX of the GATT.

14. Finally, we are confident that this concept is compatible with paragraph 32 of the Doha Declaration, as it does not add to or diminish the rights and obligations of Members under existing WTO agreements. The protection of WTO Members against unnecessary trade restrictions remains untouched, and also against arbitrary or unjustifiable discrimination or disguised trade restrictions. Our concept just says that the fact that a very large number of nations, i.e. the Parties to an MEA, consider a measure to be necessary shall be sufficient for WTO to equally consider this measure as necessary. We do not change or even abolish the requirement of necessity as written down in Article XX of the GATT. The only thing we do is to set up a procedural rule saying that if the measure is covered by an STO, the necessity test has already been made, namely by the parties to the MEA concerned, which are also WTO Members. Why should a WTO Member come to a different conclusion as the member of an MEA and as a Member of WTO with regard to the necessity of an STO? In summary, the clarification we seek does not change the existing rights and obligations with regard to the WTO rules and specifically with regard to Article XX of the GATT. It merely clarifies the way these rights and obligations should be interpreted in order to ensure the mutual supportiveness of the trading and environmental systems, as mandated by the Doha Declaration.
