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

Submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

Paragraph 31 (i)

I. OVERVIEW

1. Regarding the negotiations on the relationship between WTO rules and specific trade obligations (STOs) set out in MEAs, delegations have made substantial contributions to the elaboration of the mandate in the meetings of the Committee on Trade and Environment in Special Session (CTESS). Some delegations single out certain provisions with trade obligatory implications within individual MEAs and identify examples of STOs. Other submissions tend to favour the illumination of the negotiations in a more conceptual way. The Government of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu is of the opinion that these two approaches by their nature are not mutually exclusive. In fact, they should be able to complement each other. A deliberation on the basis of a mixture of approaches appears desirable and constructive.

2. It should be noted that the term "STOs" was formulated by the WTO delegations. No comparable expression can be found in the context of MEAs or international environmental law. However, since any discussion of STOs would have to touch upon the basic design of the MEAs, it would be of notable help if contributions and aspiration will be given from international environmental communities, especially from those MEAs incorporating trade obligations.

3. In order to make our negotiations more thorough and fruitful, we continue to hold that "STOs set out in MEAs" should be understood in a broader sense.[1] As long as such trade measures provided for under MEAs are with binding effect among their parties, they should be within the scope of STOs in MEAs. As will be explained further, our finding is that, in addition to STOs provisions in MEA treaties, certain decisions made by the Conference of the Parties (COPs) of the MEAs, including those under compliance procedures, create obligations among the contracting parties and do have binding effect. There is apparent reason to cover such decision in our negotiations.

4. Here, we would also like to express our views on the consistency between STOs in MEAs and WTO rules. As will be explained, although it may be indisputable that STOs are necessary and essential to fulfil the goal of MEAs, it might not be desirable for WTO Members to accept unconditionally that all implementations of the STOs should be deemed legitimate under the WTO rules.

II. FURTHER ELABORATION OF THE BROADER VIEW ON "SET OUT IN MEAS"

5. The Government of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu would like to elaborate further some ideas in its previous statement in light of the comments and

[1] TN/TE/W/11 (submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu).

submissions by delegations. The concept of MEAs in the context of paragraph 31(i) of the Doha Declaration should be perceived to cover not only MEA treaties themselves, but also regimes with institutional function, which engage in law-making process and create mandatory regulations among their contracting parties. We believe that most MEAs will not merely confine their legally binding norms to the treaty context. Thus we agree with the proposal of the European Communities (EC) in that certain decisions made by a competent organ of an MEA, including, *inter alia*, the Conference of Parties (COP), the Meeting of Parties (MOP) and its sub-committees are likely to be perceived as legally binding.[2]

6. In addition to the three categories of COP decisions with different degrees of mandatory implications raised by the EC, we would also like to point out another type of decisions - COP/MOP decisions authorizing trade measures in accordance with compliance procedure established under MEAs. Under such mechanisms, trade restrictive measures or trade sanctions are usually applied to ensure observance of the Conventions. For instance, in Annex IV[3] of the Montreal Protocol, entitled "Non-compliance Procedure", an Implementation Committee was established in order to supervise the national implementation of the Protocol. According to paragraph 9 of the Annex, the Committee shall report to the MOP of the Protocol, including any recommendations it considers appropriate. Then, based upon the report, the Parties may decide upon and call for necessary measures to enforce full compliance with the Protocol. To avoid controversy and confine the extent and content of the measures the Parties may take, Annex V of the Protocol sets up a list of measures in a straightforward manner. Apart from non-coercive and incentive means, in paragraph C of the Annex, suspension of trade is clearly specified.

7. Hence, the Montreal Protocol, being equipped with the enforcement mechanism, has an institutional and legal basis to order trade sanctions against violators. We consider it difficult to assume such MOP decisions involving trade bans are not legally binding. We invite delegations to ponder whether such a decision of trade measures amounts to STOs.

8. In addition to the Montreal Protocol, delegations might also want to pay attention to other MEAs having a similar configuration or device as that of the Montreal Protocol. We certainly find that some other MEAs, such as CITES or ICCAT, do have or are developing similar mechanisms in dealing with the non-compliance issue, although there may be a lack of solid institutional basis as that of the Montreal Protocol.

III. COMPATIBILITY BETWEEN WTO RULES AND STOS IN MEAS

9. As some concepts embodied in paragraph 31(i) and the work of listing STOs in MEAs have been presented in the negotiations, delegations start to consider the consistency between STOs in MEAs and WTO rules, especially provisions in the GATT 1994, as shown in the submissions of the U.S., Japan, and Switzerland.

10. In paragraphs 5 and 15 of Japan's submission[4], the Japanese delegation considers STOs under their definition consistent with WTO rules. We remain sceptical towards the conclusion that such measures are always compatible with WTO rules[5], even if we might eventually reach a consensus that STOs should be interpreted in a relatively restrictive sense, only covering trade measures explicitly specified and mandatory in the treaty context of MEAs.

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[2] TN/TE/W/31 (submission by the European Communities).

[3] According to Article 10, paragraph 1 of Convention for the Protection of the Ozone Layer, "The annexes to this Convention or to any protocol shall form an integral part of this Convention, … ".

[4] TN/TE/W/26 (submission by Japan).

[5] In paragraph 14 of our last submission, we said, "The government shares the same view expressed by certain Members that an STO provided for in an MEA should not automatically be presumed to be in conformity with WTO rules."(TN/TE/W/11).

11. Firstly, delegates are authorized to negotiate the "relationship" between the two regimes in question. It is doubtful whether it should be within our mandate to make final judgement over the "legality" of "STOs" in MEAs under the WTO rules. Without such a mandate, the discussions or conclusion might not have any binding effect on future dispute settlement cases involving such a legality issue.

12. Secondly, although, in principle, we agree with the U.S. view that the MEAs and WTO are working together well[6], the harmony between two sides, we believe, mainly results from mutual respect and constraint. One cannot jump to the conclusion that the use of STOs in MEAs, especially those measures relating to the ban on exportation or importation of goods, by a WTO Member against another WTO Member, would never violate any relevant WTO rule. It should be clear that whether a specific STO is in line with WTO rules should always be decided under WTO jurisprudence, although WTO jurisprudence would take into account the need of environmental protection.

13. It is understandable that when parties to an MEA, which are also WTO Members, have accepted an STO, such parties should be expected to refrain from expressing different views by bringing a complaint against the measures in question to the WTO. But we should also be mindful that the willingness to be bound by an obligation under MEAs is one thing; the legitimacy of the implementation of an STO under the WTO might be another. The process of implementation may run in conflict with a number of very important principles, such as non-discrimination, proportionality, necessity, transparency and due process of law, which have already been recognized in the WTO jurisprudence.

IV. CONCLUSION

14. In conclusion, while the opinions regarding certain concepts, such as STOs, have gradually converged, we then have to decide the exact relationship between STOs set out in MEAs and existing WTO rules. Our view is that the goal of securing the mutual supportiveness of both regimes should not deprive the rights of a WTO Member to challenge STOs in question under the WTO legal system. We understand and even share the view of Switzerland that the value and necessity of STOs[7] should not be questioned in the trade regime by a party both to MEA and to WTO. However, to ensure the proper functioning of the trade regime, the WTO should still be allowed to examine the legitimacy of the application of certain STOs if a dispute arises.

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[6] Paragraph 5 of the U.S. submission. (TN/TE/W/20).
[7] See paragraph 13, 14 of Switzerland's submission (TN/TE/W/32).