

THE RELATIONSHIP BETWEEN THE PROVISIONS OF THE MULTILATERAL TRADING SYSTEM AND MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAs)

Submission by Switzerland

I. POTENTIAL OF CONFLICT BETWEEN THE WTO AND MEAs

1. The first international treaties concerning environmental issues were adopted already in the nineteenth century. Since that time, the protection of the environment has been a subject of continuous government attention. Whereas early international environmental treaties were limited as to the subject matters they addressed, the regions they covered, and the measures they provided for, the subsequent trend has been to broaden the range of international environmental treaty law and to make provision for new tools and measures. The development of international environmental law has, in particular, involved a move from traditional rules of "command and control" towards the increasing use of economic instruments and trade measures. In fact, it must be acknowledged that trade-related measures can play an important role in promoting the objectives of a Multilateral Environmental Agreement (MEA). The use of trade-related measures within the framework of MEAs may even in certain circumstances be the most effective way to ensure that environmental objectives are achieved. Therefore, adopting measures that affect trade within the environmental framework is not only understandable, but sometimes also desirable.

2. Until now, no MEA-related conflict has arisen within the WTO. According to Switzerland's understanding of the rules and principles governing the relationship between the WTO and MEAs, such a conflict should not arise. Namely, the existing WTO rules as they stand and as the Panels and Appellate Body interpret them permit the adoption and implementation of trade-related measures prescribed by MEAs. However, though there should in principle be no conflict between the WTO and MEAs, the WTO-compatibility of the implementation of a trade-related measure prescribed by an MEA may, nevertheless, be challenged in a WTO dispute settlement proceeding and a panel could conclude that such a measure conflicts with obligations pursuant to WTO law. In order to avoid such conflicts, we think the general approach of mutual supportiveness and deference should apply.

II. GENERAL APPROACH: MUTUAL SUPPORTIVENESS AND DEFERENCE

3. The overall objective of both environmental and trade regimes is the same, namely the promotion of wellbeing. For example, the Marrakesh Agreement establishing the WTO explicitly refers in its preamble to the objectives of allowing the optimal use of the world's resources, sustainable development and the protection and preservation of the environment. However, whilst the WTO and MEAs pursue the same overall goals, they are concerned with different areas of policy, focus on different issues and have different competencies. The WTO promotes overall welfare by establishing rules and principles for an open and non-discriminatory international trade regime. MEAs, on the other hand, contribute to general wellbeing by establishing rules, principles, institutions and mechanisms for the protection of the environment. In focusing on their own tasks and competencies, the trade and environmental regimes are mutually supportive. In order to maintain this mutual supportiveness, each framework should remain responsible and competent for the issues falling within its primary area of competence.

4. Thus the WTO should focus its activities on trade-related issues and not engage in setting its own environmental standards. By the same token, the WTO should not try to decide whether an environmental goal pursued by an MEA is legitimate or whether a measure taken in order to implement an MEA is necessary. Under the approach suggested in this submission, however, determining whether specific measures constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade should clearly fall within the competence of the WTO. On the other hand, MEAs should have sole responsibility for determining environmental objectives and for choosing the means, instruments, mechanisms and measures necessary to achieve these objectives. Moreover, whereas disputes concerning the trade regime should be solved within the WTO, environmental disputes concerning MEAs should be resolved within MEAs.

5. The fact that the WTO and MEAs should each focus on their primary competence does not mean, however, that the WTO cannot adopt principles and rules that affect the environment. At the same time, MEAs are not, and should not, be prevented from adopting rules and principles that affect trade. Rules and principles on international trade may indeed affect the environment; similarly, environmental regulations may have an impact on trade. Therefore, whilst each regime should focus on its primary competence, it is not prevented from adopting measures which affect the other regime. The concerns and interests of the other regime should be taken into account in the course of this and deference should be paid to the competence of the other regime. This, in our view, is the essence of the mutual supportiveness of both regimes.

III. THE EXISTING PRINCIPLE GOVERNING THE RELATIONSHIP BETWEEN THE WTO AND MEAs

6. Switzerland takes the view that the mutual supportiveness approach as outlined in paragraphs 3-5 above governs the relationship between the WTO and MEAs. The Appellate Body decision in the Shrimp/Turtle case confirms this understanding by indicating that the words of Article XX of GATT 1994 "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment" [see United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, para. 129]. Thus, if the international community indicates in an MEA by adopting a trade-related measure that the implementation of this measure is necessary in order to achieve an environmental goal, such a measure must also be deemed to be "necessary" within the WTO context.

7. However, the decisions of the WTO Panels and the Appellate Body are not able to establish a definite clarification of the relationship between the WTO and MEAs. That is to say, the decisions of the WTO Panels and the Appellate Body merely determine the legal situation of a specific case in relation to two WTO Members; they do not constitute a general rule on the relationship between the WTO and MEAs. Therefore, it cannot be certain that the WTO Panels and the Appellate Body will always follow previous decisions. Moreover, the previous decisions do not deal with national measures implementing an obligation established by an MEA. Until now, they have been merely concerned with national measures adopted by a single state pursuant to its national policy. Finally, the clarification of the relationship between the WTO and MEAs is so very fundamental that, in our view, WTO Members should decide on this question and not delegate its resolution to the judiciary body. Therefore, and in order to increase the predictability and the legal certainty of the WTO regime and its relationship with MEAs, and in order to avoid unnecessary conflicts, Switzerland takes the view that further clarification of the relationship between WTO and MEAs by WTO Member States would be desirable.

IV. PROPOSAL FOR FURTHER CLARIFICATION

8. Different possibilities exist and can be put into effect to clarify the relationship between potentially conflicting rules and provisions of the WTO regime, on the one hand, and rules and

provisions of MEAs, on the other. Within the WTO, the amendment of Article XX of GATT 1994, the amendment of the Marrakesh Agreement, or the adoption of an interpretative decision might be appropriate ways to clarify the relationship between the WTO and MEAs.

A. PROCEDURE: AMENDMENT OF ARTICLE XX OF GATT 1994, AMENDMENT OF THE MARRAKESH AGREEMENT AND INTERPRETATIVE DECISION

9. There have been several proposals to amend Article XX of GATT 1994 in order to clarify the relationship between the WTO and MEAs. However, the amendment of Article XX of GATT 1994 would reopen the debate on this provision and entail the risk that the whole article, which is the balanced result of long and complicated negotiations, would have to be reconsidered. Moreover, it is not only the relationship between the GATT and MEAs, but the relationship between the whole WTO regime and MEAs that should be clarified. Another solution might be to amend the Marrakesh Agreement establishing the World Trade Organization, e.g. by introducing a new Article V *bis* dealing with the relationship between the WTO and MEAs. However, the existing WTO rules as they stand seem to be open and flexible enough to accommodate the mutual supportiveness approach as outlined above. Thus, the amendment of WTO rules is not necessary to prevent misunderstandings or misinterpretations creating conflicts with MEAs, clarification will suffice. For example, the adoption of an interpretative decision by WTO Members would provide a simple and effective means of preventing unnecessary conflicts with trade-related measures of MEAs, thereby creating more predictability and legal certainty. Moreover, it would also underline the WTO's commitment to respecting environmental concerns and to cooperating constructively in the protection of the environment.

B. SUBSTANTIVE PRINCIPLE: MUTUAL SUPPORTIVENESS AND DEFERENCE

10. An interpretative decision of this kind pursuing the mutual supportiveness approach described above could outline the principles governing the relationship between the WTO and MEA provisions. It would have to make clear that the WTO and MEAs should focus on their primary competence and pay deference towards the competence of the other. Thus, while it is the task of the WTO to adopt rules and principles for the establishment of an open, transparent and non-discriminatory trading system, MEAs must establish the rules and mechanisms necessary for the protection of the environment, and whilst assessing whether a specific measure is arbitrarily discriminatory or protectionist falls fully within the competence of the WTO, determining the legitimacy of an environmental goal and the necessity and proportionality of a measure to achieve this goal must remain the competence of MEAs. Moreover, such an interpretative decision could also provide objective criteria for determining towards which MEAs such deference should be paid. Such criteria might, for example, be that an MEA must be open to all countries, that it must reflect broad-based international support via its actual membership, and that its provisions requiring or authorizing trade-related measures must be drafted precisely.

V. CONCLUDING REMARKS

11. According to Switzerland's understanding of the WTO agreements, the relationship between the WTO and MEAs is governed by the mutual supportiveness approach. This implies that while the WTO should not assess the necessity of trade-related measures provided for by MEAs, it should be competent to assess whether specific measures constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. By formulating such an approach towards the relationship between the WTO and MEAs, this submission is intended to provide a basis for fruitful discussion within the CTE.