WORLD TRADE ORGANIZATION

WT/CTE/W/168
19 October 2000

(00-4331)

Committee on Trade and Environment Original: English

CLARIFICATION OF THE RELATIONSHIP BETWEEN THE WTO AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

Submission by Switzerland

I. INTRODUCTION

1. The relationship between the WTO and multilateral environmental agreements (MEAs) and especially between the rules and principles of the WTO on the one side and trade-relevant provisions in MEAs on the other side is one of the core issues of the trade-environment debate. However, until now, it has been impossible to reach agreement between the WTO Members on which rules and principles should govern the relationship between the WTO and MEAs. The Swiss submission on *The Relationship Between the Provisions of the Multilateral Trading System and Multilateral Environmental Agreements* (WT/CTE/W/139) led to a broad and stimulating discussion in the CTE meeting of 5-6 July 2000. The Swiss submission outlined the general approach of mutual supportiveness and deference, which should govern the relationship between the WTO and MEAs; the following paragraphs will now, building on the constructive discussion at the July meeting, address several issues more concretely.

II. CLARIFICATION OF THE RELATIONSHIP BETWEEN THE WTO AND MEAs BY WTO MEMBERS

2. The discussion at the 5-6 July 2000 meeting of the CTE clearly showed that there is disagreement among WTO Members regarding the need for clarification of the relationship between the WTO and MEAs. While some Members stressed the importance of clarifying the relationship between the trade and the environmental regimes to ensure legal certainty, predictability and international coherence, others argued that there is no need for such clarification. Namely, it was said that recent decisions of the WTO Appellate Body have clarified that the trade relevant measures of existing MEAs are WTO-compatible. Other delegations took the view that there is no need for clarification, as no conflict exists. Others pointed to the fact that only a minority of MEAs contain trade measures. Nevertheless, while it is true that, at this stage, only a limited number of existing MEAs raise questions about possible conflicts with WTO rules and principles, these include very important MEAs, such as CITES, the Basel Convention, the Montreal Protocol, the PIC Convention and the Biodiversity Convention. Secretariats of these conventions have already highlighted the need for clarification (see e.g. *Communication from the Secretariat of the Vienna Convention and the Montreal Protocol*, contained in WT/CTE/W/142, §32).

3. Several delegations have also argued that there is an urgent need to harmonize the relationship between the Convention on Biological Diversity (CBD) and the TRIPS Agreement because of an alleged incompatibility between these two instruments. While in Switzerland's view these two instruments are not incompatible but mutually supportive, there seems nevertheless to be agreement that a potential for conflict between the WTO and MEAs does exist. However, this potential relates not only to existing trade measures in MEAs but also to future provisions of MEAs having effects on trade. It seems that, in the past, MEAs with trade measures have proved to be

successful. One reason may be the lack of other effective enforcement or dispute settlement mechanisms which characterizes many MEAs. Another reason might be that trade measures are a very efficient environmental policy tool as well as a means to create incentives for compliance. In the light of this, there will certainly be more trade measures adopted in existing and in future MEAs. This, however, increases the potential for conflict with the WTO regime. Furthermore, the current uncertainty may have a negative impact on MEA negotiations. For example, one reason why the negotiations of the Cartagena Protocol on Biosafety were so difficult was precisely the lack of clarity with regard to the relationship of the Protocol to the WTO. Clarification of the issue would, therefore, also help MEA negotiators in their task to find the best means and mechanisms for the realization of their goals. Finally, the current ambiguity creates legal uncertainty and, hence, encourages unilateralism. If, however, the relationship between the WTO and MEAs could be clarified – and especially if it would be made clear that trade-related measures that are internationally agreed upon within MEAs are presumed to be WTO compatible – this would reduce substantially the attractiveness of unilateral measures.

4. It is sometimes said that since WTO Members have not been able to clarify this relationship, the Appellate Body has done so in its Shrimp-Turtle report (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 November 1998, WT/DS58/AB/R). In any case, this decision clarified the sequence of steps in the analysis under Article XX of the GATT 1994 and held that this analysis is two-tiered: first, it must be assessed whether a measure qualifies for provisional justification under Article XX(a) to (j); second, it must be appraised whether such a measure meets the requirement in the introductory clause of Article XX. Moreover, the Shrimp-Turtle decision clarified the term "exhaustible natural resources" in Article XX(g) of the GATT 1994 and held that, in the light of contemporary international law, living natural resources, such as turtles, can be "exhaustible natural resources" according to Article XX(g). This decision did not, however, deal with measures or rules established by an MEA and, therefore, did not clarify the relationship between the WTO and MEAs.

5. While it could be argued that the best and easiest solution may be to leave this difficult question to the WTO dispute settlement mechanism, Switzerland takes the view that such an important decision should rather be taken by WTO Members and not through litigation. First, WTO panels should determine merely the legal situation of a specific case; it is not their task to set general abstract rules. A panel decision involving the relationship between the WTO and an MEA would, therefore, be a decision in a specific case and not necessarily clarify the general relationship between the WTO and MEAs. Most importantly, the relationship between the WTO and MEAs is not merely a legal question, but a politically sensitive issue which has to be addressed in negotiations rather than in the dispute settlement mechanism.

III. PRINCIPLES CLARIFYING THE RELATIONSHIP BETWEEN THE WTO AND MEAs

6. As indicated in its submission contained in document WT/CTE/W/139, Switzerland takes the view that the relationship between the trade and the environmental regimes is governed by the general principles of no hierarchy, mutual supportiveness and deference. In fact, there is no need for a hierarchy between trade and environmental regimes: both, while focusing on different policy areas, pursue the same overall goal of promoting wellbeing and sustainable development. By preventing inefficient or even potentially confrontational situations and by focusing on their own competencies, the trade and environmental regimes are mutually supportive. Thus, in order to maintain this mutual supportiveness, both regimes should pay deference to the competence of the other regime.

7. MEAs respect the general principles of no hierarchy, mutual supportiveness and deference. Namely, WTO Members, when negotiating an MEA, pay attention that trade measures are not included in the MEA if they are unnecessary, arbitrary, protectionist or unjustifiably discriminatory.

In fact, it is the task of each WTO Member to ensure coherence between its obligations under the WTO and its positions taken during MEA negotiations. Given that during broad-based MEA negotiations all stakeholders having an interest in the issue will be present, there will always be countries having a direct interest to prevent an unnecessary trade measure. In this way, it is ensured that MEAs avoid the adoption of measures which are not necessary for the protection of the environment or which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Hence, MEAs respect the international trade regime as established by the WTO. Moreover, newer MEAs, such as the PIC Convention or the Cartagena Protocol on Biosafety, explicitly refer to the principle of mutual supportiveness. In Switzerland's view, it would also be appropriate to confirm these general principles within the WTO framework, thereby clarifying that these principles govern the relationship between the WTO and MEA legal systems.

8. In order to clarify and confirm that the general principles of no hierarchy, mutual supportiveness and deference govern the relationship between the trade and the environmental regimes, Switzerland suggests that the WTO could establish the following:

- The WTO should focus on its own field of competence and not engage in adopting environmental rules and standards. Environmental rules and standards must be adopted in the regimes with specific environmental competencies and knowledge, i.e. MEAs. This implies that the WTO should leave the question of how such environmental concerns can best be protected to the MEAs. Thus, MEAs must remain competent to adopt the measures, which are necessary for the realization of their goals. This also implies that the best fora to determine which measures are necessary and which are not, are the fora having the specific knowledge necessary for this determination, i.e. the MEAs. Therefore, the *trade measure itself* provided for by an MEA should benefit from a presumption of WTO conformity (i.e. to be "necessary" to protect the environment; to not be arbitrarily or unjustifiably discriminating; and not to be a disguised restriction on international trade). The criteria such MEAs must fulfill to be able to avail themselves of such presumptions must of course still be worked out. Namely, these criteria should ensure that the MEAs are supported by all relevant stakeholders and that their provisions concerning trade-related measures must be drafted precisely.

- Moreover, while the measures as provided by such an MEA should be presumed to be WTO compatible, the way *such measures are implemented* could still raise questions of WTO conformity. This means that the implementation of such a measure would remain subject to the WTO requirement that it must not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

9. This can be illustrated by a theoretical example involving states C and D which are both WTO Members: (C represents the complainant and D represents the defendant).

- Let us first assume that Country D prohibits the production and importation of a substance "S" because of its harmful effect on the global environment. Country C, as an exporter of "S" initiates WTO dispute settlement proceedings against Country D. First, complainant C would have to show that the import ban of defendant D constitutes a violation of its obligation for example under Article XI of the GATT 1994. Then, relying on an exception to the general rules of the WTO, defendant D would have to show that its measure is covered by the exceptions of, for example, Article XX(b), namely that it is (a) necessary to protect the environment, and (b) neither arbitrarily discriminatory nor protectionist.

- Let us now assume that there is an MEA, which is open to all countries, whose actual membership reflects broad-based international support and includes Parties from all continents and from all stages of development. Through this MEA, the international community has explicitly prohibited the production and importation of "S." According to the presumption of WTO conformity as described above in paragraph 7, the import ban of defendant D as such would be considered to be WTO compatible. Thus, a WTO panel would not have to assess whether this import ban is necessary according to Article XX(b), but assume that the measure as such falls within the exception of Article XX(b). However, complainant C could still argue that the way defendant D is implementing the import ban does not conform to its WTO obligations, if it constitutes, for example, a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

10. Switzerland takes the view that such a presumption of WTO conformity, while at the same time ensuring that the implementation of a measure corresponds to WTO standards, would constitute a constructive concretization of the general principles of no hierarchy, mutual supportiveness and deference, which govern the relationship between the WTO and MEAs. The discussion of this suggestion in the CTE will hopefully provide the basis for further reflection and more detailed proposals.

_____