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THE RELATIONSHIP BETWEEN EXISTING WTO RULES AND SPECIFIC TRADE OBLIGATIONS SET OUT IN MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAS)

Submission by Japan

Paragraph 31(i)

I. PURPOSE OF THIS PAPER

1. The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, especially those pursuant to Multilateral Environmental Agreements (MEAs) has been addressed as one of the most fundamental issues, among the agenda of the CTE, so as to develop interface between rules on trade and rules on environment.

2. In response to these discussions at the CTE, our ministers agreed in Doha to negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs while limiting the scope of negotiations to the applicability of such existing WTO rules as among Parties to the MEA in question.¹

3. The purpose of this paper is to present an idea on "specific trade obligations". That is, those which are highly specified in MEAs should be deemed to be consistent with WTO rules, while other relevant measures specified in MEAs should be presumed to be WTO consistent on condition that those measures meet certain substantial requirements.

4. The view of this paper neither means to prejudice the WTO rights of any Member that is not a Party to the MEA in question nor to add to or diminish the rights and obligations of Members under existing WTO agreements.²

II. BACKGROUND

5. Global environmental problems are important challenges to be dealt with in cooperation with the international community of the 21st century. In order to tackle these challenges, it has been recognized that non-trade measures, including improving access to finance and promoting technology transfer, are preferable. Such positive measures have proved, in a number of cases, very effective in achieving environmental objectives. However, a certain number of MEAs with trade measures such as the Montreal Protocol on Substances that Deplete the Ozone Layer indicates that there are certain cases where trade measures are considered to be necessary and effective means for achieving the environmental objectives. There are various types of MEAs that contain trade measures. For example, some MEAs stipulate trade measures in their text themselves, some adopt trade measures

¹ Paragraph 31(i) of the Doha Ministerial Declaration (WT/MIN/(01)/DEC/W/1)

² Paragraph 31(i), 32 of the Doha Ministerial Declaration (WT/MIN/(01)/DEC/W/1)

through the determination of MEA decision-making bodies and some do not stipulate trade measures themselves but use measures which might affect international trade.³

6. When trade measures are taken, there may be the danger of these measures being used in a manner that would constitute a means of arbitrary, unjustifiable discrimination or a disguised restriction on international trade. In particular, unilateral trade measures which are not consistent with WTO rules, seriously undermine the multilateral trade system and they should be strictly avoided. Even if trade measures are taken in order to achieve the environmental objectives, these measures should be based on multilateral framework, as far as possible.⁴

7. From such a viewpoint, in order to ensure the mutual supportiveness of trade and environmental policies,⁵ it is essential for the international community to develop common understanding on the relationship between specific trade obligations set out in MEAs and WTO rules, though the negotiations are limited to the relationship among Parties to the MEAs in question.

8. Up to now, many countries have been discussing the relationship between WTO rules and trade measures stipulated in MEAs.⁶ However, Members have not so much focused on the specificity of the trade measures and the applicability of existing WTO rules among the Parties to the same MEA.

9. Some may argue that it would be possible to minimize the risk of overlooking the abuse of these trade measures, if such measures are defined sufficiently specifically. They may also point out the *lex posterior* principle, which is partly incorporated in Article 30 of the Vienna Conventions on the Law of Treaties, can be invoked so as to clarify the relation between MEAs and WTO rules. However, it would be difficult to sufficiently clarify such relations by applying this principle since MEAs and WTO rules do not necessarily address the same concerns.⁷ Therefore, it is useful and beneficial to all the members to develop some common understanding to clarify the relationship between MEAs and WTO rules.

III. DEFINITION OF AN MEA

10. It may be difficult to develop a definition of an "MEA". However, we need to clarify to what extent the term of "MEA" covers, in order to identify the scope of "specific trade obligations", which is being negotiated as mandate.⁸ In this regard, Japan believes that the following elements are appropriate criteria for such a definition, which were submitted as part of Japan's proposal in 1996 and are now modified as then discussed.

³ WT/CTE/W/160, Annex

⁴ See Principle 12 of the Rio Declaration on Environment and Development.

⁵ See preambles of the Cartagena Protocol and the PIC.

⁶ WT/CTE/W/2, 20, 31, 39, 139, 162, 168, 170, 180.

⁷ Furthermore, given the different membership of respective MEAs and the complex rights and obligations stipulated under them, combined with their frequent revisions, it would be too difficult to assume that the complicated relations between MEAs and the WTO rules can be clarified under this principle.

⁸ In terms of definition of an MEA, following elements are indicated.

(1) EC proposal (TN/TE/W/1)

(i) Environmental objectives

(ii) Open to all Members, legally binding documents

(iii) At least 3 Parties are participating including regional agreements.

(2) Argentina proposal (TN/TE/W/2)

(i) in force,

(ii) more than 3 countries, under UN or UNEP,

(iii) open to all Members.

- (i) An MEA is open to any country sharing the environmental objective of the agreement.
- (ii) An MEA, developed and agreed, taking into account works including those under the aegis of the United Nations or its specialized agencies and with the participation of a substantial number of the countries, reflects the interests of major Parties concerned, such as Parties with substantial trade interests, actual and potential major producers and consumers of materials concerned.

Other than MEAs in force, for practical reasons it would be necessary to include in the discussion MEAs which have already been signed and adopted in due course but yet entered into force.

IV. "SPECIFIC TRADE OBLIGATIONS"

11. Regarding "specific trade obligations", Japan believes that the approach proposed by the EC, which categorizes various trade obligations according to their specificity, is helpful. Reviewing the definition of "trade obligations" is a premise of this process. Certain provisions, which do not explicitly stipulate trade obligations but only allow for Parties to take appropriate measures, do not fall within the scope of "trade obligations". In view of these criteria, Japan tried to classify trade measures stipulated in MEAs, reviewing a list of MEAs in document WT/CTE/W/160/Rev.1 prepared by the secretariat. The following preliminary results are only for illustrative purpose and this paper does not intend to prejudge the outcome of future work in this negotiation. Moreover, this categorization, needless to say, does not affect the legal status of each MEA, which is established through due process.

1. Trade measures to be taken are explicitly provided for and mandatory under MEAs;
 - Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Articles 3 to 6 (regulation of trade in specimens of species included Appendix I-III).
 - Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Article 4.1 (Import prohibition of hazardous waste, notification, export prohibition), Articles 6 to 9, Article 13, etc.
2. "Obligation de résultat" is explicitly provided for in an MEA and a trade measure is identified as potential means taken by Parties to meet the obligation of that MEA;
 - Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Article 8.1
3. "Obligation de résultat" is specified in an MEA but a trade measure to be taken for the obligation is not identified in the MEA, while the MEA leaves Parties to decide measure to be taken to fulfil the obligation; and
 - Montreal Protocol on Substances that Deplete the Ozone Layer, Article 2A to 2H
4. Trade measures are not mentioned in MEAs but Parties can take trade measures in accordance with relevant decisions made under the MEA framework.
 - A number of regional fisheries agreements such as ICCAT, CCAMLR, and so forth.

V. COMPATIBILITY BETWEEN WTO RULES AND SPECIFIC TRADE OBLIGATIONS SET OUT IN MEAS

12. Japan considers that, with regard to trade measures explicitly provided for and mandatory under MEAs (categorized in (1) of the paragraph 11 above), such trade obligations could be deemed as compatible with WTO rules among MEA Parties, since those obligations had been negotiated under the existence of WTO or GATT rules and implementation procedures for these trade measures had been agreed.

13. If an MEA provides for “obligation de résultat” and indicates the relating trade measures in the MEA (categorized in (2) of the paragraph 11 above), Japan also considers that there is common understanding on the needs for the measures among MEA Parties.

14. In the case referred to in paragraph 13, though the MEA Parties have common acknowledgement of needs and relevance of the trade measures, those measures could not be automatically deemed as compatible with WTO rules, since specificity of individual measure would not be so clear as category (1). Therefore, in this case, Japan considers that it would be rebuttably presumed to be consistent with WTO rules⁹, if substantial requirements could be introduced such as indicated as below. For instance, in terms of GATT Article XX, following substantial requirements are appropriate¹⁰,

1. The trade measures, pursuant to an MEA to achieve its environmental objectives, are based on scientific reasons, the trade measures are reasonably related to the objectives.
2. The scope of trade measures has proportional range and degree in the pursuit of MEA objectives (Proportionality).

15. On the other hand, trade measures categorized in (3) & (4) of the paragraph 11 above are deemed to be outside the scope of this mandate. Each trade measure categorized in the latter two groups, if necessary, should be deliberated on a case-by-case basis. Furthermore, if a Party takes certain trade measures based on a MEA categorized in (3) or (4) of paragraph 11 above, such measures could be subject to consultation between affected Parties of the MEA in question through information exchange mechanism. Thus, a linkage between paragraph 31 (i) and (ii) could contribute to enhance the legal stability of the application of MEA-related trade measures.

VI. OUTCOME OF THE NEGOTIATIONS

16. With respect to the relationship between existing WTO rules and specific trade obligations set out in MEAs, the above-mentioned classification could be considered as a criterion to assess compatibility with the WTO Agreement. When we have to find a way out at the end of the negotiations, Japan could propose to adopt a binding interpretative understanding pursuant to Article 9.2 of Marrakesh Agreement Establishing the WTO on the relationship between existing WTO rules and specific trade obligations set out in MEAs among MEA Parties. It is true that there have been few disputes over trade measures between MEA Parties that are also Members of the WTO. However, we could suggest establishing such an interpretative understanding, because such indication would ensure the legal stability and enhance predictability on the compatibility between both jurisprudence.

⁹ Article 2.5 of the TBT Agreement refers to a method of rebuttable presumption.

¹⁰ These requirements were previously referred to in Japan's proposal to the CTE in 1996. Japan reviewed the requirements in light of relevant jurisprudence thereafter. See paragraphs 137-142 of the Appellate Body Report of the US-Shrimp case (WT/DS58/AB/R).

17. Even if “specific trade obligations” pursuant to MEAs are deemed as consistent with the WTO rules, each trade measure actually taken by a WTO Member is not automatically consistent with the WTO rules. If a certain interpretative understanding, as mentioned above, can be adopted, an issue to be examined in the dispute settlement would be presumably “whether the measure in question has been taken in pursuant to relevant provisions of MEAs or not.”

VII. ENHANCING DIALOGUE AND COORDINATION BETWEEN WTO AND MEAS

18. In order to achieve the objective of making trade and environmental policies mutually supportive, as well as to prevent potential disputes, dialogue and coordination between trade officials and environment officials at national and international levels should be enhanced. The Doha Ministerial Declaration states, “procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status (paragraph 31 (ii))”; thus the dialogue among international organizations will be further needed.

19. Taking advantage of the negotiation mandate stipulated in the DDA, CTE should invite MEA Secretariats to CTE meetings for briefing on its trade measures in general. The CTE should also seek an opportunity to obtain necessary information and present its views when the provisions of trade measures are contemplated in the course of negotiation of a new MEA or amendments of existing MEAs. Japan considers that such a procedural mechanism should be needed, in order to prevent misuse from the protectionism viewpoint.
