

**MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAS):
IMPLEMENTATION OF THE DOHA
DEVELOPMENT AGENDA**

Submission by the European Communities

Paragraph 31(i)

I. INTRODUCTION

1. The European Union, like many WTO Members, believes that the Multilateral Trading System has a key role to play in the achievement of global sustainable development. This was underlined by the 4th Session of the WTO Ministerial in Doha and the launch of the Doha Development Agenda (DDA). The fact of including the term ‘development’ in the name of the new round of trade liberalization is not anodyne: it proves that development issues and the interests of developing countries are integral to the work we shall carry out together in the years to come.

2. The interface between the MTS and our common commitment and responsibility to the conservation and sustainable use and management of ecosystems and natural resources is complex and in recent years the CTE has addressed several of the issues at this interface. However, the picture is different today: in Doha, Ministers agreed to start negotiations on some specific issues to be conducted in parallel with the follow-up of the CTE mandate.

II. THE MANDATE

3. In the Declaration agreed in Doha, ministers stated that

“We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive ... We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.”

4. On the basis of this, in paragraph 31 of the Declaration, ministers went on to set out a clear mandate for negotiations on the relationship between WTO rules and Multilateral Environmental Agreements (MEAs) stating that:

“With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA secretariats and the relevant WTO Committees, and the criteria for the granting of observer status”

5. The EU considers paragraph 31 (ii) an important part of the DDA mandate on Trade and Environment. On this issue, too, it will seek a positive outcome and contribute to the debate on the issue soon.

III. DEFINITION OF AN MEA

6. The EU considers that an MEA is a legally binding instrument between at least three parties, the main aim of which is to protect the environment and which is open to all countries concerned from the moment negotiations begin. In the context of the WTO, an MEA should also be relevant to the aims set out in sub-paragraphs (b) or (g) and the headnote of GATT Article XX. To avoid lacunae, relevant regional agreements, such as fisheries organizations, should also be covered, provided that countries concerned outside the region are not prevented from participating.

7. It should be noted that the WTO would exceed its competence if it were to aim to define an MEA in general. Therefore, the only purpose of seeking within the WTO an agreed definition of an MEA is subsequently to clarify the circumstances under which specific trade obligations set out in an MEA should be given explicit recognition under WTO rules. In this context, the elements mentioned below are in our view of particular relevance:

- (a) The agreement should have been negotiated under the aegis of the UN or one of its agencies or programmes, such as UNEP, or under procedures for negotiation open for participation of all WTO Members;
- (b) the agreement should be open for accession by any WTO Members on terms which are equitable in relation to those which apply to original Members;
- (c) if the agreement is regional in nature, the elements above should apply to all countries in the region, i.e. openness in negotiation and accession. Moreover, the agreement should also be “open” to any countries outside the region whose interests may be affected by the agreement.

8. The EU believes WTO Members could usefully solicit input on this specific issue from UNEP and MEA secretariats.

IV. BENEFITS ACCRUING FROM A CLARIFICATION

9. For many years, the EC has consistently taken the view that there is a need to address the relationship between MEAs and WTO rules so as to ensure that it is based on mutually supportive grounds. We consequently welcome the possibility given by the DDA to address the issue and move

forward “with a view to enhancing the mutual supportiveness between trade and environment” in the realm of the WTO.

10. Considering the growing interface between trade and environment, and, in particular between MEAs and WTO agreements, the EU believes that there is an urgent need for all WTO Members to arrive at a consensus about the way forward in this area through agreement on our shared interests and the desirable outcomes that can accrue from addressing the trade and environment relationship for the benefit of all. In particular, it is important that the relationship between WTO rules and trade measures pursuant to MEAs is the result of a political consensus arising out of a process of negotiation between WTO Members rather than simply being left to potential dispute settlement and the results it imposes.

11. Like the vast majority of WTO Members, the EU believes that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus, as stated in Principle 12 of the Rio Declaration on Environment and Development. Indeed, unilateral action by one country is unlikely to be effective in solving such issues. Moreover, the way in which trade measures in MEAs are negotiated and agreed, i.e. by consensus in a multilateral context, should be an effective guarantee against discriminatory action and their use for protectionist purposes.

12. MEAs also represent a concrete implementation of the “common but differentiated responsibility” principle (Principle 7 of the Rio Declaration on Environment and Development). While trade measures may be needed in certain cases to achieve the environmental objective, co-operation provisions, and notably financial, technology transfer, technical assistance and capacity building are an at least equally important part of the MEA package, which can clearly be critical, notably for developing countries, for the effective implementation of the MEA

13. The EU believes that these considerations provide sound reasons for WTO Members to strive towards and to reach a consensus on the relationship between WTO rules and trade measures taken pursuant to MEAs.

14. The MEA issue is not a zero sum game: clarification of the relationship between WTO rules and MEAs would provide gains to all WTO Members and Contracting Parties to MEAs. It is clear that clarification would provide greater legal security for both MEAs and for the WTO, making both systems more effective and making sure that policy formulation within both systems was improved by the mere fact that neither would operate in isolation of the other. In this sense, the EU views the MEA/WTO relationship as an international governance issue, i.e. relating to the functioning of the global governance system and, in particular, to the necessary links between bodies of law dealing with international trade and environment which both form part of a global system.

15. Clarifying the relationship would also create a clearer policy making environment for both trade policy makers and negotiators of MEAs alike and help prevent conflicts from happening in the first place because clearer parameters would mean that MEAs would take WTO rules into account and WTO law would give due weight to obligations arising under MEAs.

16. Of particular importance, though, is the fact that clarification would render multilateralism de facto more attractive than unilateralism without changing WTO rules: a more explicit and clearer status than exists at present as regards specific trade obligations under MEAs could confirm the positive status of such measures under WTO. Such measures are more secure than similar measures taken unilaterally and without any form of international frame of reference, endorsement or debate.

17. These factors should bode well for reaching a consensus among WTO Members on the relationship between WTO rules and trade measures taken pursuant to MEAs. Indeed, the EU considers that a positive stance among WTO Members and an open spirit focussed on the objectives

of legal clarity and security could enable negotiators to clarify and interpret the WTO/MEA relationship in such a way as to further improve policy coherence between both bodies and ensure that they operate in a mutually supportive way.

V. THE AIM OF THIS PAPER

18. Agreement on the nature of the problem and defining what our aims should be in clarifying the relationship are the necessary departure point of the negotiations ahead of us. The EU is tabling this paper as a first contribution to the negotiation process on this issue and to stimulate a positively oriented discussion among WTO Members. In this submission we seek to set out some thoughts to feed into the debate, notably on the concepts of “specific trade obligations” and “among parties” contained in paragraph 31 (i) of the DDA.

19. As a first step before examining these two particular elements, the EU considers that the relationship between WTO rules and MEAs in the context of a global governance system should be based on the following principles:

- The importance and necessity of MEAs: global environmental problems need a multilateral approach and solutions; accordingly unilateral action should be avoided as far as possible.
- Multilateral environmental policy should be made within multilateral environmental fora, and not in the WTO, in accordance with each body’s respective expertise and mandate.
- When governments around the world develop positions for MEAs negotiations it is desirable that they give consideration to relevant WTO rules so as to ensure a mutually supportive relationship between both sets of rules. When the trade and environment interface raises novel trade-related questions, these could usefully be a subject of information exchange between the MEA secretariat and the relevant WTO Committees.
- MEAs and WTO are equal bodies of international law. They should recognize each other with a view to being mutually supportive, in order to meet the common goal of sustainable development.
- WTO rules should not be interpreted in “clinical isolation” from other bodies of international law and without considering other complementary bodies of international law, including MEAs.¹

20. Some elements of these principles are developed further in our deliberations below.

VI. “SPECIFIC TRADE OBLIGATIONS”

21. Existing MEAs have a variety of objectives, for example, protection of a particular species (flora, fauna ...), protection of ecosystems and human health from harmful substances that could, for instance, bioaccumulate in the food chain (hazardous waste, dangerous chemicals, pesticides ...) or protection of the “global commons” (ozone layer, biodiversity, global climate ...).

22. Trade measures might not always represent the best available option to address a global environmental problem. However, they represent undoubtedly one mean to reach the objective(s) of

¹ Appellate Body in *Reformulated Gasoline* case.

MEAs, either self-standing or combined with other types of measures, and in some cases have been key to the success of the MEA. For instance, the trade obligations contained in the Montreal Protocol on Substances that deplete the Ozone Layer have been universally recognized as being instrumental to the effective and early implementation of the Protocol.

23. The Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal has also been key in the reduction and elimination of the dumping of hazardous waste on developing countries. This has enabled the Convention to shift its original scope towards the one of minimising the hazardous waste generation at the source (Ministerial declaration on environmentally sound management, December 1999). Another example is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) thanks to which none of the species protected by it have become extinct as a result of trade. As became clear during exchanges of views and dialogue between MEAs secretariats and the CTE, the use of trade measures should not necessarily be regarded in a static way. In fact, their application should rather be considered in a dynamic context insofar as the nature of trade measures in a specific MEA might evolve over time depending on the effectiveness of the initial trade measure and/or the need to take other considerations into account.

24. It is also worth noting that some MEAs, such as CITES and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), contain the terms “international trade” in the name of the Convention itself and trade measures are the key instrument to reach the ultimate objective of the MEA in question.

25. Trade obligations under MEAs can cover a wide spectrum of possibilities, ranging from trade bans to notification procedures or labelling requirements. For the purpose of illustration and discussion, the EU has identified four categories of measures arising from trade obligations. These are listed below. Some examples of MEAs are given in order to provide a better illustration of “trade obligations”.² They do not cover trade measures applied exclusively *vis-à-vis* non-Parties.

- Trade measures explicitly provided for and mandatory under MEAs: this is the case in CITES where trade in some species threatened with extinction which are or may be affected by trade (listed in Appendix I) can only be permitted in exceptional cases, and trade in other species which may become extinct unless trade in these species is subject to strict regulation in order to avoid utilisation incompatible with their survival (listed in Appendix II) requires an export permit or a re-export certificate. This is also the case in the Stockholm Convention on Persistent Organic Pollutants (POPs) which will *inter alia* prohibit the import and export of certain POPs with some exceptions such as their environmentally sound disposal or a specific use/purpose, such as insecticides, on the request of some Parties. The same applies to the Cartagena Protocol on Biosafety as regards obligatory advanced informed agreement procedure for the first shipment of living modified organisms.
- Trade measures not explicitly provided for nor mandatory under the MEA itself but consequential of the “*obligation de résultat*” of the MEA. This category covers cases where an MEA identifies a list of potential policies and measures that Parties could implement to meet their obligations.
- Trade measures not identified in the MEA which has only an “*obligation de résultat*” but that Parties could decide to implement in order to comply with their obligations. In contrast to the previous category, the MEA does not list potential policies and measures so countries have greater scope as regards the exact nature of the measures they might decide to deploy to reach the objectives of the MEA.

² Some MEAs contains several categories of “trade obligations” and examples given are not exhaustive.

- Trade measures not required in the MEA but which Parties can decide to implement if the MEA contains a general provision stating that parties can adopt stringent measures in accordance with international law. This is the case with the Montreal Protocol (Art. 2.11) and PIC (Art. 15.4). In some cases, the MEA may explicitly recognize the right of Members to apply specific trade measures.

26. The EU considers that the above categories have to be analysed in detail in order to determine where any cut-off point (or points) between “specific” and “non-specific” trade obligations exist.

27. The EU welcomes the work carried out by the CTE Secretariat in cooperation with several MEAs Secretariats and considers that document WT/CTE/W/160/Rev.1 “*Matrix on Trade Measures Pursuant to Selected MEAs*” provides valuable input for WTO Members’ reflection on this aspect of the issue.

VII. “AMONG PARTIES”

28. As a point of departure it is worth recalling the fact that any specific trade obligation in an MEA is negotiated and agreed by consensus in a multilateral context and that this should be, in principle, a guarantee against discriminatory and protectionist action. Challenges between Parties over specific trade obligations are, therefore, highly unlikely from both a political and legal point of view. Accordingly, if Parties have agreed specific trade obligations, they should have no reason or ground to challenge them afterwards. The EC is also of the view that, were such a case to arise, the Parties involved should make every effort to solve the issue through the MEA dispute settlement, as recommended by the CTE in its report to Singapore³. If such a course of action were not followed and a case were brought in the WTO without any effort to resolve the issue in the MEA’s dispute settlement mechanism, or if the MEA in question did not have such a mechanism, the WTO panel should take due account of the MEA when addressing the case, as has been consistently confirmed by successive panels. It could be legitimately argued that the measures taken by a WTO Member to implement specific trade obligations should in such a case be recognized as legitimate by the WTO and yet their concrete implementation might still be challenged if a Member has used its discretion in a manner which infringes WTO obligations.

29. Building on this and the principles set out above, the following points are worth bearing in mind as we consider the co-existence of WTO rules and MEAs:

- The conclusion of an MEA can have considerable relevance for the application of WTO rules in a particular dispute, even in relation to non-parties. The jurisprudence of the Appellate Body in environment-related cases strongly suggests that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT. Indeed, the Appellate Body has made clear that good-faith efforts to negotiate such an agreement can, provided certain other conditions are met, be sufficient to justify that a trade measure meets the criteria of the “chapeau” to article XX. In addition, the Appellate Body also confirmed that GATT Article XX “*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*” and that, in general, WTO agreements should not be interpreted in clinical isolation from other parts of international law such as

³ Paragraph 178 : “While WTO members have the right to bring the dispute to the WTO dispute settlement mechanism, if a dispute arises between WTO members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanism available under the MEA”.

MEAs. It is clear that the existence of an MEA should be taken into consideration in applying WTO rules.

- WTO rules and MEAs are two bodies of public international law with equal status. As a general principle, countries should aim at fulfilling in good faith both sets of rules and, in the event of adjudication, the first task would be to seek to interpret each set of rules in a manner which avoids potential conflicts. This should normally be sufficient to avoid such conflicts, particularly bearing in mind that – as stated above – general WTO provisions have been interpreted giving due weight to the conclusion of an MEA, even in cases where non-parties are involved.
- In those rare cases in which interpretation is not sufficient to avoid a potential conflict, there is a need to determine – under rules of public international law – which is the applicable body of law. This is a complex issue which merits further discussion. At this stage, it may suffice to say that an important consideration could be not so much the application of the *lex specialis* test but which of the two sets of rules provides for a more specific regulation of the issue under dispute. In this connection, the discussion above on the extent to which an MEA contains a specific trade obligation may well be of particular relevance.
- It would appear that, in those cases in which an MEA provides a specific trade obligation and this is the basis for the trade measures under dispute, parties should in the first instance seek to resolve their dispute within the MEA in question, notably under any dispute settlement mechanism provided.

VIII. CONCLUSION

30. The EU is seeking to further constructive dialogue among all WTO Members on the relationship between WTO rules and MEAs. The EU believes that such dialogue could usefully be orientated towards seeking consensus on the following points:

- WTO Members should agree on principles that should govern the relationship between WTO rules and MEAs;
 - the extent to which “specific trade obligations” should be considered to be automatically in conformity with WTO;
 - the fact that we are currently only considering the applicability of WTO rules as among Parties to MEAs does not mean that MEAs should not be an important element of interpretation of WTO law in disputes involving non-Parties.
-