

RESOLVING THE RELATIONSHIP BETWEEN WTO RULES AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

Submission by the European Community

1. It is in the interest of all WTO Members to ensure that the multilateral trading system makes its full contribution to the achievement of global sustainable development. As reflected by the agenda of the CTE, there is a wide range of complex interactions between the multilateral trading system and our common commitment and responsibility to the sustainable use and management of ecosystems and natural resources. 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.
2. We would also like to take this opportunity to stress our willingness to address the trade and environment challenge in a balanced way, taking into account concerns and interests expressed by a number of partners. We are ready to work on all issues constructively. This should be done in an open spirit and be inspired by the principles enshrined in the Rio Declaration. In particular, the EU is fully committed to the fundamental principle of common but differentiated responsibility in dealing with environmental issues. In the same spirit, we consider that unilateral measures to deal with global and transboundary environmental issues should be avoided. Finally, we wish to reaffirm our support for the fundamental principle that environmental measures should not be abused as disguised restrictions on trade and consequently our opposition to “eco-protectionism”.
3. As part of our contribution to the process of developing consensus across the range of issues we are submitting this paper on resolving the relationship between MEAs and WTO rules, a subject the resolution of which we believe would be to the advantage of all WTO Members. This paper seeks to put forward some ideas that could provide foundations for agreement on the nature of the problem and what our aims should be in clarifying the relationship. The purpose of the paper is to stimulate a positively oriented discussion among WTO Members. To this end it also considers the concept of the reversal of the burden of proof. We remain ready, however, to consider any proposals made by others in this context.
4. The EU, like many WTO Members, believes that Multilateral Environmental Agreements (MEAs) are the most effective way of tackling international environmental problems. Furthermore, the fact that trade measures MEAs may contain were negotiated and agreed by consensus in a multilateral context should be a guarantee against discriminatory action and their use for protectionist purposes. In this light, it should be possible to reach a consensus among WTO Members on the relationship between WTO rules and trade measures taken pursuant to MEAs.

I. WHAT IS THE PROBLEM?

5. The relationship between WTO rules and MEAs in general is unclear. If MEAs were deemed to justify discriminatory and protectionist action, it could set a damaging precedent for the Multilateral trading system. Similarly, subordinating MEAs to the WTO would undermine international efforts to tackle environmental problems and would fuel the arguments of those opposed to the WTO. The delay in agreeing the Cartagena Protocol on Biosafety demonstrates that this is a very real problem. How the provisions of MEAs relate to and/or could be defended, notably under GATT Article XX, is also the object of debate and interpretation. Given the growing interface between MEAs and WTO rules, uncertainty over the relationship between the two sets of rules in the WTO is increasingly affecting MEA negotiations which in our view unnecessarily exacerbates tensions between MEAs and WTO.

6. Since discussions started on this issue in the CTE, the nature of these interactions has evolved considerably. Beyond traditional trade measures in MEAs (such as in CITES or in the Basel Convention for instance), MEAs containing measures which might have trade implications and which can therefore interact with trade rules should now be part of the picture. One example is the relationship between TRIPs and the Convention on Biological Diversity where the challenge is to find a way to implement the two instruments in a mutually supportive and responsive manner.

7. Uncertainty surrounds in particular the issue of non-parties to MEAs. So far, no trade measure taken pursuant to an MEA has been challenged in the WTO by a non-party. It is unsure whether this would happen in the future but the legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs.

8. 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. It would:

- Provide greater legal security for both MEAs and for the WTO and reinforce the integrity of both systems;
- create a clearer policy making environment for both trade policy makers and negotiators of MEAs alike;
- multilateralism will become *de facto* more attractive than unilateralism without actually changing WTO rules *per se*. This would be of particular benefit to smaller and weaker countries because they are more likely to be the objects of (and less able to resist) unilateral measures than more economically powerful entities; and
- prevent potential conflicts: clearer parameters would mean WTO considerations could be factored into MEAs from the start.

II. WHAT SHOULD OUR AIMS BE?

9. In this paper, we put forward a number of complementary ideas to feed into the debate. As a foundation we seek consensus on basic principles relating to the relationship between the WTO and MEAs, including key relevant concepts developed in Dispute Settlement practice. This should also include a general clarification that MEAs are not subordinated to WTO rules.

10. In addition, we believe that addressing the specific issue of Non-Parties is important. For this particular purpose, some form of accommodation mechanism is in our view necessary to preserve trade measures taken pursuant to MEAs from undue challenge. It should be made clear however that such an accommodation system would only apply to measures specifically mandated under MEAs. While being open to other suggestions, we are considering the reversal of the burden of proof as a possibility to provide greater security without altering the rights and obligations of WTO Members.

11. We support continuing the dialogue with MEA Secretariats and are open to considering a “code of good conduct” for trade measures in MEAs, as suggested by some WTO Members. These suggestions are explored in greater detail below.

III. HOW DO WE DEFINE AN MEA?

12. We consider an MEA to be a legally binding instrument the aims of which include environmental protection, open to all countries concerned, and relevant to the aims set out in the headnote of GATT Article XX and sub-paragraphs (b) and (g). To avoid lacunae, relevant regional agreements, such as regional fisheries agreements, should also be covered.

A. CONSENSUS ON BASIC PRINCIPLES REGARDING WTO RULES AND MEAS

13. We propose that WTO Members should agree on basic principles regarding the relationship between WTO rules and MEAs, incorporating elements of WTO Dispute Settlement practice. Such principles could include:

- The WTO and MEAs should be mutually supportive;
- the best way to solve international environmental problems is multilaterally;
- multilateral environmental policy should be made within MEAs and not in the WTO;
- conflict between Parties to an MEA in relation to the implementation of that agreement should be solved within the MEA; and
- WTO rules should not be interpreted in clinical isolation of complementary bodies of international law, including MEAs.

B. CLARIFICATION THAT MEAS ARE NOT SUBORDINATED TO WTO RULES

14. We seek confirmation that WTO rules and MEAs are separate but equal bodies of international law and that, accordingly, MEAs are not subordinate to WTO rules and vice versa. Such a confirmation in the WTO is an essential step in developing a mutually supportive relationship between MEAs and the WTO.

C. ACCOMMODATION MECHANISM FOR SPECIFICALLY MANDATED TRADE MEASURES TAKEN PURSUANT TO MEAS

15. A non-Party could challenge in the WTO a measure taken by another WTO Member pursuant to an MEA. In order to make sure that specifically mandated trade measures taken pursuant to MEAs are recognized as being necessary and justified under WTO rules, some form of accommodation mechanism would be necessary. A possibility that we are considering is reversing the burden of proof. At the moment, the onus falls on a WTO member defending a measure under GATT Article XX to prove that the measure, if deemed incompatible with other GATT provisions, nevertheless meets the requirements laid down in Article XX. The reversal of the burden of proof would turn that around so that the country challenging the measure would, just like under some provisions in the TBT and SPS Agreements, have to prove the measures imposed by the other party do not meet the conditions of Article XX. This would however not affect the right of any WTO Member to resort to dispute settlement nor alter in any way the substantive requirements of GATT Article XX.

D. DIALOGUE WITH MEA SECRETARIATS

16. The ongoing informal dialogue with MEA Secretariats in the CTE is proving a very useful tool to exchange information and ensure increased transparency. This dialogue should be pursued, strengthened and possibly formalized. This could help prevent conflicts arising in the first place.

E. "CODE OF GOOD CONDUCT"

17. Some form of "code of good conduct" for the use of trade measures in MEAs may, as proposed by some WTO Members, help to develop a mutually supportive relationship between MEAs and WTO Agreements and to prevent potential conflict. As part of a broader package, we would be open to exploring this option. To guarantee mutual supportiveness, such a code would need to be jointly developed and "owned" by the WTO, MEA secretariats and UNEP.
