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## PUTTING MEA/WTO GOVERNANCE INTO PRACTICE: THE EC'S EXPERIENCE IN THE NEGOTIATION AND IMPLEMENTATION OF MEAS

Submission by the European Communities

### Paragraph 31 (i)

The following communication, dated 4 July 2005, is being circulated at the request of the Delegation of the European Communities.

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#### I. INTRODUCTION

1. In the context of the negotiations on paragraph 31 (i) the EC submitted a paper to the CTESS in March 2004 (TN/TE/W/39). In this submission, we emphasized the importance of focussing on fundamental governance principles underlying the WTO/MEA-relationship. These principles essentially served to outline how different but equal bodies of international law should work together and interact in order to ensure mutual supportiveness.

2. One essential principle in the EU submission was the need for close cooperation and increased information flows at both national level and international level in order to enhance the mutual supportiveness of international trade and environment policies. This submission aims to focus more specifically on this principle and *inter alia* provide some examples of how the EC is working to ensure national and regional coordination on WTO and MEA issues. It also discusses some ideas for improved coordination at an international level.

3. This paper also aims at contributing to the practical discussion that has begun in the CTE on sharing national experiences in the negotiation and implementation of MEAs. The submission first presents the EC's experience with regard to negotiations of MEAs and then describes internal policy coordination as regards enacting legislative measures implementing obligations stemming from MEAs. This paper is without prejudice to the EC's view that scrutiny on how MEAs are implemented is clearly outside the mandate of paragraph 31 (i) of the DDA.

#### II. THE EC'S EXPERIENCE IN POLICY CO-ORDINATION

4. The EC has a long tradition of internal co-ordination on trade and environment issues. Firstly, the Treaty establishing the European Community (EC Treaty) and the case law of the European Court of Justice (ECJ) recognize that restrictions to the free movement of goods/services may be justified under certain conditions on the basis of environmental protection.

5. Secondly, the EC has always sought to integrate environmental concerns into its internal market policy and to balance the free movement of goods/services and environmental protection. Moreover, harmonization of environmental requirements at EC level has successfully contributed to the completion of the internal market. For this reason, in June 1999 the European Commission adopted a Communication on the single market and the environment. This Communication sets out a strategy aimed at enabling the two policies to further strengthen and support each other while simultaneously developing positive interaction between them.

6. In the EC's own experience, effective inter-department co-operation is the necessary prerequisite for developing a positive relationship between the objective of creating a single market based on the free movement of goods/services and that of protecting the environment. The EC has developed internally a set of principles designed to promote integrated and inclusive policy making. In its White Paper on European Governance<sup>1</sup>, the European Commission identified a number of key principles (*openness, participation, accountability, effectiveness, and coherence*) which *inter alia* should guide and underpin the policy making process in order to improve coherence between policy areas and to promote good governance. This general principle of sound internal cooperation and collegiate decision-making also applies to the negotiation and implementation of MEAs.

### III. NEGOTIATING MEAS IN PRACTICE

7. The EC is a Party to many MEAs which are often multidisciplinary and of a complex nature; the range of issues addressed by MEAs is very wide and includes biodiversity, climate change, management of chemicals and waste etc. Several MEAs contain measures affecting trade and more specifically specific trade obligations (STOs). Proper internal co-ordination between environment and trade officials when MEAs are negotiated and implemented is, therefore, essential. Given that EU policy on MEAs is formulated together by the European Commission (hereafter the Commission) and the Council (the body in which the EU Member States are represented), such coordination takes place both between departments within the Commission and between Ministries in EU Member States.

8. Specific procedures to be followed between the Commission and the Council vary depending on the issue at stake (e.g. negotiation of new agreement, amendment to main text, technical decisions having legal effects, amendments of annexes, etc.). The EU position can either be agreed by a decision of the Council, following an initiative/proposal from the Commission or, on the basis of draft Council Conclusions prepared by the Presidency of the Council.

#### A. POLICY COORDINATION WITHIN THE EUROPEAN COMMISSION

9. Within the Commission, departments are referred to as Directorates General (DG). The Directorate General for Environment (DG ENV) is the leading department for MEAs. In advance of each MEA meeting, DG ENV co-ordinates the Commission position and requests the opinion of all the other DGs and services which may be concerned. This procedure is called Inter-Service Consultation. In the case of MEAs containing trade-related measures, DG Trade is systematically consulted. If needed, interdepartmental meetings are also organized and, in some cases, standing inter-departmental groups are created. The process of Inter-Service Consultation helps policymakers and officials become more aware of the complexities of each others' areas of work. In addition, the different perspectives on an issue which colleagues from various DGs can bring help ensure that all the potential costs, benefits, challenges and opportunities arising from a proposed policy position are taken into consideration. Once a text has been subject to Inter-Service Consultation, including draft recommendations to the Council authorizing the Commission to negotiate, and has been agreed at working level, the Commissioner responsible for Environment then sends it to the College of

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<sup>1</sup> COM (2001) 428 final.

Commissioners, the body where all 25 Commissioners sit. The document must be agreed by the College of Commissioners.

10. The Commission has drawn up an internal guide on “*How to run inter-service consultation procedure*”. The guide, which is briefly described in Box 1, sets out the rules and recommends good practice for running inter-service consultation procedures.

**Box 1. Core principles of the guide on “*How to run inter-service consultation procedure*”**

- **Time limits:** minimum time limit of 10 working days; any reduction of the time limit must be justified.
- **Selection of DGs for consultation:** the lead department is responsible for identifying which other DGs need to be consulted. There are a number of services which are compulsorily consulted, such as the Commission’s Legal Service, which must be consulted in all cases which may have legal implications, the Secretariat-General - consulted on all initiatives of political importance and Directorate General Budget, which must be consulted when a proposal has an impact on the European Community’s budget.
- **Replies to Inter-Service consultation:** there are five types of possible replies:

**No observation** means that the DG consulted has no specific comments.

**Approved** expresses agreement.

**Approved subject to comment being taken into account** means that the DG consulted approves only on condition that the comments or amendments proposed are actually taken into account.

**Unfavourable opinion** means that the proposal is unacceptable in its current state.

**Suspended opinion** is intended to freeze the consultation process and allow for further exchange of comments among services.

- **Closing of the consultation:** once the consultation is closed, the lead department incorporates as faithfully as possible the comments. In instances where different DGs have opposing positions, careful arbitration is required in order to produce a position acceptable to all DGs.
- **Posting of the revised text after consultation:** the lead department must post the revised version of the proposal on its internal web site, if possible indicating the amendments that have been made.

11. The Commission has also developed a web application for sending and processing inter-service consultations within the Commission. This application has significantly improved and simplified inter-service consultation processes within the Commission: it has made the process more transparent because all departments can view in real time the comments made by others.

## B. STAKEHOLDER CONSULTATION

12. In addition to the Inter-Service Consultation, the Commission usually also holds external consultations to make sure that the views of all interested stakeholders are integrated into the process of developing positions.

13. The Commission’s Communication on “*General principles and minimum standards for consultation of interested parties by the Commission*” sets out the general rules for stakeholder

involvement and consultation. The Commission's Communication on "*the collection and use of expertise by the Commission: principles and guidelines*" provides additional guidance on this issue.

14. When preparing together with the Council the EU position on the negotiation of MEAs, the Commission follows this general participatory approach based on wide stakeholder involvement and consultation. Consultation of stakeholders essentially aims at understanding what stakeholders expect from the negotiations and soliciting their views on the issues covered. Box 2 shows a recent example of stakeholder consultation that the Commission launched as part of its work to define future climate change policy. Although the Kyoto Protocol does not contain any mandatory trade measures or obligations as such, we have chosen this example because it shows the Commission's efforts to consult stakeholders in an area relevant to an MEA.

**Box 2. Stakeholder consultation: the future climate change policy**

In September 2004, the Commission launched a web-based stakeholder consultation to seek the opinion of all interested parties on the EC's approach to the future international fight against climate change after 2012 when the current Kyoto Protocol's targets end.

All interested parties were invited to make substantive contributions by the end of October 2004 through the web-based forum "Action on Climate Change post 2012". The Commission also organised a Stakeholder Conference on 22 November 2004.

The consultation gave an opportunity for stakeholders (citizens, businesses, policy makers, NGOs, public authorities, scientists and others) to contribute to the debate on the future of global climate policy. The Commission used the contributions in the development of the EC's future climate change policy and of the Commission's contribution to the EU position in the international debate on the future international climate change regime.

More precisely, the stakeholder consultation provided input to the Commission's communication "Winning the Battle Against Climate Change" adopted in February 2005 and presented to the Spring Council 2005 which discussed future global and EC climate change policy.

C. DISCUSSION IN THE COUNCIL

15. The work of the Council of Ministers is carried out at various subsidiary bodies such as Committees and working parties. The EU position for MEA negotiations is normally discussed in either the Working Party on International Environmental Issues (WPIEI) or at the horizontal Working Party on the Environment. The Council's trade committee (the 133 Committee) is kept informed of relevant discussions going on at these two groups and, where appropriate, is consulted with regard to trade aspects.

16. Both environmental working parties are attended by representatives from the Environment Ministries of EU Member States, as well as from their Foreign Offices. The Commission attends all working parties with officials from different departments, according to the issue at hand, and co-operates with the Presidency of the Council in steering the debates. The view expressed by the representative of national Environment Ministries is normally agreed in the national capitals of EU Member States with other relevant ministries. In many ministries, the policy co-ordination is similar to the process described above for the Commission: co-ordination with other ministries or governmental agencies, consultation of civil society. In addition to the formal structures in the Council, representatives of Member States also attend the periodic meetings of an ad hoc group of trade and environment experts. This group, which is chaired by the Commission, does not prepare the work for Commission positions on specific MEAs but it does discuss in detail the broader issues

surrounding MEAs, as well as a range of other trade and environment subjects. Representatives from any Member State's ministry may attend, although most are from ministries for the environment, trade and economic policy.

17. In the case of MEAs containing trade measures and more specifically STOs, national Trade Ministries are normally consulted and involved in the Council discussion and may also attend the meetings. It is important to note that by the time an issue is discussed in the Council there has been considerable co-ordination between ministries in Member States and between Directorates General in the Commission, with the result that the positions taken by representatives of both the Member States and the Commission each reflect an informed consensus position.

18. Upon approval of the draft Council Decision/Conclusions within the Working Party, the matter then goes up a level to be dealt with in the Committee of Permanent Representatives from Member States (COREPER), composed of Ambassadors of the Member States. COREPER prepares the activities of the Council at Ministerial level. On the basis of the findings of the sectoral working groups MEA issues are dealt with by the Environment Council which meets four times a year.

19. The final draft Council Decision/Conclusions are adopted in the Council. The Presidency or the Commission then leads the MEA negotiations with support from the Member States.

#### D. THE ROLE OF THE EUROPEAN PARLIAMENT

20. The European Parliament is kept informed by the Commission throughout the process of preparations of the agreements and during the conduct and conclusion of international negotiations. The information is provided either through relevant parliamentary committees or at a plenary sitting in sufficient time for the Parliament to express its view and for the Commission to take Parliament's view into account. Before the MEA is concluded by the Council, the Parliament formally expresses its opinion. In certain cases, the assent of the European Parliament is required. Upon the request of the President of the European Parliament, Members of the Parliament can participate as observers in delegations negotiating international agreements.

#### E. EXAMPLES OF INTERNAL CO-ORDINATION

21. As a detailed example this section explains internal practices in relation to Cartagena Protocol on Biosafety which contains a number of trade-related measures concerning the transboundary movements of living modified organisms (LMOs).

22. In the case of the Biosafety Protocol, it was clear that internal co-ordination was essential to reconcile environmental concerns with the trading interests of the EU. DG ENV worked very closely with other DGs when preparing the negotiations. DG Trade, DG Health and Consumer Protection, DG Research, DG Enterprise, the Secretariat General, the Legal Service, DG Agriculture, DG Development and the Joint Research Centre were all closely associated and consulted.

23. The Commission also consulted regularly with NGOs and the biotechnology industry throughout the process and fed the outcome of these consultations into the development of the EU position within the Council.

24. The EU preparations at technical level for the biosafety negotiations took place in the meetings of the *Ad Hoc Group on Biosafety*, a sub-group of the Environment Council Working Group. In this framework, the Commission and the Member States worked very closely to refine the EC position. A negotiating mandate for the Commission was adopted by the Council prior to CBD COP-2 in Jakarta and was revised several times during the negotiations of the protocol.

25. The Commission delegation in the negotiations of the Biosafety Protocol was headed by DG ENV and composed of officials coming also from other relevant DGs, such as DG Trade and the Legal Service. The Presidency of the Council and the other Member States participated actively in the negotiations and were particularly involved with some specific issues.

26. It should be noted that this procedure was followed when negotiating other MEAs such as, for instance, the Rotterdam Convention on Prior Informed Consent, the Montreal Protocol or the Basel Convention. In all of them consultations with stakeholders, inter-departmental consultations and discussions in the Council of Ministers took place following the patterns described above.

#### **IV. IMPLEMENTATION OF MEAS IN THE EC**

27. International obligations arising out of MEAs are implemented into the European Community legal order by regulatory means. There is a long standing practice of public consultation when developing and adopting legislative proposals. Existing practices were complemented and systematized through the "Better Regulation Package" adopted in 2002. Consultation processes are open to all individuals, private and public organisations and governments. To simplify and ensure broad public participation in consultations, a "single access point" has been created on the web. It also displays results of previous consultations.

28. Opinions of stakeholders are taken into account by the DG Environment in coordination with other services already before and during the drafting of proposals in the field of environmental policy. Each legislative proposal is accompanied by an explanatory memorandum setting out reasons for its adoption.

29. Proposals adopted by the Commission are then submitted to the Council and the European Parliament for adoption, in most cases, through the "co-decision procedure". This legislative procedure aims at a text approved by both the Council and the Parliament. Representatives of the EU Member States in the Council and the Members of the European Parliament can propose amendments to the draft. The works on legislative proposals inside EU Member States are coordinated between relevant national ministries.

#### **V. POLICY COORDINATION AT NATIONAL AND INTERNATIONAL LEVEL**

30. Coordination of policy at national level is important not only to help ensure that the different policies of a country or a region are coherent with each other but so that policy positions taken by a country or region in different international fora on any given subject are also coherent. Progress is difficult, for example, if a country or region takes one position at the COP of an MEA and another in the WTO.

31. In addition, the EC believes that institutional coordination and cooperation between international bodies is as important as national policy coordination. In member-driven organizations, such cooperation depends on the recognition by members of its importance and added value and their willingness to foster it. Policy cooperation at international level should help to improve knowledge on the often complex issues at stake. It should also help in preventing conflicts and contribute to improving the global governance system.

32. To enhance policy coordination and coherence in the WTO/MEA field, continued and increased co-operation and information flows between the WTO and MEAs secretariats is important. Close cooperation between these secretariats could also contribute to promoting synergies between trade and environment and ensure consistency as regards the competences of the institutions to the benefit of all.

33. Since the WTO Ministerial in Singapore, information exchange in the WTO on issues within the trade and environment interface has been undertaken by the CTE. The EC, however, believes that channels of communication and increased information flows between the MEA secretariats and the WTO should be strengthened, for example, by institutionalizing exchange sessions and encouraging other WTO committees to convene similar events, as well as by granting observer status as appropriate.<sup>2</sup> The WTO Secretariat and the secretariats of MEAs are key actors in relation to two important parts of international law: greater mutual awareness of each other's ambit of activity can only serve to help ensure the interface between international trade rules and international environmental law is as smooth as possible.

34. Effective policy coordination in the negotiation and implementation phase should in theory imply that countries which are parties to both an MEA and to the WTO will strive to fulfil both sets of obligations in a consistent way. However, if a problem arises, effective information exchange also has to be ensured in dispute settlement procedures.

## **VI. CONCLUSIONS: LESSONS LEARNED**

35. The EC has drawn on a number of lessons from its long experience of internal co-ordination prior to and during MEA negotiations:

(1) Whereas it is clear that good governance is vital for sustainable development, it is equally clear that sustainable development cannot be achieved by national action alone. As a consequence, good governance requires policy coordination both at national and international levels. Policy coordination is a prerequisite for preventing conflicts between policy areas as well as for ensuring that certain overarching objectives can be attained.

Sustainable development has been recognized by the international community as one such overarching objective both in the 1992 Rio Declaration and in the Preamble to the WTO Agreement. As that same international community works to further elaborate and develop international trade rules and international environmental policy, it is obvious that policy makers from the relevant areas must cooperate and coordinate their efforts in order to produce results which contribute to the smooth development of the two policy areas, as well as to the overarching objective of sustainable development.

(2) Effective national policy coordination requires a continuous policy dialogue and information exchange at all levels of the policymaking chain and between all involved institutions, from the phase of policy formulation to the negotiation and implementation of MEAs.

(3) Policy coordination is only effective if there is a common and shared policy objective among the actors involved. If the concerned national institutions - ministries and agencies - have not agreed on an overarching policy objective, subsequent policy coordination in terms of related negotiations and implementation will have little or no effect. Similarly, all actors involved must have a clear understanding of the principles which provide the reference framework for their joint efforts. This is particularly relevant in the WTO/MEA area. In its submission to the WTO (TN/TE/W/39) the EC recalled principles which form the "acquis" in the field of trade, environment and international governance and accordingly which provide the basis for policy formulation on the WTO/MEA relationship including the negotiations under 31 (i).

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<sup>2</sup> See the EC submission on "The Relationship between WTO Rules and MEAS in the Context of the Global Governance System", TN/TE/W/39, 24 March 2004.

36. In conclusion, to ensure mutual supportiveness between the WTO and MEAs, proper policy coordination, cooperation and information exchange at national and international levels is essential. There are broad benefits to be gained from policy cooperation, not only in ensuring mutual legal consistency and thereby avoiding potential problems but also in identifying synergies between international trade and environment policies so that the international community might move closer to achieving its proclaimed overarching objective of sustainable development.

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