

**THE RELATIONSHIP BETWEEN MEAS AND WTO AGREEMENTS:
“SET OUT IN MEAS”**

Submission by the European Communities

Paragraph 31 (i)

1. In the CTE's ongoing discussion on the concepts laid out in paragraph 31(i) of the Doha Development Agenda (DDA) mandate, the European Communities (EC) continues to favour an approach where concepts are discussed on the basis of examples which allow to clarify and illustrate the concepts and principles at stake, but which are not intended to provide an exclusive nor exhaustive list of examples.

2. At the meeting of the Committee on Trade and Environment in Special Session (CTESS) on 12-13 February 2003, the EC raised a number of basic concepts in the mandate that needed to be examined in order to advance the negotiations on paragraph 31(i) of the DDA. One of the concepts on which we believe, along with a number of other delegations, that some clarification would be useful is the meaning of the words “*set out in MEAs*”, as flagged by the EC at the February CTESS meeting. Clarification is important as these words have horizontal implications, and as we need to take due account of the “real world” of MEAs to best secure a mutually supportive outcome for trade and environment for these negotiations.

3. The EC shares the view expressed by other delegations at the last CTE SS that the wording “set out in MEAs” should not be interpreted as being limited to the treaty itself, as originally adopted, but should also cover all subsequent decisions by the Conference of the Parties (COP), provided that they qualify as “Specific Trade Obligations”. It is therefore useful to further clarify the extent to which COP decisions should be covered by these negotiations. For the purpose of this submission, we would wish to focus in particular on the legally binding¹ nature and effect of COP decisions, without prejudice to other equally important aspects of the mandate. We would therefore have the following remarks:

4. The Conference of the Parties is usually in charge of taking mostly (internal) administrative decisions, and in particular, of adopting the budget. Beyond such administrative powers, however, it is also generally vested with “substantive powers” of decision-making. Such powers are provided for and specified in the treaty. The decision-making powers are delegated powers derived directly from the Contracting Parties and limited to the extent of that delegation.

5. In practice, the denomination of the acts or measures taken by a COP may vary, although the legal status may be the same. It seems in particular that the Regional Fisheries Agreement, and in particular the International Convention for the Conservation of Atlantic Tuna (ICCAT), use a

¹ When the term “legally binding” is used in this submission, relevant procedures for ratification and entry into force have to be respected.

different terminology compared to other MEAs (in ICCAT, COP decisions are referred to as recommendations). Below we will use the term "decisions" for ease of reference.

6. COP decisions can be broadly categorized as follows:

(a) *COP decisions introducing amendments to the MEA. This category encompasses:*

- (i) Decisions to amend the MEA Treaty itself. Such amendments will usually become legally binding for the Parties having ratified them upon their entry into force, in accordance with the applicable amendment procedure.

Examples include: Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer (e.g. London, Copenhagen, Montreal and Beijing); Article 21 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC); Article 21 of the Stockholm Convention on Persistent Organic Pollutants (POPs); Article 17 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel).²

- (ii) Decisions adopting or modifying technical annexes. Such decisions are also legally binding, upon procedures laid down in the Treaty. Such Annexes or their modifications are "assimilated" to the MEA itself in the sense that they form part of the "MEA corpus" (e.g. PIC Article 22.1, which states that "Annexes to this Convention shall form an integral part thereof and, unless expressly provided otherwise, a reference to this convention constitutes at the same time a reference to any annexes thereto").

Examples include: Basel Article 18; PIC Article 22, POPs Article 22.

7. The above COP decisions, being legally binding, can therefore qualify as STOs.

(b) *COP decisions aimed at interpreting or at further specifying the concrete implementation by Parties of certain provisions of the original MEA or subsequent COP decisions*

8. In many cases, such COP decisions are not legally binding on Parties (e.g. technical guidelines on the interpretation of the terms "environmentally sound management" under the Basel Convention). However, whether they are legally binding or not should be assessed on a case-by-case basis and will eventually depend on the concrete terms of the decision.

9. These COP decisions, even if not legally binding, can nevertheless have an important role to play in the interpretation of MEA provisions, including that of STOs contained in the MEA. In this respect, and while not qualifying as STOs in the sense of these negotiations, one should nonetheless recognize their potential role in interpreting STOs with a view to implement them in the most effective way.

² The main procedures are the following: (1) normal ratification process, (2) so-called "opt-out" procedure where the decision becomes legally binding if a Party has not notified its intention not to be bound after a fixed period of time or (3) decisions adopted by consensus and binding on all Parties on a date specified in the decision.

(c) *COP decisions of a purely general and political nature*

10. By their very nature, such COP decisions are not legally binding and therefore do not contain “obligations”. However, such COP decisions can, to some extent and depending on the concrete language, be used to interpret MEA provisions and the intentions and objectives of Parties, which also means that such COP decisions can have a role to play in the interpretation of MEAs.

CONCLUSION

11. The EC is of the view that, within the context of these negotiations, the wording “set out in MEAs” should be interpreted as covering not only original MEA Treaties, but also all subsequent COP decisions that, in the “real world of MEAs”, form part of MEAs.

12. The EC considers that all COP decisions that are legally binding should be covered by these negotiations if and to the extent they contain obligations within the definition of an STO. This is in particular the case for COP decisions of the first category identified above (amendment to the Treaty itself and adoption/amendment of annexes), which are clearly legally binding. For other COP decisions, and while recognizing that the very great majority of them is not legally binding, the assessment of their legally binding nature should be made on a case-by-case basis and be done in the language used.

13. In most cases, there is no doubt on the legally binding nature of COP decisions. However, should doubts arise, such a nature will eventually depend on the concrete terms of the decision and the issue should be settled, if need be, by MEAs.

14. While fully recognizing that non-legally binding COP decisions do not qualify as STOs, the EC would wish to point out that these categories of COP decisions, notably when they aim at interpreting or providing guidance on the implementation of STOs contained in MEAs, can play an important role in the interpretation of STOs, which is an important aspect to keep in mind.
