

SUB-PARAGRAPH 31(I) OF THE DOHA DECLARATION

Submission by the United States

Paragraph 31(i)

The following submission, dated 21 June 2004, is being circulated at the request of the delegation of the United States.

I. INTRODUCTION

1. During the last two years, the CTE in Special Session has engaged in fruitful dialogue concerning the mandate in sub-paragraph 31(i) of the Doha Declaration. Based on these discussions over many meetings, and the 26 submissions offered under 31(i), a consensus has emerged that the Committee should proceed with an analysis based on fact and experience. There also appears to be wide agreement among Members that certain multilateral environmental agreements (MEAs) of common interest contain Party-to-Party specific trade obligations (STOs) within the 31(i) mandate. Building on these welcome developments, this submission seeks to contribute to further progress in the CTE's discussion of the 31(i) mandate.

2. This submission also builds on the first U.S. submission under 31(i) (TN/TE/W/20), which discussed the mandate's limits and categories of STOs in MEAs, including identification of STOs covered under the mandate, and proposed an experience-based way forward to focus future discussions. Consistent with the framework proposed by Australia (TN/TE/W/7), and following Hong Kong's submission concerning its experience (TN/TE/W/28), this submission continues down the path to a new phase in the discussions. In light of the shared understanding that certain MEAs contain STOs within the 31(i) mandate, this paper moves to the next phase of sharing Members' experiences with the negotiation and implementation of the STOs set out in certain MEAs.

3. This submission provides U.S. observations concerning the similarities and differences among certain features of STOs in several MEAs enumerated in WT/CTE/W/160/Rev.1 and builds upon examples contained in TN/TE/W/20. It is without prejudice to U.S. views on any other provisions contained in those MEAs that are not specifically referenced in this submission and without prejudice to U.S. views on the applicability of WTO rules. Finally, the inclusion of particular MEA provisions in this submission and exclusion of others is intended to further a constructive discussion in the CTE and is not an indication of the importance or environmental significance of any particular MEA provision in relation to any other.

II. U.S. EXPERIENCE REGARDING CERTAIN STOS IN CERTAIN MEAS

4. The United States has participated in the development and implementation of a number of MEAs. In a previous submission, the United States identified six MEAs that we believe include STOs within the meaning of the mandate. For purposes of this submission, we will highlight U.S. experiences related to particular STOs in three of these MEAs that appear to be of common interest to Members: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Stockholm Convention on Persistent Organic Pollutants (POPs); and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC). We have had a varying duration of experience with the mechanisms established by each of these MEAs. For example, CITES entered into force in 1975 and offers decades of implementation-related experience. The POPs Convention entered into force only this year and offers a fresh perspective on negotiating MEAs containing STOs. The PIC Convention, while entering into force only this year, derives many of its relevant features from the pre-existing voluntary London Guidelines.

5. The identified STOs set out in these three MEAs present a useful array of common and distinguishing features. The discussion below of U.S. experience regarding a subset of STOs (export restrictions) set out in these three MEAs highlights the importance of:

- National coordination, transparency, and accountability generally in the negotiation and implementation of MEAs containing STOs; and
- the design and implementation of STOs in particular.

6. Drawing on U.S. experiences, the submission also identifies features of these STOs that have, in our view, contributed to the effective achievement of each MEA's objectives and furthered the mutually supportive relationship that has existed between these MEAs and the WTO. The United States hopes these experiences offer insight and information useful to the Committee in its discussions of the 31(i) mandate.

A. NATIONAL COORDINATION, TRANSPARENCY AND ACCOUNTABILITY WITH RESPECT TO NEGOTIATING AND IMPLEMENTING MEAS

7. The United States has stressed the critical importance of domestic coordination between MEA and WTO policy-makers and negotiators. Domestic coordination is the most direct and effective means of maintaining harmony between STOs in MEAs and WTO disciplines. Additionally, transparency and accountability in the domestic policy-making process can contribute to better policy-making.

8. U.S. federal government agencies work together to accomplish U.S. objectives across a number of international policy areas relating to trade or environment. For example, the Department of State leads in negotiation of MEAs and in development of U.S. positions across many international environmental policy discussions in international fora. In advance of an international environmental meeting in which there is expected to be a negotiated outcome, the Department of State, or in the case of CITES, the Department of the Interior, leads an interagency process to ensure the views of the various U.S. agencies are resolved into a single unified U.S. position. Examples of how the interagency process worked in the POPs negotiations and CITES implementation are provided below.

9. In the international trade area, the Office of the U.S. Trade Representative (USTR) is responsible for developing U.S. international trade policy. USTR engages in extensive interagency coordination on trade policy matters, including matters relating to trade and environment. In particular, such coordination involves agencies with expertise in domestic and international environmental issues that might be affected by trade, including the Departments of Interior,

Commerce, State and Justice, and the Environmental Protection Agency. For example, these agencies, among others, participate in preparations for the CTE meetings. This interagency process is highly transparent within the government, and all agencies contribute their unique perspectives and expertise to a wider interagency group. The result of this robust interagency process is better informed, more thoughtful U.S. policies and positions on the environmental aspects of trade policy matters.

10. In addition to the interagency policy-making process, the United States government routinely invites and receives input from the public in order to promote transparency and accountability in the policy-making process and to contribute to well-informed, mutually supportive trade and environment policies. This is done informally through ad hoc meetings and discussions with stakeholders, including NGOs and other members of the public, as well as formally through the mechanism of public advisory committees established by the U.S. Congress, and/or a formal request for comments in the Federal Register. One relevant public advisory committee for the CTE's work is the Trade and Environment Policy Advisory Committee (TEPAC), whose members come from a variety of organizations, including business, academia and non-profit.

National Coordination in Negotiating MEAs: POPs Experience

11. In the case of the POPs Convention, the State Department established an interagency group to work on the day-to-day preparations for the negotiations, including developing U.S. positions and text proposals. Technical working groups were created as well to address specific issues, including a working group to discuss and develop U.S. positions related to trade in POPs. This "trade working group" included experts from agencies with environment and trade responsibilities. Together, these experts discussed how trade-related measures might contribute to achieving the Convention's objectives and how such measures might be tailored to meet those objectives.

12. Through this coordinating process, the U.S. delegation identified and discussed instances where a proposed mechanism could raise trade policy implications, but worked together to find equally effective alternatives that met the objective and reduced trade-related concerns. For example, one issue that emerged in the negotiations was how best to handle trade in DDT (a chemical commonly used for malaria control). Given the nature and complexity of the DDT issue, experts from the trade, environment, and health communities worked together to discuss the options for dealing with DDT. Suggestions to ban trade in DDT under the Convention raised concerns in both the trade and the health communities. Ultimately, the U.S. working group developed a proposal addressing all relevant policy objectives:

- Parties that chose to produce or use DDT would need to register with the Secretariat, and limit their production and use of DDT to the specific purpose of disease vector control in accordance with World Health Organization recommendations and guidelines.
- Likewise, Parties would be obligated to ban import and export of DDT, except for use in disease vector control in the importing Party.

13. Working together, the group was able to tailor and propose measures that took into account environmental and health objectives, as well as trade-related concerns. The U.S. proposal received a favourable reception by the Intergovernmental Negotiating Committee (INC) and formed the basis for Annex B of the POPs Convention, which outlines certain requirements concerning DDT.

14. In addition to interagency coordination, the delegation consulted with a wide variety of NGOs and stakeholders throughout the negotiating process. Before each INC meeting, the U.S. delegation invited interested stakeholders, including industry and environmental NGOs, to briefings and offered

opportunities to provide feedback on U.S. positions for the meeting. At each INC meeting, the U.S. delegation offered routine briefings to interested U.S. stakeholders in attendance.

National Coordination in Implementing MEAs: CITES Experience

15. The United States has a long history of coordinating effective national implementation of CITES. The United States implements CITES through national legislation, the Endangered Species Act (ESA). As required by Article IX of CITES, the ESA designates a Management Authority and a Scientific Authority to implement CITES obligations, including those under Articles III, IV and V. Both these authorities are housed in the Department of the Interior, to be carried out through the Fish and Wildlife Service (FWS). These authorities are responsible for the evaluation of whether applications for import or export of CITES-listed species meet the requirements of CITES and for coordinating U.S. CITES policy and evaluating species for CITES listing. These primary CITES authorities work with FWS Law Enforcement, which has port inspection and enforcement responsibilities for animals, and the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and the Department of Homeland Security, which share these responsibilities for plants.

16. The FWS coordinates U.S. implementation of CITES with other federal agencies through the CITES Coordinating Committee (CCC). Regular participants in the CCC process include the U.S. Department of Agriculture (Forest Service, Foreign Agricultural Service), the Departments of State, Justice and Commerce, and USTR. There are also subcommittees, including a subcommittee exclusively focused on marine issues.

17. In addition to cooperating internally, the United States consults extensively with the public on CITES implementation, including its participation in CITES technical committee meetings and meetings of the Conference of the Parties (COP). For example, the FWS has repeatedly sought public comment on the U.S. position in the next meeting of the CITES COP scheduled for October 2004 in Bangkok (see, e.g., June 19, 2003 and January 12, 2004 notices available at <http://international.fws.gov/fedregister/fedreg.html>.) The FWS consider such comments in formulating U.S. positions for COP meetings.

18. Policy coordination at the national level in negotiating and implementing STOs is a key contributing factor to a mutually supportive relationship between trade and MEA obligations.

B. SPECIFIC TRADE OBLIGATIONS: DESIGN AND IMPLEMENTATION OF EXPORT RESTRICTIONS

19. In its first submission concerning 31(i), the United States emphasized the variety of STOs set out in MEAs. The wide variety reflects the complex environmental concerns that these STOs were designed to address. The United States notes that the variety in the design and scope of STOs suggests that STOs are not easily categorized.

20. For purposes of this submission, the United States will focus in particular on export restrictions¹ in MEAs. Export restrictions offer a useful point of comparison both because there are considerable differences in their features and because they appear to be one of the most common forms of STOs set out in MEAs. In reviewing U.S. experience, this submission identifies some of the factors that have contributed to successful design and implementation of these export restrictions, so as to achieve MEA objectives in light of WTO rights and obligations.

¹ For purposes of this submission, the United States refers to the various export-related obligations in these three MEAs by using the generic term "export restrictions." However, it should be noted that each MEA uses a precise terminology for its export-related STOs (e.g., CITES refers to the "regulation" of trade in endangered species because in some cases, such as Appendix II-listed species, the permitting requirements would function as regulations rather than restrictions on trade).

21. The U.S. experience with the negotiation and implementation of export restrictions also suggests that there have been tremendous efforts to work together to craft STOs in a manner that takes into account the specific objectives of the MEA, the nature of the environmental harm to be prevented, the other types of control obligations set out in the MEA (e.g., production and use restrictions), the concerns and needs of all participating countries and relevant trade rules and trade implications.

Features of the Export Restrictions

22. In the U.S. experience, export restrictions can vary in design in several important respects, including: the purpose of the export restrictions; the role of the export restrictions within the MEA; the extent to which the importing Party's view about the proposed export is relevant; the procedures and criteria by which export restrictions may evolve; and the level of clarity of the export restrictions.

- (1) *Purpose.* Export restrictions may be aimed at protecting the environment of either the exporting or the importing Party. In CITES, for example, export restrictions are generally aimed at protecting populations of species found in the exporting Party that are, or may become, threatened with extinction unless trade in such species is strictly regulated. In the PIC and POPs Conventions, in contrast, the purpose is to protect the importing Party from an environmental or health hazard, such as hazardous chemicals.
- (2) *Role of the export restriction within the MEA.* Export restrictions may also differ in terms of the role that they play in the MEA. In the PIC Convention and CITES, for example, the purpose of the MEA itself is to regulate trade to address a particular environmental concern, and the STOs are the primary mechanism for doing so. In contrast, the STOs set out in the POPs Convention are supportive of the primary control measures, which restrict Parties' production and use of POPs.
- (3) *Role of the importing and exporting Parties.* The role of the importing Party concerning export restrictions varies significantly depending on the role of the export restriction within the MEA and its design. Export restrictions that are intended to protect the environment in the exporting Party (e.g., CITES) typically do not put as much emphasis on the conditions in, or the views of, the importing Party. In contrast, export restrictions intended, at least in part, to protect the environment and/or human health in the importing Party (e.g., POPs and PIC Conventions) typically take into account the conditions in, and/or the view of, the importing Party. However, export restrictions under all three MEAs involve some degree of interplay of obligations and activity on the part of both the exporting and importing Party. For example:
 - Under CITES, trade in Appendix I species is allowed only if the exporting Party issues an export permit based on a finding, *inter alia*, that the export will not be detrimental to the survival of the species, and the importing Party issues an import permit based on a finding that the import will be for a purpose that is neither commercial nor detrimental to the survival of the species. For Appendices II and III, trade can go forward without an import permit, but the importing Party may allow import only upon presentation of a valid export permit or (in the case of Appendix III) either an export permit or a certificate of origin.
 - Under the POPs Convention, there is an export and import prohibition that complements the general prohibition on the production and use of POPs. However, exceptions exist as well. The export restriction (Article 3.2(b))

does not apply if: the export is destined for environmentally sound disposal in the importing Party; or if two conditions are met, one of which must be agreed to by the Parties generally (i.e., a continuing need for the chemical in question has been identified by the Parties in an annex to the Convention), and the other of which depends upon the importing Party specifically (i.e., the importing Party has chosen to permit the use of that chemical in its territory and has availed itself of a specific exemption under the Convention for that particular purpose).

- Under the PIC Convention, which also deals with hazardous chemicals, importing Parties also play an important role in the application of the export restriction. However, in this case, unlike the POPs Convention, the importing Party is entirely in control of whether the export restriction applies. The importing Party decides (Article 10), on a final or an interim basis, whether it consents to the import of a chemical listed in Annex III, with or without conditions. The exporting Party must then ensure that its exporters comply with the decision taken by the importing Party (Article 11.1(b)). In essence, the export restriction is aimed at helping the importing Party enforce its import decisions. It should be noted that an importing Party's ability to withhold its consent to imports is not without limitation. In all cases where a Party decides not to consent to import a chemical or to consent to its import only under specified conditions, the importer must simultaneously prohibit or subject the chemical to the same conditions domestically, and its decision must apply to all import sources (Article 10.9).

23. As a practical matter, the above export restrictions that are aimed at helping the importing Party to enforce an import decision appear unlikely to generate trade concerns. For example, it is unlikely that an importing Party, who set the import condition in accordance with the terms of the MEA, would raise concerns or complaints about the export restriction (within the MEA or in another forum), which is intended to help the importing Party enforce its domestic policies. It is also unlikely that an exporting Party would raise concerns with an importing Party's decision, if that decision is clearly articulated within the MEA and consistently applied.

(4) *Evolution of the scope of the export restriction.* The export restrictions considered here generally have in common that their scope can evolve in order to maintain and improve effectiveness in response to scientific and other relevant developments. In the U.S. experience, there are two elements to this evolution that are likely to be relevant to the extent to which trade concerns are raised:

- The degree to which changes to the scope of the export restrictions are based on science; and
- The degree to which the process for modifying the scope of the export restriction is transparent and provides for input from all Parties.

24. All of the MEAs highlighted in this submission provide for science-based and participatory decision-making, but they also differ in several particular respects.

- In the case of CITES, the Convention requires that COP decisions concerning the listing of species in the Appendices be made on the basis of objective scientific criteria. The COP periodically meets to consider changes in the listing of species in light of developing knowledge and new information. The Animals and Plants Committees review scientific and technical data and make recommendations that can lead to listing proposals by Parties. All Parties to CITES are entitled to participate on an equal basis in

meetings of the COP, and the members of the various committees are elected on a regional basis. At the national level, key decisions about whether a specimen may be traded are based on evaluation of scientific evidence by national authorities as specified in Articles III and IV. This well-developed system of institutions ensure that export restrictions are defined, adjusted and applied on the basis of solid information and analysis in which all Parties have a chance to be involved, so as to target the environmental problem that CITES seeks to address. Non-governmental organizations, such as TRAFFIC and the IUCN (World Conservation Union), also provide valuable scientific and technical information and analysis.

- In the case of the PIC Convention, a Chemical Review Committee will be established by the Conference of the Parties (COP) to review certain information, e.g., related to national regulatory actions regarding banned or severely restricted chemicals. Based on information submitted by a Party and pursuant to criteria specified in the relevant annexes, the Committee makes recommendations to the COP concerning new listings of chemicals. With respect to banned or severely restricted chemicals, for example, these criteria include, among other factors, sound science (e.g., whether data have been generated and assessed according to generally recognized scientific principles and procedures) and risk (e.g., whether the regulatory action is based on a risk evaluation involving prevailing conditions in the Party). The Committee is composed of experts from a variety of Parties.
- In the case of the POPs Convention, a Persistent Organic Pollutants Review Committee (POPRC) will review all proposals for listing new POPs according to scientific criteria established in Annex D. The POPRC has the authority to set aside proposals that do not, in its view, meet the scientific criteria established and/or pass the risk evaluation, and to make recommendations to the COP concerning the listing of new POPs chemicals. All Parties are entitled to participate on an equal basis in meetings of the COP, and the COP is charged with appointing members of the POPRC. Members of the POPRC must make every effort to operate by consensus (Article 19.6(c)).

25. The extent to which an MEA's procedures rely on objective criteria and scientific input in making decisions (with full opportunity for input by all Parties and for the collection of information from reliable sources) contributes to the MEA's effectiveness and may significantly reduce the likelihood of disagreement among Parties concerning an export restriction.

26. In addition to science-based and participatory decision-making processes, these MEAs require varying degrees of consent regarding changes to the scope of the export restrictions, and additionally, provide opportunities for Parties to opt out of changes to the scope of the export restrictions. For example:

- Under the PIC Convention, consensus is required for the adoption of an amendment to add or remove a chemical from Annex III, but all Parties are bound by the amendment.
- In contrast, under the POPs Convention, consensus is not required for adoption of an amendment to add a chemical, but a Party has the opportunity not to be bound by the resulting amendment.
- In the case of CITES, all Parties are bound by a listing decision, unless a Party takes a reservation, which Parties infrequently choose to do, and the trade restrictions on the listed species go into effect 90 days after the COP decision.

27. As a practical matter, mechanisms that provide Parties appropriate flexibility in terms of whether or not to be bound by changes to the scope of an export restriction reduce the likelihood of a formal disagreement among Parties concerning an export restriction.

(5) *Clarity of the export restriction's scope.* In the U.S. experience, the degree to which the STO and its scope are clearly defined in the MEA facilitates consistent and complete implementation of the STO, increases understanding of the MEA and its goals among government officials and the public, and reduces the opportunity for disagreement among Parties in terms of the STO's application. Clarity can be promoted through various means, including through:

- A publicly available list of items subject to the export restriction;
- application of science-based, objective criteria; and
- specificity.

28. For example, all three MEAs include a clear and publicly available list of specific items that are subject to export restrictions under the MEA (e.g., POPs Annexes A and B; CITES Appendices I, II, and III; and PIC Annex III). In the case of the POPs and PIC Conventions, even the Chemical Abstract (CAS) Number is included in the listing in order to ensure technical specificity. In addition, in the case of the POPs Convention, the procedure for obtaining permission to use a POP is open - all acceding Parties may register for one or more types of specific exemptions. The procedure for ascertaining whether the importing Party is permitted to use the substance in question is highly transparent, as all permissible uses for each substance are clearly listed in Annexes A or B of the Convention, and each Party that has availed itself of a specific exemption is listed in a publicly available Register. This clear and transparent approach is preferable to approaches that allow disparate interpretations by different Parties of a list framed in general terms, or disparate interpretations of non-specific obligations, which can open the door to disagreement among MEA Parties concerning how an export restriction is applied.

III. CONCLUSION

29. Based on the U.S. assessment of its experiences, as reflected above, the United States believes that the MEA/WTO relationship is working quite well. This is especially true where:

- Trade and environment experts have worked together nationally (and internationally) to tailor STOs to meet particular environmental objectives in a way that takes account of Parties trade-related rights and obligations; and
- both the design of the STOs in the MEAs and Parties' practice in their implementation (at both the national and international levels) incorporate certain features, which contribute to their effective operation.

30. The United States also believes that certain features of the STOs have, in practice, contributed to a mutually supportive relationship. These design and implementation features include, e.g.,:

- The careful design of export restrictions (and their complementary import provisions), so as to target a specific environmental problem;
- science-based procedures by which the export restrictions can be adjusted in light of advances in knowledge or other changes in relevant conditions;

- procedures for changes to the scope of the export restriction over time that are both inclusive and appropriately flexible; and
- the clarity and transparency of export restrictions.

31. In light of these factors it is not surprising that no formal disputes, on trade or other matters, have arisen concerning the STOs discussed here.

- In the nearly 30 years that CITES has been in force, to the knowledge of the United States no Party has ever invoked the provisions for formal resolution of disputes by arbitration under Article XVIII of that Convention, nor has any dispute ever been raised in a trade forum, such as the WTO.
- Similarly, although the PIC Convention entered into force only recently, the PIC procedure for ascertaining whether the importing Party has consented or not, and whether conditions have been set, is fairly well developed given that it builds on the existing voluntary PIC procedure, operated by UNEP and FAO since 1989. The PIC Convention takes into account experience gained during the implementation of the voluntary procedure (as set out in the London Guidelines for the Exchange of Information on Chemicals in International Trade and the FAO International Code of Conduct on the Distribution and Use of Pesticides). None of this experience has involved formal disputes in trade forums or elsewhere.

32. The United States notes that this submission reflects practical observations related to certain STOs in certain MEAs and is not put forward in the nature of principles or other guiding factors, either specific to certain STOs or generic. Instead, the United States offers these observations in an effort to move the discussions forward by initiating an experience-based dialogue among delegations. Through such a dialogue Members can move beyond definitional discussions of terms in the mandate itself (e.g., what is an MEA, a specific trade obligation, etc.) and initiate a practice-based discussion in which members can share concrete experiences. The United States hopes that this submission will help to advance the Committee's discussion and invites other delegations to share their experience in negotiating and implementing STOs in MEAs.
