

DISCUSSION PAPER ON THE CONCEPT OF SPECIFIC TRADE OBLIGATIONS (STOS)

Submission by Canada

Paragraph 31(i)

I. INTRODUCTION

1. At the CTESS meetings in October and November 2002, Members agreed to examine specific trade obligations (STOs) set out in certain multilateral environmental agreements (MEAs) as the next step in the analytical stage of the negotiations. Members agreed that a conceptual analysis could complement that review. We believe that both approaches are essential if we are to reach a common understanding.

2. Some Members proposed that the initial discussion should focus on STOs in six MEAs: the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol); the *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal* (Basel Convention), the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (PIC), the *Cartagena Protocol on Biosafety* (Biosafety Protocol), and the *Stockholm Convention on Persistent Organic Pollutants* (POPs).

3. Canada supported this approach. The purpose of this paper is to assist in this discussion by outlining a number of issues for consideration and providing illustrative examples. It is submitted as a non-paper and without prejudice. An in-depth examination of provisions in these six MEAs can provide Members with useful information to inform our negotiations. Canada's support for the examination of specific provisions in these six MEAs does not mean that we view them as the definitive list of all MEAs which contain STOs but we believe that examination of these six can provide significant insights. Although the PIC and POPs Conventions and the Biosafety Protocol are not yet in force, each of them has a significant number of signatories, 73, 151 and 100 respectively (WT/CTE/W/160/Rev.1), indicating broad participation by the global community in the negotiations of the MEA. Hence, it is appropriate that these should be included in our analysis at this time.

4. In each of these six MEAs, trade-related measures are important tools to achieve the underlying environmental conservation and protection objectives in an efficient, effective and timely fashion. These measures take different forms such as bans, restrictions or conditions on international trade in products, substances or species. In some cases, this is accompanied by restrictions or bans on domestic production and/or use (e.g. POPs Convention, Article 3 and Montreal Protocol, Article 2). In the Basel Convention, Parties seek to minimize the transboundary movement of hazardous wastes and, when these do occur, that it is done in a manner that will protect human health and the environment.

II. ANALYSIS OF SOME OF THE FACTORS RELEVANT TO THE CONCEPT OF SPECIFIC TRADE OBLIGATION

5. In undertaking our examination of specific provisions of each of these MEAs, based on the document WT/CTE/W/160/Rev.1, we must take into account that this document does not reproduce all provisions in each MEA. It may be necessary to examine a specific provision in the context of other provisions of the MEA and its objectives. A Party to an MEA expects other Parties to that Agreement to respect all of their MEA obligations in the same way that WTO Members expect other Members to respect all of their WTO obligations.

6. An examination of trade related provisions in these six MEAs reveals that an obligation may be contained in one specific article or a combination of several articles that taken together could constitute a specific trade obligation. Some of these provisions provide further information on how and/or when the trade-related measure should be implemented. For example, Articles 4.1 and 4.2 of the Montreal Protocol each deal respectively with the import and export of substances in Annex A. However, the process for listing of substances in Annexes is governed by Articles 2 & 6. We note that in its very useful submission TN/TE/W/13, the Republic of Korea classifies Articles 5, 6, 7, 8, 10.4, 10.9, 11.2, 12.1 and 13.2 together as precise and mandatory PIC procedures. Articles 5, 6, 7 & 8 of the PIC Convention are provisions dealing with the notification of national regulatory actions and mechanisms for additions to the annexes. These would appear not to be directly related to trade. Should the full range of provisions that support or contribute to the trade-specific articles be considered to be part and parcel of the STO?

7. Members have raised the question of whether decisions of the Parties should be included in our discussions of STOs set out in MEAs. The question arises when MEAs use decisions to further specify when and/or how a given provision referencing a trade-related measure is to be used. Whether decisions by the Parties at Conferences of the Parties, or through some other agreed procedure, are obligations within the definition of an STO as that term is used in the Doha Declaration, or are to be used in the interpretation of these obligations, requires a careful examination of the specific MEA. There would appear to be no legitimate reasons for excluding them *a priori*.

8. Members have also raised the issue of whether amendments to an MEA should be included in our examination. The Montreal Protocol is an example of a protocol that has been amended four times: London Amendment in 1990, Copenhagen Amendment in 1992, Montreal Amendment in 1997 and the Beijing Amendment in 1999. In some cases, these amendments have added new substances or, altered or added obligations, which are trade related. There would appear to be little justification for not including amendments to MEAs in the definition of "set out in MEAs" in para. 31(i) for those WTO Members who are also Parties to the amendments and if the amendments include measures that are STOs.

9. Precision and clarity in provisions simplify the task of identification of an STO. For example, Article 3 of the POPs Convention provides for a Party to ban the import or export of the controlled substances or wastes subject to certain conditions. Although no details are provided on the procedures to be utilized by a Party to put these bans into effect, they clearly set forth the result (to eliminate the import or export) to be achieved while the Party still has to determine which and if "legal or administrative measures are necessary". In Article 3.2 (b), the POPs Convention requires a Party to take measures to restrict the export of certain chemicals "taking into account any relevant provisions in existing international prior informed consent instruments". While there are no details, the language is fairly precise in nature. Can this particular aspect of the obligation in Article 3.2 be considered to be a specific obligation?

10. It is perhaps easier to identify a provision as an STO if it affects traditional areas of trade law i.e. import and export bans and restrictions on trade (Article 4.1 Montreal Protocol, Article 3 POPs Convention) but an STO may also include provisions that affect trade such as notifications, technical regulations, packaging and labelling requirements all of which are subject to WTO rules (e.g. Article 4.7 (b) Basel Convention; PIC). In all six MEAs, while the trade effect can be similar, that is to ban, restrict or condition trade, there is diversity in the approach taken to achieve these similar ends in the MEAs. This diversity should be encouraged, as a one-size-fits-all approach to trade-related measures is unlikely to effectively address all environmental problems. For example, the PIC Convention and the Basel Convention both include prior informed consent procedures but the procedures and details of the obligations vary.

11. There are other complexities in trying to scope out the key issues when looking at the concept of STO. In some instances, an STO does not become an obligation of one Party until another Party has asserted a right or privilege (Article 4.1 (a), (b) & (c) of the Basel Convention). Should the right or privilege be captured by the concept of the STOs when its exercise results in a mandatory trade obligation?

12. Trade related provisions in MEAs may also include processes with a discretionary element which further complicates the analysis of STOs. For example, Article 4.2 (d) of the Basel Convention requires each Party to take the appropriate measures to "ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement". It requires Parties to put in place technical regulations ("measures") to achieve this objective. It is mandatory and a transboundary movement should qualify as international trade. However, the standard of "minimum consistent with" may be subject to various interpretations and a Party will have some discretion in its application although this discretion is limited by the precision of the phrase "environmentally sound management" which is defined under the Convention and further delineated by technical guidelines for specific waste streams.

13. Similarly, Article 4.2 (e) of the Basel Convention which requires Parties to take appropriate measures to not allow the export of hazardous wastes to a country "if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner, according to criteria to be decided by the Parties at their first meeting". Some discretion is left to the Party in the application of the provision but it would have to be consistent with criteria to be developed by the Parties and technical guidelines.

14. Some MEAs provide that the convention does not prevent a Party from imposing additional requirements (e.g. Basel Article 4.11 and PIC Article 15(4)). These provisions are not trade specific nor are they mandatory. Some MEAs provide that any additional requirements are to be consistent with international law which would include international trade rules.

15. In some cases, MEAs include preambular language and/or general principles (e.g. Biosafety Protocol, PIC Convention) that refer to the international trade regime. Members should take into account the potential legal implications of such references in examining the relationship between WTO rules and specific trade obligations set out in MEAs.

16. Some Members have also suggested that the *United Nations Framework Convention on Climate Change* (UNFCCC) and its *Kyoto Protocol* should be included in our examination of MEAs containing STOs. Our preliminary analysis indicates that there is nothing in the UNFCCC or the Kyoto Protocol that could be considered an STO. Therefore, at this stage, we do not believe that any issues raised by the UNFCCC and the Kyoto Protocol are within the mandate of paragraph 31(i) of the Doha Declaration.

III. CONCLUSION

17. In defining what is an STO set out in an MEA, there are a number of factors to be considered. A complete analysis may require an examination of a single provision in an MEA or a combination of provisions and may also include amendments or decisions of the Parties depending on the specific circumstances of each MEA. The more explicit the language in the provision(s) as it relates to trade, the easier the task of identification of an STO. Some MEAs include trade related measures to meet environmental objectives and an understanding of both is required. A core concept for distinguishing amongst trade-related measures appears to be the level of "discretion" left to a Party in the choice of a range of measures, and the implementation and the design of a measure. Members should consider whether provisions in MEAs which permit considerable discretion should have the same relationship to WTO rules as those with little or no discretion.
