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PARAGRAPH 31(I) OF THE DOHA DECLARATION
AUSTRALIA'S EXPERIENCE

Submission by Australia

Paragraph 31 (1)

The following communication, dated 11 October 2004, is being circulated at the request of the Delegation of Australia.

I. INTRODUCTION

1. In the initial stages of the discussion of the paragraph 31(i) mandate in the Committee on Trade and Environment in Special Session (CTE SS), Australia suggested a three-phase process for structuring our negotiations on the relationship between existing WTO rules and specific trade obligations (STOs) set out in multilateral environmental agreements (MEAs) (TN/TE/W/7). We were pleased that this kind of approach was supported by many Members who agreed that a balanced and practical structure to our discussions would be the best way to deliver a mutually supportive outcome in line with the mandate agreed by Ministers in Doha.

2. In line with this approach, Members have had an interesting and useful first phase discussion in the CTE SS where most members have sought a practical discussion of the identification of STOs in MEAs. This leads naturally into a second phase exchange on Members' experiences in negotiating and implementing STOs. Indeed, many Members have drawn on their national experiences in offering views in their submissions and statements to the CTE SS on the identification of STOs.

3. This paper is a further contribution to the practical discussion we have begun on sharing experiences on negotiating and implementing STOs. It builds on the submissions put forward by Hong Kong, China (TN/TE/W/28) and the United States (TN/TE/W/40) and offers further national experiences that can help improve our understanding of STOs in MEAs and their relationship with WTO rules. We have found both these papers very useful and hope that Members will equally find our submission of value in moving our negotiations forward within the terms of the very specific mandate under paragraph 31(i).

4. This submission provides some observations on Australia's national experience in negotiating and implementing STOs in relation to the Basel Convention, the Montreal Protocol and CITES. We have chosen to focus on these three MEAs because, of the six MEAs the Committee has generally

agreed contain STOs[1], the period of time these three have been in force means that the largest number of Members will be able to relate to these experiences

II. AUSTRALIA'S NATIONAL EXPERIENCE IN NEGOTIATING AND IMPLEMENTING INTERNATIONAL AGREEMENTS

5. Australia agrees with the US that national level coordination between different domestic agencies and stakeholders involved with international agreements is key to achieving compatibility between countries' different international obligations and their smooth domestic implementation. As with many Members, Australia has established processes to ensure this national coordination occurs during each of negotiation, ratification and implementation of an international agreement, including MEAs and the WTO Agreement.

6. During the negotiating stage, relevant Australian Federal Government Departments contribute their views to the development of an Australian position on negotiating issues through an inter-departmental committee process. Information is shared between departments through this process and the different policy perspectives and knowledge of existing commitments that departmental representatives bring to the discussion contributes to a unified whole-of-government position on these issues. Key departments involved in this process will include representatives on the Australian delegation to international negotiating sessions to ensure that their expertise is on hand to respond to developments. Consultation with State and Territory Governments (who will often be responsible for implementation of certain of Australia's obligations contained in international agreements under Australia's federal system), stakeholders (such as NGOs and industry) and the general public is also part of the development of Australian positions.

7. When considering ratification of an international agreement, under Australia's Constitution treaty-making is the formal responsibility of the Executive rather than the Parliament. As part of an enhanced consultation process, however, a treaty is tabled in both Houses of the Australian Parliament prior to binding treaty action being taken and is reviewed by Parliament's Joint Standing Committee on Treaties (JSCOT). The treaty is tabled with an accompanying National Interest Analysis (NIA) which notes the reasons why Australia should become a party to the treaty. NIAs include a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty action and whether the treaty provides for withdrawal or denunciation. Treaties which affect business or restrict competition are also required to be tabled with a Regulation Impact Statement.

8. A whole-of-government position is necessary for the NIA, which, as with the negotiating process described above, involves inter-departmental coordination and consultation with the Australian States and Territories, stakeholders and the public. Accordingly, if a decision is taken to proceed to ratification, all affected are aware of the requirements in advance of ratification, resulting in the timely implementation of obligations.

9. A similar coordination and consultation process operates with respect to Australia's domestic implementation of our international commitments, tailored to the agreement and obligation in question. Some examples of this are given below for selected STOs in the three nominated MEAs.

[1] These six MEAs are: Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol), Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), Stockholm Convention on Persistent Organic Pollutants (POPs).

III. AUSTRALIA'S EXPERIENCE IN IMPLEMENTING THE BASEL CONVENTION

10. The Basel Convention contains a number of STOs with regard to the transboundary movement of hazardous waste. In Australia's view, these include Articles 4.1 (b, c, e, g), 4.6, 4.7 (a, b, c), 6.1-6.5 and 6.9. In Australia, the *Basel Convention is implemented by the Hazardous Waste (Regulation of Exports and Imports) Act 1989* and its Regulations. As with many parties to this Convention, Australia implements these STOs and other obligations through a permit system. Under the Act, the decision to grant or refuse a permit is made by the Minister for the Environment and Heritage, or a delegate.

11. In reaching a decision on whether or not to issue a permit to export or import hazardous waste, the Minister must have regard to certain matters set out in the Act or Regulations, which, *inter alia*, implement the STOs noted above. Advice on these matters is formulated by the Australian Department of the Environment and Heritage (DEH) in a technical and administrative policy framework developed in consultation with the Hazardous Waste Act Policy Reference Group. This group meets at least twice a year. It is a consultative forum for major stakeholders including up to thirty representatives of industry, trade unions, environment groups, overseas development groups and other government agencies. The group provides advice to DEH on the operation of the *Hazardous Waste Act* and related issues arising from Australia's implementation of the Basel Convention.

12. On occasion, specific issues arising in a permit application may also require interdepartmental consultation to achieve a whole of government view. Issues which may have implications for our multilateral or bilateral trade obligations are referred to the Department of Foreign Affairs and Trade (DFAT) and other Departments as necessary for advice.

13. In forming advice for any permit application, DEH regularly consults with State and Territory governments to ensure that any movements are conducted in an environmentally sound manner and are otherwise consistent with the requirements of the *Hazardous Waste Act* and with Australia's international obligations.

IV. AUSTRALIA'S EXPERIENCE IN IMPLEMENTING CITES

14. In Australia, the *Environment Protection and Biodiversity Conservation Act 1999* fulfils Australia's legislative requirements as a signatory party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). It controls the movement of wildlife, wildlife specimens and products made or derived from wildlife into and out of Australia.

15. CITES facilitates trade in endangered species by establishing a regulated system of assessment of detriment to determine whether trade in particular species or specimens of a species may proceed without endangering the survival of the species. Without this system of assessing detriment, many countries may be reluctant to permit trade in some endangered species, in fear of contributing to the species' decline.

16. In some cases, the ability to trade in an endangered species can encourage its conservation. Regulated trade can contribute to the long-term survival of the species by providing an economic incentive to preserve the species. The case of Australian saltwater crocodiles is an example where the wild-harvest of eggs and hatchlings provide an incentive to land owners to maintain crocodile habitat.

17. Articles III.2 and IV.2 of CITES require a non-detriment finding before an export permit can be issued. These are clearly STOs. In the case of commercial exports, Australia implements this requirement by assessing the operation the specimens were sourced from. Specimens can be sourced from a captive breeding, artificial propagation or wild-harvesting operation. In the case of non-commercial permits, the non-detriment finding is made for each permit.

18. Each application for approval of an operation or permit for import or export is considered on its merits by the Minister for the Environment and Heritage, or a delegate, on the basis of advice prepared by DEH. This advice will include an evaluation of relevant scientific and technical evidence and is prepared after consultation, where necessary, with relevant scientific experts and government agencies. There is no requirement for a national level export quota for every species traded, however in some cases, such as for the saltwater crocodile, the Department negotiates annual wild-collection quotas with State or Territory authorities.

19. The establishment of sound scientific national practices that include consideration of species management at the national level – both wild populations and captive breeding/artificial propagation programmes – are integral to Australia meeting our CITES and other international obligations.

V. AUSTRALIA'S EXPERIENCE IN IMPLEMENTING THE MONTREAL PROTOCOL

20. Article 4B.1 of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Amendment) obliges Parties to develop a licensing system for imports and exports of controlled ozone depleting substance. This is an obligation that most members have agreed is an STO. In Australia, the Montreal Protocol is implemented through the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act). The licensing system under the Act is administered by DEH. In developing the system, DEH drew upon the expertise and experience of numerous government departments, including DFAT. This collaboration ensured that the current licensing system is not only designed for consistency with Australia's trade obligations under the Montreal Protocol, but also its WTO obligations. For example, in deciding whether to grant a licence to access Australia's controlled substance import or export markets, the Minister "must have regard to Australia's international obligations … in relation to the manufacture, importation or consumption of scheduled substances."[2]

21. The licensing system facilitates equitable access by all Protocol Parties to Australia's controlled substances import and export markets, and equitable treatment of domestic and foreign actors. Prospective controlled substances importers and exporters from any Protocol Party must satisfy the same criteria, which must also be met by any prospective domestic manufacturer of controlled substances.

22. The quantitative annual restrictions of the licensing system are instrumental to Australia's compliance with the Protocol's primary control measures to phase out controlled substance production and consumption. The licensing system facilitates non-discriminatory administration of these quantitative restrictions by accommodating the full or partial transfer of quotas at any time between persons that meet the licensing criteria.

VI. FEATURES OF STOS THAT FACILITATE THE MUTUALLY SUPPORTIVE RELATIONSHIP BETWEEN MEAS AND WTO RULES

23. The US paper (TN/TE/W/40) concludes that certain features of STOs have contributed to a mutually supportive relationship between MEAs and WTO rules. The features the US identifies include "science-based procedures by which the export restrictions can be adjusted in light of advances in knowledge or other changes in relevant conditions" and "procedures for changes to the scope of the export restrictions over time that are both inclusive and appropriately flexible". The US draws upon the PIC, POPs and CITES Conventions to illustrate these conclusions.

[2] Under the Act, "scheduled substances" are equivalent to the Protocol's references to "controlled substances".

24. Australia considers that the success of the Basel Convention and Montreal Protocol can also be largely attributed to their science-based, participatory approaches to decision-making. Some examples of experience with the Montreal Protocol are provided.

Science-based procedures

25. Decisions to add substances to the Montreal Protocol's list of controlled substances are informed by scientific and technical assessment of prospective controlled substances prepared by the Protocol's Scientific Assessment Panel (SAP) and Technology and Economic Assessment Panel (TEAP) of the Protocol. The Panels comprise experts from throughout the world.

26. The assessment process is triggered by a Party, or the SAP or TEAP, notifying the Protocol's Secretariat that a substance is potentially ozone depleting and likely to be subject to substantial production. The Secretariat then requests all Parties to report information on whether the substance is produced or sold in their territories, the quantities involved, the purposes for which the substance is marketed or used and, if possible, the names of the producers and distributors. Concurrently the Secretariat requests the SAP and TEAP to prepare scientific and technical assessments of the substance, where relevant drawing on information provided by the Parties. It is on the basis of these assessments that the Parties decide whether a substance poses a significant threat to the ozone layer, and therefore warrants addition to the Protocol's list of controlled substances.

Inclusive and flexible procedures for change

27. Given the magnitude of its potential impact on Parties, a decision to add a substance to the Montreal Protocol's list of controlled substances constitutes an Amendment to the Protocol. The impact on Parties is potentially significant not only because it expands Parties' obligations, including their obligation to phase out production and consumption, but also because it represents the first step towards restrictions on trade in substances with non-Protocol Parties.

28. In accordance with the Amendment procedure, the Parties must receive a minimum six months' notice of a proposed decision to add a substance. All Parties are entitled to participate in the negotiations on the proposed decision, which must be adopted by consensus or at least a two-thirds majority of all Parties present and voting. Since its entry into force, all Protocol decisions have been taken by consensus. However, the Protocol provides the additional safeguard that a Party is not bound by a decision to add a substance until they ratify the Amendment incorporating the decision.

VII. CONCLUSION

29. These examples of Australia's experience in negotiating and implementing specific trade obligations in MEAs demonstrate that trade and environment obligations can be and are, in Australia's case, being implemented in mutually supportive ways. The relationship is working well and, in our view, effective domestic coordination and consultation processes are a key factor in this outcome. Such coordination has also helped ensure that STOs have certain features which contribute to compatibility with WTO rules.

30. Australia's experience has shown that the adoption at the national level of a sensible set of consultation and coordination mechanisms plays an important part in how Australia is able to negotiate, implement and abide by its international obligations. Because it is possible to take such steps at the national level and since the relationship between trade and environment obligations is working well, Australia remains firmly of the view that members need to proceed carefully with the discussions under paragraph 31(i). Ministers did not mandate us to make changes for changes sake, which is why a practical, focused discussion based on real experiences rather than theoretical or hypothetical scenarios is the best way to advance our discussions.

31. We hope that Members have found this paper focused on sharing Australia's experiences useful. Australia would welcome other Members coming forward with examples of their own national level experiences as a means of contributing to further discussion in a manner consistent with the paragraph 31(i) mandate.

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