SUBMISSION TO THE INQUIRY OF THE JOINT STANDING COMMITTEE ON TREATIES INTO AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANIZATION

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1. HUMAN RIGHTS, DEMOCRACY AND THE WORLD TRADE ORGANIZATION (WTO)

The creation of the WTO at the completion of the Uruguay Round of GATT trade negotiations in 1995 saw the emergence of an organization that has become an increasingly effective agent of trade and financial liberalization, and of political change. The Uruguay Round outcomes significantly expanded the range of activities brought within the scope of the GATT/WTO regime to include trade-related aspects of intellectual property, trade in services, trade-related investment measures, regulation of biotechnology, and public and animal health and safety laws. In addition, Member States made commitments at the Uruguay Round to further liberalise trade in goods through agreeing to new rules on issues such as subsidy provision, and greatly increased the enforcement powers of the regime through the establishment of the WTO.

Criticisms of the potential impact of the agenda for trade, financial and investment liberalization pursued by the WTO began to surface in the aftermath of the Uruguay Round of GATT trade negotiations. For example, human rights activists and scholars have argued that the new agenda of the WTO significantly narrows the areas of political, economic and social life over which people can participate in making decisions, and that apparently technical free trade agreements impact upon the human rights obligations of states.[1] In addition, non-governmental organizations in the areas of labour rights, environmental protection, sustainable farming, housing, food security and consumer rights have argued that the WTO is a secretive, non-democratic institution that entrenches the interests of corporations and investors over those of citizens and human beings. These issues are now firmly on the WTO agenda, partly as a result of the protests that took place at the WTO Ministerial Meeting held in Seattle in November 1999.

In this submission, we want to outline our concerns about the impact of the apparently technical free trade agreements negotiated and implemented under the auspices of the World Trade Organization. In Part 2, in order to illustrate these concerns as briefly as possible, we focus on two agreements which have involved Australia in disputes

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[1] See Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443; Sundhya Pahuja,' Trading Spaces: Locating Sites for Challenge in International Trade Law' *forthcoming, Australian Feminist Law Journal.*

before the WTO as case studies of the breadth of trade and financial agreements and their domestic implications. The two agreements we consider are the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), both of which expand on obligations already contained in GATT 1947. These agreements are considered at pages 2 to 12 of our submission.

In Part 3, we make a series of recommendations to the Committee relating to improved transparency of the WTO, dispute settlement reform, sovereignty and democratic participation and meeting existing human rights, labour standards and environmental obligations. These recommendations are detailed on pages 12 to 16 of our submission.

2. CASE STUDIES

(a) Human rights, the environment and the SPS Agreement

The SPS Agreement received little attention from human rights lawyers in the aftermath of the Uruguay Round, but provides a good illustration of the way in which apparently technical free trade agreements impact upon human rights obligations.[2] The SPS agreement sets out obligations and procedures relating to the use of sanitary and phytosanitary measures, including those aimed at protecting human or animal life or health, and applies to all sanitary and phytosanitary measures which may directly or indirectly affect international trade.[3] Members of the WTO are obliged to ensure that any such measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without scientific evidence.[4]

The only exception to the obligation to base such measures upon scientific evidence occurs where relevant scientific evidence is insufficient. In that situation, Members can provisionally adopt measures on the basis of pertinent information, but must seek to obtain additional information necessary for a more objective assessment of risk within a reasonable period of time.[5] Under the Agreement, Members also agree to base their measures on international standards, guidelines or recommendations where they exist.[6] Members may introduce or maintain standards which result in a higher level of protection than would be achieved by measures based on such international standards, but only if there is a scientific justification for such increased protection or where the Member has engaged in a process of risk assessment as laid down in Article 5 of the Agreement.[7]

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[2] This analysis is drawn from Anne Orford, 'Globalization and the Right to Development' in Philip Alston (ed), *Peoples' Rights: The State of the Art* (2000, forthcoming).

[3] Key terms including 'sanitary or phytosanitary measure' are defined in Annex A to the SPS Agreement. Such measures had theoretically been allowable as exceptions to the non-discrimination provisions of GATT, particularly under Article XX(b). The aim of the Agreement was, *inter alia*, to establish a framework of rules within which such exceptions would apply.

[4] SPS Agreement, Article 2.

[5] SPS Agreement, Article 5(7).

[6] SPS Agreement, Article 3(1).

[7] SPS Agreement, Article 3(3).

- **Meat Hormones dispute**

The 1998 decision of the Appellate Body of the WTO in the *EC Measures Concerning Meat and Meat Products (Hormones)* dispute provides an example of the reach of the SPS Agreement into areas of domestic policy-making and of its impact upon human rights protection.[8] That dispute involved parallel complaints brought against the European Community (EC) by Canada and the US. The complaints concerned an EC ban on the sale of meat from animals that had been treated with any of six growth hormones.[9] A series of EC directives operated to ban the sale of such meat within the EC, and included a ban on the importation of meat treated with such growth hormones. The complainants argued that the EC had introduced measures that differed from the voluntary standards proposed by the relevant international body, the Codex Alimentarius (the Codex).

The EC argued that the standards developed by the Codex were out of date, that it wished to maintain standards that resulted in a higher level of protection than would be achieved by measures based on the Codex standards and that for one of the hormones, no Codex standards existed. The decision by the EC to ban the use of such hormones had resulted from wide-ranging public and scientific discussion and debate about the issue over a ten year period. The EC had commissioned a series of scientific inquiries into the issue, culminating in a roundtable on the use of growth hormones with scientists, consumer groups, industry workers and other interested parties in 1995. While most scientists agreed that use of the 'natural' hormones in controlled conditions under veterinary supervision appeared to pose no threat to human health, the EC decided that it was not possible to monitor and regulate the conditions under which hormones were administered, nor was it possible to stop the black market trade in such hormones without imposing a total ban on their use.

The Appellate Body of the WTO found that, while the measures in dispute neither resulted in discrimination between domestic and foreign producers nor in a disguised restriction on international trade, the ban on importation of meat treated with hormones was nevertheless in breach of the SPS Agreement. It held that the EC was not entitled to regulate the use of growth hormones as its decision to do so was not based on sufficient scientific evidence.

With respect to the synthetic hormone MGA, for which there was no relevant international standard, the Appellate Body held that there was not sufficient scientific evidence to support the maintenance of even provisional measures to protect human health. With respect to the other five growth hormones, the Appellate Body held that there was not sufficient scientific evidence to support the maintenance of food safety standards that were higher than those set by the Codex. It held that there must be a risk assessment based on detailed scientific data in order for such measures to be enacted, even where there is no clear scientific opinion regarding the risks posed by a product and even where the measures had been enacted before, but maintained after, entry into force of the SPS Agreement.

[8] Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted 16 January 1998, WT/DS26/AB/R, WT/DS26/AB/R [hereinafter the Meat Hormones Report].
[9] The hormones at issue were the ‘natural’ hormones oestradiol-17β, progesterone and testosterone, and the ‘synthetic’ hormones trenbolone acetate, zeranol and melengestrol acetate (MGA).

- **Australian salmon dispute**

This approach to requiring a scientific basis in order for regulatory regimes to be valid under the SPS Agreement was reinforced by the decision of the Appellate Body in the *Australia – Measures Affecting the Importation of Salmon* dispute.[10] The dispute concerned a complaint by Canada regarding Australia's prohibition on the importation of fresh, chilled or frozen salmon from Canada. The Appellate Body there upheld the Canadian complaint, holding that the measure in question breached Australia's obligations under Article 5.1 of the Agreement. That Article requires Members to ensure that their sanitary and phytosanitary measures are based on an assessment of risks to human, animal or plant life or health. While Australia had based its import prohibition on a risk analysis, the Appellate Body found that this risk assessment was not adequate. As a result, the Appellate Body also found that the import prohibition was not based upon scientific principles as required under Article 2.2 of the Agreement.[11]

- **Implications for democratic decision-making**

The *Meat Hormones* and *Salmon* decisions illustrate the ways in which participation in decision-making about public health and safety issues is radically constrained by the SPS Agreement. The effect of the Agreement as interpreted in the *Meat Hormones* ruling is to require states to base all public policy decisions about human or animal health or welfare on a narrowly defined form of scientific evidence, which excludes from consideration any other community concerns or knowledge. The requirement that states privilege scientific knowledge over the knowledge of local consumers, workers, industry groups or farmers operates to limit the scope for contesting and debating particular policies and laws. Only scientific experts, often working for multinational corporations, are recognised as legitimate sources of authorised knowledge upon which government policies can be based without breaching trade agreements. By restricting the bases upon which states can introduce laws relating to consumer safety, animal health and welfare or sustainable farming practices, the right of peoples and communities to participate in and shape their economic, social and cultural development is effectively limited.

- **Implications for human rights protection**

The *Meat Hormones* decision also illustrates the impact that such apparently technocratic and economic decisions have on broader human rights commitments. First, civil and political rights such as the right to political participation and the right to self-determination, are weakened where international agreements operate to remove decisions about consumer safety or environmental protection from the political arena. Similarly, the agreement infringes the central requirement of the collective right to development that 'every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development'.[12] The

[10] Report of the Appellate Body, *Australia – Measures Affecting the Importation of Salmon*, adopted 20 October 1998, WT/DS18/AB/R.

[11] Australia was also found to have acted inconsistently with its obligations under Article 2.3 and Article 5.5 of the SPS Agreement.

[12] Declaration on the Right to Development, adopted 4 December 1986, GA Res 41/128 (Annex), UN GAOR, 41st Sess., Supp. No. 53, at 186, UN Doc A/41/53 (1987), Article 1.

SPS Agreement limits the right to participate by enshrining a particular form of knowledge as the basis upon which public policy decisions about health, safety and environmental issues can legitimately be made. Only scientific knowledge about the value of biotechnology or the impact of using patented hormones or genes in food production is admitted as legitimate. The effect of the SPS agreement is to institutionalise hierarchies of knowledge, and thus of participation. Only those people who are able to participate in producing, or paying for the production of, such scientific knowledge, are able to participate in decision-making about complex and broad-ranging issues.

Second, the SPS Agreement has a negative impact upon the protection of economic, social and cultural rights. The *Meat Hormones* decision, for example, has a subtle but significant impact on the right to health. In its argument to the WTO Appellate Body, the EC relied upon scientific opinion that ingestion of the hormones in dispute is potentially carcinogenic. In particular, the EC presented scientific evidence that the synthetic hormone MGA increases the risk of breast cancer.[13] Although the EC was not able to produce scientific research conducted on the narrow question of the relationship between breast cancer and residues of MGA in meat when used as a growth promoter, it did produce scientific evidence relating to the broader relationship between levels of progesterone - the hormone MGA mimics - and increased rates of breast cancer. While the complainants, Canada and the US, had scientific data relating to the health risks posed by MGA residues, the report of the Appellate Body notes that those parties 'declined to submit any assessment of MGA upon the ground that the material they were aware of was proprietary and confidential in nature'.[14] That information was presumably owned as intellectual property by the company producing the hormone.

The Appellate Body found that as ‘there was an almost complete absence of evidence on MGA in the panel proceedings’, the EC could *not* justify banning the use of that hormone.[15] In an extraordinary footnote, the Appellate Body held that even if the scientific evidence concerning the risk to women was correct, only 371 of the women currently living in the Member States of the European Union would die from breast cancer as a result of trade in hormone-related beef, while the total population of the Member States of the European Union in 1995 was 371 million.[16] The reader is left to assume that the health risk posed to those women is considered minimal and insignificant by the members of the Appellate Body when compared to the goal of trade liberalisation, and that the Appellate Body views the potential sacrifice of the lives of a group of women as appropriate where it leads to achieving the greater good of competitiveness.

The EC argued unsuccessfully that, when dealing with a risk to public health of such a potentially serious nature, and when faced with conflicting and inadequate scientific research, states should be permitted to adopt the precautionary principle and take a cautious approach to allowing the unregulated use of such hormones. As a result of the *Meat Hormones* decision, however, the onus of proof as to the safety of a

[13] See the discussion of the evidence of Dr Lucier in the Meat Hormones report, *supra* note 8, at paragraph 198.
[14] *Ibid*, paragraph 201.
[15] Meat Hormones report, *supra* note 8, at paragraph 201.
[16] *Ibid*, footnote 182.

particular growth hormone rests, not with the agrichemical corporations who profit from the use of such hormones, but with the consumers in the states where the resulting products are to be sold. The Appellate Body held that the lack of scientific research into the health risks posed by a novel product, process or technology acts as a barrier to consumer protection legislation, rather than as an indication that such protection is necessary. In such a way, the investment liberalization agenda of the WTO shifts the boundary between public good and private interest in favour of the private interests of transnationals, a shift that has profound implications for the utility of liberal concepts of democracy and human rights operating in the public sphere. A more cautious approach would suggest that states should be free to regulate such products or processes until the corporation seeking to profit from new technologies can show by reliable scientific studies that such products or processes are safe.

The right to food is also affected by the SPS Agreement. That right is dependent upon a state's capacity to ensure that economic conditions exist in which food can be produced and distributed, and upon the state's willingness to regulate industries engaged in food production. Decisions such as that of the Appellate Body in the Meat Hormone case mean that it will be more difficult for small-scale farmers producing organic meat or dairy products to maintain a market for those products. By limiting the extent to which consumers in the EC can demand laws that regulate the sale of meat treated by hormones, for example, corporations can limit the means available to those consumers to resist the dominance of large-scale farming by multinational corporations in other parts of the world.[17] The effect of such moves at the international level is that it will be far more difficult for consumers to support organic and sustainable farming practices, whether for reasons of health, safety, animal welfare, environmental protection or solidarity with Third World farmers. As Ralph Nader and Lori Wallach note:

> It's a very neat arrangement. European corporations target US laws they do not like. US corporations target European laws they do not like. Then European and US corporations attack Japanese laws and vice versa - the process can go on until all laws protecting people and their environment have either been reversed or replaced by weaker laws that do not interfere with the immediate interests of the corporations .... Corporations are poised to win at both ends, while citizens and democracy lose.[18]

These human rights impacts have a flow-on effect internationally. For example, by denying civil and political rights such as the right to participate in decision-making to people in one part of the world, TNCs can more easily deny the economic, social and cultural rights of those people in other parts of the world seeking to develop sustainable means of producing food. Food production becomes increasingly tied to the profits and interests of monopolistic corporations. States signing on to such trade

[17] Multinational corporations have increased their control over agriculture through increasing the integration of seeds with chemicals and animal products with hormones. As a result, farmers are becoming increasingly dependent on biotechnology corporations. For analyses of that process and its effects, see Vandana Shiva, 'Biotechnological Development and the Conservation of Biodiversity' in Vandana Shiva and Ingunn Moser (eds), *Biopolitics: A Feminist and Ecological Reader on Biotechnology* (1995) 193.

[18] Ralph Nader and Lori Wallach, 'GATT, NAFTA, and the Subversion of the Democratic Process' in Jerryy Mander and Edward Goldsmith (eds), *The Case Against the Global Economy: And for a Turn Toward the Local* (1996) 92, 98.

agreements to further economic development substantially weaken the human rights guarantees of people within their states and globally.

(b) SCM Agreement and Howe Leather

The WTO Panel Decision in *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (the "Howe Leather Decision") was decided under the SCM Agreement.[19] This case illustrates the way in which apparently technical free trade agreements can have a far reaching effect on broader social, political and cultural conditions within Australia. The wide interpretation of prohibited subsidies adopted by the WTO Dispute Settlement Body will have significant ramifications for those Australian industries, both present and future, which rely on Domestic Industry Assistance schemes such as those provided to Howe Leather.

- **Background to the dispute**

Until March of 1997, Howe and Company Proprietary Ltd. ("Howe Leather") had been a recipient of government subsides pursuant to the Australian Textiles, Clothing and Footwear Import Credit Scheme (the "ICS"). On 26 March 1997, Australian Customs Notice No. 97/29 excised automotive leather from the ICS and the Export Facilitation Scheme for Automotive Products (the "EFS"), effective 1 April 1997 in compliance with a settlement reached between the United States and Australia on 24 November 1996.

At the time of the settlement, which was not conducted under the auspices of the WTO, the government of Australia announced a commitment to provide financial assistance to Howe to help it to maintain its commercial viability in light of the settlement between Australia and the United States. As a consequence, the government of Australia entered into two separate agreements, a **grant contract** and a **loan contract**, with Howe and its parent company, Australian Leather Holdings, Limited ("ALH") in March 1997.

The **grant contract** provides for three payments totalling up to a maximum of A$30 million, an amount estimated to equal approximately 5 per cent of Howe's expected sales for the period 1 April 1997-31 December 2000. The first payment of A$5 million was to be paid upon conclusion of the contract. The second and third payments, of up to A$12.5 million each, were to be paid in July 1997 and 1998 respectively, on the basis of Howe's performance against the targets set out in the contract. The performance targets consist of sales targets and capital expenditure targets. Howe was required, under the contract, to use "best endeavours" to meet these targets. The **loan contract** provides for a fifteen-year loan of $A25 million by the government of Australia to Howe and its parent company, ALH. For the first five-year period of this loan, Howe/ALH is not required to pay principal or interest. After the expiration of this five-year period, interest on the loan is to be based on the rate for Australian Commonwealth Bonds with a ten-year maturity, plus two percentage points. The loan is secured by a second lien over the assets and undertakings of ALH.

[19] The analysis in this section is drawn from Jennifer Beard, John Howe and Sundhya Pahuja, '*Case Note: Australia – Subsidies Provided to Producers and Exporters of Automotive Leather'*, unpublished manuscript on file with the authors.

The United States alleged that Australia had provided prohibited subsidies to Howe by means of grants and a loan made on preferential and non-commercial terms. It argued that these measures were in violation of Australia's obligations under Article 3 of the SCM Agreement because they constituted a prohibited subsidy to Howe Leather.[20] On 11 June 1998, the United States requested the immediate establishment of a panel, and this Panel was established on 22 June 1998, with standard terms of reference.

- **Findings of the Panel**

The Panel found that although the loan is not a subsidy, which is contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement, the payments under the grant contract were. Accordingly, pursuant to Article 4.7 of the SCM Agreement, the Panel recommended that Australia withdraw the subsidies within 90 days.

In reaching its conclusion, the Panel considered the definition of a subsidy in Article 1 of the SCM Agreement. Article 1 provides that in order for a subsidy to exist, there must be a financial contribution from government. It gives an exhaustive list of four basic types of government practices. Any government practice that does not meet one of the four criteria laid out in the subsections of Article 1 is not considered a subsidy. Both Australia and the United States were in agreement that both the loan and each of the three payments made under the grant contract were subsidies within the meaning of Article 1 of the Agreement.

In the SCM Agreement, subsidies are divided into three categories according to whether they are prohibited, actionable or non-actionable. The facts of the Howe case involve an alleged violation of the first category of subsidies, namely those prohibited by Article 3 of the SCM Agreement. Article 3.1 provides that prohibited subsidies include subsidies contingent, in law or in fact,[21] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I.[22]

Having found that the United States had abandoned its arguments on whether the subsidies were contingent in 'law' on export performance, the Panel proceeded to decide the question whether the subsidies in question were contingent 'in fact' upon export performance. The Panel adopted a very wide interpretation of the meaning of the term 'contingent ... in fact ... upon export performance' which has significant ramifications for Australian industry policy. This is so not only for assistance directed toward 'export enhancement' programs, but also for the many industry assistance programs that are directed to other goals such as employment generation, regional development and encouragement of environmentally sustainable industry.

The Panel found that the concept of 'contingent…in fact…upon export performance' as expressed in Article 3.1 of the SCM agreement, coupled with the language of

[20] WT/DS126/1, G/SCM/D20/1, 8 May 1998.

[21] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[22] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

footnote 4 of the same agreement, required the panel 'to examine all of the facts that actually surround the granting or maintenance of the subsidy in question, including the terms and structure of the subsidy, and the circumstances under which it was granted or maintained.' The Panel emphasised that the mere fact that a subsidy was granted to enterprises which export, could not be the sole basis for concluding that a subsidy was "contingent in fact". However, the Panel supported the argument put by the United States that if the 'totality of the circumstances' surrounding the granting of a subsidy were to reveal that the subsidy was 'in fact tied to its application to export performance, it must be determined that the grant (or maintenance) of the subsidy favours export over domestic sales'. In other words, even if the subsidy itself does not expressly provide for, or aim to produce an increase in exports by the beneficiary of the subsidy, if the overall *effect* of the subsidy is to enhance export performance, then the subsidy is in violation of Article 3 of the SCM.

It appears that there was no documentary evidence before the Panel which expressly stated that the payments to Howe Leather under the grant contract were conditional upon future export performance. Notwithstanding this, the Panel took into account factors such as the removal of automotive leather from eligibility for benefits under the ICS and EFS programmes, and public reports at the time that the assistance provided was necessary to ensure that Howe Leather continued in business, to imply that export performance was a condition of assistance. Although acknowledging that the removal of the EFS and IFS was likely to have been a factor in the granting of the contract, Australia pointed to the government's concern for job retention in the region in the absence of assistance for Howe as a possible reason for the grant. Nevertheless, in considering all the circumstances of the subsidy, the Panel concluded that the grant of assistance to Howe Leather by the Australian government was contingent on anticipated export performance, and was therefore in violation of Article 3(1)(a) of the SCM Agreement.

The Panel held that the loan was not a subsidy contingent upon export performance within the meaning of Article 3.1(a) of the Subsidies Agreement. It found that there is nothing in the loan explicitly linking the loan to Howe's production or sales, and thus nothing which might link the loan to export performance.

- **The implications of Howe Leather for industry assistance**

All levels of government in Australia provide assistance to industry including cash grants, loans, tax credits and other form of non-financial investment 'facilitation' In 1996, the Industry Commission (now the Productivity Commission) estimated that the total amount of Federal, State and Local government assistance to industry was more than sixteen billion dollars, including Commonwealth border and market protection measures. The Commission estimated that of this amount, State government assistance to industry amounted to almost six billion dollars in subsidies and payroll taxes foregone.

While some industry assistance is expressly designed to encourage existing businesses to enhance their export capacity, or to assist businesses in competing internationally, most assistance is granted on a selective and discretionary basis. A decision to offer assistance is often based on a number of different policy objectives. . These objectives include attracting new foreign and domestic investment, creating or

retaining employment, and encouraging targeted sustainable regional and rural development. Assistance is not necessarily based on any consideration of the actual or potential export activities of the industry applicant. This does not mean, however, that the recipient of assistance may not export goods or services once operating within a particular state.

For instance, the Victorian government's Regional Infrastructure Development Fund (RIDF) is intended to revive rural and regional Victoria by, among other things, attracting new industry development in order to create new jobs. Applications made for the funding are required to demonstrate the applicant's ability to meet a 'significant number' of the identified criteria. These criteria include the demonstration of local community and industry support, consistency with ecologically sustainable development, the creation of jobs and stimulation of regional economic growth, and facilitation of '*integration of [the applicant's] region into global markets*'.[23]

The Panel's interpretation of 'contingent… in fact… upon export performance' means that it is possible that assistance granted to a business that meets *all* of these RIDF criteria could be successfully challenged if *one* of those conditions is 'contingent in fact' upon export performance. It seems clear that if a particular business is dependent on exports covered by a WTO agreement, then a Panel would be likely to find assistance to be a subsidy in breach of the agreement.

This means that Federal government representatives involved in negotiating international trade agreements should be aware of the range of Domestic Industry Assistance on offer in Australia, including State and Local government assistance. It also means that Federal, State and Local government policy makers must be cognisant of Australia's obligations under international trade agreements when it comes to formulating industry policy strategies and programs. Assistance programs that are expressly intended to encourage export activities in industries or sectors covered by trade agreements to which Australia is a contracting party will have to be reconsidered. Moreover, in all cases governments will be forced to assess the extent to which applicants for industry assistance are dependent for their ongoing existence upon export performance in an industry covered by an agreement to which Australia is a contracting party.

Attention will also need to be given by governments to the form of assistance that is provided to industry. For example, it may be that loans are less likely to be prohibited than cash grants or tax credits It may be that something akin to the Higher Education Contribution Scheme which applies to tertiary education fees could be adopted, requiring successful applicants to repay assistance once the objectives of the assistance are met. In addition to rethinking the form of assistance, where assistance is directed toward social justice objectives such as the creation or retention of jobs in a disadvantaged region, it may be prudent for governments to ensure that assistance is clearly made conditional on achievement of those goals, as opposed to criteria based solely on economic performance of the recipient.

[23] Department of Regional and State Development, *Regional Infrastructure Development Fund Guidelines*, April 2000.

- **Broader implications of the SCM Agreement**

In terms of Australia's relationship to the WTO, and in particular the SCM agreement, it should be noted by the Committee that all future negotiations concerned with the use of subsidies have the potential to affect a great range of political programs in Australia because "subsidy" itself is a term which has no firm definition within trade law or trade theory. Indeed, despite the SCM agreement, which marks out certain actions as a subsidy and delimits some of those as "prohibited" or "actionable", what constitutes a subsidy *per se* remains a highly contentious issue within international trade law.

The argument for the restriction of subsidies is that, on the basis of free-market principles, any measures that distort relative costs, such as subsidies, are arguably detrimental to economic efficiency, basically because the subsidised producer is put at an advantage in relation to its efficient but unsubsidised competitors. Subsidies can amount to a barrier to trade either offensively or defensively. That is, offensively, they operate to make a product destined for export cheaper than it should be because a portion of the cost of production is born by the taxpayers of the state from which the product originates. Defensively, they may operate to make a product designed for domestic consumption artificially cheaper than the imported version. Either way, they are said to be distortions of the market. However, even according to free-market principles, it is arguable that subsidies can be rationalised not only as socially imperative deviations from principles of economic efficiency but also as correctives for distortions from other sources.

However, the real inability to define what constitutes a subsidy lies in the shift of attention from positive to negative subsidies. It is accepted that nation states each have different regulatory environments. The absence of regulation can, comparatively, amount to a negative subsidy. So, for example, if a state were to subsidise the manufacture of shoes in the form of positive grants to the footwear industry, that would amount to a positive subsidy. However, if the footwear industry were excused from complying with occupational health and safety requirements, or tax payers were to bear the occupational health and safety costs associated with the tannery, this could amount to a similar financial benefit to the company, and have the same impact on the cost of the shoes. Therefore, this would logically have to be characterised as a negative subsidy. The difficulty then arises as to where to draw the line, because there is no theoretically sustainable stopping point.

Unless states agree together on broader socially and democratically legitimate exceptions to what constitutes prohibited or actionable subsidies aimed at sustainable social and economic development and environmental protection, states will be unable to assist industries to remain or to establish themselves in their markets by subsidising them in traditional ways. Industries that are not able to obtain traditional governmental assistance may recolate to states which provide negative subsidies such as lower labour standards, systemic violation of human rights and unsustainable environmental regulations. This will increasingly be the case if the General Agreement on Trade in Services (GATS) is also connected with the SCM agreement. Negotiations to make such a connection are currently underway. This may well result in leaving the Australian government unable to manage much domestic policy without violating WTO obligations.

Classically, the notion of sovereignty has referred to a state's right to do as it wishes within its own borders. The desirability of trade liberalisation has been seen as beyond question but states have resisted the linkage of labour standards to international trade on the basis that this amounts to an infringement of sovereignty. The mobility of capital, however, means that a nation's sovereign control of its domestic regulation stands in conflict with its attempts to attract global capital. Multilateral political action among states is therefore vital if states are to be able to continue setting their own regulatory limits. Preemptively encroaching on their own regulatory freedom by agreeing to, implementing and enforcing international standards such as labour standards may be the only way states can prevent a loss of sovereignty to the market.

3. RECOMMENDATIONS

The examples we discussed above provide an illustration of the extent to which trade agreements impact upon both democratic participation and human rights protections within Member States. This impact is intensified by the jurisprudence which is being developed by the panels and Appellate Body of the WTO. That jurisprudence enshrines a commitment to economic efficiency over concerns for values such as consumer protection, human rights and environmental protection and full employment, and over the adoption of a precautionary approach to assessing the risks of novel technologies to human and animal life and health.

In this section, we outline some recommendations that draw on the above analyses and that we argue Australia should adopt in shaping its relationship with the WTO.

(a) Transparency issues

- **external transparency**

Australia should support moves to improve the 'external transparency' of the WTO. This could involve an increased role for NGOs as observers at negotiating rounds and as participants in dispute settlement processes (see further the discussion under (b) below).

- **internal transparency**

Australia should support the post-Seattle push for 'internal transparency'. This would involve incorporating developing countries more directly in negotiations and developing mechanisms to limit the domination of the 'Quad' (US, EC, Canada and Japan) as the group who formulate the directions for future negotiations and policy.

(b) Dispute settlement reform

- **broader composition of panels**

Australia should play a leading role in proposing dispute settlement reform, including developing a consensus on the need for broader composition of dispute settlement panels and the Appellate Body. Where the Members concerned cannot find a mutually agreed solution through consultations, the DSB must, at the request of a party to the

dispute, establish a panel of three to five independent trade experts appointed on an *ad hoc* basis.[24] The composition of the panel takes place once the panel has been established by the DSB. Potential candidates must meet certain requirements in terms of qualifications. Panels are to be composed of well-qualified governmental and/or non-governmental individuals, including persons who: have served on or presented a case to a panel; or have served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee to any covered agreement or its predecessor (Kennedy or Tokyo Round) agreement; or have served in the Secretariat; or have taught or published on international trade law or policy; or have served as a senior trade policy official of a WTO Member.[25] For example, an experienced quarantine officer with a strong knowledge of trade law or policy may be placed on a panel concerned with an issue arising from the Agreement on Sanitary and Phytosanitary Measures, or a person experienced in the trade issues of intellectual property law might be appointed to a Panel composed to deal with an issue arising from the TRIPS agreement.

Similarly, the panelists of the standing Appellate Body are chosen from seven persons, three of whom shall serve on any one case.[26] Members of the Appellate Body are to be 'persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.[27]

Limiting the Panels to those persons experienced only in trade law or policy is too restrictive given the implications these panel decisions have on issues stretching beyond international trade. The procedure could be made more legitimate if experts in environmental sustainability, labour standards or development, for instance, who may not *necessarily* be experienced in trade law or policy, be included in panels dealing with exceptions to the law and policy of free trade.

Although the inclusion of official and non-governmental legal experts introduces a more legalistic and less economic perspective to panel decision-making, it is insufficient to deal with exceptions to trade law, which because of their exceptional nature, include legal and policy issues beyond the expertise of trade lawyers. Reforming the composition of panels in this way would meet the express aims referred to in the Preamble to the WTO Agreement, which recognises that trade is a means to an end, that is to create a better quality of life. It states that trade relations should be conducted with a view to raising standards of living and ensuring full employment, while allowing for the objectives of sustainable development and the need to protect and preserve the environment.

The suggested reforms to the composition of panels would also conform to Article 8.2 DSU, which provides that the selection of panelists be made with a view to ensuring the independence of panel members, a sufficiently diverse background and a wide spectrum of experience.

[24] Article 8 DSU.
[25] Article 8.1 DSU.
[26] Article 17.1 DSU.
[27] Article 17.3 DSU.

- **role of civil society**

Australia should support the inclusion of a mandatory review of *amicus curiae* briefs by Panels. In its decision in the *United States - Import Prohibition of Certain Shrimp and Shrimp Products* dispute, the Appellate Body held that *amicus curiae* briefs could be submitted by non-governmental organisations at the discretion of the Panel.[28] More recently, in its decision in the *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* dispute, the Appellate Body held that it may accept an *amicus curiae* brief from the public at the appeal stage.[29]

While these decisions have the potential to broaden public input into the dispute settlement process, there is no obligation on either a Panel or the Appellate Body to accept NGO briefs. The review by Panels of *amicus* briefs would allow them to base their decisions on a far greater range of expert evidence. In order to ensure that a Panel takes into account the evidence presented in *amicus* briefs, it would be reasonable to require a Panel to provide reasons why it accepts or does not accept the evidence contained in such briefs in its reasoning. This would go some way to avoiding the criticism of the Shrimp/Turtle dispute decision that the dispute settlement process is unduly insulated, short sighted and ill equipped to deal with environmentally related trade disputes.

(c) Sovereignty and democratic participation

- **Initiation of disputes**

While under WTO rules the dispute settlement process is a state-to-state proceeding, corporations nonetheless play a significant role within states in initiating complaints. This means that the way in which WTO obligations are interpreted is shaped by corporate interests in how those rules develop. Critics have argued that this process leads to an unbalanced development of WTO rules. As a result, they are not generally shaped by concern for issues such as human rights protection, labour standards protection, health and safety measures and environmental protection.

In our view, there is a need to reconsider the domestic processes within Australia for initiation of disputes. The new WTO Disputes Investigation and Enforcement Mechanism provides exporters with a formal means to request the Australian Government to exercise Australia's WTO rights on their behalf. According to the Minister for Trade Mark Vaile, the mechanism 'will involve a partnership between the private sector and the Government for the pursuit of Australia's rights'.[30] The Australian government needs to consult more broadly about the way in which it should develop arguments about the proper interpretation of WTO obligations, and

[28] See Report of the Appellate Body on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, October 12, 1989, WT/DS58AB/R, paras. 79-91 examining the admissibility of three *amicus* briefs attached to the US submission to the Panel.
[29] Report of the Appellate Body, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* dispute, adopted 10 May 2000, WT/DS138/AB/R.
[30] Minister for Trade, Mark Vaile, 'New Mechanism to Underpine Australia's WTO Export Rights in Global Markets', September 16 1999, http://www.dfat/govt.au/media/releases/vaile/mvt025_99.

indeed whether it is in the general community to initiate a complaint in a particular case.

For example, where an exporter formally requests the Government to initiate a dispute under the WTO Disputes Investigation and Enforcement Mechanism, WTO experts in the Department of Foreign Affairs and Trade should be required to initiate a broader inquiry into the views of other groups on the way in which that dispute should be framed. Increasing the participation of civil society in this way may well improve decision-making at the WTO and engender greater trust in the decisions that are made there. Civil society can balance the trend towards protecting only the interests of corporations and ensure that WTO dispute settlement processes reflect views other than those of states acting on behalf of corporate interests. This argument is beginning to receive some attention from states like the US who are keen to develop greater public ownership of the whole free trade agenda.

- **Formulation of negotiating positions**

Similarly, Australia needs to develop a more transparent, democratic process in formulating Australia's negotiating position on future directions for agreements such as the Agreement on Trade-Related Investment Measures, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights. At present, there exist good levels of consultation with certain industry groups but inadequate mechanisms for consulting with the broader public. While the parliamentary processes that exist to scrutinise treaties prior to ratification are a step in the right direction, these processes occur far too late to have any real effect on the way in which agreements are negotiated. Objections to treaty obligations at that later stage can too readily be dismissed by arguing that it would not be in Australia's interests to be one of the only states to refrain from signing on to a new trade agreement.

(d) The relationship between WTO agreements and other multilateral agreements

- **Meeting existing human rights, labour standards and environmental obligations**

Australia should support moves to ensure that commitments undertaken under trade agreements are compatible with commitments undertaken under multilateral human rights, labour and environmental agreements. Australia continues to be bound by obligations undertaken in treaties in such spheres even when it is carrying out its role as a Member State of the WTO.

4. CONCLUSION

As we finish writing this submission from our desks in Melbourne, the dust is settling on a week of dramatic protests against the effects of economic globalization against the backdrop of the meeting of the World Economic Forum. In our view, these protests once again highlight the seriousness of the issues facing those responsible for designing and shaping the international institutions that oversee global governance, and for those developing the relationship of governments to the corporations whose

interests are furthered by trade and financial liberalisation. We urge the Committee to take seriously the environmental, human rights and democratic issues that economic globalization raises, and to keep these issues in mind when making its report on Australia's future relationship with the WTO.

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