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The Hon Andrew Thompson, MP
Chairman
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Sir

Inquiry into Australia's relationship with the World Trade Organisation

I wish to make a submission to the Parliamentary inquiry into Australia's relationship with the World Trade Organisation.

This paper is heavily edited version of a dissertation I recently submitted as part of my Master of International law program. The paper deals with the problems that can arise when governments, specifically the Australian Government, compromise the integrity and goals of the WTO international trading laws by entering into multilateral environmental treaties. The paper deals in detail with the relationship between the WTO and the proposed *Cartegena Protocol on Biosafety to the Convention on Biological Diversity.*

I hope the Committee finds it informative.

Yours faithfully
Troy Anderson

Australia's relationship with the World Trade Organisation

As a small nation, Australia's relationship with the World Trade Organisation ("WTO") and its capacity to utilise the WTO dispute mechanism and agreements is critical to the nations capacity to gain access to the world's agricultural markets, the majority of which are still heavily protected. For that reason, Australian governments must ensure that any new treaties to which it is to ratify does not undermine the rights, benefits and obligations that are generated by membership to the WTO.

The difficultly now for any Government participating in the international treaty making process is determining not only how the range of treaties to which it is already a signatory to may apply domestically, but also how the various treaties interact with each other, particularly where treaties on supposedly different topics overlap, creating a situation of competing priorities. The relationship between different international treaties can clearly present a problem for a Government when the treaties have apparently contradictory goals. This situation appears to have already occurred in relation to the World Trade Organisation ("WTO") and the environmental treaties to which the Australian Government is considering signing and ratifying, for example, the *Cartegena Protocol on Biosafety to the Convention on Biological Diversity,* ("the Protocol").

In 1999 it was estimated there were 185 MEA's, 20 of which had an element that attempted to promote an environmental cause and which included environmental trade measurers (reprisals) for nations not adopting the action prescribed the MEA.[1]

For example, the *Convention on the International Trade of Endangered Species of Wild Flora and Fauna* ("CITES"), the *Montreal Protocol on Substances that Deplete the Ozone Layer 1989* and the *Convention or the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, 1989* are all MEA's which can undermine the international trade laws established by the WTO. The Australian Government needs to recognise the capacity for overlap and insure that it gives a clear preference so that any ambiguities regarding which treaty takes priority is avoided.

This paper is not arguing against MEAs. The problem is very much their execution and whether the stated outcomes of the treaties are not in fact politically correct

[1] *Industry Competitiveness, Trade & the Environment,* Productivity Commission, Canberra, March 1999.

justifications for trade protection, undermining the agreed goals of the WTO trade liberalisation agenda.

The *Cartegena Protocol on Biosafety to the Convention on Biological Diversity,* was created under the auspices of the Convention on Biological Diversity ("the CBD") and is a prime example of an environmental treaty which has another agenda. The exact nature and details of the Protocol are discussed below. However, briefly, the Protocol is promoted as dealing with the environment, specifically, the Protocol is designed to protect a nation's domestic environment from the accidental release and spread of "Living modified organisms" ("LMO's"), which are the results of genetic engineering. The term is distinct from genetically modified organisms ("GMOs"). The distinction is that an LMO is a subset of a GMO. For example, an LMO is something such as a seed, which is "living" and can escape into the environment and grow of its own volition. Anything that is no longer living but has been altered genetically, such as the peanuts that make peanut butter, are GMO's and not subject to the Protocol.

The Agreement on Sanitary & Phytosanitary Measures ("SPS")and the Agreement on Technical Barriers to Trade ("TBT").

Contrary to many of the submission that have been received by the JSCOT inquiry, Australia is not forced to import goods that are harmful to Australian industry, nor are Australia's laws ignored in the face of the wishes of the faceless WTO.

Two of the key ways by which any WTO member can "protect" its domestic industry from foreign products that threaten the local industries viability is the Agreement on Sanitary & Phytosanitary Measures ("SPS")and the Agreement on Technical Barriers to Trade ("TBT").

The SPS and TBT were introduced by the WTO as a means of placating nations whose exports were dominated by agriculture[2] and who were concerned that more protectionist countries could create new barriers to the entry of agricultural goods via quarantine measures, diminishing any benefits won by the agricultural sector on tariff reduction and quotas under the WTO Agreement on Agriculture. Arguably, something such as the Protocol, if ratified, could do just that.

[2] Anderson, K. School of Economics and Centre for International Economic Studies, University of Adelaide, speech given to the Cairns Group & Farm Leaders Conference, April 1998.

The contrast that exists in the manner by which the SPS and TBT seek to promote international trade while not exposing a nations domestic industry or consumers to health or safety risks is vastly different from the Protocols approach. The preamble to the SPS states:

> *".. no member should be prevented from adapting or enforcing measures necessary to protect human, animal or plant life or health subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members.."*

Article 2(3) of the SPS states members have the right to take any steps necessary to protect human, animal or plant life or health providing they are based on scientific evidence and

> "..*do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail…Sanitary and Phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."*

The SPS therefore maintains a nation's right to stop products being imported where there is a legitimate risk that the imported good could cause the outbreak of a disease which could threaten the local industry.[3] This is significant of itself because it counters the claims made by some that the WTO limits national sovereignty in protecting local industry and interests.

The TBT is the second limb of the WTO's approach to ensuring the pro-trade liberalisation policies of the Agriculture Agreement are not undermined. The TBT preamble states that its goal is to:

> *". ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade…no member should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not to be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members.."*

[3] Article 2 (1) SPS Agreement.

Therefore, while the SPS stops arbitrary trade barriers being created via the use of unjustifiable health and safety standards for the entry of plants or animals into a country, the TBT stops the use of other unjustifiable "technical measures." It is a very broad concept. Once again the principle is that the Member can impose any standard it wants provided it follows the MFN principle and does not use its standards as a means of limiting imports[4] and other Members shall not only be warned of the adoption of the standard[5], but given the opportunity to make comment regarding the application of the new standards.

A key clause of the TBT is Clause 2.8, which states that when examining a product, and setting technical regulations, the country imposing the regulation will look at the characteristics of the ultimate product not its production process. Analysing the production process rather than the product is called the "Production and Processing Method" ("PPM") and is not permitted under the WTO. This is because the WTO regards the use of PPM's as potentially being used by some countries as a trade barrier[6]. The PPM approach is of great significance when it comes to Living Modified Organisms, as they are referred to in the Protocol. Is genetic modification something impacting on the product or the production process or both? The answer is important because the capacity for a nation to stop an import based on the presence (or suspected presence) of an LMO, as permitted in the Protocol, would not be possible under the TBT Agreement if the LMO is regarded as nothing more than part of the production process. The fact that the Protocol would potentially remove this test is one of the ways the Protocol, as an MEA, undermines the WTO agreements.

In setting a particular standard, Members are justified in taking into account, without breaching their free trade obligations, domestic interests such as human, plant and animal safety, the protection of the environment, the prevention of deceptive practices and national security issues[7] providing they do so in a manner which is non discriminatory.

What is the Cartegena Protocol on Biosafety?

[4] Article 2 (2.1) TBT Agreement.
[5] Article 2 (2.9.2) TBT Agreement
[6] Phillips, P., & Kerr, W., *The WTO versus the Biosafety Protocol for Trade in Genetically Modified Organisms,* Journal of World Trade Vol. 34(4) page 63 at 70.
[7] Article 2 (2.2) TBT Agreement.

Studies have shown that there is a perception that genetically modified organisms ("GMOs") pose a risk to human health.[8] There is certainly some suggestion that the EU has adopted a "go slow" in the use of GMOs because of these concerns, although the fears could be allowed in ways other than the Protocol.[9] Runge and Jackson[10] summarise the key consumer concerns as:

1. GM food may have unknown long term consequences on human health;

2. The nature of the changes made to food via genetic engineering may spread from one type of food to another; and

3. The intellectual property rights attaching to each GMO is held by "gene giants", companies that can set their own price for the use of their seeds and make it difficult for people in less developed countries to obtain access to the seeds.

The Senate Standing Committee on Community Affairs' report, *A Cautionary Tale: Fish Don't Lay Tomatoes, a Report on the Gene Technology Bill 2000*[11] states that a further concern amongst farmers is that GMOs could contaminate traditional crops that have not been genetically manipulated and / or increase environmental damage through the increase in use in pesticide necessary in controlling the GM plant[12]. It is also conceivable that the GMO's, which may be created by the chemical companies in such a way so that they become dependent on their growth only with access to certain fertilisers, made by that company. Or that the seeds will only regenerate for a limited number of times, forcing the farmer to continually buy new seed.

Genetic engineering can take two forms, either transgenic modification (eg the insertion of fish gene in a potato) and non-transgenic modification which involves genetic engineering within the same species but is the deliberate selection of certain traits to be inserted into the DNA of an organism (eg locating the gene responsible

[8] Productivity Commission Report, *The Cartegena Protocol on Biosafety: Some Preliminary Observations,* 2000 quoting Dolling A and Peterson D, *Genetically Modified Products: a consumer choice framework,* Productivity Commission Staff Working Paper, Canberra, 2000.
[9] Kerr, W., *The Next Step will be Harder – WTO Agricultural Negotiations* in Journal of World Trade pg 129 at 136.
[10] For Runge and Lee Ann Jackson, *Labelling, Trade and Genetically Modified Organisms* in Journal of World Trade, Vol 34(1) 2000, pg: 111 at 112.
[11] Senate Standing Committee on Community Affairs, *A Cautionary Tale: Fish Don't Lay Tomatoes, a Report on the Gene Technology Bill 2000,* Canberra 2000, pg 17.
[12] Again, this appears an odd fear given that one of the key features of the GMO/LMO crops is to make them herbicide and insect resistant. These two qualities are bred into approximately 99% of GMO crops- Phillips, P., & Kerr, W., *The WTO versus the Biosafety Protocol for Trade in Genetically Modified Organisms,* Journal of World Trade 34(4) page 63.

for skin texture in tomatoes and then manipulating it so all tomatoes have a particular skin texture.) Importantly, the Protocol deals with LMO's and not genetically modified organisms or "GMOs".[13]

The Protocol is a crude attempt to allay the fears of environmental contamination by permitting nations to control the release of LMO's in their countries. The distinction between LMO and GMO's is necessary because it is only if the organism is living and has the capacity to re-generate that the concern arises. The GMO ingredient in, say, pasta, is not a concern. A "living modified organism, as defined in Article 3 of the Protocol is, "any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology." A LMO is the result of genetic engineering, which is the process of artificially combining genetic material to produce new varieties of plants and animals or to alter the characteristics of existing plants and animals[14].

The Protocol was welcomed by many environmental groups and the United Nations news service describes it as permitting countries importing "..Modified organisms an opportunity to assess the risks involving the products of modern biotechnology…establish strict "Advanced Information Agreement" procedures that will apply to seeds, live fish and other living modified organisms."[15] This paper is not designed to debate the merits of GMOs or LMOs, but to put their use in context, the United States has 2.57 million acres of GMO maize, soybeans and cotton crops, representing 28% of the total areas planted for those crops. 61% of the US cotton crop is thought to be GMO.[16] By contrast Australia has approximately 100,000 acres of GM crops[17]. Overall there are estimated to be over 500 genetically modified plant varieties currently available .[18]

The Protocol was developed at a conference of the parties to the 1992 CBD as it became increasingly clear that biotechnology was increasing. It is a protocol to the CBD with the stated objective of contributing to "..the safe transfer, handling, and use of living modified organisms resulting from modern biotechnology that may have

[13] Productivity Commission Report, n.83 pg: 3.
[14] *Fontana Dictionary of Modern Thought*, n.31.
[15] Quoted in the US Department of States Press Release titled *UNEP Statements on Biosafety Protocol*, 25 May 2000.
[16] Productivity Commission Report, *Industry Competitiveness: Trade & the Environment,* 1999, pg 4
[17] James, C., "Global Review of Commercialisation of Transgenic Crops 1998" in *International Service for the Acquisition of Agri-Biotech Applications*, Ithaca, NY, 1998 cited in Runge and Lee Ann Jackson, n.33, pg: 111 at 111.
[18] Runge and Lee Ann Jackson, n. 33, pg: 111 at 111.

adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focussing on transboundary movements."[19] The Protocol will come into force and can be capable of being relied on by each nation that has ratified it 90 days after at least 50 of them have ratified the Protocol. The Protocol was open for signing between 5 June 2000 and 4 June 2001. Although 104 countries signed the Protocol, (and Australia so far is not one of them), only Bulgaria, Fiji, Norway and Trinidad & Tobago ratified it.[20]

Australia signed the CBD on 5 June 1992 and ratified it on 18 June 1993. The significance of Australia ratifying the CBD is that it therefore had the right to participate in the forming of the Protocol and can sign it. The United States, by contrast, did not ratify the CBD[21], and consequently did not get to vote on the substance contained in the Protocol nor sign it.[22] To date the Australian Government has not ratified the treaty.

The Protocol is designed to deal with, "..the safe transfer, handling, and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focussing on transboundary movements."[23] It is perhaps an attempt to legitimise a practice the EU has already been adopting by imposing restrictive measure on the labelling of US GMO corn and soybeans[24]. The Preamble to the Protocol states:

> *"Recognising that trade and environment agreements should be mutually supportive with a view to achieving sustainable developments,*
>
> *" Emphasising that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,*
>
> *"Understanding that the above recital is not intended to subordinate this Protocol to other international agreements have agreed as follows…"*

The exact meaning of this Preamble, it is argued below, is more than just a little unclear, and it is suggested, one of the areas in which the Protocol, as an MEA,

[19] Article 1 "Objective" of the Protocol.
[20] Convention on Biological Diversity Secretariat 2000 (www.biodiv.org/biosafe/protocol/signinglist.asp) as at 22 June 2001.
[21] For the United States to ratify an international treaty two thirds of its Senate must agree.
[22] Smith, F., *The Biosafety Protocol: The Real Losers are the Developing Countries*, pg 3.
[23] Article 1 "Objective" of the Protocol.

undercuts or at least confuses the role of the WTO's trade liberalisation agreements. This is perhaps the key reason the Australian Government should not enter the Agreement and is discussed below in detail. Article 2(4) states:

> *"Nothing in this Protocol shall be interpreted as restricting the right of a Party to take action that is more protective of the conservation and sustainable use of biological diversity than that called for in this Protocol, provided that such action is consistent with the objective and the provisions of this Protocol and is in accordance with its other obligations under international law."*

Article 2(4) is particularly significant in terms of the relationship between the Protocol and the WTO. The scope of the Protocol is that it is to apply in circumstances where LMO's are moving across international boundaries and may have adverse effects on the conservation of human health and biological diversity in the importing country.[25] However, it is not to apply to pharmaceuticals[26] or when the LMO's are simply in transit or to be used in some form of "contained use".[27]

A distinction is made within the Protocol between LMO's designed to be released into the environment ("LMO-E") and LMO's that are to be used in food, feed or processing[28], ("LMO-FFP"). The significance of the distinction is that risk assessment for LMO-FFP is not required, therefore, they can be imported providing they meet the importers' own domestic regulatory regime and provides those domestic laws are consistent with the Protocol. [29] By contrast, LMO-E's are assessed for the risks to human health. The distinction is not explained.

Articles 7, 8, 9 and 10 of the Protocol, would regulate lMO-Es. The country importing the LMO-E is to be notified of this potential importation by the exporter on the first occasion of the goods transboundary movement into the importer country.[30] The next step is for the importing country to decide whether it will allow the goods into its jurisdiction.[31] The importing nation then has the option of either prohibiting the goods imports completely, request additional information about the goods or create certain conditions under which the good may be imported on that first occasion and for

[24] Pruzin, D. *US Submits Paper to WTO Citing Increase in Biotechnology Restrictions*, 27 June 2000, www.biotech-info.net.
[25] Article 4 of the Protocol.
[26] Article 5 of the Protocol.
[27] Article 6 of the Protocol.
[28] Article 7(2) of the Protocol.
[29] Article 11(4) of the Protocol.
[30] Articles 7(1) and 8(1) of the Protocol.

subsequent occasions. Failure of the importing nation to inform the prospective exporter of its decision within the required 270 days should not be construed as acquiescence on the part of the importer[32]. This approach is the "Advance Informed Agreement" and is subject to review where an exporter, whose goods may have been prohibited, considers new material has come to light that may effect the ban.[33]

Article 11 of the Protocol controls lMO-FFPs. The three-step approach to the import of an LMO-FFP is similar to that of an LMO-E, but with two key differences. When assessing the risks associated with LMO's to be used in food, feed or processing, the importing country is able to assess the goods against their own domestic regulatory regime, providing those laws are consistent with the Protocol[34] as opposed to the LMO-E which is to be released into the environment where there appears to be no measure by which the right to restrict their release and use is measured. Again, the distinction between the two is not explained. The only exception to this approach is if the importer describes itself as a "developing country Party or a Party with an economy in transition"[35] in which case the Risk Assessment procedure must take place. In the absence of that, the decision not to allow the import of the produce is based purely on the domestic importer's domestic approach to LMO-FFPs. The second difference is that the rejection of an LMO-E can be reviewed pursuant to Article 12; such an option does not exist for LMO-FFPs.

Of critical importance for the overall debate surrounding the Protocol is the fact that an importing countries decision to prohibit the import of either form of LMO does not necessarily have to be based on scientific certainty regarding the possible problems of the LMO. In perhaps the most controversial Article of the Protocol, and the one which shows the embodiment of the precautionary principle, the Protocol states at Articles 10(6) (in relation to LMO-Es) and 11(8) (in relation to LMO-FFPs):

> *"Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in*

[31] Article 10 of the Protocol.
[32] Article 10(5) of the Protocol.
[33] Article 12(1) of the Protocol.
[34] Article 11(4) of the Protocol.
[35] Article 11(6) of the Protocol."

> *question as referred to in paragraph 3 above, in order to avoid or minimise such potential adverse effects."*

The Protocol's preamble specifically refers to the "precautionary approach". Critics of the precautionary approach, or as it is more commonly know, the precautionary principle, argue it is a concept which stultifies technological progress[36], but this is an overly simplistic response. The precautionary principle is not a new concept. The US "Delaney Clause" dealing with the use of pesticide residue in food was passed in 1958 and referred to the need to take a "precautionary approach"[37] and the World Charter for Nature adopted by the United Nations General Assembly in 1982 also used the term.[38] The *Basel Convention on the Transboundary Movement of Hazardous Waste* also uses the concept. In terms of really putting the precautionary principle at the centre of environmental issues was its adoption at Article 15 of the CBD, that states:

> *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental harm."*

It is submitted that the "precautionary principle" is a concept rather than a scientific approach. It is a measure that appears sensible. It is based on the premise that Governments should protect human, animal and plant health and from that point justifies a State doing what ever is necessary to protect its environment, even in cases where the exact threat is not defined. It is a pro-active approach to environmental protection. The problem is not so much the concept itself, but how the Protocol attempts to use it, which is as a benchmark for the trade of LMOs.

The conflict between the Protocol and the World Trade Organisation – reasons why Government must be careful before ratifying new treaties

(a) Ambiguity of precedence between the Protocol on Biosafety & the World Trade Organisation

[36] Julian Morris, Focus on the Precautionary Principle in Institute of Public Affairs Review, Vol. 53 No. 1, March 2001 pg 9.
[37] Appell, D, *"The New Uncertainty Principle"* Scientific American, January 2001
[38] Smith, Frances, *The Biosafety Protocol: The Real Losers are the Developing Countries,* n.97, pg 14.

There are several substantial problems with the Protocol, both from a technical drafting perspective and in terms of how a treaty supposedly dealing with the transboundary movement of LMOs can undermine the complex trade relationships and rules of the WTO.

As noted above, the WTO's role is to be the pre-imminent international trade law. It is submitted that the ratification of the Protocol by the Australian Government would not only compromise the WTO's capacity to facilitate free trade, but could signal at the least a cessation of trade liberalisation and at worst, the movement back to trade protection. It is a classic case of an MEA, with perhaps laudable goals, undermining a trade treaty. In contrast to CITES or the *Basel Convention on the Transboundary Movement of Hazardous Waste* it does not actually stop trade of a particular good. Unlike endangered species or hazardous waste, the trade of LMOs is not something that enough people can get passionate about to bring their trade to a complete halt. The Protocol however purports to gives nations the capacity to protect their animals and plants and humans from the unknown consequences of LMOs. The problem is not the goal, but that the existing trade regime detailed above can achieve this goal within the parameters of a functioning trading system. Should the Protocol come into force, it has the potential to undermine the existing agricultural trade regime as created by the WTO.

The ambiguity lies in the Protocol's preamble. The preamble is unclear in defining the Protocol's relationship with the WTO trading regime and its agreements such as GATT and the SPS and TBT Agreements. The interpretation of international treaties and their interaction with one another are analysed according to the principles set out in the VCLT which was settled in Vienna on 23 May 1969 and which came into force in Australia on 27 January 1980.

Article 30(2) of the VCLT demonstrates a realisation that over time nations will enter into successive treaties on the same subject matter and that the treaties can define their role in relation to one another, either being subject to an existing treaty's rules or one that is expected to be entered into. This way the parties can therefore read the treaty in the context of existing international law and understand just what has changed. The problem for any form of statutory interpretation, which this essentially is, is how a new treaty is reconciled with an existing one when the new does not clearly define the relationship. Which takes precedence? Unlike domestic law, it is not a matter of simply repealing existing law.

Ideally the “new” treaty will contain a clause which clearly defines its relationship with other treaties dealing with that issue, for example Article 311(1) of the United Nations Convention of the Law of the Sea which explicitly states that it is to take precedence over the 1958 Geneva Conventions on the Law of the Sea. Similarly, the CBD at Article 22(1) which states that it will not effect the rights and obligations of any contracting party except where the exercise of those rights and obligations would harm biological diversity. The Protocol makes reference to existing treaties but it does not clarify its status.

The Protocol’s Preamble uses phrases that dismally fail to establish the relationship between the Protocol and other treaties. On the one hand the Protocol states: “..*that trade and environment agreements should be mutually supportive with a view to achieving sustainable developments...”* Such a phrase of itself may be a meaningless platitude or it could be significant, requiring the Protocol to be given the same status as the WTO’s trade treaties when disputes arise. For free traders, this is hardly a positive way to open the Protocol. However, a free trader’s concern may be diminished upon reading: “..*that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements.”* Based on that phrase, the Protocol will not alter any existing rights or obligations between states under any existing agreements.

Such a statement could be interpreted as supporting the *status quo* had the preamble not continued with the words: *“Understanding that the above recital is not intended to subordinate this Protocol to other international agreements have agreed as follows…”* That is the phrase that creates the uncertainty regarding the hierarchy of the two international treaties and their interpretation and, it is submitted, undermines the WTO’s trade liberalisation agenda if the Protocol was ratified internationally.

Article 30(3) of the VCLT states that where the same parties to a treaty enter a new treaty on the same subject matter, without terminating or suspending the earlier treaty, the later takes precedence and the earlier treaty only applies to the extent that it is not incompatible with the new one[39].

[39] It should be noted that Article 59 of the Vienna Convention is also relevant because it states that where a second treaty is entered some time after the first treaty, then the first is considered to have been superseded to the extent that it is incompatible with the second, but only if “..all the parties to it [the first treaty] conclude the second.

Although Article 30(3) begins with the words, “When all the parties to the earlier treaty are parties also to the later treaty…” this does not mean that the later treaty only prevails if every single nation has signed both treaties. Article 30(4)(a) makes this clear. Consequently, if Australia signed the Protocol, at first glance there may be the thought that because the United States cannot sign the Protocol (and therefore not all parties are parties also to the later treaty), its objectives will not come into effect and the WTO’s regulations still cover the field. Article 30(4) states that when the parties to the later treaty do not include all the parties to the earlier one, then the treaties to which both are signatories govern the relationship.

It is submitted that if Australia signed the Protocol, then whenever Australia had a dispute with another signatory to the Protocol, for example over market access for some soy beans, the Protocol would take precedence, not the WTO SPS or TBT Agreements or Article XX of GATT. Conversely, the United States, which cannot sign the Protocol, gets the benefit of Article 30(4)(b) which states that where one nation is a signatory to both treaties and another nation is only signatory to one (in this instance the WTO) the treaty to which both states are a party governs their mutual rights and obligations. By signing the Protocol Australia throws away the substantial benefits that exist through GATT Article XX, the SPS and TBT, while its second biggest trading partner gains the benefit of not being subject to the Protocols restriction, potentially picks up Australia’s slice of any given market.

(b) No clear dispute resolution processes

The Protocol’s subject matter of itself conflicts with the SPS Agreement as both deal with LMOs. Immediately there is conflict between the MEA, as expressed by the Protocol, and a trade treaty. One of the potential areas for dispute under the Protocol is via its use of the precautionary principle. Under the Protocol’s approach the mere suspicion of a contamination is sufficient to halt trade. Under the WTO, “mere suspicion” is insufficient to halt trade for more than the “reasonable time” necessary to undertake proper scientific analyses – Article 5(7) of the SPS and Article 5 of the TBT. Without a proper dispute settlement procedure in place there is no mechanism to challenge the ruling. This is an example of why the Protocol will affect trade in a way that contravenes and undermines the goals of the WTO.

As the precautionary principle is a concept rather than a scientific approach, how does once challenge the conclusions reached by parties adopting it? Under the WTO

approach, a scientific criteria is necessary in order to justify halting imports under the SPS. Article 2(3) of the SPS states members have the right to take any steps necessary to protect human, animal or plant life or health providing they are based on scientific evidence and

> "*Do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail…Sanitary and Phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."*

The use of the "precautionary principle" as the measure by which the importation of LMOs can be stopped is therefore of great significance and there must be a mechanism to deal with it. In contrast to the approach established via the Dispute Settlement Understanding of the WTO the Protocol has no satisfactory dispute settlement process. It is submitted that if the Protocol was to be more than simply an arbitrary means by which an import could be stopped then the Protocol would contain a detailed system enabling disputes to be resolved either as some form of quasi judicial system and / or by proscribing remedies. At Article 27 of the Protocol states:

> *"..adopt[ing] a process with respect to the appropriate elaboration of international rules and procedures in the filed of liability and redress for damage resulting from transboundary movements of LMO's, analysing and taking due account of the ongoing processes in international law on these matters."*

Article 27 appears to suggest that countries that suffer "damage" from the movement across their borders will be entitled to some form of reparation. Just examining this clause from the perspective of legal drafting it has severe problems. The concept of damage is not defined (literally damage in terms of destroying other crops and income? Or damage in terms of the socio-economic factors referred to at Article 26?) "Transboundary movement" is also left undefined and unexplained. Does the Article mean only transboundary movement either deliberate importation or also by the natural elements such as wind or water or of course by wildlife.

Article 27 also fails to examine how the cause of the damage would be traced. If you cannot do this, how do you establish who to recover damages from? Assuming it could be, does it extend to damage caused by wind blowing LMO's across borders? If so, does the country where the LMO originated automatically become liable for damage? The Article is also deficient in that while paying attention to the "..ongoing processes" of international law on "these matters" why is no mention made of the

pre-existing international law and forums dealing with dispute resolution, if not the WTO, the International Court of Justice?

It is submitted that Article 27 is a token attempt to demonstrate some kind of process exists whereby nations ignoring the Protocol can be brought into line, but its goals lack clarity and no attempt is made to define the parameters of what the section is trying to achieve. It is surely unrealistic to expect trading nations to ratify a treaty that can have significant impacts on the trade of LMO's and that does not tie itself in to the pre-existing trade resolution provisions of the WTO. To merely promise at some point in the future to establish procedures for liability and redress is unsatisfactory and undermines the WTO trade resolution process.

Recent examples of disputes heard by the DSB involve the export of Australian beef to Korea; the export of Australian and New Zealand lamb to the United States and the importation of Canadian salmon into Australia. These cases illustrate how the DSU of the WTO are effective in assessing nations claims to protect their domestic industries and make rulings that nations accept, even if they do so reluctantly. "Acceptance", it should be noted, does not always mean removing trade barriers. It may simply mean being prepared to accept the successful nation levying retaliatory tariffs on the unsuccessful nation's goods.

One of the greatest problems Australia would face, should it sign the Protocol, is that whenever it comes into dispute with another party to the Protocol, it may be the Protocol that governs the dispute settlement. This is because, again referring to the VCLT's interpretation of treaties, by ratifying the Protocol more recently than ratifying the WTO agreements, it can be interpreted that the parties wish to be bound by its terms of dispute settlement, a process that is not designed for trade disputes. However, a party that has not ratified the Protocol can still draw on the WTO process, even where the other party has ratified both the WTO and DSB. [40]. This is potentially a great bonus for the United States because it is not in a position to sign the Protocol and will therefore unlikely suffer at the hands of its arbitrary import restrictions and non-existent dispute resolution scheme.

If two parties to both the WTO and the Protocol took a dispute involving LMOs to the WTO's DSB it is unclear how the DSB would resolve the dispute. The VCLT would

[40] Cors, T.A – "*Biosafety & International Trade: Conflict or Convergence?"* discussion paper, Centre for International Development, pg 1.

suggest the Protocol's reliance on the precautionary principle rather than the SPS or TBT Agreements would be justified in halting trade of LMOs because of Article 30 of the VCLT. The point is probably theoretical in that a dispute involving the Protocol is outside the jurisdiction of the DSB.

(c) Environmental protection is not enhanced

The Protocol, despite being an MEA, is really a failure as an environmental treaty because its most important aspect, the application of the precautionary principle to the trade in LMO's, is not defined. The problems this creates for an MEA is that with the lack of an agreed version of the principle in international law it is impossible to have it applied in a uniform manner across the world. This means that while one country may adopt a stringent approach to the transboundary movement of LMOs, its neighbour may not, and LMOs may shift countries by accident, "damaging" both environments. The Protocol would be a better environmental treaty if it adopted a scientific and testable process, which could assess levels of danger and try and control the risks more appropriately.

The Protocol, it is submitted, puts Australia's export markets at risk by using the precautionary principle rather than "risk based" science, relying on the OIE and Codex institutions that are in the position of making impartial decisions. Consequently, a substantial problem with the Protocol is that it lacks credibility. The precautionary principle is not scientific, so it cannot seriously be used by the Protocol as a standard against which scientific decisions are made. Page 1 of the Protocol "reaffirmed" the use of the precautionary principle, as does Article 1. This is akin to a legislator thinking that a new piece of legislation is needed to govern, for example, e-commerce, then before the Bill can be drafted let alone debated and passed, a court is already making findings based on it.

The use of the precautionary principle in the Protocol is a direct contradiction to the scientific criteria used in order to justify the cessation of imports under the Agreement on SPS which states at Article 2 (3) that members have the right to take any steps necessary to protect human, animal or plant life or health providing they are based on scientific evidence. The recent US / EU *Beef Hormone Case* (2001)[41] is evidence that the WTO Appellate Body does not recognise the precautionary principle as a

justification for stopping the importation of a product or that it is part of customary international law.[42]

The Global Crop Protection Foundation[43] ("GCPF") represents the agricultural interests that stand to lose the most should the Protocol come into force. Its comments should be read from that perspective and although its March 2000 position paper on the Precautionary Principle does not make any mention of the Protocol by name (despite being published at the same time the Protocol was being signed) it is clearly aimed at the Protocol and what it regards as its problems. The GCPF argues the lack of an agreed definition of when the precautionary principle is relevant and the criteria used to determine whether something does have "scientific uncertainty" is a real concern, giving rise to abuse and undesirable results. The GCPF considers the Precautionary Principle could hinder scientific and technological progress in preference for considerations toward political and emotional factors. It states the Precautionary Principle can create:

> *"..disguised trade restrictions and obstacles to the free movement of goods. Given such potential negative effects of the "Precautionary Principle," it is imperative to ensure that a precautionary approach is defined and applied in an appropriate and consistent manner. The absence of generally accepted guidelines for the application of a precautionary approach needs to be remedied. In this regard, a consensus on the interpretation of a precautionary approach as such and the conditions for its application should be urgently established, preferably at international level. The new trade round indeed offers an opportunity to make the international trade system more responsive to legitimate environmental and human health concerns."*[44]

The Protocol gives States far wider and essentially arbitrary powers to restrict the imports of LMO's without scientific justification, something that could not occur under the WTO regime. This does not protect the environment of the importing states because if there were genuine concerns with the environmental consequences of the use of LMOs, the existing WTO provisions could be used. As Kerr states[45], if

[41] WT/DS26/ARB
[42] Cors, T.A – "*Biosafety & International Trade: Conflict or Convergence?"* n.115 pg 2..
[43] The Global Crop Protection Federation represents the agricultural producers involved GMO in Africa/Middle East, Asia-Pacific, Europe, Japan, Latin America and North America, allegedly covering approximately 90% of the world's research-based Crop Protection Industry in more 73 countries.
[44] *"Australia's Relationship with the World Trade Organisation",* Department of Foreign Affairs and Trade, Canberra, September 2000, page 82.
[45] Kerr, W., *The Next Step will be Harder – WTO Agricultural Negotiations* in Journal of World Trade page 129 at 138.

implemented the Protocol could have considerable ramifications for the trade in agricultural goods, yet not be subject to the WTO dispute mechanism and broader WTO principles. This is absolutely critical and for this reason alone the Protocol should not be adopted. There is no standard definition of "environmental degradation" but the account of the precautionary principle in paragraphs 10.6 and 11.8 of the Protocol refers the "potential adverse effects" of a living modified organism. This is so open-ended as to be meaningless. The risk the party applying the Protocol is assessing is the likelihood of adverse effects on "conservation or sustainable use of biodiversity". Again, the terms are not defined in the Protocol. As it presently appears, the Protocol's vague drafting and inconsistent provisions could allow it to be used as a way of controlling international trade and undermining Australian producers' goal of the liberalisation of agricultural products. The Department of Foreign Affairs and Trade states:

> *"Australia believes that the WTO Rules provide an appropriate framework for managing international trade in products of biotechnology. For Australia, a key issue is that trade restricting measures adopted by countries to manage trade in biotechnology products should adhere to a risk-based approach based on science…*
>
> *"Australia has an interest in these issues as both a developer and user of biotechnology products and processes…it is in Australia's interests that other countries not arbitrarily impose regulations or requirements in ways that would damage our market access for agri-food exports. Maintaining open market for biotechnology products while protecting human health and the environment from any risks associated with biotechnology is a particular challenge for Governments."*
>
> *" While Australia supports appropriate use of the Precautionary Principle we are concerned that some countries are seeking to misuse it…the EC's approach risks undermining the scientific basis for analysing and managing risks to human, animal and plant life or health which underpins the WTO SPS and TBT Agreements. It also risks the imposition of unjustified trade barriers that could put at risk Australia's agricultural and food trade and increase the potential for conflict between national policies and other international commitments, including WTO Agreements."*[46]

[46] *"Australia's Relationship with the World Trade Organisation",* Department of Foreign Affairs and Trade, Canberra, September 2000, page 80.

Despite much of the bad press the WTO receives regarding its handling of environmental issues, the evidence necessarily support this. The *Tuna-Dolphin II* (1994)[47] case dealing with the US *Marine Mammal Protection Act* 1972 is an example of the US Government attempting to reduce the incidental killing of dolphins in the harvesting of tuna. The US Government attempted to do this by banning imports of all yellow fin tuna into the US from nations that did not use the US state-of-the-art tuna harvesting techniques. The case heard before the WTO's DSB was created, and the GATT Dispute Settlement Panel instead heard that. The Panel held the US Government reliance on Articles XX (b) and (g) of GATT was unjustified – not because it did not support the goal, but, like the *Shrimp Case* referred to above, because in the panel's view, it was simply the US attempting to force other nations, to adopt different practices, and was in effect protecting its own established industry. That is the key question. If nations are concerned about LMO importation and the protection of their environment, the existing SPS Agreement and GATT XX can be used. The Protocol merely offers the right to stop imports, based on the speculation of a possible problem and with disregard to trade laws.

(d) Onerous labelling Requirements

The TBT clearly sets out the cost benefit analyses that must be carried out before a nation can impose on an exporter certain labelling requirements on their products. Article 18 of the Protocol, states that packaging for goods crossing international boundaries must take into account whether the goods contain LMOs. No mention is made of whether the benefits this brings to the consumer outweighs the cost for the producer, which is a requirement pursuant to Article 2.2 of the TBT Agreement . Of course an exporter having to disclose the fact that his or her product "may contain LMO"[48] could do it enormous harm from a sales perspective, particularly if there are actually no LMOs and it is simply noted to satisfy the precautionary principle. Secondly, the requirement for labelling whether a product "may contain" a LMO enters into the grey area of whether the use of an LMO is part of the PPM. If the LMO is a characteristic of the ultimate product, then according to the WTO Agreements it

[47] GATT Doc Ds29/ R June 1999, United States – Restrictions on the Import of Tuna.
[48] Article 18(2)(a) of the Protocol.

can be labelled, but not if the LMO is simply part of the production process.[49] These are, it is submitted, further examples of how the Protocol could undermine the WTO trade liberalisation agenda.

(e) "Social" indicators as a basis for allowing certain imports

If the precautionary principle is insufficient to halt the import of the product, then Article 26 will do the trick. Article 26(1) states:

> *"The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities".*

It is not clear what "socio-economic factors" are, nor why they should be considered in a treaty allegedly dealing with an environmental issue. It is almost unclear how LMO's are thought to be a threat. Smith suggests this provision is targeted at developing countries[50] however, it can be applied more broadly than that.

Although Article 26 notes the application of the "social" criteria is to be consistent with the States other international obligations, given that the hierarchy between the Protocol and the WTO is uncertain, it is arguable that the State's trade liberalisation obligations are of secondary importance. For example, a certain grade of wheat containing an LMO is imported into a country. That country already produces its own equivalent grain. The imported wheat is more popular and consequently sales of the domestic equivalent fall, leading to a lowering of profits and employment for the domestic producer. Pursuant to Article 26 it is possible for the importing nation to stop the importation of the LMO on the basis that it is having adverse socio-economic consequences. While this is also possible under the WTO, it is only possible for a limited time[51]. Because the Protocol has been entered after the WTO Agreements, on one view of the VCLT, the treaty entered later in times always takes precedence,

[49] Phillips, Peter & Kerr, William, *The WTO versus the Biosafety Protocol for Trade in Genetically Modified Organisms,* Journal of World Trade 34(4) pg 63 at 70.
[50] Smith, F., *The Biosafety Protocol: The Real Losers are the Developing Countries,* n.97 page 27.
[51] Article 21 WTO Agreement on Subsidies and Countervailing Measures.

therefore, the social factors can be used to protect domestic industries from LMO's, cutting directly across a policy of the WTO.

In any event, the existing WTO regime allows for social considerations to be taken into account pursuant to the Agreement on Safeguards. Article 2 of the Agreement on Safeguards states that a nation may apply safeguard measures where a product which is being imported causes or threatens to cause serious injury to the domestic industry that producers like or directly competitive products. "Serious injury" is defined as a significant impairment to the domestic economy[52]. The purpose of this agreement is to allow economies, for example in the lesser-developed world, which may be swamped with the cheap import of some product they had previously been making domestically, to slow the importation to give their economy time to readjust. Unlike the Protocol, the Agreement on Safeguards and the measures taken in its name will only be applied, "..for such period of time necessary to prevent or remedy serious injury and to facilitate adjustment."[53] And again in contrast to the Protocol, decisions pursuant to the Agreement on Safeguards are reviewable by the DSB.[54]

Article 19 of the GATT, entitled "Emergency Action on Imports of Particular Products", also permits member nations who suffer "unforseen developments" threatening or injuring their domestic industry as a consequence of the trade liberalisation obligations of the GATT and WTO to take protective action. The protective action takes the form of suspending the GATT free trade obligations, wholly or in part, but as with the provisions of the Agreement of Safeguards, only until such time that domestic industry can either be relocated to other sources of employment or become more competitive. The use of the safeguard is possible, but it must still be justifiable in that it must be a genuine attempt to slow imports so that local industry can re-orientate itself and it is challengeable via the DSB of the WTO. There is jurisprudence about what constitutes "serious injury" and "unforseen consequences" and of course, how long the trade liberalisation obligations can be modified.[55]

The point is not whether safeguard provisions are always employed successfully by the nations wishing to rely on them, but rather that they exist at all. The WTO

[52] Article 4(a) of the Agreement on Safeguards.
[53] Article 7(1) of the Agreement on Safeguards.
[54] Article 14 of the Agreement on Safeguards.

Agreements, both the GATT and the specific Agreement on Safeguards, are there to protect domestic industry which suffer from an immediate impact on the adoption of trade liberalisation. The Protocol attempts to incorporate social concerns to do with the importation of LMOs and their impact on the environment. It is submitted that avenues already exist under the WTO to justify the cessation of LMO importation if its impact is having a negative impact on domestic industry. In any event, as Phillips and Kerr state, it appears somewhat incongruous to have a treaty dealing with biotechnology, which also deals with socio-economic issues.[56]

(f) Creates a bias in favour of importers

As noted above, under the Protocol a nation importing LMO's has the option of either prohibiting the import of the goods completely or requesting additional information about the goods or create certain conditions under which the good may be imported on that first occasion and for subsequent occasions. The decision making process for deciding whether an LMO-E is "acceptable" has not been defined,[57] and the use of existing expertise in relation to the risks associated with any LMO-E's is only "encouraged" not mandatory.[58] This clearly goes against the scientific basis for decision making under the SPS Agreement and its use of the international scientific organisations such as Codex and the OIE. Science is no barrier to the Protocol[59].

The risk assessment procedure outlined in Articles 15 and Annexure II of the Protocol also reinforces this position. Clause 4 of Annexure II states that the lack of scientific certainty, or "consensus", should not necessarily be interpreted as indicating a particular level of risk or security.[60] Article 15 states that risk assessments are to be undertaken in a scientifically sound manner, but there is no requirement that the importing nation undertake this testing. There is also no reference as to who bears the onus of proof between importer and exporter, nor the cost for carrying out the procedure. Of critical importance is the fact that although risk assessments are carried out, there is no obligation on the importing nation to be

[55] Jackson, J. *Safeguard and Adjustment Policies* in *The World Trading System: Law & Policy of International Economic Relations*,1997 reproduced in University of Sydney's International Trade Regulation Materials Vol II, 1999, pg 675 at 682.
[56] Phillips, Peter & Kerr, William, *The WTO versus the Biosafety Protocol for Trade in Genetically Modified Organisms,* Journal of World Trade 34(4) pg 63 at 73.
[57] Article 10(7) of the Protocol.
[58] Article 2(5) of the Protocol.
[59] Article 10(6) of the Protocol.

bound by the results on any risk assessment. This is because of the overriding presence of the precautionary principle, as enshrined at Articles 10(6) and 11(8).

Article 12.1 of the Protocol allows the party of import to change its decisions regarding the importation of a particular good in the light of new and potentially adverse scientific data. Again, it is a decision that although requiring reasons, cannot be challenged.

This approach completely undercuts the strict requirements imposed by Articles 2.2 of the SPS Agreement and its requirement that action only be applied to the extent necessary to protect human health and not maintained where there is no scientific justification for doing so. The precautionary principle obviously goes further than this is clearly undercutting the WTO. The importer also has the power under Article 2.4 of the Protocol not to just to stop the importation of an LMO but to take any action that they deem justifiable to protect their nations biodiversity in accordance with the nations other international law obligations. The preservation of biodiversity is obviously critical, but such a provision provides the importing nation with unfettered power to stop the trade of a particular good and in the absence of a clear dispute mechanism or risk assessment procedure, it is done with immunity.

The Precautionary Principle obviously underlies all of this. Consequently it is worth revisiting the use of the term at Article 15 of the CBD which states the precautionary principle is justified, " Where there are threats of serious or irreversible damage." It is submitted that the use of the term in the Protocol goes beyond that criteria of "threats of serious or irreversible damage" and has instead inverted the proposition to be – unless you can show nothing can go wrong, we are not going to trust it. Not only is this a breach of the WTO approach to trade, it runs contrary to the scientific principles of reasoning put forward, and widely accepted, by Prof. Karl Popper. Popper's theory of "falsifiability" was that something was true (for example, LMO's are harmless) until there was an example proving the statement could be false (for example, the LMOs contaminated other species of plants) and that although the initial statement can never be given more than conditional acceptance, it should be accepted until it could be contradicted[61]. The precautionary principle starts at the opposite end, assuming that the LMO is potentially dangerous and then proceeds to expect its proponents to disprove all possible problems.

[60] Article 15(2) of the Protocol.

(g) Relationship with Non-members

Contrary to the manner in which the WTO agreements operate, and other international law, the Protocol attempts to dictate the terms upon which even non-member states behave, albeit limited to the transboundary movement of LMOs. Article 24(1) of the Protocol states, apparently innocuously, that LMO movements, *" between parties and non-parties shall be consistent with the objectives of this Protocol."* Article 24(2) states that "non parties" will be encouraged to participate in the Protocol's regulatory regime.

Proponents of the Protocol may argue that because of the Protocol's environmental nature it is ineffective if neighbouring countries do not accede to it. However, such a measure is not justifiable as a matter of law. Article 34 of the VCLT clearly states that a treaty between two countries cannot create obligations or rights for non-parties without the other party's consent, though conceivably it could occur as part of customary international law. If one area of international law was to develop in such a way so as to make non-parties to treaty behave in certain ways; it would be the environmental area, because all nations are impacted by the environment. As it will not legally be possible to bind non-parties to the treaty the "encouragement" which may be adopted in order to have the Protocol's goals followed may be anti-trade. For example, a signatory may reject another countries LMO-E goods because there is a perceived risk, however, this may simply be a justification for halting trade until the other nation signs the treaty.

Contrasting Article 24 of the Protocol with the WTO agreements is quite stark. As discussed in relation to the *Shrimp Case*, one nation cannot create a policy, irrespective of motive, and then, in effect, require other nations to adopt the same policy, and failing to do so create a barrier to its trade. Similarly, in the *Tuna II Case*[62], dealing with the application of GATT XX, that the Article could not be interpreted in such a way so as to allow some member states to impose their own domestic policy (on the environment or anything else) on other nations, threatening

[61] *Fontana Dictionary of Modern Thought,* n.31
[62] General Agreement on Tariffs & Trade: Dispute Settlement Panel Report on US Restrictions on Imports of Tuna, 1994.

trade barriers if the other nation did not toe the line.[63] The Protocol not only does not make similar provisions, respecting each nations sovereignty, but encourages members to impose their standards elsewhere. This is contrary to the WTO legal framework and undermines its goal of promoting trade liberalisation and removing distortions to free trade.

What should Australia do?

The WTO offers a unique set of international laws covering trade, not only an area of great significance today, but also perhaps the very activity that has driven civilisation. This paper does not dispute the need for MEAs, but rather it questions how they are used, the manner in which compliance has been sought by countries and the motivations for entering MEAs.

From a political and economic perspective if Australia is to maintain it current, positive relationship with the WTO and continue to attempt to use the WTO as a means by which agricultural protection in the EU, Japan and the US be minimised, MEA's which threaten the WTO's trade liberalisation role must be avoided.

Superficially the Protocol appears to be a relatively benign, environmental treaty, tackling the issue of genetically modified organisms. However, as discussed above, it does so in a way that is contrary to the existing international law governing free trade, and the manner in which free trade is promoted. The adoption of the Protocol will erode the SPS and TBT agreements and undermine the GATT. It is also submitted that the Protocol's use of the precautionary principle is inconsistent with current international law with respect to risk assessment.

Australia must consider the potential problems that arise when signing new international treaties to ensure they do not impact on the international rights and obligations that currently exist under the WTO. If the Protocol was signed and ratified by Australia it has the potential to undermine the hard won (though still relatively small) benefits that the WTO has created for Australian agricultural producers.

[63] General Agreement on Tariffs & Trade: Dispute Settlement Panel Report on US Restrictions on Imports of Tuna, 1994, paragraph 5.26.