Australian Council for Overseas Aid

SUBMISSION TO

THE JOINT STANDING COMMITTEE ON TREATIES

PARLIAMENTARY INQUIRY INTO

Australia's Relationship with the World Trade Organisation

October 2000

Australian Council for Overseas Aid

Private Bag 3 DEAKIN ACT 2600 02 6285 1816 ph. 02 6285 1720 fax

acfoa@acfoa.asn.au www.acfoa.asn.au

ACFOA is the co-ordinating body for over 90 Australian non government organisations working in the field of overseas aid and development

CONTENTS

ACKNOWLEDGEMENTS

ACFOA would like to acknowledge the input into this submission of all ACFOA member agencies and to the following individuals in particular:

Alan Griffiths, Research Officer,
Deakin University
Jagjit Plahe, Policy and Campaigns Officer,
World Vision Australia
Jane Hearn, Human Rights Advocacy Officer,
ACFOA
Jim Redden, Policy Director, ACFOA
and Editor of the submission

ACFOA would also like to thank Kerrie Griffin and Doreen De Silva for layout and administratve support.

EXECUTIVE SUMMARY

ACFOA welcomes this inquiry. It comes at a time of growing public concern about the impact of global institutions on patterns of wealth distribution and their role in national decision making.

ACFOA members work daily with the victims of worsening global inequality and poverty and seek to work constructively with the Australian Government to achieve a more equitable and accountable global trading system..

While increased trading opportunities may be beneficial to developing countries the inequitable impact of trade liberalisation has frequently undermined the credibility and legitimacy of multilateral institutions like the World Trade Organisation (WTO). The WTO is central to the international trade architecture and as such has become the target of serious criticism by communities in both developed and developing countries.

There is growing concern throughout the Australian community and internationally that to date the (WTO) has mainly pursued those agreements which protect the interests of global corporations and the powerful developed countries. This agenda has been implemented at the expense of economically poorer countries and disadvantaged communities in all societies. Our submission provides clear evidence of WTO agreements which have further exaccerbated the widening wealth poverty gap.

ACFOA strongly supports a multilateral rules based trading system to counter the vagaries of unbridled market led growth as well as the uncompetitive practices of global corporations. Multilateral trading rules that create a fairer playing field and a more equitable distribution of the benefits of global trade are highly desirable.

ACFOA therefore believes that substantial reforms need to be made to the WTO's organisational structure, its decision-making processes and certain trade agreements. Without substantial reform, public protests in both developed and developing countries will continue to intensify and may encourage a return to forms of protectionism that would not be in the interest of developing countries or Australia.

Australia's strategic location as a medium sized trading partner in the Asia Pacific region binds our own national interest with that of the region's requiring Australia to work closely in the interest of our neighbours. ACFOA believes that in its relations with the WTO, Australia has a vital role to play in advancing the concerns of disadvantaged communities, developing countries and a progressive reform agenda for the WTO.

To achieve public legitimacy the structures and procedures of the WTO must be based on principles which demonstrate a commitment by the international community to fairness and equality. Formal equality of status of national states in international fora masks the inherent inequality between development and developing nations. Many developing nations lack the capacity to fully and effectively participate in international fora to represent their national interests. Nor do they have the capacity to implement their obligations or represent their interests if drawn into a dispute.

The Australian Government has a responsibility to its own citizens to represent the national interest. However Australia, as a nation, has a responsibility under the UN Charter to foster an international social order in which peace, stability and social and economic progress are realisable for all peoples. Foreign and trade policy should be informed by these broader goals.

ACFOA therefore advocates the following basic principles as the cornerstone of an Australian WTO reform agenda:

1. **Equality of participation:** Currrent decision making processes and practices, especially during trade negotiations, are inherently unequal and work against the effective participation of developing nations. This structural inequality can be addressed by:
   - reforming the negotiation procedures to allow majority voting so as to ensure that the views of poorer countries are officially recognised and on the public record;
   - introducing technical and advisory assistance programmes to build the capacity of poorer countries to enjoy full and effective participation in trade negotiations and dispute procedures so as to foster a level playing field; and by
   - introducing measures to protect the poorest members in developing countries against unfair trade practices of wealthier nations and global corporations**.**

2. **Transparency which recognises the legitimate interests of civil society.** The lack of openess of the WTO can be addressed by formally recognising the interests of civil society by:
   - reforming the WTO to grant standing to civil society organisations which represent particular communities of interest. This would ensure that all stakeholders views and interests are given formal consideration in determinations;
   - in Australia, briefings, consultations and advisory bodies to assist in preparation for trade negotiation and dispute settlement would open Australian government action to civil society and promote better understanding of WTO procedures.

3. **Consistency with Human Rights and Environmental Law Obligations**. The failure of trade negotiators to appreciate and factor into their work human rights and environmental issues of concern can be addressed by:
   - adopting as a matter of policy the position that trade law obligations must not be inconsistent with the objectives and obligations under international law which relate to human rights, the rights of workers and the environment;
   - Australia delegations should be adequately briefed on the impacts and implications of trade agreements, and, in particular, be made aware of human rights and environmental issues that may be raised;
   - Tabling National Interest Analysis in Parliament to provide clear explanation by the Government as to how it took human rights, labour rights and environmental obligations into consideration.

4. **Capacity to deliver the benefits of trade.** There are a number of specific areas where the capacity of developing countries to deliver the benefits of trade need to be enhanced, but in general:
   - trade agreements should include special provisions that require developed countries to take measures to assist developing countries in capacity building.
   - the WTO should pursue a range of mechanisms to enhance the capapcity of developing countries to comply with international trade law standards

5. **Redress Existing Inequality.** A number of existing trade agreements and conditions require review and reform in order to deliver more equitable outcomes in the future. The Australian Government should give in principle support for:

- a comprehensive review of the Uruguay Round Agreements and their effect on market access for developing countries using existing human rights law and multilateral enviroment agreements;
- any proposal within the WTO negotiations in agriculture which require developed countries to eliminate export subsidies;
- the food security principle which should be included and enshrined in the preamble to the Agreement on Agriculture;
- a full review of the TRIPs Agreement with a particular focus on the rights of small and indigenous communities and the incorporation of the 'Prior Informed Consent' principle;
- a full review of the Textile and Clothing Agreement to ascertain whether it has provided market access to developing countries with a view to increasing market access for developing countries.

ACFOA commends these principles and the more detailed recommendations that elaborate these principles in this submission to the Parliamentary Joint Standing Committee on Treaties.

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1 - GENERAL

ACFOA recommends that:

- the Australian Government integrate the five principles described in this submission into trade policy as a basis for future relations with the WTO;
- there should be a comprehensive review of the World Trade Organistion (WTO) decision-making processes and its overall structure; and
- there should be a comprehensive review of the Uruguay Round Agreements (URA), and their effect on market access for developing countries using existing human rights law and multilateral environment agreements, all as standards against which WTO processes and agreements should be reviewed.

RECOMMENDATION 2 – CIVIL SOCIETY PARTICIPATION

ACFOA recommends that:

- DFAT should jointly organise a number of general public forums per year on the WTO agreements with umbrella organisations such as the Australian Council of Social Services (ACOSS), the Australian Council for Trade Unions (ACTU) and ACFOA. Such forums should be advertised widely, free of charge, and should be accessible to the public; and
- DFAT should organise inter-ministerial forums with participation from major non government groups including not-for-profit organisations and community-based organisations on trade liberalisation policy and the role of the WTO.

RECOMMENDATION 3 – SOCIAL AND ENVIRONMENTAL ADVISORY COMMITTEE

ACFOA recommends that:

The Government establish a Ministerial Advisory Trade Committee on Social and Environmental Sustainability to advise the Trade Minister and government on issues of concern to the Australian public in relation to WTO and related matters.

RECOMMENDATION 4 – NGO REPRESENTATION

ACFOA recommends that:

DFAT should include representation from non government organisations on regional and international trade delegations.

RECOMMENDATION 5 – WTO DECISION MAKING STRUCTURE

ACFOA recommends that:

The WTO should adopt a system of majority voting during negotiations as opposed to a consensus based one.

RECOMMENDATION 6 – NGO STATUS IN WTO NEGOTIATIONS

ACFOA recommends that:

The WTO should grant observer status to non government organisations during official negotiations. The WTO should also organise multi-stakeholder dialogue sessions during its various negotiations. The WTO should recognise non government organisations on official government delegations.

RECOMMENDATION 7 – WTO DISPUTE SETTLEMENT PROCEDURES

ACFOA recommends that:

- reform the WTO to grant standing to civil society organiations which represent particular communities of interest;
- like all other international dispute settlement processes, WTO dispute settlement processes should be made public;
- simplified information on the dispute proceedings should be made accessible to the public throughout the proceedings of any given case;
- Australian positions on dispute settlement cases need to be developed with input from the all affected major groups and not just the business and industry sector;
- through recognised legal procedures, the WTO should allow for amicus briefs from non government and community-based organisations as a venue for increased input during dispute settlement proceedings;
- as part of AusAID's development assistance to developing countries, Australia should help to fund the dispute settlement costs of developing countries in the region;
- Australia should provide legal expertise to developing countries (if they request it) for dispute settlement;

- Australia should urge the WTO to increase technical assistance to developing countries for dispute settlement; and
- the cross retaliation provision should be repealed. This is because developing countries unlike the developed countries are dependent on just one or two sectors for export earnings.

RECOMMENDATION 8 – ADVOCACY FOR DEVELOPING COUNTRIES

ACFOA recommends that:

- Australia should support any proposal within the WTO negotiations in agriculture which requires developed countries to eliminate their export subsidies;
- Australia should support the proposal by the 11 developing countries (G/AG/NG/W/14) which proposes collapsing all domestic support into one general box with new qualifying criteria with special and differential treatment for developing countries;
- the Australian Government should propose new rules in the WTO which will counter the problem of tariff escalation;
- the WTO should allow developing countries to use the Special Safeguard Provision regardless of whether they have taken to tariffication;
- through a special provision in the WTO, NFIDCs should be compensated for any increase in world food prices that arises due to the implementation of the agreement on agriculture;
- NFIDCs should be allowed greater latitude in developing their own agricultural productivity and capacity by, for example, allowing them to use domestic support measures which developed countries have to phase out under the Agreement on Agriculture;
- the food security principle should be 'included and enshrined in the preamble of the Agreement on Agriculture with a specific mention of the fact that all other provisions should be measured and evaluated against this principle';[1] and
- Australia should support the June 2000 proposal by developing countries entitled *Special and Differential Treatment and a Development Box (G/AG/NG/W/13).*

RECOMMENDATION 9 - TRIPs

ACFOA recommends that:

- Australia should support a full review of the TRIPs Agreement, which invites the broadest possible assessment of the effects of the agreement on human rights especially on the

[1] Wendy Phillips, (Draft) Food Security: *A First Step in Fair Trade*: A discussion paper on the liberalisation of agriculture and food security, World Vision Canada, 2000, pp. 22-23.

rights of small and indigenous communities and on food security in developing countries (consistent with the recommendation in the introduction which calls for a review of the Uruguay Round Agreements);

- as an absolute minimum, TRIPs must incorporate a provision which addresses the concept of 'Prior Informed Consent'; and
- through the AusAID technical assistance programs, Australia should support *any sui generis* system which protects basic human rights, the rights of indigenous people and small communities and food security in developing countries.

RECOMMENDATION 10 - GATS

ACFOA recommends that:

- through JSCOT, the Australian Government should instigate an inquiry into the General Agreement on Trades in Services (GATS) Agreement so that the Australian community has an opportunity to participate in decisions on the liberalisation of services;
- the WTO should address the liberalisation of labour and come to an agreement acceptable to all WTO members within the next two years; and
- the WTO GATS Agreement should include a special section that will require developed countries to take certain measures to help developing countries to export services. These include providing incentives to corporations that import services from developing countries.

RECOMMENDATION 11 – TECHNICAL BARRIERS TO TRADE

ACFOA recommends that:

- the WTO should enhance the capacity of developing countries to comply with the international technical and safety standards;
- through technical assistance programs, the Australian Government should help developing countries comply with the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) Agreements;
- international standard setting organisations need to be reformed so that they are more transparent and include developing countries during their negotiations; and
- developing countries need more time to comply with the SPS and TBT agreements.

RECOMMENDATION 12 – TEXTILES AND CLOTHING AGREEMENT

ACFOA recommends that:

- the WTO should review the TCA to ascertain whether it has provided market access to developing countries (consistent with the recommendation in the introduction which calls for a review of the Uruguay Round Agreements);
- with the exception of agriculture, textiles and clothing is the only other sector which developing countries have a comparative advantage in producing. Due to this fact, after reviewing the TCA, the WTO should revise the agreement so that developing countries gain increased market access in developed countries;
- under no circumstances should the WTO force developing countries to provide reciprocal treatment to developed countries under the TCA. Smaller and poor countries need special and differential treatment under this agreement; and
- *Article 6* of TCA which allows restrictions if domestic industries in developed countries suffer serious damage, should be repealed.

RECOMMENDATION 13 – REGIONAL TRADE ARRANGEMENTS

ACFOA recommends that:

Australia should instigate a process of inclusion of the public through parliamentary processes and other processes that involve the participation of NGOs with regard to any new proposals for a free trade area or closer economic relationship in the region.

RECOMMENDATION 14 – HUMAN RIGHTS, THE ENVIRONMENT AND TNCs

ACFOA recommends that:

- the WTO should conduct a human rights and environmental audit to ascertain whether the WTO upholds the various human rights conventions and customs as well as multilateral environmental agreements and corporate accountability and responsibility standard (consistent with the recommendation made in the introduction which calls for a review of the URA);
- the audit should be conducted jointly with the UN Commission on Human Rights the ILO, UNCTAD, UNEP and the Commission on Sustainable Development and other relevant UN bodies;

- the audit should also invite comments from non government organisations and other major groups such as trade unions;
- the WTO should repeal any agreement which violates or compromises any human rights or environmental agreement, or standards on corporate responsibility and accountability;
- the Australian Government should enact laws which control the conduct of Australian corporations abroad;
- the Australian Government should support direct binding international standards to regulate transnational corporations through an international treaty for example which would give power to an international tribunal to regulate TNCs; and
- the Australian Government should support any other proposals which would directly regulate TNCs such as giving the human rights commission or another UN body the right to investigate any UN human rights abuses or environmental pollution issues.

1 INTRODUCTION

The Australian Council for Overseas Aid (ACFOA) is the peak body for 95 NGOs in the field of overseas development assistance. Our members include aid agencies, human rights groups, environmental organisations, church groups and other civil society organisations concerned about international development issues. The common purpose of ACFOA member agencies is to promote sustainable human development so that all people can fulfil their needs, enjoy a full range of human rights and live a life of dignity.

ACFOA member agencies work closely with the poorest communities in developing countries, and are acutely aware that their development cooperation efforts need to be underpinned by sustainable and equitable economic policies in these countries. Our members enjoy the support of a wide and substantial cross-section of the Australian community. Their work is made possible by the financial, moral and practical support of Australians who care deeply about the issues which this inquiry is addressing.

ACFOA believes that unless reforms are made to the WTO's organisational structure and decision-making processes, public protests in both developed and developing countries will encourage a return to forms of protectionism that are not in the interest of developing countries or Australia.

There are many examples of the negative effects of trade liberalisation agreements on developing countries. ACFOA members such as Community Aid Abroad / Oxfam Australia in their submission to this enquiry note that the 48 least developed countries, home to 10 per cent of the world's population, have seen their share of world exports decline by almost half over the past two decades to a negligible 0.4 per cent. They point out that without appropriate complimentary measures and a strategy for wider disbursement of benefits, further trade liberalisation will exaccerbate existing inequalities and damage livelihoods.

Another member, World Vision Australia, in a discussion paper on Trade and Development (Brett Parris, Making the WTO work for the Poor, World Vision, Novemeber 1999) note the effects of the Uruguay Round of Agreements (URA's) on the food import bills of developing countries.

> The 1996 study of the effects of the URAs on the food import bills of developing countries by the FAO concluded that for the developing countries as a whole, their food import bill was likely to be nearly $25 billion (62 per cent) higher in 2000 than in 1988, of which $3.6 billion (16 per cent) would be due to the URAs. The effects on Africa are particularly concerning since the region is projected to widen its trade deficit in agricultural products, and the URAs did not change this outcome. Both its volume of imports and the prices it pays for them were expected to increase substantially—mainly reflecting population-induced growth in demand. The net effect was expected to be an increase in the total food bill from $6 billion in 1988 to $10 billion in 2000—of which $500 million would be due to the URAs. Overall, the food import bill of the Net Food Importing Developing countries (NFIDCs) was expected to increase by nearly $10 billion, of which around 14 per cent or $1.4 billion would be due to the effects of the URAs.

Vandana Shiva in her recent address to the World Economic Forum in Melbourne (September 10th, 2000) highlighted the impact of patenting practices under WTO Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreements on women and small farmers which allow global corporations to plunder centuries of knowledge by not having to recognise 'prior art' and indigenous medicines. She notes that in countries like Indonesia, 20 per cent of household income and 40 per cent of food supplies come from home gardens managed by women. Nevertheless, current trade liberalisation agreements remain insensitive to the role that women and small farmers play in providing food for many poorer communities.

These few examples point to a growing body of opinion, research and analysis which suggests that if the concerns of those who are being disadvantaged by trade liberalisation are not addressed, resulting dissatisfaction in the constituencies of both developed and developing countries will undermine the potential benefits of trade.

It is increasingly clear that if trade liberalisation is to be successful, multilateral trade organisations such as the WTO will need to ensure that agreements result in improvements in the living standards of the majority of people in all countries. ACFOA advocates the following principles as necessary to guide Australia's reform agenda and would request the inquiry to adopt such principles in their recommendations to the Australian Government.

The Principles

1. **Equality of participation**
2. **Transparency which recognises the legitimate interests of civil society**
3. **Consistency with human rights and environmental law obligations.**
4. **Capacity of developing countries to deliver the benefits of trade**
5. **Redress of existing inequality in trade agreements**

This submission contains a number of recommendations which elaborate these principles. ACFOA believes that it is important for an Australian Government to adopt these principles as fundamental policy positions in advancing the interests of developing countries and in most cases, in Australia's interest as well.

In terms of Australia's future relation with the WTO, firstly Australia must strongly assert that if such an organisation is to be relevant and effective in the future, it must begin by addressing its own structure - a structure which has undermined the meaningful participation of developing countries and has not been transparent to civil society. Secondly, the WTO should address the social, economic, environmental and cultural effects of the Uruguay Round Agreements (URA) with special attention to the impact of these agreements on developing countries and poorer communities.

RECOMMENDATION 1
ACFOA recommends that:

- the Australian Government integrate the five principles described in this submission into trade policy as a basis for future relations with the WTO;
- there should be a comprehensive review of the World Trade Organisation (WTO) decision-making processes and its overall structure; and
- there should be a comprehensive review of the Uruguay Round Agreements (URA), and their effect on market access for developing countries using existing human rights law and multilateral environment agreements, all as standards against which WTO processes and agreements should be reviewed.

2 OPPORTUNITIES FOR COMMUNITY INVOLVEMENT IN DEVELOPING AUSTRALIA'S NEGOTIATING POSITIONS ON MATTERS WITH THE WTO

2.1 Public Debate in Australia

The Federal Government negotiated and signed the Uruguay Round Agreements before the Joint Standing Committee on Treaties (JSCOT) was in place. For this reason, very few Australians are aware of what has been negotiated and how the agreements affect them. There has been little public debate on the role of the WTO. The Australian Government needs to instigate a wider debate on the agreements by sponsoring learning forums, media programs and holding public debates with input from businesses, community organisations, academia, trade unions and non government organisations (NGOs). The few forums that the Department of Foreign Affairs and Trade (DFAT) has organised have been largely targeted toward educating the business community. Such forums have been held in hotels in Sydney and Melbourne and are expensive for community organisations and ordinary citizens. They have not been well publicised and attendance has been through invitation only. ACFOA believes that learning forums should be well publicised in advance and should accommodate an interactive learning process whereby members of the public have an opportunity to provide input, rather than just receive input. The forums should preferably be free of charge or of minimal cost and held at convenient venues.

At present the inter-ministerial debate on WTO issues is not made public. ACFOA believes that the wider public needs to know if such a debate is taking place and if it is, then the public needs to be informed about what is being discussed. We would encourage DFAT to take the lead in inviting different ministries especially those involved in environmental and social justice issues to participate in public debates hand in hand with civil society organisations on various WTO issues.

RECOMMENDATION 2

ACFOA recommends that:

- DFAT should jointly organise a number of general public forums per year on the WTO agreements with umbrella organisations such as the Australian Council of Social Services (ACOSS), the Australian Council for Trade Unions (ACTU) and ACFOA. Such forums should be advertised widely, free of charge, and should be accessible to the public; and
- DFAT should organise inter-ministerial forums with participation from major non government groups including not-for-profit organisations and community-based organisations on trade liberalisation policy and the role of the WTO.

2.2 Establishment of a Ministerial Trade Advisory Committee on Social and Environmental Sustainability

The Trade Minister is advised by the Trade Policy Advisory Council (TPAC) which consists of members of the business and industry sector. There are no representatives from other sectors. There is no similar advisory committee which articulates social and environmental concerns to the Minister.

ACFOA strongly urges the government to establish such a committee to facilitate input and provide advice to the Trade Minister and the government in developing WTO negotiating positions and trade policies. This committee could represent a wide range of Australian not-for-profit NGOs and community-based organisations.

RECOMMENDATION 3

ACFOA recommends that:

The Government establish a Ministerial Trade Advisory Committee on Social and Environmental Sustainability to advise the Trade Minister and government on issues of concern to the Australian public in relation to WTO and related matters.

2.3 ACFOA and NGO representation on trade consultations and delegations

ACFOA and member agencies have sought to play a constructive role in regard to Australia's policy on trade liberalisation, on trade and development policy and on the role of the WTO in a number of ways. ACFOA:

- sent NGO delegates to WTO meetings in Geneva and more recently to Seattle. These delegates, whilst excluded from the official Australian Government delegations, consulted and worked effectively with DFAT and other government officials sharing some common concerns and analysis;
- was represented last February at UNCTAD meetings where the Trade Minister, DFAT officials and ACFOA representatives openly discussed the concerns and sensitivities of developing countries with respect to the WTO and the Australian Government's position on trade and development matters;
- has met regularly with DFAT officials working in the many areas of trade policy in relation to the WTO and UNCTAD. These meetings have, we believe, been mutually beneficial and recently led to a generous and constructive offer from DFAT to host ACFOA representatives on their official departmental training courses on trade;
- works with a wide range of civil society organisations regionally and internationally from developing countries. These organisations can provide useful research and advice for the government on trade matters and the implications of various trade decisions for poorer communities in developing countries;
- has offered to undertake further training and education of our members and the wider Australian community around complex issues concerning the role of the WTO, and the free versus fair trade debate. Membership report back sessions were held after WTO and UNCTAD meetings; and
- continues to seek representation on official government delegations to major trade forums, and has consistently recommended the development of a ministerial trade advisory committee on social and environmental issues.

Notwithstanding the goodwill and cooperation between government and ACFOA demonstrated in the points mentioned above, NGOs still have not been invited to be part of Australia's official trade delegations to the World Trade Organisation or to other major trade forums such as APEC or UNCTAD. This represents a political bias in favour of business interests as if other sections

of the Australian community did not also have legitimate interests in the outcomes of trade decisions. ACFOA urges the government to ensure that trade delegations to the WTO and to other major trade forums include representation from NGOs which are involved in international development, and with particular expertise on the links between trade, social and environmental issues.

RECOMMENDATION 4

ACFOA recommends that:

The Australian Government should include representation from non government organisations on regional and international trade delegations.

3 TRANSPARENCY AND ACCOUNTABILITY OF WTO OPERATIONS AND DECISION-MAKING

3.1 The decision-making structure of the WTO

The WTO's decision-making processes are unfair to smaller nations and developing countries. This is widely acknowledged and in part the reason the ministerial meeting in Seattle collapsed last year. The rules assume an equality of bargaining power between all the countries that engage in trade. They are also designed overlooking or ignoring the fact that the greater percentage of global trade is controlled by powerful multinational enterprises. The WTO needs a more balanced negotiating process. Decision-making through consensus has been an unfair system which has left the vast majority of the smaller and poorer countries out of the negotiation processes. This has been recognised by DFAT. ACFOA therefore urges the government to support a system of majority voting at the WTO.

RECOMMENDATION 5

ACFOA recommends that:

The WTO should adopt a system of majority voting during negotiations as opposed to a consensus based one.

3.2 Lack of Public Scrutiny during negotiating procedures

The WTO's negotiation processes are not open to the public. Unlike the United Nations system, the WTO does not permit observer status to non government organisations during trade negotiations. The United Nations Commission on Sustainable Development for example not only grants non government organisations observer status during negotiations, it also allows them to make periodical interventions. Furthermore the UN Commission organises dialogue sessions between different major groups (NGOs, business and industry groups and trade unions) as part of official negotiating programs. Such sessions have helped non government groups articulate their concerns within the UN decision-making processes and have been influential in final UN decisions.

RECOMMENDATION 6

ACFOA recommends that:

The WTO should grant observer status to non government organisations during official negotiations. The WTO should also organise multi-stakeholder dialogue sessions during its various negotiations. The WTO should recognise non government organisations on official government delegations.

4 THE EFFECTIVENESS OF THE WTO'S DISPUTE SETTLEMENT PROCEDURES AND THE EASE OF ACCESS TO THESE PROCEDURES

4.1 Transparency

One of the major criticisms of the WTO is the total lack of scrutiny of its Dispute Settlement Body (DSB). The adjudication is conducted behind closed doors. The only parties that are privy to these hearings are governments that either challenge another or fend off a challenge and a panel of three (occasionally five) independent experts from different countries who decide which member state is right or which is wrong. Their report is then passed on to the DSB which can only reject the report by consensus.

The US has been lobbying to open up the dispute settlement process to the public. All international arbitration processes and tribunals are open to the public. If this does not happen, then they will not have any legitimacy in the eyes of the public.

ACFOA believes that many of the problems hampering the WTO derive from its resistance to open up its process to civil society. Due to the sheer lack of resources, developing countries have the most to lose from the closed 'in house' proceedings. If the adjudication process were to open, the scope and flexibility of the world's communities and NGOs could assist in the development of a more accountable and transparent dispute settlement system.

Furthermore, communities should have the right to present their case during the WTO dispute panel proceedings. Their evidence should be considered with other evidence. Standing should be granted to civil society organisations with legitimate community interest.

The WTO should also allow the legal right of communities to appear before the panel as *amicus curiae* which is a right given to them in most national and international tribunals.

4.2 Ease of access to these procedures

Dispute panellists are independently chosen from a list of experts from different countries. International experts charge extremely high legal fees, as do national legal advisers. If a

relatively well resourced department in Australia finds dispute settlement expensive, then it is quite clear that developing countries simply cannot afford to settle disputes. Many of these countries do not have missions in Geneva and those who do have a few staff stationed in Geneva are expected to be present during all inter-governmental meetings in Geneva including those within the UN. A country that cannot afford to have a mission in Geneva can hardly be expected to meet the costs of dispute settlement. This imbalance underlines a clear lack of access issue.

At present 74 per cent of the current WTO membership is made up of developing countries.[2] Constantine Michalopoulos, Special Economic Advisor at the WTO, studied the participation of developing countries in the WTO.

> He noted that 65 developing countries maintain WTO missions in Geneva, but 26 others are represented by missions or embassies elsewhere in Europe and seven others list their representatives as being located in ministries in their national capital. Of the LDCs which are members of the WTO, only 12 had representation in Geneva and virtually *all* the small island economies were represented from missions in Europe or their national capitals. Some 30 developing countries were also barred from chairmanships on WTO committees because they were in arrears to the organisation.[3]

Currently AusAID provides funding to various countries in the region to help them bring their domestic legal systems up to WTO standards such as the trade related aspects of intellectual property rights agreement. Australia through AusAID should also help developing countries in their dispute settlement cases and provide them with the legal expertise (if required) to prepare for such settlement, especially where conciliation is preferred over litigation. Countries should not be prevented from using the dispute settlement mechanism because they are too poor to do so.

Similarly, the Australian Government should help communities in Australia and in the region gain access to the WTO dispute settlement bodies through *amicus* briefs.

---

[2] C. Michalopoulos, (1999) "The Developing Countries in the WTO", The World Economy, Vol. 22, No 1, January, p. 121 qouted in Brett Parris's paper (1999), Trade for Development, Making the WTO Work for the Poor, World Vision, p16

[3] Ibid.

The cross retaliation provision within the dispute settlement rules, is potentially very harmful to developing countries, many of which are dependent on very few commodities for export earnings. Therefore, the cross retaliation provision should be repealed from the dispute settlement rules.

RECOMMENDATION 7

ACFOA recommends that:

- reform the WTO to grant standing to civil society organiations which represent particular communities of interest;
- like all other international dispute settlement processes, WTO dispute settlement processes should be made public;
- simplified information on the dispute proceedings should be made accessible to the public throughout the proceedings of any given case;
- Australian positions on dispute settlement cases need to be developed with input from the all affected major groups and not just the business and industry sector;
- through recognised legal procedures, the WTO should allow for amicus briefs from non government and community-based organisations as a venue for increased input during dispute settlement proceedings;
- as part of AusAID's development assistance to developing countries, Australia should help to fund the dispute settlement costs of developing countries in the region;
- Australia should provide legal expertise to developing countries (if they request it) for dispute settlement;
- Australia should urge the WTO to increase technical assistance to developing countries for dispute settlement; and
- the cross retaliation provision should be repealed. This is because developing countries unlike the developed countries are dependent on just one or two sectors for export earnings.

5 AUSTRALIA'S CAPACITY TO UNDERTAKE WTO ADVOCACY FOR THE BENEFIT OF DEVELOPING COUNTRIES

5.1 The Agreement on Agriculture

The problem for the developing countries is that richer countries use loopholes to retain their existing protection levels within this agreement. The following are some ways in which this is being done.

- Some developed countries have extremely high tariffs, in some cases nearly up to 300-400 per cent. A simple 36 per cent reduction will not solve the problem of protectionism.
- The domestic support commitments under *Article 6* and *Annex 2* in essence give some developed countries the right to continue to protect their sectors through the subsidies allowed under these sections. Therefore, though some developed countries have started to reduce their aggregated measure of support (AMS) by 20 per cent over six years, under the 'allowed subsidies' they have actually increased their subsidies. It is up to the governments' discretion to select which sectors of the AMS are to be reduced. This agreement is clearly biased toward certain developed country interests and completely goes against the principle of freeing up trade. From 1996 to 1998, domestic subsidies in developed countries have increased from US$ 247 billion to US$ 274 billion.[4]
- Similarly with regard to export subsidies, developed countries previously maintained very high levels of subsidies. Under the agreement, a 36 per cent reduction in six years will not provide market access to developing countries.
- The EU, Japan and the US have manipulated the conversion of their non-tariff barriers to tariff barriers by overestimating the original value of non-tariff barriers.
- Many developing countries have very few non-tariff measures. Developing countries according to the agreement are forbidden from ever using these measures and therefore in essence have been denied the flexibility of using instruments which could lead to increased production. This is grossly unfair and directly threatens food security in these countries.

---

[4] Bhagirath Lal Das, Third World Network, Briefing Paper *Negotiations in Agriculture and Services in the WTO: Suggestions for modalities/guidelines*, 2000, pp. 2-3.

- The Special Safeguard provision can only used by those countries which have converted their non-tariff barriers to tariffs. Countries that did not maintain non-tariff barriers (mainly developing countries) cannot use this provision.
- To counter tariff escalation, higher import duties have been placed on more processed products which severely hampers the ability of developing countries to diversify their production.

ACFOA notes that the European Commission has recently adopted a proposal to grant duty free access to the world's 48 poorest countries for all products except the arms trade. This is an important initiative which moves developed countries beyond the language of "essentially all" and an initiatve which the Australian Government should support.

5.2 Net Food Importing Developing Countries

ACFOA recognises the latest proposal that the Cairns Group has put forward to the June 29-30, 2000 negotiations (G/AG/NG/W/11). While the proposal calls for an extension for special and differential treatment for developing countries, the proposal also has to specifically address the problems that Net Food Importing Developing Countries (NFIDCs) face due to the liberalisation of agriculture.

When the agreement was signed originally, there were potential provisions made for NFIDCs. These included financial assistance to offset the high prices of food, adequate levels of food aid and technical assistance to improve agricultural productivity. According to Consumers International, so far developed countries have failed to meet these obligations under the agreement despite a 47 per cent increase in the NFIDC cereal import costs between1993-94 and 1997-98.

With the elimination of the huge US and EU subsidies, some developing countries could gain immensely from the liberalisation of agricultural exports, but it is the NFIDCs that will still stand to lose the most, even in the event of a positive scenario of lower protection in the EU, US and Japan. Countries such as Indonesia and some African nations for example, which are heavily dependent on food imports, will suffer since the price of food will rise with the reduction in subsidies but the price of export raw commodities will continue to fall. For example, the prices of wheat, coarse grains and diary products are expected to rise while those for coffee, cocoa and rice are expected to fall. Therefore

though some developing countries are expected to benefit from the liberalisation of agriculture, the benefits will only go to those countries which export commodities that fetch a higher price in world market.[5] Sadly, African, Pacific and Caribbean countries would still stand to lose even if the EU and Japan stopped subsidising their domestic production.

It is therefore very important for the Australian Government to uphold its commitments under the Agreement on Agriculture and support NFIDCs and for the WTO to make special provisions for NFIDCs.

5.3 Food Security

In the June 2000 session of the negotiations on agriculture, 11 developing countries presented a proposal entitled *Agreement on Agriculture: Special and Differential Treatment and a Development Box (G/AG/NG/W/13)*. The proposal argues that

> key products, especially food staples, should be exempted from liberalisation, and the domestic production capacity of developing countries must be encouraged and helped along to become more competitive, rather than destroyed on the basis of non-competitiveness.

The same developing countries *(D/AG/NG/W/14)* presented another proposal which focuses on domestic subsidies. They are proposing that all domestic support should fall into one general subsidies box which should have new qualifying criteria with special and differential treatment for developing countries and the protection of small and household farms.[6]

---

[5] Graham Dunkley, *The Free Trade Adventure*, Melbourne University Press, 1997, p. 147.
[6] Bhagirath Lal Das, (2000), p. 5.

RECOMMENDATION 8

ACFOA recommends that:

- Australia should support any proposal within the WTO negotiations on agriculture which requires developed countries to eliminate their export subsidies;
- Australia should support the proposal by the 11 developing countries (G/AG/NG/W/14) which proposes collapsing all domestic support into one general box with new qualifying criteria with special and differential treatment for developing countries;
- the Australian Government should propose new rules in the WTO which will counter the problem of tariff escalation ;
- the WTO should allow developing countries to use the Special Safeguard Provision regardless of whether they have taken to tariffication;
- through a special provision in the WTO, NFIDCs should be compensated for any increase in world food prices that arises due to the implementation of the agreement on agriculture;
- NFIDCs should be allowed greater latitude in developing their own agricultural productivity and capacity by, for example, allowing them to use domestic support measures which developed countries have to phase out under the Agreement on Agriculture;
- the food security principle should be 'included and enshrined in the preamble of the Agreement on Agriculture with a specific mention of the fact that all other provisions should be measured and evaluated against this principle'; and[7]
- Australia should support the June 2000 proposal by developing countries entitled *Special and Differential Treatment and a Development Box (G/AG/NG/W/13).*

5.4 Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement

Article 27 3b of the treaty is the most contentious one in the agreement. It allows countries to patent plant varieties as well as plants and animals that are produced through micro-biological or non-biological processes. Patenting of life forms threatens food security in many poor countries and also threatens the culture of many people in countries where individual ownership of life forms is neither recognised nor acceptable.

Some countries which had intellectual property laws before the TRIPs treaty was negotiated, developed regimes which not only encouraged inventions, but also protected

[7] Wendy Phillips, (Draft) Food Security: *A First Step in Fair Trade*: A discussion paper on the liberalisation of agriculture and food security, World Vision Canada, 2000, pp. 22-23.

the public from exploitation through monopoly rights held by inventors. India for example, previously permitted only process patents and no product ones. This encouraged competition and made sure that basic items, especially essential medicines, were accessible to the poor. However now, under WTO rules, developing countries like India are being forced to adopt both process and product patents. Through the *sui generis* provision within the TRIPs treaty, developing countries should be permitted and supported by the WTO to develop any sort of intellectual property rights regime which protects the rights of people, especially those of small communities and indigenous people, as well as ensures food security in the country.

TRIPs strictly forbids the saving of patented seeds for replanting. This threatens the very viability of subsistence farming and most rural cultures in the developing world.

A Kenyan working in this area contends:

> under patent law, farmers replanting patented seed for the next season would be legally required to pay royalties. This has a number of implications. Firstly, many of the most successful varieties available commercially are derived from stock which has been carefully bred by people in the South. But instead of being rewarded for their important contribution—both for developing the genes for desirable traits and the knowledge and skills required to use these—they may be required to pay the companies to use the products.[8]

Article 102 of the *US Patent Law*, which defines prior art for example, does not recognise technologies and methods in use in other countries as prior art. If knowledge is new for the US, it is novel, even if it is part of an ancient tradition of other cultures and countries. This was categorically stated in the *Connecticut Patent Law* which treated invention as 'bringing in the supply of goods from foreign ports that is not yet of use among us'.

By not recognising 'prior art', knowledge such as indigenous medicine can be pirated by Western corporations. 'Around 75 per cent of all plant-derived prescription drugs were discovered because of their prior use in indigenous medicine'.[9] In many cases this knowledge has evolved over many centuries, and has often become intrinsic to cultures in the developing world.

---

[8] Patrick Mulvany, (1997) IT Kenya, http://www.ukabc.org/ipr2.htm November

No patent should be given where prior art exists, since patents are supposed to be granted only for new inventions on the basis of novelty and non-obviousness. Instead, countries should adopt a system of prior informed consent.

> Prior informed consent means that when someone from within or outside of the community wants to use the community's genetic resources, for whatever purpose, they should explain exactly what they are going to use them for, who the ultimate end user will be, and agree, in a legally-binding way, how any benefits from the further commercial development of these resources, will be shared with the community. In order for communities to be able to negotiate effectively, make reasonable assessments of the implications of any information they are given and be able to claim adequate compensation for their genetic materials, there needs to be an agreed framework supported by appropriate legislation at national level.[10]

According to commentator Vandana Shiva,

> If a patent system which is supposed to reward inventiveness and creativity systematically rewards piracy, if a patent system fails to honestly apply criteria of novelty and non-obviousness in the granting of patents related to indigenous knowledge then the system is flawed, and it needs to be changed. It cannot be the basis of granting patents or establishing exclusive marketing rights. [11]

---

[9] Aziz Choudray, TRIPs (1999) "Whose property, whose rights? Traders tales", Number 68, Autumn , p. 19.

[10] Patrick Mulvany, IT Kenya, http://www.ukabc.org/ipr2.htm Nov. 1997.

[11] Vandana Shiva, 'Biopiracy: need to change Western IPR systems', *THE HINDU*, July 28, 1999.

RECOMMENDATION 9

ACFOA recommends that:

- Australia should support a full review of the TRIPs agreement, which invites the broadest possible assessment of the effects of the agreement on human rights especially on the rights of small and indigenous communities and on food security in developing countries (consistent with the recommendation in the introduction which calls for a review of the Uruguay Round Agreements);
- as an absolute minimum, TRIPs must incorporate a provision which addresses the concept of 'Prior Informed Consent'; and
- through the AusAID technical assistance programs, Australia should support any *sui generis* system which protects basic human rights, the rights of indigenous people and small communities and food security in developing countries.

5.5 General Agreement on Trade in Services

ACFOA is deeply concerned about the process governing Australia's 'inclusion list' in the WTO General Agreement on Trade in Services (GATS) treaty. Any decision on services liberalisation should only be made through the JSCOT process with enough time allowances for genuine public participation.

Developing countries do not have a comparative advantage in exporting services to other countries. Therefore the GATS treaty has mainly benefited the rich countries. Developing countries have included some sectors in their 'positive list' but unfortunately do not expect to receive any reciprocal benefits.

The GATS treaty gives special treatment to capital (through *articles XI* and *XVI*) over labour. The mobility of natural persons as an issue has not moved forward in the WTO. Developing countries have a comparative advantage in providing labour and labour intensive services, yet developed countries have showed no interest in negotiating an agreement on the mobility of labour. This issue needs to be negotiated in the WTO in the next two years if developing countries are to gain any benefit from the GATS treaty.

Through the WTO rich countries should also take specific measures to ensure that developing countries are able to export their services. This could be done through technical assistance programs and by providing incentives to importers that import services particularly from developing countries.[12]

RECOMMENDATION 10

ACFOA recommends that:

- through JSCOT, the Australian Government should instigate an inquiry into the General Agreement on Trade in Services (GAT) Agreement so that the Australian community has an opportunity to participate in decisions on the liberalisation of services;
- the WTO should address the liberalisation of labour and come to an agreement acceptable to all WTO members within the next two years; and
- the WTO GATS Agreement should include a special section that will require developed countries to take certain measures to help developing countries to export services. These include providing incentives to corporations that import services from developing countries.

5.6 Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) Agreements

Developing countries have particular problems in meeting Codex Alimentarius standards and other internationally recognised standards as stipulated in the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) Agreements. They do not have the scientific or technical expertise to meet these standards. Knowledge on these agreements is generally poor, and given the fact that the majority of the developing countries export agricultural products, they stand to lose a considerable level of export earnings due to this.

Developing countries did not participate in the negotiation of these agreements. They are not represented at the SPS committee meetings or other meetings that set international safety and technical standards. Furthermore developing countries do not have the capacity to participate in dispute settlement in these areas. A recent study indicates that rich countries have not taken sufficient account of the special needs of developing countries

[12] Bhagirath Lal Das, (2000), p. 8.

under the obligations of the SPS agreement.[13] Secondly, developing countries have not been allowed adequate time to comply with the requirements of the agreements.

These inadequacies are very serious and the WTO and countries such as Australia should make sure that developing countries have access to technical assistance to address these issues. Furthermore a greater effort needs to made on the part of rich countries to include smaller and developing countries in SPS committee meetings and also meetings of international standard setting bodies such as Codex and the International Standardisation Organisation (ISO).

RECOMMENDATION 11

ACFOA recommends that:

- the WTO should enhance the capacity of developing countries to comply with the international technical and safety standards;
- through technical assistance programs, the Australian Government should help developing countries comply with the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) Agreements;
- international standard setting organisations need to be reformed so that they are more transparent and include developing countries during their negotiations; and
- developing countries need more time to comply with the SPS and TBT agreements.

5.7 The Agreement on Textiles and Clothing (ATC)

This agreement was a major breakthrough during the Uruguay Round Negotiations. It mapped out a phase-out timetable for the discriminatory Multi-fibre Agreement (MFA). The agreement (which was the best deal that developing countries could get) outlined four stages through which the textiles and clothing products could be integrated into the GATT. These were to integrate 16 per cent by January 1995 of the total volume of 1990 imports of these products, 17 per cent on the first day of the third year, another 18 per cent on the first day of the seventh year and the final 49 per cent at the end of the tenth year.

[13] Spencer Henson et al (2000), *The impact on developing countries of sanitary and phytosanitary measures and technical requirements,* Centre for Food Economics Research, Department of Agricultural and Food Economics, http://www.rdg.ac.uk/AcaDepts/ae/AEM/cefer/phyto.htm

This schedule is problematic for developing countries because importing countries are free to select the products which they wish to integrate first, and they have mainly integrated products which do not threaten their domestic producers and which are already liberalised. Secondly, most developed countries are obliged to integrate the bulk of their textiles and clothing products only at the end of the tenth year, which has given them a transition time of ten years. Finally, even during this transitional period, new restrictions can be imposed by developed countries through a transitional safeguard mechanism according to *Article 6* of the TCA. This can be done if the importing countries feel that textile and clothing products are causing 'serious damage' to their domestic industries. According to Magda Shahin 'such agreements show clearly that the system remains largely politicised, where the importing countries always find their way to continue to impose export restraints and quotas'.[14]

This year the International Textiles and Clothing Bureau (ITCB), a consortium of 24 developing countries accused developed countries of failing to provide them with market access under the TCA. The European Union informed developing countries that greater access to the markets of developing countries is a 'precondition for liberalisation of quota restrictions'[15]. Developing countries have expressed outrage over this proposal by contending that they 'regard the rhetoric about reciprocity as insubstantial and purely tactical'.[16] Given the sheer imbalance of the WTO system and given the fact that developing countries need a special and differential system in order to somewhat balance the WTO playing field, developed countries should actually provide greater and better opportunities for developing countries to gain market access in international markets, especially for those goods that developing countries have a comparative advantage in producing.

---

[14] Madga Shahin, *From Marrakesh to Singapore: The WTO and Developing Countries*, Third World Network, Http://www.twnside.org.sg/title/madga-cn.htm

[15] International Centre for Trade and Development (ICTSD), (2000)"Developing Countries Cry Foul Over Textiles", 25 July, ICSD *Bridges Weekly Trade News* Digest, p. 2. Http://www.ictsd.org/htm/weekly/story3.25-07-00.htm

[16] ICTSD, (2000), p.2.

RECOMMENDATION 12

ACFOA recommends that:

- the WTO should review the TCA to ascertain whether it has provided market access to developing countries (consistent with the recommendation in the introduction which calls for a review of the Uruguay Round Agreements);
- with the exception of agriculture, textiles and clothing is the only other sector which developing countries have a comparative advantage in producing. Due to this fact, after reviewing the TCA, the WTO should revise the agreement so that developing countries gain increased market access in developed countries;
- under no circumstances should the WTO force developing countries to provide reciprocal treatment to developed countries under the TCA. Smaller and poor countries need special and differential treatment under this agreement; and
- *Article 6* of TCA which allows restrictions if domestic industries in developed countries suffer serious damage, should be repealed.

6 THE RELATIONSHIP BETWEEN THE WTO AND REGIONAL ECONOMIC ARRANGEMENTS

6.1 Asia Free Trade Area and Closer Economic Relations (AFTA-CER); Asia Pacific Economic Cooperation (APEC)

Given the delay in negotiations in the WTO it is our understanding that Australia is trying to accelerate regional trade negotiations. However, there is a lack of community awareness, including the Australian Government's continued reticence to include any NGOs on trade delegations, and negotiations are continuing behind closed doors even during a public federal inquiry into our relationship with the WTO. ACFOA believes that any free trade area agreements, close economic relations agreement and Australia's relationship with APEC, need to be developed through parliamentary processes and the active involvement of civil society.

ACFOA believes that to ensure maximum public inclusiveness and transparency the government needs to introduce processes of consultation at the regional level. Given that regional forums such as the APEC Forum have instigated various initiatives such as the Accelerated Trade Liberalisation initiative,[17] we believe Australia should introduce processes to include the concerns of the broader community in the region.

In Kyoto November 1995, The Fair Trade Forum, consisting of some of Australia's leading NGOs including ACFOA and one of its members, World Vision Australia, released their 'Draft Fair Trade Forum Charter'[18] calling on APEC to establish an APEC Social and Environmental Forum.[19] ACFOA strongly urges the government to establish an APEC Social and Environmental Forum so that there is wide public debate in the region (amongst different sectors both governmental and non government) on how trade can complement the broader goals of environmental and social sustainability. Alternatively,

---

[17] ICTSD Internal Files, *BRIDGES Weekly Trade News Digest* Vol. 4, Number 24, 20 June, 2000

[18] 'Draft Fair Trade Forum Charter', In care of Lee Tan of the Australia Conservation Foundation

[19] Carolyn Deere, 'The APECking Order', *Arena Magazine* (Fitzroy, Vic), no. 25, Oct/Nov 1996: pp. 5-7, Record 9 of 14 in AUSTROM:APAIS (Public Affairs)

the establishment of a Ministerial Trade Advisory Committee on Social and Environmental Sustainability (recommendation 2.2) could undertake this task.

RECOMMENDATION 13

ACFOA recommends that:

Australia should instigate a process of inclusion of the public through parliamentary processes and other processes that involve the participation of NGOs with regard to any new proposals for a free trade area or closer economic relationship in the region.

7 THE RELATIONSHIP BETWEEN WTO AGREEMENTS AND THOSE ON TRADE RELATED MATTERS, INCLUDING ENVIRONMENTAL, HUMAN RIGHTS AND LABOUR STANDARDS

7.1 Compatibility between human rights law and multilateral environmental agreements on the one hand, and WTO agreements on the other

The Preamble to the Agreement Establishing the World Trade Organisation, No. 1 states:

The Parties to this Agreement,
Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The WTO is obliged through its preamble, to assure that member states respect certain basic fundamental human rights. By virtue of this recognition but more importantly by virtue of hierarchy in international law, the WTO is obliged to uphold all human rights and multilateral environmental agreements that states have developed over the last 50 years. After the horrors of the second world war, the Universal Declaration for Human Rights was put in place to assure that 'any society committed to improving the lives of its people must also be committed to full and equal rights for all'.[20]

Because it is the state that signs and ratifies human rights agreements, it is then the duty of the state to educate, monitor and enforce these covenants that it has promised to protect by enacting appropriate domestic legislation. States have negotiated and ratified agreements that uphold the seven basic freedoms. These are[21]:

- Freedom from discrimination—by gender, race, ethnicity, national origin or religion;

[20] *Human Development Report 2000,* United Nations, front cover.
[21] Ibid.

- Freedom from fear—of threats to personal security, from torture, arbitrary arrest and other violent acts;
- Freedom of thought and speech and to participate in decision-making and form associations;
- Freedom from want—to enjoy a decent standard of living;
- Freedom to develop and realise one's human potential;
- Freedom from injustice and violations of the rule of law; and
- Freedom from decent work—without exploitation.

No WTO agreement should undermine or override any of the above freedoms which are guaranteed through both international customary law (which binds all states without exception and irrespective of their consent) and treaty law in the form of legally binding covenants and agreements.

A recent study conducted by two lawyers on the compatibility of trade law and human rights law concludes that 'respecting the hierarchy of norms in international law, where human rights, to the extent that they have the status of custom in international law, and certainly where they have the status of preemptory norms, will normally prevail over specific, conflicting provisions of any treaties including trade agreements'.[22] The study also points to *Article 103* of the *United Nations Charter* which is very important in the interpretation of the international obligations of member states. The article provides that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

7.2 Transnational corporations and human rights

WTO agreements should uphold international codes of conduct which specifically address the issues of TNCs and the protection of human rights and the environment, such as the recently revised OECD Guidelines on Transnational Corporations (2000) and the ILO tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1997).

---

[22] Makau Mutua and Robert Howse, *Protecting Human Rights in a Global Economy Challenges for the World Trade Organisation* p. 3.

ACFOA commends the steps that the Australian Government has taken to introduce domestic legislation in line with the OECD Bribery Convention (1997) which obliges States Parties to exercise jurisdiction in respect of bribery offences committed abroad by their nationals. This is a significant move in the direction of 'home state liability', which requires home states 'to enact and enforce legislation to impose human rights duties on their Multinational Enterprises with regard to their overseas activities'.[23] We urge the Australian Government similarly to enact legislation to uphold the OECD Guidelines for Transnational Corporations as well as to introduce or support legislation to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes.

[23] Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights', *Netherlands International Law Review*, Vol. XLVI, 1999, p. 175.

RECOMMENDATION 14

ACFOA recommends that:

- the WTO should conduct a human rights and environmental audit to ascertain whether the WTO upholds the various human rights conventions and customs as well as multilateral environmental agreements and corporate accountability and responsibility standard (consistent with the recommendation made in the introduction which calls for a review of the URA);
- the audit should be conducted jointly with the UN Commission on Human Rights the ILO, UNCTAD, UNEP and the Commission on Sustainable Development and other relevant UN bodies;
- the audit should also invite comments from non government organisations and other major groups such as trade unions;
- the WTO should repeal any agreement which violates or compromises any human rights or environmental agreement, or standards on corporate responsibility and accountability;
- the Australian Government should enact laws which control the conduct of Australian corporations abroad;
- the Australian Government should support direct binding international standards to regulate transnational corporations through an international treaty for example which would give power to an international tribunal to regulate TNCs; and
- the Australian Government should support any other proposals which would directly regulate TNCs such as giving the human rights commission or another UN body the right to investigate any UN human rights abuses or environmental pollution issues.