Joint Standing Committee on Treaties

Australia's relationship with the World Trade Organisation

Submission by

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This submission will focus on 3 of the suggested areas. These are:

- the transparency and accountability of WTO operations and decision making;
- the effectiveness of the WTO's dispute settlement procedures and the ease of access to these procedures; and
- the relationship between WTO agreements and other multilateral agreements, including those on trade and related matters, and on environmental, human rights and labour standards.

Background to the WTO

The World Trade Organisation (WTO) was established following an agreement of the Final Act of the Uruguay Round of multilateral trade negotiations in 1994. This agreement ensured the incorporation and consolidation of a number of elements of the multilateral trade system that had been established under the General Agreement on Tariffs and Trade (GATT) of 1947, as well as the addition of some new elements. These include bodies such as the Dispute Settlement Body (DSB) and WTO Committee of Trade and Environment (CTE), and additional texts such as the Understandings such as that on Dispute Resolution appended to the GATT and the "Uruguay Round Agreements" including:

- Agreement establishing the WTO (Marrakesh Agreement);
- The Agreement on Agriculture;
- The Agreement on Technical Barriers to Trade (TBT);
- Agreement on Application of Sanitary & Phytosanitary Measures (SPS);
- Agreement on Subsidies & Countervailing Measures (ASCM);
- Agreement on Trade-Related Aspects of Investment Measures (TRIMS);
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

The Uruguay Round enabled considerable advances to be made in the regulatory sphere for several reasons. Firstly it provided a more effective framework for

solving disputes through the WTO's dispute settlement panel (DSP) and appellate body (AB). Secondly, it tackled the problem of non-tariff barriers through the SPS Agreement and a strengthened TBT Agreement. Third it gave greater importance to international standards bodies.

The Final Act is an all-or-nothing package, with members subscribing to the range of agreements with no reservation permitted. The hierarchy of these is established in the "general interpretive note" to Annex 1A of the Marrakesh Agreement, and states that where the GATT conflicts with one of the listed Uruguay Round agreements the latter prevails.

- **the transparency and accountability of WTO operations and decision making**
- **the effectiveness of the WTO's dispute settlement procedures & the ease of access to these procedures**

The two questions of the transparency and accountability of the WTO and its operations and the adequacy and efficacy of dispute settlement processes are heavily interrelated. It is for this reason that they will be considered in together in the following discussion. The below text firstly provides an overview of the functioning of the dispute settlement process within the WTO. It then outlines several of the more controversial aspects of the dispute settlement process. This section of comments is then concluded by a case study on food safety and quarantine requirements under the WTO with mind in particular to the Australian-Canadian salmon case.

Essentially an elaboration of Articles XXII and XXIII of the GATT, the WTO Understanding on Dispute Settlement establishes a firm process for the resolution of disputes and the implementation of determinations. As stated in the Understanding itself (Article 3.2) "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". The WTO has been called on to deliberate on a number of high profile fisheries issues, where trade measures were used to advance environmental concerns. These include the turtle-shrimp and the Canadian/Australian salmon case. Such cases evidence one manner in which trade will continue to affect fisheries and other natural resources policy, both internationally and domestically.

It is important to recall that the WTO dispute settlement procedure is an elaboration of the GATT system that preceded it, but that several key changes have occurred. Substantial differences include that a single nation's can no longer veto the adoption of a report, and as compensation for this change, a new layer of appeal has been introduced to the process. Notwithstanding the positive affects of these changes, there are still a number of criticisms of the WTO's dispute resolution process. These include panel selection and membership, the panel process, implementation of a panel or appellate body report, transparency and access to the dispute settlement process at its various stages and the role of precedent in dispute determination, each of which are discussed in turn below.

The initial stage for embarking on the dispute settlement process is through the registering of a disputes through either Article XXII or XXIII of the GATT or through other Agreements under the WTO which rely on very similar provisions as a basis for dispute settlement. An article XXII dispute is one which is considered to affect the obligations of the agreement. Article XXIII provides for consultation where one member considers that another member is failing to carry out its obligations under the agreement.

If a consultation is registered under Article XXII then during the consultation phase of dispute settlement additional WTO members may request to be joined in the consultation as third parties, though this provision is not available to consultations under Article XXIII.

The manner in which consultations are conducted is up to the parties, except that they are to be held within 30 days of a request. Written questions may be exchanged and answers requested. Despite this lack of structure consultations have led either to settlement, or at the least abandonment of a case, in what has been estimated at roughly half of the cases.

Overseeing the dispute settlement process is what is referred to as the dispute settlement body, which is composed of all WTO members and meets almost monthly. Technically the DSB is the General Council performing its dispute settlement role under a different chair. It is informed about consultations in progress and hears applications for formal dispute settlement. The DSB oversees the conduct and effectiveness of the dispute resolution process for all WTO agreements and the implementation of the decisions on WTO disputes.

Panel Selection

The WTO is required to act as a dispute settlement body only when consultations fail to resolve an issue bilaterally. The DSB may be asked to set up a panel (DSP) to consider the issue. This procedure may only be initiated by member States. The DSB is required to appoint a panel no later than the second meeting at which the request appears on the agenda (usually within 45 days of the conclusion of consultations).

Appointment of the three individuals who will serve as panellists is conducted by the DSB. Where the dispute involves a developing country, if requested by that country then one panelist must be from a developing nation. The DSB presents a selection to the disputing parties who can reject a proposed panel only for "compelling reasons". In practice however, the parties have a rather free reign to object since their agreement to the composition of the panel is necessary, unless the Director General (DG) is called upon to appoint a panel. The practice of frequent rejections means that panel selection process is quite slow with an average of 7 weeks.

If the parties can not agree on the identity of the panellists with in 20 days of the panel's establishment then any party to the dispute may request the DG to appoint the panel, which he is required to do within 10 days. This practice is becoming quite commonplace with the DG having appoint 16 of the 45 panels composed as of mid 1999. It is however common for parties to have already agreed on one or two of the panellists that are appointed by the DG. The frequent use of this supposed last resort of DG appointment in worrying in terms of both reflecting an inability of the DSB to fulfil this task and in regard to the time it takes from other core tasks of the DG.

Panel membership

The primary requirement for membership to a WTO panel is familiarity with international trade law and policy. The selection criteria for a Panel has been narrowed down to three categories: government officials (current or former), former Secretariat officials, and academics. To date most positions have been filled by government officials — with a ratio of government:Secretariat:academic of 114:8:29.

Rules of conduct for the panelists require that their member nations do not give them instructions nor seek to influence them. Moreover, those involved in a dispute settlement determination as panellists, experts or Secretariat must disclose any interest in the proceedings that is likely to give rise to doubts as to the independence thereof.

Panels may either consult individual experts or form an expert review group to advise it on technical and scientific issues. While panels may request independent scientific or legal expertise to assist them in adjudicating disputes that raise non-trade issues, there is no obligation that they do so. Thus sensitive issues involving the relationship between trade and environment may be resolved by trade experts with little understanding of environmental science, policy or law.

One proposal to counter these perceived problems is that of the creation of an Appellate Body (AB)-like pool of permanent panellists from which individual panels could be drawn. Such a body would have a host of advantages including: the building of a body of knowledge as the boundaries of the WTO are pushed further with time and cases become more complex; the establishment of working relationships between panellists over time; increased experience with procedural issues; and consistency of approach and results. Of course such a model is not without its problems including increased expenses as panelists are currently not remunerated and questions of number and selection of this body of panellists.

The Panel process

A panel normally would deliver its report within 6 months. On receipt of the panel's report the two parties are then given the opportunity to submit comments. If the panel finds that a member has not acted in accordance with its obligations under the WTO it will usually recommend that the member bring its measures into conformity within a reasonable period of time. The DSB then adopts the report unless there is a unanimous decision to reject it.

Report implementation

The DSB is also responsible for the adoption and timely implementation of the Panel or Appellate Body report. This is one area in which there has been a significant alteration of the scheme under the GATT. No longer must the plaintiff nation call for the report to be adopted, nor can the defendant either block the suit or the adoption of the report as it could under the old GATT

consensus scheme, but instead adoption of a report is automatic unless there is a consensus to the contrary.

Typically the Panel or AB will recommend that the member concerned bring the offending measure into conformity with its WTO obligations. Although a report may suggest a means of implementation it is left to members to determine how to implement.

The DSB monitors implementation of the report's recommendations. The offending member is required to report to each regular DSB meeting as to its progress in implementation.

If measures are not brought into conformity within a reasonable period of time (usually between seven and 15 months) the prevailing member may request compensation. The DSB can agree to members negotiating temporary measures of compensation or if that is not forthcoming the prevailing member may request the DSB to authorise it to suspend concessions owed to the non-implementing nation, that is temporary proportionate retaliatory measures such as product embargoes may be introduced. This however is viewed as a last resort. In such cases all issues would be kept under constant surveillance by all members through the DSB.

These provision work well when there is agreement as to whether there has been implementation. However when this issue is under contention then the process is unclear. Article 21.5 of the DSU requires that such a disagreement be referred to the original Panel and requires a report within 90 days. It does not however specify whether this ought to be preceded by consultation, nor is it clear if there is a right of appeal. Moreover, and unlike in regard to a Panel hearing, there are no provisions for the expedition of these two steps. This becomes a problem in light of the parallel sanctioning process where within 30 days of the expiration of a reasonable period of time the DSB on request must suspend concessions to the offending nation. Whether these procedures are simultaneous or sequential is not addressed in the Understanding and these and related questions are the focus of the ongoing review of the DSU.

Transparency and access to the dispute settlement process

There have been criticisms of both the DSP and the AB process in relation to the closed nature of these processes. Points raised are the contradictory nature of such a scheme given the open transparent nature of nations trade restrictions for example under the Sanitary and Phytosanitary Agreement (SPS).

Though coming mainly from non-governmental bodies, there are also concerns that non-party WTO member participation as third parties in the dispute settlement process is too limited. WTO members are required to demonstrate a substantial interest in the matter, otherwise panel proceedings are not open to non-parties.

The primary discussion however has revolved around whether access to the

system should be expanded not only to non-parties, but also non-governmental bodies. These criticisms have to an extent been reduced by the acceptance of three *amicus curiae* or friend of the court briefs from non-governmental organisations by the AB in the *shrimp-turtle* case. The extent to which panels and AB's will exercise this right to accept unsolicited third party non-governmental briefs remains uncertain.

The US are a strong proponent of opening dispute settlement proceedings to the public and of accepting *amicus curiae* briefs from non-parties. A supporting argument to this is that opening the system would increase its public credibility (an issue of particular importance for environmental and food safety considerations). Given current fears of globalisation, credibility is seen by some as essential in ensuring the future effectiveness of the WTO.

Alternatively, some members oppose such suggestions viewing the WTO as strictly intergovernmental. In their view if a non-governmental body wishes to make an argument to a panel they should convince a party to make it, and if this is not successful then this is evidence that the argument was not meritorious.

The Appellate Body process

If a panel decision is disputed then it may be appealed to the AB for reexamination. Unlike the DSP, the AB consists of seven individuals appointed by the DSB each for four-year terms. The AB hears appeals of panel reports in a body (or division) of three, although its rules provide for the division hearing a case to exchange views with the other four AB members before finalising its report. The members that make up a particular division that hears an appeal are selected on a secret procedure based on randomness, unpredictability and the opportunity for all members to serve without regard to national origin.

The AB's review a panel decision is limited to issues of law and legal interpretation. This limitation of the review presents what is sometimes considered to be a significant procedural problem: that is, once a panel rules against a defendant government, then there are no means for that government to introduce new scientific evidence. For example, an inadequate risk assessment or one that does not demonstrate risk (see page y) may be potentially curable, but there is no procedure for this new or improved evidence to be considered. One suggested means of remedying this is to allow for the AB to remand cases to the original panel for reconsideration in light of its decision and the new evidence.

The AB has the express power to reverse, modify or affirm a panel decision. Of the 17 appellate body reports issued as of mid 1999, in only three cases was the panel affirmed, and in one case it was reversed. In the remaining 13 cases the AB has modified, sometimes extensively, the panels findings, though in all bar two cases the basic result reached was upheld.

The role of precedent: the DSP and AB as rule making bodies

There exists no principle of *stare decisis* is WTO dispute resolution — that is

future panels are not bound to follow the decision of previous panels.

Although the WTO is not based on precedent, the accumulation of a body of jurisprudence relating to the settlement of disputes does tend to determine how disputes and articles will be interpreted. In this way, the creation of the DSB and AB in 1995 has lead to the formation of a body of case law, and previous decisions are often cited and referred to in new determinations

There is concern however that the DSB is not an appropriate to resolve questions of trade conflict. Nations are becoming anxious that world trade rules not be determined or dictated by 'case law' but rather by negotiations and there is some uneasiness that the dispute settlement procedure has become, by default, a rule making device. In the absence however of negotiated agreement, answers to contentious questions of trade rules will be the jurisdiction of dispute settlement panels. Indeed it has been predicted that one of the main ways that the WTO will deal with trade and environment issues is likely to be through this means over the next few years.

A special case: the WTO and sanitary and phytosanitary measures

Although scientists may be able to answer some scientific questions, they cannot bridge differences in values that often underlie health-related conflicts between countries, and disputes may result. Complaints have been raised by some nations that international trade in seafood was often hindered by sanitary regulations of importing parties. These include:

- the imposition of burdensome administrative measures that sometimes considerably delay imports;
- duplication of inspection controls at the port of origin and the port of entry;
- duplication in the issuance of sanitary certificates and special certification of the absence of *Vibrio cholerae*; and
- the repeated laboratory analysis for the determination of the presence of pathogenic organisims such as *salmonella.*

Indeed the largest number of complaints in the first three years since the WTO Agreements came into force have concerned SPS measures. Of these two were against Australia in regard to salmon quarantine measures. As of mid-1999 only three judgements pertaining to the SPS Agreement however, have been handed down by the WTO panels and the AB. One of these was the Canadian/Australian salmon dispute wherein the AB held that Australia had not been consistent in its treatment of salmon imports with that of other species, and that the risk assessment did not demonstrate a sufficient risk so as to warrant its salmon's market exclusion (see also box). The two other involved *EC-Measures Concerning Meat and Meat Products (Hormones)* and *Japan-Measures Affecting Agricultural Products*. In all thee cases the defendant government employing the health measures lost. Because SPS has more stringent disciplines than the GATT the health exception of section XX(b) is not available to a government as a

defense in an SPS lawsuit. The consistent victory of the plaintiffs is likely to lead to more such cases in the future, though to date developing nations (who are most regularly targeted by SPS measures) have been reluctant to initiate such actions. Many other examples exist of where nations have changed restrictive practices: a very large number of notifications and discussions on potential disputes have been able to be resolved without embarking on a dispute resolution process.

One issue that appears to have been important in all three SPS cases is that of an adequate risk assessment. In all three cases the defendant government was found not to have satisfied the Article 5.1 requirements. According to the AB a risk assessment must find evidence of an "ascertainable" risk - which has been interpreted to mean that a tangible risk must be identified rather than impose regulations on the basis of a "theoretical" risk.

In the case, *Australia-Measures Affecting the Importation of Salmon*, the Canadian government complained against an Australian ban (begun in 1975) on the importation of uncooked salmon. Australia has enacted this ban to prevent the introduction of exotic pathogens not present in Australia. As such this was a fishery health measure not a food safety measure. The AB ruled against Australia in October 1998 and an arbitrator gave Australia 8 months to bring its regulations into conformity with SPS rules.

A key element in the DSP and AB rulings was that the risk assessment carried out by the Australian government was not a proper assessment because it lent too much weight to unknown and uncertain" elements. A question that has been raised in terms of the requirement that a "ascertainable" rather than "theoretical" risk be demonstrates is who then pays if this theoretical risk does occur. If the WTO has insisted on the importation of fresh salmon and a new pathogen enters the Australian environment as a result then Australia faces the prospect of a significant financial loss. The issue of what happens if a panel decision - based on scientific evidence - has been proven wrong has not been considered. Perhaps one alternative, as espoused by trade expert Steve Charnovitz, is that of the provision of financial insurance by the WTO system, for Australia. That is if the panel is wrong on a SPS decision then the nation that has been forced to open it boarders to a previously prohibited import will be insured in the unlikely even that such an outbreak occurs.

Several procedural and substantive issues remain untested. For example, the extent to which a panel may discount the scientific findings presented by a government when these conflict with those of other experts has not under the SPS Agreement as yet been tested.

In terms of fisheries, future issues that may be brought before the WTO under SPS provisions are likely to involve aquaculture issues. A wide range of chemicals are used in many aquaculture a operations. These include antibiotics used to control disease, the overuse of which may contribute to the evolution of drug-resistant disease. To date the are only very limited inspection programs in most countries for antibiotic residue, the US inspecting for chloramphenicol and

oxolinic acid alone. As concerns over antibiotic overuse rise inspection and possible prohibitions are likely to follow. In addition pesticides are used to control weeds, algae and parasites in aquaculture facilities, and these chemical may accumulate in food and potentially harm human consumers. Laws governing the use of chemicals differ from nation to nation. In terms of trade some nations permit the use of chemicals which are prohibited in other countries.

Increasingly Australia's quarantine decisions will come under close scrutiny in a similar manner to that which occurred in the salmon decision. While most developed nations and a number of developing nations have embraced the SPS principles the penetration of this message has not been as deep through developing nations and emerging Asian economies as had been hoped. Many simply do not understand their obligations and the links with relevant international standards and many do not have the scientific capacity to enable them to meet their obligations.

There is also considerable disagreement on quality attributes such as the nutritional content and production methods and on the extent to which they may be legitimately the subject of international regulation. European regulations are based to a considerable extent on a product's organoleptic qualities (taste) and authentisity. The notions of product quality are ill matched to the more restrictive approach adopted *de facto* internationally which allows only for the consideration of sanitary and phytosanitary factors.

- **the relationship between WTO agreements and other multilateral agreements, including those on trade and related matters, and on environmental, human rights and labour standards**

There are a number of regional and multilateral environmental agreements (MEAs) and many ambiguities remain concerning the respective roles of United Nations agreements, regional arrangements and the WTO. Australia has repeatedly expressed the view that MEAs and the WTO should be able to constructively co-exist and countries should seek to ensure that they were able to comply with the obligations of both sets of agreements.

Coercive measures are avoided as much as is possible in environmental regimes. Most are based on consent and transparency and participation are arguably the most important implementation tools. When these fail however, trade is one of the most effective means for obliging other nations to respect children's or environmental rights. Examples exist where trade restrictions and a desire for access to greener markets have had an impact on a nation's attempts to improve social and environmental regulation (appendix 3).

Environmental considerations do receive some attention and acknowledgement in trade arrangements. Perhaps the best example of this is the NAFTA side Agreement. In regard to the WTO system, GATT Article XX exceptions sub-sections (b) and (g) were maintained and the Agreement on Technical Barriers to Trade in its preamble mirrored the wording of these sections.

In regard to the WTO itself, a new preamble was added to the Marrakesh Agreement establishing the WTO, making special reference to the environment. It mandated that:

> "That their relations in the field of trade and economic endeavour shall be conducted … while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both the protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development…"

Furthermore, in an attempt to find some middle ground and constancy between the trends for reduced international trade barriers and increased environmental protection, a Committee on Trade and the Environment was established by Ministerial Decision in the final Uruguay Round negotiations at Marrekesh. This was provided with extensive and detailed terms of reference, and has, since the WTO came into existence on January 1 1995, considered options for resolution of incompatibilities in these paradigms.

Trade measures are included in MEAs usually to achieve one of three objectives. Firstly they may be used in order to reassure other nations that they all face

comparable regulatory constrains and that these are being implemented properly; secondly there may be a need to restrict the trade in some products which have a high demand but are scare; and finally the threat of imposing limits on trade with both parties and non-parties can be an effective tool for securing greater compliance than may otherwise be so.

This part of the submission considers three areas. The first is the manner in which concerns over the compatibility of the WTO and MEAs has bee handled in a recently concluded agreement. Secondly the area of fisheries conservation is examined and the interaction between the trend towards increased trade and investment liberalisation, and the increased environmental expectations and regulation that fisheries trade and marketing is being subject to. Finally, in looking to the future, consideration is given to the possible impact of an investment regime akin to or created under the auspices of the WTO.

The Cartagena Protocol on Biosafety and GMOs under the WTO

The interaction between MEAs and the WTO has most recently been considered under the auspice of the Convention for Biological Diversity. In July 1996 the Convention for Biological Diversity became active with 152 member nations. As per Article 19.3, at the first conference of parties an ad hoc working group of experts on biosafety was established, and it was determined that most nations supported the creation of a framework on biosafety under the convention..

From 20-28 January 2000 negotiations that had broken down the preceding March resumed in an Extraordinary Conference of the Parties (ExCOP). Australia participated primarily as part of the “Miami” group of nations which included Argentina, Canada, Chile, Uruguay and the US. The January 2000 meeting saw the conclusion of an international biosafety protocol to ensure the safe transfer, handling and use and disposal of LMOs. The Cartagena Protocol on Biosafety is the first international agreement that addresses situations where LMOs (the Protocol refers always to living modified organisms or LMOs) cross national boarders and applies to the "…transboundary movement, transit, handling and use of all living modified organisms…" (Preamble).

In terms of the relationship between the Protocol and the WTO scheme, some nations advocated the creation of a provision in the biosafety protocol that would ensure that the protocol did not alter existing agreement like the SPS. Subordination of the Protocol to the WTO scheme was however opposed by a range of nations as well as environmental NGOs. In the quest to reach an acceptable compromise the utility of addressing this question at all has been queried. Indeed the job seems to be only half complete and the result capable of several interpretations.

The key issue of subordination of the provisions of the Protocol to those of the WTO (or *visa versa*) was addressed in the Protocol's preamble. This reads:

> *Recognising* that trade and environment agreements should be mutually supportive with a view to achieving sustainable

development;
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……

The first and third of these are held up by the European Community and less developed nations as proving that LMO matters under this Agreement are not subservient to the WTO. Conversely the US emphasises upon the second paragraph and message contained therein.

In terms of the participation of non-parties to the CBD, Article 24 states that the transboundary movement between parties and non-parties shall be consistent with the Protocol. Apparently drafted with the US in mind, it remains to be seen where the sympathies of a DSP or AB would lie in the case of movement between a party and non-party a challenge under WTO provisions such as the SPS Agreement.

Though not clarifying the situation this does reflect the extent to which a stalemate on the issue of WTO and MEA compatibility and supremacy has developed.

Trade measures through RFMOs

The same debate as is raging over the relationship between MEAs and the WTO is applicable to regional fisheries management organisation (RFMOs) and their governing conventions, many of which use similar measures to those in MEAs. Indeed regional fisheries, initially regulated through agreements, have in the face of increasing levels of illegal, unobserved and unregulated (IUU) and flag of convenience (FOC) fishing faced an inability to prevent overfishing through direct regulation and quotas. Thus they have increasingly turned towards management through product controls. That is through the certification of point of origin information on fisheries products. In this way, trade measures are increasing in salience in the international fisheries agenda, being see as important tool in the fight against the problems facing a number of RFMOs.

The introduction of import controls to regulate fisheries management is an issue that has been given slight consideration in the WTO outside of the degree to which they share characteristics of MEAs. Criteria for evaluating the conditions under which national and supranational trade related conservation measures are appropriate, where they satisfy the requirements of the WTO could include:

1. whether the measure is based on an internationally or regionally recognised standard developed through consultation with stakeholders
2. whether the measure fulfills the WTO principles of transparency and non-discrimination;

3. whether a multilateral agreement or other international instrument recognises the environmental benefits of taking the measure being enforce through trade measures
4. whether the nation or bloc imposing the measure made prior good faith efforts to stimulate international agreement on the need for such a measure
5. whether the measure makes other appropriate provisions for developing nations to meet the standard called for in the measure as per the principle of common but differentiated responsibilities
6. whether the measure focuses on the objective of managing domestic consumption of the regulating nation rather than on changing policies of other countries
7. whether the measure avoids singling out an environmental problem peculiar to some foreign producers as opposed to domestic producers (adapted from Downes and VanDyke, 1995).

Such constraints are clearly linked to discussions of certification of fisheries products which are established by regional fisheries management organisations, and which may affect parties and non parties to such certification.

Certification schemes clearly have to be designed in relation to WTO rules related to transparency and non-discrimination. It is clear that introduction of such measures can be more effective in regional management arrangements where all parties agree to the scheme–for example under the International Commission for the Conservation of Atlantic Tuna (ICCAT) or Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) arrangements. Where schemes are clearly designed for valid purposes the introduction of certification arrangements are unlikely to be challengeable under the WTO system. Environmental organisations argued during the process of developing the CCAMLR catch documentation system that countries supporting pirate fisheries are unlikely to be prepared to take a case to the WTO dispute resolution system.

The most recent example of an RFMO looking at market instruments to reinforce gains and restrictions is the Western Central Pacific convention for the conservation of highly migratory fish species and the Commission to guide the management of tuna and tuna like species within the West Central Pacific, With the conclusion of the multi-lateral high level consultation (MHLC) process, this Convention will open for signature in August this year. Clearly the inclusion of this mechanism reflects the view of island nations of trade restrictions as a means of ensuring that negotiated regional fisheries management and conservation arrangements can be reinforced. The use of trade instruments to assist other management tools has been seen as important by parties and under the draft Convention the Commission is charged with developing procedures that will enable 'non-discriminatory' trade measures 'consistent with the international obligations' of members of the Commission to be taken against states or entities that undermine the effectiveness of conservation and management measures adopted by the Commission.

Same question, different regime: the Multilateral Agreement on Investment (MAI)

The MAI was a proposed trade framework overseen by the OECD which would have enabled investor's capital to move more freely between nations. The final text was to be open to all nations — both OECD and non-OECD members. Negotiations opened in mid-1998 for a mini-round of discussions in preparation for the Millennium Round. It was initially intended that the MAI would be offered as a model for a binding investment liberalisation agreement to be placed under the WTO umbrella.

Talks focused on expanding the rights of investors with little consideration of investor responsibility. It is a broadly accepted principle that there is a need for any such agreement to impose investor responsibility in the form of minimum standards upon multinational corporations so as to ensure that their activities will promote sustainable activities.

In relation to fisheries three of the proposed measures were likely to have significant impact upon conservation laws and fisheries regulations. There are:

1. the inclusion in the MAI of most favoured nation and national like treatment provisions. These would require a nation to treat foreign investors as they do domestic investors, thus reducing nations power to provide limited access to fisheries only to nationals that historically have depended upon the particular resource for subsistence;
2. the expropriation provisions requiring compensation be paid for expropriation of investment. Expropriation was so defined to include measures "tantamount to investment" and could hence require a government to provide compensation of expropriations of investment based on regulatory measures that reduce an owner's ability to use property. This could interfere with efforts to control the use of fishing permits or revoke permits held by those who breach particular laws. This may interfere with a government’s ability to modify conditions placed upon the granting of a fishing permit according to changes in ecological conditions. And may pose a particular problem in respect of ITQs, which have many of the characteristics of private property; and
3. finally the placement of prohibition on 'performance requirements' would prevent a nation from requiring that foreign investors confer local benefits such as local employment of transfer of technology, in exchange for entry. The removal of such measures severely limits the opportunity for in particular developing nations to use investment policy as a tool to promote sustainable social, economic or environmental objectives.

The draft MAI was criticised for elevating the rights of investors far above those of governments, local communities, citizens, workers and the environment. Of particular concern were provisions allowing foreign investors and corporations to directly sue governments for any action they claim undermines their planned profits. Other concerns were that the MAI may override existing MEAs and that

under the MAI, laws to designed to meet international conservation goals could be challenged and potentially reversed

Though due to be completed by April 1998, talks broke down in before its conclusion. This was a result in part by the mobilisation of NGOs opposed to it: witness the release of a joint statement by more than 600 organizations from 67 countries calling for the suspension of negotiations on the Multilateral Agreement on Investment (MAI). In addition were concerns that the scale of reservations place upon the MAI would render it near meaningless in practice. For example NZ had stated its intention to place a reservation on the agreement to the MAI to ensure the current NZ restrictions on foreign ownership of fisheries quota would not included in the MAI.

Such reservation were linked to concerns that in terms of fisheries the MAI may override the rights and responsibilities of national sovereignty in EEZs as established under the Law of the Sea Convention (LOSC). Under the LOSC countries have the exclusive right to make laws, regulations and take other measures for the conservation and management of natural resources on their territories and in their EEZ. However under MAI provisions such measures as:

- Licensing of fishermen, fishing vessels and equipment,
- Determining the species which may be caught, and fixing quotas of catch
- Regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

The MAI may have had severe implications in that any alterations of Australian government law may have opened Australia up to compensatory claims from foreign nations fishing in our waters in that their investment had been diminished by government rules.

Appendix 1: Four Phases of the Dispute Settlement Process

Consultations:

Parties to a dispute are obliged to see if they can settle their differences. The goal is to allow each to better understand the factual situation and the legal claims in respect of the dispute. If consultations are not successful within 60 days the complainant can ask the Dispute Settlement Body to establish a Panel. The parties may also undertake good offices, conciliation or mediation procedures

The Hearing:

The three member panel decides the case in a quasi-judicial process. The panel report is then circulated to all WTO members within none months of panel establishment, and becomes the ruling of the DSB unless it is rejected by consensus or appealed

Appeals:

The possibility of appealing a panel ruling is a new feature in the dispute settlement mechanism. Either party can appeal the ruling of the panel based on the points of law. Appeals are head by three randomly selected members of the Appellate Body who may uphold, modify or reverse the legal findings and conclusions of the panel in a report issued with in 60 to 90 days.

Surveillance of Implementation:

The violating member is required to state its intentions on implementation within 30 days of the report being adopted by the DSB. If the party fails to implement the report within a reasonable time then the two countries enter negotiations to agree upon appropriate compensation. If this fails the prevailing party may ask the DSB for permission to retaliate by imposing (for example) trade sanction the level of which is subject to arbitration.

Appendix 2: Work Program of the CTE

The CTE has an agenda of 10 items for discussion. These are the:

1. relationship between trade rules & trade measures used for environmental purposes including Multilateral Environmental Agreements (MEAs)

2. relationship between trade rules & environmental policies with trade impacts.

3. a. relationship between trade rules & environmental taxes and charges

   b. relationship between trade rules & environmental requirements for products, including packaging, labelling & recycling standards.

4. trade rules on the transparency of trade measures used for environmental purposes, & of environmental policies with trade impacts.

5. relationship between WTO dispute settlement mechanisms & those of MEAs.

6. potential for environmental measures to impede access to markets for developing country exports, & the potential environmental benefits of removing trade restrictions & distortions.

7. issue of export of domestically prohibited goods.

8. relationship between the environment & TRIPS Agreement.

9. relationship between the environment & trade services.

10. WTO's relations with other organisations, both NGOs & inter-governmental.

Appendix 3: Trade Measures in Selected MEAs

Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (131 parties)

Parties may only export a hazardous waste to another party that has not banned its import and that consents to the import in writing, Parties may not import from or export to a non-party. They are also obliged to prevent the import or export of hazardous waste if they have a reason to believe that the waste will not be treated in an environmentally sound manner.

CITES — The Convention on International Trade in Endangered Species of Wild Fauna and Flora (146 parties)

CITES bans the trade in an agreed list of endangered species. It also regulates and monitors by use of permits quotas and other restrictive measures trade in species that might become endangered.

Montreal Protocol to the Vienna Convention on Substances that Deplete the Stratospheric Ozone Layer (172 parties)

The protocol lists certain substances as ozone depleting and bans all trade in those substances between parties and non-parties. Similar bans may be implemented against parties as part of the Protocols non-compliance procedures. The Protocol also contemplates allowing import bans on products made with, but not containing, ozone-depleting substances.

Appendix 4: The CTE and MEAs

The WTO's website remarks on the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements

Excerpt:

"A range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to multilateral environmental agreements (MEAs). Those that are cited regularly as being of key importance are the provisions relating to non-discrimination (MFN and national treatment) and to transparency. Beyond that, and subject to certain important conditions, the exceptions clauses contained in Article XX of the GATT allow a WTO Member legitimately to place its public health and safety and national environmental goals ahead of its general obligation not to raise trade restrictions or to apply discriminatory trade measures.

While some MEAs contain trade provisions, the Report notes that trade restrictions are not the only nor necessarily the most effective policy instrument to use in MEAs, but that in certain cases they can play and important role. It also states that the WTO already provides broad and valuable scope for trade measures to be applied pursuant to MEAs in a WTO-consistent manner. To date, few MEAs contain trade provisions and no problem has arisen in the WTO over the use of trade measures applied pursuant to MEAs. A number of proposals have been put forward in the CTE to broaden the scope available under WTO provisions for the use of trade measures applied pursuant to MEAs, including some that would create an "environmental window" for the use of discriminatory trade measures against non-parties to MEAs, but these proposals have not attracted consensus support in the CTE."

From http://www.wto.org/wto/environ/environm.html

Appendix 5: Regional fisheries management organisations trade based conservation schemes

International Convention for the Conservation of Atlantic Tuna (ICCAT)

The International Commission for the Conservation of Atlantic Tuna has developed significant instruments to certify that Atlantic tuna have been caught in accordance with Commission rules. ICCAT has instigated:

- bluefin tuna certification for all contracting parties importing tuna into their territory ; and
- the use of trade measures preventing the landing of bluefin by non-contracting parties suspected of taking fish within the convention area in a way that undermines the effectiveness of the regime's conservation measures.

This has resulted in the embargoing of Equatorial Guinea (an ICCAT member-nation) for non-compliance relating to the conservation program for bluefin tuna, and the placement of swordfish embargos on Honduras and Belize (non-member countries) for fishing practices that hinder the effectiveness of ICCAT swordfish conservation measures. ICCAT's import ban on Beleize and Honduras was issued on the basis that individual vessel had not followed required management practices and flag states had not responded to calls from ICCAT to resolve these issues. These measures have been designed to be compatible with WTO rules on import bans. In addition to ICCAAT regulations, a commitment has been made by a major firm, Mitsubishi Corporation, not to purchase fish caught by flag of convenience (FOC) vessels in the ICCAT region.

The Bluefin Tuna Statistical Document program (provides certification of the point of origin of all bluefin tuna destine for international trade). It also requires that all bluefin being imported into the territory to be accompanied by an ICCAT 'statistical document'. This document indicates the name of the issuing country, and the name of the exporter and importer. It identifies the area of catch. The document is required to be validated by a port state government official.

Convention for the Conservation of Antarctic Marine Living Resources

The Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) is an international organisation established in 1982 and applying to Antarctic marine living resources in an area bounded to the north by a line which approximates the southern convergence.

IUU fishing within the CCAMLR area has posed significant management challenges for the Commission. Much of the illegal fishing for toothfish is undertaken by vessels from CCAMLR member states, although these vessels may also avail themselves of a flag of convenience (FOC). Attempts to restrict the level of IUU toothfish have seen the US establish a certification scheme for Patagonian toothfish/Chilean seabass. This requires landings of toothfish into the US to be certified that the fish has been caught according to relevant national

and international rules. US NGOs such as the National Audubon Society have urged the US public not to purchase Chilean Sea Bass as part of a consumer boycott. Action by the US, together with increased surveillance and enforcement by coastal states, has reduced the level of illegal catch, as measured by the rising price and demand for the fish in major markets. The development of the catch documentation scheme (CDS) for toothfish is a major achievement in CCAMLR's eighteen year history.

Concern at the level of IUU fishing for toothfish species has led to CCAMLR endorsing a catch documentation system at CCAMLR XVIII in November 1999. The CDS is a Conservation Measure that entered force on 7 May 2000, six months after the conclusion of the Commission meeting

The key element of the CDS is that the scheme applies both inside and outside the CCAMLR area. It requires CCAMLR members to ensure that their vessels to fill in documentation for landing and transhipment. The form will be forwarded to the CCAMLR secretariat and entered into a database. It is thus non-discriminatory and transparent, satisfying key requirements under the WTO.

The specific elements of the CCAMLR CDS are:

1. CCAMLR parties will require that each of their vessels complete a Dissostichus catch documents and obtain flag state certification of the document on each occasion that it lands or transhipps toothfish, wherever landed or transhipped;
2. CCAMLR parties will require that any toothfish landed at its ports or transhipped to its vessels be accompanied by a Dissostichus catch document, competed by the vessel and certified by the flag state of the vessels, whether a Party or a non-party to CCAMLR; and
3. CCAMLR parties will require that each shipment of toothfish into its territory be accompanied by the Dissostichus catch document or documents, certified by the exporting state, that account for all of that shipment.

An emerging issue in the toothfish certification system is how to deal with a product that is transhipped to a intermediate location for processing prior to shipment to the final market. In such a scenario ensuring the 'chain of custody' of the catch is vital.

<u>Convention for the Conservation of Southern Bluefin Tuna (CCSBT)</u>

CCSBT has introduced a trade information scheme. This proposal has been mooted for several years, following the introduction of the ICCAT scheme. Japan had initially been reluctant to endorse certificates of origin for SBT, citing the increased work load it, as the primary market state, would have to bear. Japan's support for the CCSBT scheme reflects a direct concern at the high level of IUU SBT catch its industry. Japan is concerned that its commitment to reducing the capacity of its fleet is being negated by increasing non-party and FOC catch. Japan's import management arrangements and its comprehensive import statistics have been central to the success of the ICCAT certification

scheme, and Japan’s support is similarly necessary for the CCSBT scheme to succeed.

The scheme, the Southern Bluefin Statistical Document Program, entered force on 1 June 2000. It includes the principle that 'there is no waiver' of the requirement that importation of SBT into the territory of a member of the CCSBT shall be accompanied by a CCSBT Southern Bluefin Statistical Document. The scheme is also based on the principle that the program will be in conformity with 'relevant international obligations'. One interesting element of the CCSBT scheme is the information required for 'farmed tuna' recognising the significance of farmed SBT tuna in Australia, comprising almost 95 per cent of the current annual Australian quota allocation of 5265 tonnes.

As in other schemes, the Southern Bluefin Statistical Document that accompanies the landing of fish will be endorsed by an official of the vessel's flag state, or its 'delegated entity'. Data obtained from the program will be circulated to all Members twice a year (1 April for the period 1 July-31 December and 1 October for the period 1 January-30 June). Members will check export statistics against the data provided to them from the CCSBT Secretariat. CCSBT has instructed its Executive Secretary to request non-members that are major SBT importing countries/entities to cooperate in the implementation and provision of data to the Commission for their implementation of the program.