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Director

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Mr. Grant Harrison
Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra, ACT 2600

Dear Mr Harrison

Submission on Australia's Relationship with the World Trade Organisation (WTO)

In March 1999, the Department of Foreign Affairs and Trade ("DFAT") sought public input in formulating Australia's approach to negotiations in connection with the third World Trade Organisation ("WTO") Ministerial Conference to be held in Seattle in November and December 1999. The call for public submissions suggested a number of important issues and areas for consideration. Disturbingly, however, DFAT did not deem the relationship between environmental protection and international trade important enough to mention specifically.¹

Perhaps, though, this was not so surprising at the time. A press release from the WTO about the Ministerial Conference omitted any reference to the environment.² Moreover, Member States of the WTO did not seem any more predisposed to consider the issue in Seattle. Of the 90 plus communications received by the WTO General Council from various states on the upcoming ministerial conference, only Switzerland and Norway raised the possible inclusion of the issue of the relationship of trade and environment for discussion.³ Such a state of affairs made the much touted March 1999 High-Level Symposium on Trade and Environment⁴ held under the auspices of the WTO appear to have been merely lip service. This appearance of empty rhetoric was a paramount concern of legitimate protestors in Seattle.

Clearly, states should be doing more to address the longstanding tensions that exist between rigid trade rules and disciplines, and effective environmental protection. Indeed, Australia should be doing more. This article looks at one key item - the relationship between trade rules and multilateral environmental agreements ("MEAs") - that ought to be a high priority at the 3rd WTO Ministerial Conference. It is an item that has languished over the past 5 years and an item that should be driven by the Australian delegation.



Trade rules and MEAs

Because trade rules and MEAs have developed on separate tracks, their provisions often do not fit neatly together. A number of MEAs rely on trade measures as mechanism to protect the environment, to punish non-compliance and to encourage non-parties to join. These MEAs have the potential to come into conflict with, and be overridden by, trade rules.

The Montreal Protocol,⁵ for, instance, prohibits the trade of listed ozone-depleting substances between parties and non-parties. If a party and a non-party are both WTO Member States, this could be claimed to be a violation of the most favoured nation requirement under the General Agreement on Tariffs and Trade ("GATT").⁶

The WTO Committee on Trade and Environment ("CTE") has, for over five years, been considering the relationship between WTO trade provisions and legitimate discriminatory trade measures permitted under MEAs.⁷ Unfortunately the CTE has not been able to significantly progress the issue beyond the bland assertion that that the preferred approach for governments to take in tackling trans-boundary or global environmental problems is cooperative, multilateral action under an MEA and that unilateral actions in this context should be avoided.

While no dispute involving a direct conflict between an MEA and trade rules has ever found its way before a GATT or WTO dispute panel, the goal of environmental protection of individual states has suffered roundly by the decisions taken by trade dispute panels. The history of the primacy of trade rules over environmental protection in these decisions clearly shows that the present wording of limited environmental exceptions in the GATT is inadequate.⁸ The decisions by these panels have increasingly curtailed the options that policy-makers have to use trade measures for environmental or animal protection purposes.

For example, an unsound method or manner by which goods are produced is often a key environmental concern. Under Article III of the GATT national regulations may only be applied to foreign products to the extent they are equally applied to "like" domestic products. Unfortunately for the environment, the "like product" has been interpreted by dispute panels to prohibit regulation based on differences in production and processing methods.⁹ Thus, regulatory discrimination between a domestic and foreign products that are physically similar to an end product is not permitted, even if one is produced in an environmentally unsound manner.

Dispute panels have narrowed the exceptions contained in Article XX(b) of the GATT, which allowed for measures, "necessary to protect human, animal or plant life or health". According to a number of dispute panels, trade measures are only "necessary" under Art. XX(b) if they constitute the least trade restrictive measure that can be taken. In the *Tuna Dolphin I* case, for instance, the panel found that US import restrictions on tuna involving a high incidental dolphin catch did not meet the necessary test because the US had not exhausted less trade restrictive options including "the negotiation of [an] international cooperative agreement".¹⁰

Dispute panels have also narrowed the Article XX exception "relating to the conservation of exhaustible natural resources . . ." (Art. XX(g)). This terminology would appear to impose a less stringent requirement than the "necessary" test under Art. XX(b) However, until recently¹¹ dispute panels have consistently applied a similar analysis - one reflecting the strict "necessity test - to both articles, thereby limiting the scope for environmental protection.

Panels have interpreted the term "relating to conservation" to mean "primarily aimed at conservation", which in turn has been narrowly interpreted to permit only regulations that directly accomplish the stated conservation policy goal. Regulations that accomplish the goal indirectly or over a period of time do not qualify for Article XX(g) protection.¹²

The need for clarification

The history of decisions regarding the relationship between trade rules and unilateral environmental regulation has resulted in a great deal of uncertainty as to how the GATT, WTO and MEAs relate to each other. Clarifying these relationships would be in the best interest of all concerned and should be a priority for the upcoming 3rd WTO Ministerial Conference. Successful trade challenges to the provisions of MEAs would not only undermine the vital protections they afford, but could also harm the system of liberalised trade.

In brief, the WTO should consider the adoption of the following interpretive rules to ensure that the environmental protection afforded by MEAs is not diminished by the draconian application of trade rules:

1. An interpretive rule that trade related environmental protection measures contained in MEAs presumptively fall within the exceptions provided by Article XX of the GATT.
2. An interpretive rule that the term "like product" as used in Article III of the GATT, and as applied to environmental protection policies, permits differentiation based on process of production method so long as the policies are not intended primarily or disguised as a protectionist measure. If developing country producers are affected, sufficient financial and technological assistance should be forthcoming by parties to the MEA to help ensure compliance.
3. An interpretive rule in relation to the "necessity" test under Article XX(b) that allows for a range of policy options on the part of a regulator and is not limited exclusively to the least trade restrictive. In the case of an MEA there should be a presumption of necessity, in that the international community has decided that environmental trade measures are necessary to achieve the desired goals.
4. An interpretive rule in relation to the "relating to conservation" test under Article XX(g) requiring dispute panel to apply the plain meaning of the term so as to include trade related environmental measures under a MEA that either directly or indirectly achieve the stated environmental objective, either immediately or over time.
5. An alteration of the presumption under the 1994 Dispute Settlement Understanding which presumes an "adverse impact" on trade has occurred whenever there is a breach of the rules. This presumption is inconsistent with the Article XX exceptions whose very purpose is to countenance "adverse impacts". The WTO should adopt an interpretive rule which shifts the burden of proof once a defending state(s) raises an Article XX exception.

¹ Department of Foreign Affairs and Trade, *Request for Public Comment, Australia's approach to further multilateral trade negotiations*, The Australian (March 1999). Specific issues mentioned by DFAT for

consideration included, trade and investment; trade and competition policy; transparency in government procurement; electronic commerce; industrial market access; and, WTO institutional issues.

² WTO, The World Trade Organization's 3rd Ministerial Conference, 28 June 1999, available on the WTO website: www.wto.org/wto/minist/minrel.htm (visited 28 July 1999).

³ Communication from Switzerland, WTO Doc. WT/GC/W/265 (20 July 1999); Communication from Norway, WTO Doc. WT/GC/W/176 (30 April 1999).

⁴ WTO Doc., Background Note, Trade and Environment in the WTO/GA TT (High Level Symposium on Trade and Environment 15 and 16 March 1999).

⁵ Protocol on Substances that Deplete the Ozone Layer, [1989] ATS (No. 0018), reprinted as amended.

⁶ Art. I, General Agreement on Tariffs and Trade (1947) 55 UNTS 187.

⁷ Report of the WTO Committee on Trade and Environment, WTO Doc. WT/CTE/1 (12 November 1996).

⁸ See P Pescatore, et al., Handbook of GATT Dispute Settlement (1991).

⁹ See eg United States - Restrictions on Imports of Tuna, Report of the Panel, GATT Doc. DS2/R-39S/155 (3 Sept. 1991)[Tuna Dolphin I].

¹⁰ *Id.*, at 5.28.

¹¹ See United States - Standards for Reformulated and Conventional Gasoline, Report of the Panel, WTO Doc. WT/DS4 (20 May 1996).

¹² United States - Restrictions on Imports of Tuna, Report of the Panel, GATT Doc. DS29/R-02S (23 May 1994)[Tuna Dolphin II]