EXECUTIVE SUMMARY

INTRODUCTION

Australia needs a strong, rules-based international trading system that guarantees access to overseas markets and provides a predictable and transparent international trading environment for our exports to grow. World Trade Organization (WTO) rules and disciplines are the key means of delivering this for Australian exporters.

As a medium-sized economy that is not a member of a powerful geo-political bloc - and with broadly based and geographically diverse trading interests - Australia cannot generally exert sufficient influence by itself to open other countries' markets or remove subsidy distortions. But we can (and do) exert influence, in coalition with others, in multilateral trade negotiations.

For these reasons successive Australian governments have been strong supporters of the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT). There is a direct link between Australia's interest in an effective multilateral trading system and the Government's wider policy agenda focused on delivering economic growth, more jobs and better living standards for all Australians.

Australia has benefited substantially from successive rounds of multilateral trade negotiations, especially from the most recent Uruguay Round. But more work needs to be done in the WTO. The Government attaches a high priority to securing more open markets for agriculture, services and industrial products in the WTO. That is why the Government supports strongly the launch of a new market access focused round of multilateral trade negotiations at the earliest opportunity.

Recent WTO Gains for Australia

- Fairer access for Australian beef exports to Korea (Australia's third largest beef export market) following a WTO dispute panel finding in our favour.
- The decision by the EC to stop subsidising Danish pork to Australia was influenced in large part by the EC's subsidy reduction commitments in the WTO.
- Improved opportunities for Australian exporters following the phasing out of Indian quantitative restrictions on a range of agricultural and manufactured goods.
- Regaining access for Australian prawns to the US market.
- Better returns for Australian musicians in the United States by protecting royalty rights.
- Improved market access through the accession process for new WTO Members, including major trading partners such as China, Taiwan and Saudi Arabia.

The Opportunities for Community Involvement in Developing Australia's Negotiating Positions on Matters Before the WTO

- The Department of Foreign Affairs and Trade (DFAT) believes it is very important to maintain and intensify two-way consultations with State and Territory governments, Australian business, a wide range of non-government organisations (NGOs) and other stakeholders on trade policy matters.
- The department consults with all stakeholders through a range of formal and informal mechanisms. These exchanges assist in formulating appropriate strategies and approaches to international trade policy issues, including our negotiating positions before the WTO, consistent with Australian Government policy.
- In the lead-up to the December 1999 WTO Seattle Ministerial Conference, the department coordinated a wide-ranging public consultation process to elicit views, and help frame objectives for a new round of multilateral trade negotiations.
- The department also conducts an active program of public outreach and information exchanges aimed at promoting greater awareness and appreciation in the community of the department's trade policy role. This includes public seminars, maintaining an up-to-date web site and producing trade policy-related publications.

The Transparency and Accountability of WTO Operations and Decision Making

- WTO rules are negotiated, agreed and implemented by its Members. Decision-making is generally by consensus. The WTO is not a 'world government'.
- Australia does not ratify new or amended WTO agreements until the Joint Standing Committee on Treaties has subjected them to parliamentary and public scrutiny.
- Most WTO Members, including Australia, recognise there is scope for the Organization to enhance transparency but see no need for radical changes. A process is underway in the WTO to improve internal decision making, information flow and communication among Members. Member governments also are increasing external transparency and outreach to interested community groups with significant improvement in the public's access to WTO documents and enhanced dialogue with NGOs.
- At the same time there is a strong view among most WTO Members that as an intergovernmental organisation, the primary responsibility for discussing the benefits of open markets and a rules-based multilateral trade system, and for consultations with 'civil society' on WTO issues, rests with Members themselves.

The Effectiveness of the WTO's Dispute Settlement Procedures and the Ease of Access to These Procedures

- The WTO dispute settlement system is a fundamental feature of international trade policy and has been a central element in providing security and predictability to the multilateral trading system. It protects Australia's rights under WTO rules and allows us to pursue transgressions by others.

- The dispute settlement system has been effective in resolving disputes and Members have generally changed their practices to comply with WTO rules. An indicator of the legitimacy the system enjoys is its frequent and expanded use, including by smaller and developing country Members.
- The dispute settlement system also ensures that unilateral retaliatory action cannot be taken by one WTO Member against another.

Australia's Capacity to Undertake WTO Advocacy

- Australia's approach to dispute settlement is similar to that adopted by Australia's major trading partners including the United States, the European Communities, Canada and New Zealand.
- Australia is an active participant in the WTO dispute settlement system and has been involved in more than 20 disputes since the WTO's creation in 1995. Australia has been successful in the three complaints it has prosecuted to date under the WTO system (one complaint against the US on lamb is pending). It also has achieved important market access wins from participation as a third party in a number of other disputes, (for example regaining access to the US prawn market and protecting royalty rights for Australian musicians in the US).
- The department's trade law experts bring multi-disciplinary policy skills to the pursuit of dispute settlement in the WTO, as well as to the regular provision of advice on the WTO consistency of domestic policies and measures and those of our trading partners.
- Australia's legal reasoning has influenced the interpretation of WTO rules in important areas such as agricultural export subsidies, trade and the environment, trade-related intellectual property and sanitary and phytosanitary measures.
- DFAT's resources available to undertake WTO dispute settlement have been strengthened significantly and will be further boosted by the establishment of a Trade Law Branch in the department.

The Involvement of Peak Bodies, Industry Groups and External Lawyers in Conducting WTO Disputes

- Industry support and participation is a key part of the effective conduct of disputes. The government/industry task force approach to WTO dispute settlement has proved a successful, cost-effective method of pursuing Australia's trading interests, while avoiding the very high costs often associated with international dispute resolution.
- Industry's support in dispute settlement recently has been bolstered by a WTO Disputes Investigation and Enforcement Mechanism (DIEM) in the department that seeks to ensure equity of access for all Australian exporters to Government support and assistance.
- A potential role exists for private lawyers to identify WTO rules applicable to market access problems faced by clients and to act on their behalf in bringing such problems to the department's attention.
- The department is expanding its outreach programs to conduct seminars for State and Territory government officials, members of law societies, chambers of

commerce and private law firms on the basics of WTO rules and dispute settlement.

The Relationship Between the WTO and Regional Economic Arrangements

- Under the WTO, Regional Trade Agreements (RTAs) are an exception to the rule that reductions in trade barriers should be applied on a Most Favoured Nation (MFN) basis to all WTO Members. In an RTA, preferred arrangements involve tariff and other concessions being accorded only to the countries that form the arrangement.

- A WTO Committee on Regional Trade Agreements examines the consistency of RTAs with WTO rules. Australia is an active participant in that committee.

- Australia is open to concluding RTAs where they would deliver meaningful market access and broader economic gains for Australia which could not be achieved in a similar timeframe elsewhere.

- Australia is a member of only one RTA with reciprocal obligations, the Closer Economic Relations (CER) Agreement with New Zealand. CER has contributed to a massive increase in trade and investment between the two countries.

- Australia and New Zealand are currently working with ASEAN countries to explore the feasibility of a free trade agreement between CER and the ASEAN Free Trade Area (AFTA).

The Relationship Between WTO Agreements and Other Multilateral Agreements, Including Those on Trade and Related Matters, and on Environmental, Human Rights and Labour Standards

Trade and Multilateral Environment Agreements

- Some developed country WTO Members have proposed that the relationship between WTO rules and the trade-related provisions of multilateral environmental agreements (MEAs) should be on the agenda for a new round of WTO negotiations. Many WTO Members (notably developing countries) consider the issues are already adequately addressed under existing rules.

- A WTO Committee on Trade and the Environment (CTE) examines the relationship between WTO rules and the trade-related provisions of MEAs, in consultation with MEA secretariats. (Most MEAs do not contain trade-related provisions.) Australia is an active participant in this Committee. We have worked with others to promote the importance of national policy and international policy coordination to help prevent any conflict between the obligations assumed by countries under different multilateral agreements.

- There have been no dispute settlement cases which reveal conflict between WTO and MEA provisions – relevant cases have not disallowed environmental protection objectives but rather identified flaws in their application which can be remedied.

Human Rights

- Human rights issues are not specifically dealt with in the WTO except in the context of debate about trade and labour standards (see below). More broadly however, the objectives of the WTO, as highlighted in the preamble of the Marrakesh Agreement Establishing the WTO, explicitly recognise principles such as the importance of raising standards of living, optimal use of the world's resources in accordance with sustainable development and protecting the environment.

Trade and Labour

- Australia supports adherence to core labour standards. The International Labour Organization (ILO) is best placed to ensure these standards are met. Australia has been a longstanding member of the ILO and plays a constructive role in the Organization.

- Some developed countries have sought to place trade and labour issues on the WTO agenda for negotiations. Most developing countries see this as disguised protectionism by industrialised nations. Moreover, research suggests that trade policy measures are unlikely to be effective in addressing the root causes of labour standard deficiencies.

- Australia has sought to build support for possible compromise proposals, such as establishing a forum outside the WTO comprising key international organisations including the WTO, the ILO, the World Bank and the United Nations.

- Placing trade and labour issues on the core WTO agenda risks undermining both the ILO's role and the prospects for achieving consensus on core WTO trade work. Complicating the WTO agenda with these contentious issues could slow down our efforts to launch a new round.

Trade and investment

- There is no comprehensive multilateral investment framework. Current WTO consideration of the relationship between trade and investment is handled in a Working Group. Australia is an active participant in the Working Group.

- WTO Members are divided on whether a WTO framework agreement on investment rules should be part of a new round agenda, particularly in view of the failure of the OECD's negotiations on a Multilateral Agreement on Investment (MAI) and public concerns about an MAI.

- While Australia is not seeking investment negotiations in the WTO, Australia might accept some limited work on investment as part of a balanced agenda for a new WTO round. This would not compromise Australia's current approach to foreign direct investment where foreign investors operating in Australia are required to adhere to Australian laws and regulations.

Trade and Competition Policy

- There is no multilateral agreement on trade and competition policy in the WTO and suggestions of more comprehensive WTO negotiations on trade and competition policy remain contentious.

- Current WTO consideration of the relationship between trade and competition policy takes place in a Working Group in which Australia participates. The Working Group has an educational work program promoting cooperation and information exchange.

- Australia is not opposed to the inclusion of trade and competition policy as part of a balanced agenda for a new round. But we would want any work to be realistic in scope, achievable within a reasonable timeframe and take developing country concerns into account. Under any international competition agreement, companies operating in Australia would continue to be required to adhere to Australia's laws and regulations, including environmental and labour standards.

The Extent to Which Social, Cultural and Environmental Considerations Influence WTO Priorities and Decision Making

- The preamble of the Marrakesh Agreement Establishing the WTO explicitly recognises the need to ensure that the WTO's work contributes to sustainable development, including through protecting the environment, and through securing the benefits of international trade for developing countries.
- The WTO Committee on Trade and Environment has focused on the role of subsidies and market access barriers in stimulating high levels of resource use and wasteful production processes. Australia has actively promoted trade reform in these areas that would benefit the environment and assist development. The WTO's work in this area complements activities in other major international organisations (the UN Conference on Trade and Development, the UN Environment Program and the OECD).
- The WTO Committee on Trade and Environment has worked to ensure that the trade rules do not limit inappropriately the scope for domestic or international actions necessary to protect the environment. At the same time the WTO rules have been reviewed to assess their effectiveness against the use of environmental concerns to justify unduly trade restrictive actions.
- The needs of developing countries are reflected in the WTO including: special and differential treatment (S&D) provisions for developing countries in WTO agreements, with particular attention to least developed countries (LDCs); the provision of technical assistance and training to developing countries through the WTO Secretariat; and the establishment of a Committee on Trade and Development. The WTO recently adopted a package of confidence-building measures to address specific concerns of developing countries.
- WTO Agreements do not contain obligations for countries to provide unrestricted access to foreign cultural products. Under the General Agreement on Trade in Services (GATS), WTO Members are only under a binding obligation to offer market access and non-discriminatory treatment between domestic and foreign

suppliers if they have made specific commitments under a particular sector. Australia has made no commitments, for example, in the audio-visual (film and television) and cultural services sectors.

- The provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) build on the existing international framework to provide for recognition and reward to Australian artists and creative people, including those working within indigenous traditions, and create practical mechanisms for transfer of environmentally-friendly technology and the sharing of benefits from biological diversity. They provide for public policy exceptions to intellectual property (IP) rights to ensure that governments can focus IP systems on social and economic benefits.
- The WTO Agreements on the Application of Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT) enable WTO Members to implement domestic measures to protect human, animal and plant life and health - for example with respect to food safety and biotechnology. These agreements require trade restrictive measures intended to provide such protection to be based on scientific principles and technical information.
- The principle of precaution is also provided for, notably in the SPS Agreement, in circumstances where relevant scientific evidence is insufficient. Australia is concerned at the possibility of the precautionary approach being used as a disguised form of trade protection.
- Some developed countries, the EC, Japan and others have been promoting the "multifunctionality of agriculture" (non-trade issues such as environmental protection, cultural values, rural development and food security) to justify high levels of agricultural protection. Australia agrees these issues are important for all countries. The question is how to address them. High levels of protection have sometimes caused or exacerbated, rather than alleviated, the problems covered by "multifunctionality".

Section 1

THE IMPORTANCE OF THE WTO TO AUSTRALIA

Open markets remain crucial to Australian and global economic prosperity. Australia has a multi-faceted approach to trade policy and pursues its trading interests bilaterally, regionally and in international fora. The World Trade Organization (WTO) remains the primary vehicle for Australia to advance its interests in achieving greater market access and secure trading conditions for Australian exporters.

AUSTRALIA'S TRADE POLICY AND THE WTO

Australia, a medium sized economy and not a member of a powerful geo-political bloc, with broadly based and geographically diverse trading interests, cannot by itself exert sufficient influence to compel other economies to open markets or remove subsidy distortions. Through multilateral negotiations we share in the concessions made between countries, through the so-called 'most favoured nation' principle. The WTO also provides a dispute resolution system that helps secure trading conditions and bridle raw economic power. These elements explain why support for a multilateral, rules-based trading system under the WTO will continue to be the fundamental basis of Australia's trade policy. Successive Australian governments have accepted that the multilateral trade system under the WTO, and its predecessor the GATT, is the best way to deliver a more equitable, open and predictable trading environment and to secure greater market access and fairer market conditions for Australia's exports.

To maximise our influence in the WTO, Australia has built and participates in coalitions around specific negotiating objectives, notably the Cairns Group of Agricultural Fair Traders, and also through a range of other informal groupings. Successful coalition building has helped Australia advance significantly its trade liberalisation and market access interests through the WTO.

Importantly, in between rounds of multilateral trade negotiations, opportunities exist for securing improved market access through implementation of GATT/WTO Agreements or when economies negotiate to become members of the WTO.

The WTO's fundamental principles have ensured that all countries, irrespective of the size and composition of their economies and of their share of world trade, can take advantage of trade opportunities made available through global trade liberalisation.

What is the WTO?

The WTO was established in 1995, replacing GATT. The Organisation's overriding purpose is to increase global economic welfare through the expansion of international trade. One of the WTO's most important functions is to provide a forum for multilateral trade negotiations. The WTO's dispute settlement system is also vital in respect of its framework of rules.

In 2000, the WTO comprises of 138 Members. Another 30 countries are seeking to join. The WTO is a member-driven organisation and the WTO Secretariat acts under the direction of Member governments.

WTO rules are not determined by the Secretariat, but are negotiated, agreed and implemented by Member governments on the basis of non-discrimination and transparency. Decisions are in practice by consensus.

According to the underlying principles of the WTO Agreements, the world trading system should be:

- without discrimination – a country should not discriminate between its trading partners (they are all, equally, granted "most-favoured-nation" or MFN status) and it should not discriminate against foreign products and services (they are given "national treatment" once they enter a country).
- freer – with trade barriers and other distortions coming down through negotiation.
- predictable – foreign companies, investors and governments should be confident that trade barriers (including tariffs, non-tariff barriers and other measures) will not be raised arbitrarily; more and more tariff rates and market opening commitments are legally "bound" in the WTO.
- competitive – by discouraging "unfair" practices such as export subsidies and dumping products at below cost to gain market share.
- more beneficial for less developed countries – by giving them more time to adjust, greater flexibility, and special privileges.

Over the past 50 years or so, the GATT/WTO has been instrumental in driving a substantial dismantling of trade barriers worldwide. (See Section 3).

Source: WTO, 1999, Trading into the Future, Second Edition, Revised, Secretariat of the World Trade Organization Geneva.

GATT/WTO BENEFITS TO AUSTRALIA

Australia has benefited substantially from multilateral trade negotiations, especially from the most recently completed and comprehensive round, the Uruguay Round (1986-94). It was the most far-reaching trade agreement ever concluded and increased significantly market access for Australian firms. The Round covered virtually all areas of trade policy, including the extension of multilateral agreements into agriculture, services and intellectual property. Australia played a leading role in the successful outcome of the Round, particularly through the Cairns Group.

Uruguay Round Benefits

Overall, tariffs facing Australia's exports were cut on average by around 50 per cent on a trade-weighted basis as a result of the Uruguay Round. More than 86 per cent of Australia's exports gained increased market access through bound tariff commitments by most of Australia's major trading partners.

The Industry Commission estimated that the Uruguay Round Agreements, when fully implemented (by 2005) are likely to add about one per cent ($A4.4 billion) a year to Australia's GDP and boost Australia's exports by over $A5 billion a year.[1]

Industrial Products

Following Uruguay Round tariff cuts, the average bound tariff rate facing Australian exports of industrial products is now less than 2 per cent on a trade-weighted basis. Nearly 50 per cent of Australia's exports now have tariff free access to significant markets. Australia was able to meet virtually all of its tariff commitments under the Uruguay Round within the framework of its unilateral pre-agreed 1988 and 1991 programs of phased tariff reductions.

Some Definitions

- A *bound tariff* is a treaty obligation not to raise MFN tariffs on particular products above specified rates in the Member's WTO Schedule – it is a ceiling rate.
- An *applied tariff* is the tariff actually imposed by a Customs Administration at the border.
- A *simple average tariff* is the unweighted average of tariffs in a given section of the customs tariff schedule.[2]
- A *trade–weighted average tariff* measures tariffs according to the amount of trade under each tariff line.[3]

[1] Industry Commission, 1994, Annual Report 1993-94, Canberra.

[2] A simple average tariff is calculated by summing all the applied tariff rates in a relevant section and dividing by the number of tariff lines.

[3] A trade-weighted average tariff is calculated by multiplying applied tariffs in a section by the amount of trade (imports), and dividing by the total amount of trade

Agriculture

In agriculture, the Uruguay Round outcomes provided for a simple average cut on all agricultural tariffs of 36 per cent for developed countries and 24 per cent for developing country Members.[4] All agricultural tariffs were bound and non-tariff measures were tariffied with reductions in resulting tariffs.[5] Other key commitments included a 20 per cent cut in trade distorting domestic support (13.3 per cent for developing Members) and reductions in export subsidies. The implementation of these and other Uruguay Round commitments on agriculture have brought a greater level of security and predictability into the trade in agricultural products. Equally important, however, was recognition that the Uruguay Round outcome on agriculture was only a 'first step' in addressing the huge distortions caused by the high levels of support and protection provided to agriculture in the EC, Japan, the United States, Korea and elsewhere. The WTO Agreement committed all Members to on-going reform and mandated further agriculture negotiations, which resumed in early 2000.

Services and Intellectual Property

In the case of services, multilateral disciplines were extended to the services sector for the first time. Standstill commitments were made on market access, with further market opening secured in sectoral negotiations held subsequently.[6] For the first time, minimum standards for the protection and enforcement of intellectual property rights were established under multilateral trade rules, benefiting Australian exporters of intellectual property especially in Asia. Like agriculture, the Uruguay Round mandated further services negotiations that began in early 2000. Estimates of the economic effects of liberalising services trade could be of the same order of magnitude as the liberalisation of goods achieved under the Uruguay Round.

From the Uruguay Round to WTO

The Uruguay Round established the WTO, providing a new institutional structure to bring under a single umbrella all the various agreements that comprise the multilateral trading system (See Section 3). Under the WTO, multilateral trade liberalisation has taken four main directions:

- ongoing work by all WTO Members to implement their commitments from the Uruguay Round
- negotiations to bring more countries into the WTO, which have allowed countries like Australia to negotiate extra market access benefits
- efforts to liberalise trade further through sectoral liberalisation initiatives
- preparations for a new round of multilateral trade negotiations.

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[4] Developed countries were required to cut each tariff line by a minimum of 15 per cent, while developing countries were required to make cuts of 10 per cent.

[5] Tariffication involves converting non-tariff-barriers such as quantitative import restrictions into tariff equivalents.

[6] A standstill commitment is an undertaking not to impose new or more restrictive trade measures after a certain date, usually the date the undertaking was made.

The WTO is already returning results for Australia:

- in early 2000, mandated trade negotiations resumed on agriculture and services.[7] The Government's expectation is that these negotiations on agriculture and services will provide a core around which a new trade round will be constructed
- the Information Technology Agreement (ITA), concluded in March 1997, eliminated tariffs on a wide range of information technology and telecommunications products in 44 countries.[8]
- under the Basic Telecoms Agreement, concluded in February 1997, 69 WTO Members accounting for more than 90 per cent of the US$600 million world market for basic telecommunications agreed to open their markets. Key trading partners, including the US, Korea, Singapore, the EC and Canada are liberalising their telecommunications markets and, like Australia, have agreed to pro-competitive regulatory principles
- under the Financial Services Agreement, concluded in December 1997, 70 Members committed to open their markets for banking, insurance and securities trading.

New WTO Accessions

Countries negotiating accession to the WTO provide another valuable opportunity to improve the trading environment for Australian businesses.[9] WTO membership involves countries making commitments to the transparent and non-discriminatory rules and disciplines of the WTO treaty. New Members are asked to commit to trade opening that matches the liberalisation that has taken place in the multilateral system over the past 50 years.

WTO accessions give Australia bilateral market access gains at no cost, because existing WTO Members do not need to provide reciprocal benefits. Negotiations typically lead to reductions in tariffs, removal of import bans, increases in quotas, commitments on lowering barriers to services trade, and elimination of discrimination against Australia. As well, arrangements are negotiated on measures such as subsidies, customs procedures and charges, publication of trade rules, standards and testing, licensing and intellectual property protection. All these have direct implications for access to markets of countries seeking WTO accession.

Australia uses these opportunities to gain new advantages for export industries. Since the WTO came into force in 1995, 13 countries have negotiated their entry. In each of these cases, Australia has sought and secured market access commitments in areas of

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[7] The mandated negotiations on agriculture and services were part of the 'built in agenda' of the WTO.

[8] The Information Technology Agreement established bound tariffs at zero for a defined product coverage, with implementation through four equal reductions by 1 January 2000. Provision was made for some Members to take a longer implementation period up to 2005, but only for a small number of products. Further negotiations to expand the product coverage of the agreement are ongoing.

[9] WTO accession involves a WTO Working Party examining a country's economic and trade policies that have a bearing on WTO agreements. In parallel, bilateral talks begin between prospective new Members and individual countries. They are bilateral because different WTO Members have different trading interests. The new Member's commitments apply equally to all WTO Members under normal non-discrimination rules, even though they are negotiated bilaterally.

key interest, such as meat, dairy, wool, grains, sugar, horticulture, processed foods, minerals, metals, automobiles and key services sectors.

Australia is currently engaged in negotiations with 30 prospective new WTO Members, including with several important trading partners (China, Oman, Russia, Saudi Arabia, Taiwan, Vanuatu, Vietnam). Australia's exports to these economies are around $10 billion annually or 10 per cent of Australia's total exports. The successful conclusions of these accession negotiations will bring this trade under WTO rules for the first time and help protect the commercial interests of Australian business.

For example, when China becomes a WTO Member a wide range of Australian agricultural and manufactured products and services will benefit from significantly improved and more predictable market access conditions and a more transparent and open regulatory environment. China will guarantee access for a range of commodities including, wool, wheat, sugar and barley. Automotive tariffs will be reduced significantly, and tariff quotas removed by 2006. For the first time, China will be bound by strong multilateral rules requiring the effective protection of Australian intellectual property, a longstanding problem for business confidence in dealing with this major market. Improvements also are being sought in China's services sectors to secure improved market access and to support licence applications by Australian firms, especially financial and professional services providers. Commitments also are being sought on value-added telecommunications, education, engineering, transport, architecture and tourism.

FUTURE PROSPECTS

A rules-based, predictable and transparent global trading system is essential if Australian business is to benefit from new patterns of production, trade and economic activity. New technologies in transport, communications, computing, biotechnology and genetics are shaping a different and more dynamic future business environment. Trade, investment, technology and communications are pushing nations towards a more integrated world economy. Previously non-traded services now are opening to international competition. The growth of the 'new economy' is progressing at speed.[10] The Internet as a business channel and e-commerce are providing mechanisms for more businesses, big and small, to become involved in international trade.

The WTO's Agenda

The success of the GATT/WTO in reducing traditional barriers to trade, its increasingly diverse membership, the reinforcing linkages between trade liberalisation and globalisation, and the desire by some WTO Members to pursue a much broader and ambitious agenda are pushing the multilateral trade system into new and increasingly complex areas. There is pressure for the WTO to incorporate 'social' issues, such as labour standards and human rights, and for enhanced work on the links between the WTO rules. Many countries consider such issues as best dealt with in other fora, and there are differences between Members on how issues which are

[10] The "new" economy is primarily a services economy. E-commerce has enabled the global delivery of traditional services and person-to-person contact is no longer a primary requirement for some services such as Internet banking, retail and financial services. Moreover, it is the services inputs and associated intellectual property rights which generate the value in highly knowledge intensive industries, such as biotechnology and information technology.

already part of the WTO's work (for example, trade and environment) should be handled. The changing nature of services trade, with the growth of electronic commerce, and the potential for rapidly expanding trade in biotechnology products are other new issues on the WTO agenda.

Global negotiations under the WTO also will need to adapt to the growth of regional trading arrangements. A key concern is to ensure that a proliferation of preferential trading arrangements does not undermine the multilateral trading system and the larger gains it can deliver for all.

New Round Prospects

At the start of a new millennium, Australia seeks even more effective international trade rules and continuing reductions in barriers to trade and investment to support the interests of Australian business, workers and consumers. Few dispute that the trend to a global marketplace and economic interdependence will continue, irrespective of Australia's policy choices. This reinforces the need for a strong rules-based trading system built around the WTO.

To ensure our interests are protected as the WTO agenda expands, Australia must continue to be active in the WTO, where our influence is considerably greater than our ranking as a world trader. We were one of the first and among the most consistent supporters of a new market access focussed round of multilateral trade negotiations.

Unfortunately, the WTO Ministerial Conference held in Seattle in late 1999 was unable to achieve a consensus on the basis for commencing a new round. It was disappointing that a range of factors, including inadequate time and the excessive ambition of some in new and contentious areas, prevented a launch at that time. In September 2000, prospects for a launch remain unclear, although Australia remains committed to working with other WTO Members to address the issues which eluded agreement in Seattle.

We are working actively with other like-minded countries to rebuild and sustain broad international support for a round launch, including through strategic contributions to WTO, UNCTAD, OECD and APEC processes. Australia's hosting of the APEC Meeting of Ministers Responsible for Trade in Darwin in June 2000 resulted in a strong message reaffirming an early round launch. The OECD Ministerial in late June and the G8 meeting in July 2000 also reiterated support for a new round.

Australia supports a round that can deliver results within a relatively short period, (say over three years), and focused on further agriculture, services and industrial product liberalisation. In pressing for a new round, we remain committed to ensuring the WTO system remains relevant to the changing needs of the Australian business community and that our trade policy objectives take into account broader public interests.

Agriculture

Further negotiations on agriculture are part of the 'built-in agenda' of the WTO and resumed in January 2000. They aim to continue the process of substantial progressive reductions in support and protection resulting in fundamental agricultural trade reform. The chances of deep cuts in domestic support and agricultural subsidies would greatly improve if a new round was launched and the agricultural negotiations

fell under its umbrella. The concessions the EC, US, Japan and other Members need to make would be easier to trade off if there were simultaneous gains to be made in other sectors under a new round.

Services

A mandate for further liberalisation of services exists under the WTO General Agreement on Trade in Services (GATS), and also was part of the WTO 'built-in-agenda'. Services negotiations began in February 2000. The GATS mandate is broad (successive rounds of negotiations) and commits Members to a framework for progressive liberalisation.

Australia has supported negotiations across all 12 services sectors, as defined by the WTO, on the basis that only a comprehensive services negotiations will give us the critical mass necessary for trade-offs and for a substantive result.[11] This does not imply that Australia will make concessions in each and every area.

Industrials

Unlike for agriculture and services, negotiations to liberalise further trade in industrial products were not mandated in the Uruguay Round's 'built-in agenda'. In part, this was because of the significant progress already made under previous GATT Negotiating Rounds to reduce industrial tariffs and non-tariff barriers. Nevertheless, in many industrialised countries, high tariffs remain in sensitive sectors to protect domestic industries. In particular, the problem of tariff peaks and tariff escalation (especially in agri-food and resource based products) remains widespread.[12]

Non-tariff measures (NTMs) on industrial products also remain a significant issue for exporters. Significant non-tariff measures include non-automatic and discretionary import licensing, highly prescriptive national standards, and costly and lengthy administrative procedures. Further work on NTMs is needed in these areas to ensure that the benefits accruing from tariff reductions are not undermined by the use of existing or new NTMs.

Australia argues that cuts in industrial products protection, covering tariffs and key non-tariff measures should be one of the core elements of a new round, and is urging preparatory work to begin in this area in advance of a round launch.

Other Issues

Australia is prepared to consider the inclusion of other issues if they create incentives for all WTO Members to make commitments, and are capable of negotiation within the desired timeframe. A limited, realistic degree of ambition is required in new areas such as investment and competition. Other issues, such as labour standards remain

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[11] The 12 sectors are: business; communication; construction and engineering; distribution; educational; environmental; financial; health-related and social; tourism and travel related; recreational, cultural and sporting; transport; and 'other services'.

[12] Many countries reduce bound tariffs on raw materials inputs more than bound tariffs on industrial products. This increase in tariff escalation is continuing to distort trade flows by providing domestic firms in some countries with cheap imported raw materials and high rates of tariff protection for imported manufactures that compete with the domestic product.

controversial and pushing for their inclusion has undermined confidence for an early launch, particularly with developing countries – an increasingly large portion of the WTO membership.

Section 2

IMPORTANCE OF CONSULTATIONS: COMMUNICATING TRADE BENEFITS

Terms of reference: The opportunities for community involvement in developing Australia's negotiating positions on matters before the WTO.

In determining how best to advance Australia's international trading interests, including within the WTO, the Department of Foreign Affairs and Trade (DFAT) maintains regular consultations with State and Territory Governments, Australian business and industry, non-government organisations (NGOs) and a wide range of other stakeholders. DFAT also provides briefing for Parliamentary Committees. These consultations and exchanges of views have proved valuable to the department in providing trade policy advice to the Government and have helped ensure that government policy and priorities takes into account the interests of Australian industry and the broader community. In addition, business leaders and industry bodies have regular opportunities to participate in overseas business missions and to meet visiting foreign trade ministers and officials.

The department (including its overseas posts) engages actively in broader public outreach activities. The department provides factual information and advice to the community on Australian trade policy, the international trading environment and the work of the WTO, including by participating in public seminars, making presentations at conferences, regular contact with industry through the market access teams producing publications and placing trade policy information on the DFAT website (see below).

FORMAL CONSULTATIVE PROCESSES INVOLVING MINISTERS

In pursuing Australia's trade policy objectives, Ministers and Government receive advice from different areas through a range of mechanisms including the Austrade and EFIC Boards and specially established ministerial councils.

Trade Policy Advisory Council

The Trade Policy Advisory Council (TPAC) provides the Minister for Trade with a very important source of advice from the Australian business community on trade and investment issues. It includes senior industry representatives and the heads of key federal government agencies dealing with trade and economic matters, including the department. Over the past year TPAC has met three times, providing a forum for a regular exchange of views on WTO issues, including dispute settlement, opportunities for Australia from accession of new WTO Members and a new round.

National Trade Consultations

National Trade Consultations (NTC) are held annually between the Minister for Trade and State and Territory counterpart ministers. The NTC provides an important forum for coordination and cooperation between the Federal Government and State and Territory Governments on Australia's trade policy and trade promotion activities.

NTC meetings also are held twice a year intercessionally at officials' level with participation by State and Territory officials and industry groups. Over the last year, NTC Ministers have met twice (July 1999 and June 2000) and consulted closely on WTO matters, including priorities for a new round launch, WTO accessions and dispute settlement. In November 1999, NTC Ministers held a teleconference to consult on Australia's priorities for the WTO Ministerial Conference in Seattle.

In August 2000, a special meeting of Commonwealth and State officials agreed to strengthen the NTC processes. The NTC agenda is to be shortened and sharpened, to make it more relevant to Ministers. The meeting in future will rotate between states and a provision for Ministers to meet separately from officials has been added. The duration of the NTC is to be extended and additional meetings will be held if issues of importance emerge.

Agriculture Trade Consultative Group

The Agriculture Trade Consultative Group (ATCG) is a forum for government and industry to share views and develop collaborative approaches to advancing agricultural trade reform, including with respect to developing Australia's negotiating approaches in the WTO. The ATCG is co-chaired by the Ministers for Trade and for Agriculture, Fisheries and Forestry, and includes Chief Executives from all main agriculture industry bodies, representing all main sectors of production. ATCG networking assists industry communicate its market access priorities to government and helps ensure that Australia's negotiating positions accurately reflect the range of industry's trade interests. This process proved particularly effective in developing negotiating positions before the Seattle WTO Ministerial Conference. The ATCG has met at least annually since its establishment in 1997, most recently in September 2000.

WTO SEATTLE MINISTERIAL CONFERENCE - CONSULTATIVE PROCESS

In the lead-up to the December 1999 WTO Seattle Ministerial Conference, the department coordinated a wide-ranging public consultation process to elicit views, and help frame objectives for a new round of multilateral trade negotiations. Over 130 submissions were received from State Governments, business groups, trade unions and various non-government community organisations and members of the public. The department also conducted a series of public hearings in all state and territory capitals and in five regional centres. These consultations contributed significantly to determining the Australian Government's approach to the December 1999 Seattle Ministerial Conference. The department published an issues paper summarising views and a paper responding to frequently asked questions. These were made available on the department's web site to encourage further public discussion of the issues and explain the nature of the WTO preparations then underway.

The Australian delegation to the Seattle Ministerial Conference included not only Australian Ministers and senior officials but also representatives from the Business Council of Australia, the National Farmers Federation, the Australian Services Network, the Australian Industry Group, other business organisations and the TPAC Chair. The department also facilitated the registration of other non-government organisations to the Seattle Conference. Daily briefings for non-government organisations by the Minister and/or senior officials were conducted in Seattle over

the duration of the Conference. Daily reports also were provided to State and Territory governments.

Sectoral Consultations

Agriculture

The department works very closely with agricultural industry bodies on trade policy matters, including WTO issues. The agricultural sector was represented on the delegation to the Seattle Ministerial Conference, and made a valuable contribution to pushing forward the agenda in the WTO agricultural negotiations.

More recently, as part of the process of developing detailed strategies for the negotiations, the department held a further round of consultations with senior representatives from the grains, meat, horticulture, dairy, fibres, sugar and wine industries. The consultations sought industry views on negotiating strategies and provided information on the processes underway in Geneva, including a Cairns Group plan to submit negotiating proposals for each of the three principal areas of agricultural reform - export subsidies, domestic support and market access. All industry groups welcomed the consultations as a valuable opportunity to exchange information and to reach mutual understanding on the industry's trade liberalisation interests.

The department also participates in regular consultations with State and Territory Governments, industry and other stakeholders on WTO-related agriculture issues. Recently, these have included areas such as biotechnology and related aspects of food safety. In addition to these consultations, departmental staff regularly address conferences and seminars. These provide additional opportunities for networking and the exchanges of practical ideas on how to advance Australia’s agricultural trading interests.

Services

Before the WTO Seattle Ministerial Conference, the department undertook extensive industry consultations to develop Australia’s strategy for WTO services negotiations. The department worked closely with the Australian Services Network and representatives of all services sectors to jointly identify market access barriers and to secure agreement on priorities.

Following the launch of mandated negotiations on services trade liberalisation in Geneva in early 2000, the department intensified its consultations and information exchanges with services industry bodies and individual companies and other stakeholders. The information gathered on market access barriers in the services sector is incorporated into a comprehensive departmental database, which helps clarify our objectives for the services negotiations.

In addition to collaboration with peak service industry bodies, some of the key consultations and outreach activities include industry seminars on services trade. In 1999-2000, seminars have been held in Brisbane (on broad services trade issues); Melbourne (on e-commerce, transport and insurance/banking) and Sydney (on education, telecommunications, wholesale and retail distribution, and tourism). The seminars and information sharing have helped build industry and broad community support for Australia’s approach to the mandated services negotiations.

The department also produces a monthly services trade and negotiations newsletter that is e-mailed to over 400 stakeholders. The newsletter provides industry-targeted information on developments in services trade negotiations, and the Minister's and department's services-related activities. The departmental web site has detailed information on international trade in services, the texts of relevant legal instruments and links to other related sites.

Industrial Products

The department's consultations with the representatives from non-agricultural industries have to respond to a diverse set of interests in relation to the WTO and the multilateral trading system. The increasing engagement of the Australian manufacturing, mining, fishing and forest products sectors in the trading system has been accompanied by a sharpened awareness about the impact of tariff and non-tariff measures on market opportunities. At the same time the role and operations of the WTO as a means of working towards a negotiated resolution of such difficulties has been attracting more attention.

In association with the Department of Industry, Science and Resources and the Department of Agriculture, Forestry and Fisheries - Australia, the department works to ensure that its role in market access and market development and the opportunities presented by the WTO for reducing tariffs and eliminating non-tariff measures are widely known. As well, the department encourages industry representatives to feed their views into negotiating processes that are planned or underway.

In the lead-up to the Seattle Ministerial Conference the department consulted with many different groups and associations. The department concentrated on informing industry representatives about the potential for reducing tariff and non-tariff measures among key trading partners and collaboratively identified Australian priorities in specific markets. Departmental officers addressed seminars and workshops organised by industry groups to focus business interest in the issues that could be taken up in a new round of multilateral trade negotiations.

A number of Australian industries were represented at Seattle either directly from Australia or through their international counterpart associations. The chemical industry and the information technology sector, among others, are significant players in the activities of the multilateral trading system. The active participation of Australian-based companies in their respective international councils can provide additional support for Australian approaches to many of the issues on the trade liberalisation agenda. The department encouraged these firms to take up their own priorities as well as Australian Government objectives for the development of a comprehensive round of trade negotiations.

Intellectual Property

In advance of the Seattle WTO Ministerial Conference, the department organised a high-level industry workshop on IP issues in cooperation with IP Australia and the Advisory Council on Industrial Property. The department's public consultations and outreach activities on WTO-related intellectual property issues also include a range of industry briefing seminars, including several recently in Sydney, Canberra, Melbourne and Adelaide (with plans for other State capitals).

Other outreach activities include the distribution of a new publication: *Intellectual Property: A Vital Asset for Australia,* published in June 2000, and specific briefings on request for a range of industry and community stakeholders. Consultations have focussed on: general Australian trade interests relating to intellectual property; seeking input on the specific concerns of Australian intellectual property right holders in export markets; and on practical mechanisms for dealing with such concerns. The department also has contributed to IP industry consultations convened by other government agencies concerned with intellectual property issues including on data protection for agricultural and veterinary chemicals, copyright and patent protection for pharmaceuticals.

Market Access Facilitation Teams

Over the past three years the Government has formed four market access facilitation teams in response to domestic economic and trade policy developments. The teams cover: processed food and beverages; automotive; information industries; and textiles clothing and footwear. A Market Access Facilitator for Agriculture has also been appointed.

The main role of the teams is to liaise with business to develop priorities and market access strategies in each sector, including through WTO processes. Teams actively invite companies to provide information about market access problems and draw on Australia's network of overseas posts and other departmental resources to assist exporters.

The Market Access Facilitator for agriculture provides a focal point for industry consultations on market access priorities. Similarly, in close consultation with industry, the processed food team recently developed a processed foods strategy which has resulted in greater focus in WTO agriculture negotiations on processed food interests.

The textiles, clothing and footwear, automotive and information industries trade facilitation teams also give special attention to international market access priorities. Through the close specialist working relationships that each team has developed with their respective industries, WTO activities aimed at securing improved markets access have been strongly supported. The Automotive team has ensured effective industry input into a range of WTO accession negotiations currently underway. The textiles, clothing and footwear team in coalition with the wool and cotton industries has developed a joint international strategy to take account of changes in the international market as a result of the WTO Agreement on Textiles and Clothing. The main focus of the information industries team has been involvement in the negotiation of the WTO Agreement on Information Technology and work on non-tariff measures in the WTO.

OTHER CONSULTATIVE MECHANISMS AND OPPORTUNITIES TO EXCHANGE VIEWS

WTO Disputes Investigation and Enforcement

In December 1999, the department established the Disputes Investigation and Enforcement Mechanism (DIEM); an instrument designed to facilitate exporter access to the WTO dispute settlement system (See Section 4). DIEM's launch involved holding public seminars in state and territory capitals, followed by the convening of specialist seminars with industry and professional bodies and with relevant state/territory officials. These exchanges were invaluable, not only providing practical advice to business, but also increasing departmental understanding of business needs in this area. DIEM allows exporters to lodge submissions electronically with the department, with details available on the DFAT web site.

On specific disputes, the department consulted closely with relevant industry bodies and other stakeholders on:

- Australia's WTO complaint against Korean beef import restrictions
- Canada's complaint against Australia's quarantine measures on salmon; and
- Australia's concerns over US cotton, and sugar assistance measures.

The department also cooperated with other agencies, industry and State Government bodies to ensure that the United States implemented the outcome in the WTO shrimp dispute in a way that would restore Australia's market access. The department also provided advice to Australian companies facing anti-dumping action in overseas markets.

Small and Medium Sized Enterprises (SMEs)

The department also recognises the increasingly important role of small and medium size enterprises (SMEs) in Australia's exports. In many cases SMEs are less familiar with the working of government. SMEs are an important target of the Disputes Investigation and Enforcement Mechanism (discussed above), to increase their awareness and understanding of Australia's rights under the WTO legal framework. This has ensured that SMEs are involved in consultation processes on Australia's trade policy.

WTO Accessions

During the past year, Australia successfully concluded market access packages with six trading partners aspiring to WTO membership. The department seeks to take into full account specific Australian business interests in WTO accession negotiations. This is achieved through regular contact with key industry bodies, exporters and bilateral business councils/chambers of commerce as appropriate. The department provides industry and other stakeholders with regular progress reports on WTO accessions.

Trade and Sustainable Development

Prior to 1999, the department hosted a regular Trade and Environment Working Group involving participation by some eighteen industry, trade union and environment groups. In the lead-up to the Seattle Ministerial Conference in late 1999, these consultations were broadened to encompass also the WTO's trade and development work and to involve a larger number of NGOs. Meetings in March and November 1999 involved over 30 NGOs representing industry, environment, development, trade union, consumer and social welfare groups. The networking and exchanges proved helpful in improving mutual understanding of relevant issues and their WTO dimension.

The broadening of consultations reflected increased community interest in the links between trade, environment and development. In August 1999, Mr Vaile and Senator Hill jointly hosted a Round Table on Trade and Environment involving a range of NGOs, academics and invited overseas speakers. Exchanges at the Round Table assisted the domestic policy debate on trade, environment and development, including the role of the WTO in these issues.

In addition, over the past three years, the department has produced a series of public information papers providing updates and progress in the WTO and OECD on trade, environment and development matters. The department has made these papers available at its website, and has distributed them to interested NGOs. Departmental officers also meet on an ad hoc basis with individual NGOs or attend meetings organised by NGOs. The department facilitated the attendance of Australian NGOs at WTO events, including symposiums on environment and development issues, and at the Seattle Ministerial Conference in 1999 and at the UNCTAD Ministerial meeting in early 2000.

Addressing the Needs of Regional Australia

In 2000, the department has undertaken a major project to seek views and promote better understanding of the role of international trade in regional and rural Australia including how it benefits from the multilateral trade system under the WTO.[13] Departmental representatives have conducted a series of visits to regional centres across Australia to meet exporters and interested community and other local organisations such as chambers of commerce. These consultations provided a valuable opportunity for private sector and community representatives to comment on government trade liberalisation policies, including its approach to WTO trade negotiations, and to discuss the issues and challenges faced by regional Australia.

The consultations will be a key input into a departmental study of exporting activities in regional areas to be launched in early 2001. These consultations also provided valuable information that was used in a series of brochures entitled *Exporting to the World*, covering over 30 regions across Australia. The brochures provide succinct information on the contribution of exports to the economy of regional Australia,

[13] The initiative responds to the recommendations of the House of Representatives Standing Committee on Primary Industry, Resources and Rural and Regional Australia, which in 1998 called for public awareness programs to showcase successful exporters and demonstrate the benefits of trade reforms to regional communities.

successful local companies, government services for exporters and relevant market access gains, including those achieved through the WTO.

Regions Covered in DFAT Consultations with Regional Exporters and the Brochure Series "Exporting to the World"	
NSW	Central West NSW*
	Far West*
	Hunter Valley
	Mid North Coast
	New England and Northern Slopes*
	Northern Rivers*
	Orana and North West*
	Riverina-Murray
	South East NSW
VIC	Ballarat Area*
	Gippsland
	Mallee and Wimmera
	North Central Victoria*
	North East Victoria
	South Western Victoria
QLD	Central Queensland*
	Darling Downs and South West Queensland*
	Far North Queensland
	Mackay Whitsunday*
	North Queensland*
	South East Queensland
	South West Victoria
	Wide Bay Burnett*
SA	Adelaide Hills and Fleurieu Region*
	Barossa Valley/Mid-North*
	Riverland*
	South East SA*
	Spencer Gulf & Eyre Peninsular*
WA	Goldfields and Esperance*
	Mid-West and Wheatbelt*
	Northern WA
	South West and Great Southern*
TAS	Regional Tasmania*
NT	Northern Territory*
* Brochures released as of 31 August, 2000	

TradeWatch

In June 2000, Mr Vaile launched TradeWatch, the department's new interactive online economic and trade information service. The service focuses on market access issues in a progressively expanding range of our key markets. It enables business to feed in directly market specific concerns that will be factored into the government's market access strategies. Access to the service is available at the website http://tradewatch.dfat.gov.au.

APEC (Asia-Pacific Economic Cooperation)

The department also coordinates Australia's involvement with APEC in close and continuous consultation with a wide range of industries. The department sees APEC as an important vehicle for promoting trade liberalisation in the region. APEC has been successful in reducing barriers to trade to Australian business, including in such areas as trade facilitation, which have not yet been sufficiently advanced in the wider WTO agenda. Our work in APEC complements and feeds strategically into the department's efforts to exercise greater influence on the WTO agenda.

The Darwin APEC Trade Ministers' meeting in June 2000 provided a valuable opportunity to advance the WTO agenda and encourage momentum for the early launch of a new round. In the first major trade meeting since Seattle, APEC ministers supported three initiatives, to help re-build momentum toward the launch of a new round; reinstatement by APEC economies of a moratorium on the imposition of customs duties on electronic transmissions until the next WTO Ministerial Conference; APEC support for intensified WTO work on industrial tariffs; and a strategic plan for capacity building to assist developing Members implement WTO agreements.

The APEC meeting also endorsed a recently produced departmental report entitled *"APEC - A Decade of Progress"* which demonstrates the benefits of open economic policies combined with institutional reform within APEC.

Departmental Web Site and Publications

The departmental web site (www.dfat.gov.au) contains an extensive range of material on trade policy matters. It is regularly updated to ensure coverage of developments of key interest to stakeholders and the broader community. The department also produces a range of brochures and other publications on trade policy and market access. The publications, a list of which can be accessed through the departmental home page or directly at www.publications.dfat.gov.au, can be ordered online.

Following are some of the key departmental trade policy related publications.

- *Annual Report*
- *Global Trade Reform 2000: Maintaining Momentum, (1999)*
- *Trade Liberalisation: Opportunities for Australia, (1997)*
- *Trade Outcomes and Objectives Statement* (*produced annually*)
- *Trade Winds: The Transformation of World Trade: Changing Patterns of Global Import Demand and Australia's Response, (1999)*

- *An Informal Survey of the Notification and Review of National Intellectual Property Laws under the WTO TRIPS Agreement, (1999)*
- *Australia and the WTO Ministerial Conference, Seattle: Information for Australian Participants, (1999)*
- *Foreign Direct Investment: The Benefits for Australia, (1999)*
- *NAFTA After Five: The Impact of the North American Free Trade Agreement on Australia's Trade and Investment, (2000)*
- *New Multilateral Trade Negotiations: Issues for Australia, (1999)*
- *Intellectual Property: A Vital Asset for Australia, (2000)*
- *Australia and International Treaty Making: Information Kit, (1999)*
- *Asia's Financial Markets: Capitalising on Reform, (1999)*
- *Asialine (produced quarterly)*
- *Transforming Thailand: Choices for the New Millennium, (2000)*
- *Doing Business in Latin America: An Introductory Guide, (2000)*

The department also contributes to trade policy-related material produced for schools and universities and responds to numerous written queries and representations from the public about trade matters.

Preparing For a New Round of Trade Negotiations

Australia continues to work towards the launch of a new round of multilateral trade negotiations at the earliest opportunity. In formulating its positions and strategies the department plans to intensify its consultations with Australian stakeholders. The department will continue its public outreach activities to inform stakeholders and the broader community about developments in the process and the Government's trade policy approach.

Section 3

WTO OPERATIONS, TRANSPARENCY, ACCOUNTABILITY AND DECISION MAKING

Terms of reference: the transparency and accountability of WTO operations and decision making.

The Marrakesh Agreement Establishing the World Trade Organization (WTO) came into force in 1995. The WTO replaced and built on the work of the General Agreement on Tariffs and Trade (GATT). For most of the post-War period the GATT provided the rules and stability for the multilateral trading system.

The core aim of the WTO is to strengthen international economic cooperation and global economic welfare through bringing greater stability and predictability to the international trading system.

As of September 2000, the WTO comprised 138 Members[14], with another 30 economies (including China and the Russian Federation) in the process of accession.

At the centre of the WTO are the "agreements". These provide the legal rules for the conduct of international trade and are signed by each Member government of the WTO.

AUSTRALIA IN THE WTO

Australia, like other Members, acceded to GATT/WTO Agreements because successive governments have judged them to be in our national interest as:

- a strong rules-based multilateral system helps protect Australia from major trading nations using their economic power and leverage to gain unfair trade advantages
- the WTO provides a forum where Australia can work with others to press for reform in areas of trade of importance to Australia, particularly agricultural reform which has been neglected
- the WTO gives greater certainty for all Australian companies engaged in international trade, including on tariffs and non-tariff measures
- the WTO has brought services trade under international rules for the first time and acknowledged the increasing importance of intellectual property in international trade and investment.

[14] The WTO is comprised of "Member" economies – the original Members that joined in 1994, or a bit later in the case of some developing countries, plus any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations which has acceded to the WTO (Reference: Article XII of the Marrakesh Agreement).

The Government pursues its multilateral trade objectives in the WTO principally through the Trade Negotiations Division of the Department of Foreign Affairs and Trade and acting through Australia's Permanent Mission to the WTO in Geneva. The Mission currently comprises eight full time officers led by an Ambassador who represent Australia in the General Council, various other councils, committees, working parties and other groups in the WTO.

In formulating our negotiating positions, the department works closely with other government agencies, in particular the Department of Agriculture Fisheries and Forestry-Australia, the Department of Industry, Science and Resources, the Department of Treasury, Environment Australia, the Attorney-General's Department, the Department of Communication, Information Technology and the Arts, the Department of Transport and Regional Services and the Department of Prime Minister and Cabinet.

WTO STRUCTURE AND OPERATIONS15

Structure of the WTO

Ministerial Conference and the General Council

The highest authority of the organisation is the Ministerial Conference consisting of all Members. The Ministerial Conference meets at least every two years, with the last meeting held in Seattle, in December 1999. It can take decisions on all matters under any of the multilateral agreements.

In between Ministerial Conferences, three bodies handle the day-to-day work: the General Council; the Dispute Settlement Body; and the Trade Policy Review Body. All three bodies are the same entity - the Agreement establishing the WTO states that all three bodies are the General Council, although they meet under different terms of reference. Again, all three bodies consist of all WTO Members. The General Council meets approximately monthly at Head of Delegation level and acts on behalf of the Ministerial Conference on all WTO affairs. It meets as the Dispute Settlement Body and the Trade Policy Review Body to oversee procedures for settling disputes and to examine Members' trade policies. Chart 1 shows the WTO's current structure.

WTO Secretariat

The WTO Secretariat, based in Geneva, has around 500 staff and is headed by a Director-General elected by the Members every six years.[16] The Secretariat's main duties are to supply administrative and technical support for the various councils and committees and the Ministerial Conferences, to provide technical assistance for developing countries, to analyse world trade, and to provide information on WTO affairs to the public and media.

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[15] This section draws on the WTO Report 'Trading into the Future', Second Edition, Revised, Secretariat of the WTO, Geneva, 1998 and from the WTO website, www.wto.org.

[16] Due to lack of consensus in the General Council on electing a new Director-General in 1999, the Council agreed to a split term. The current Director-General, former New Zealand Prime Minister Mike Moore, is serving a three-year term and will be succeeded by the current Thai Deputy Prime Minister, Supachai Panitchpakdi, who will serve a three-year term from September 2002.

Dispute Settlement Body

The Dispute Settlement Body has two subsidiaries: the dispute settlement 'panels' of experts appointed to adjudicate on unresolved disputes, and the Appellate body that deals with appeals.

Subsidiary Councils

The General Council has a number of subsidiary councils and committees. The three subsidiary councils are: the Council for Trade in Goods (Goods Council); the Council for Trade in Services (Services Council); and the Council for Trade-related Aspects of Intellectual Property (TRIPS Council).

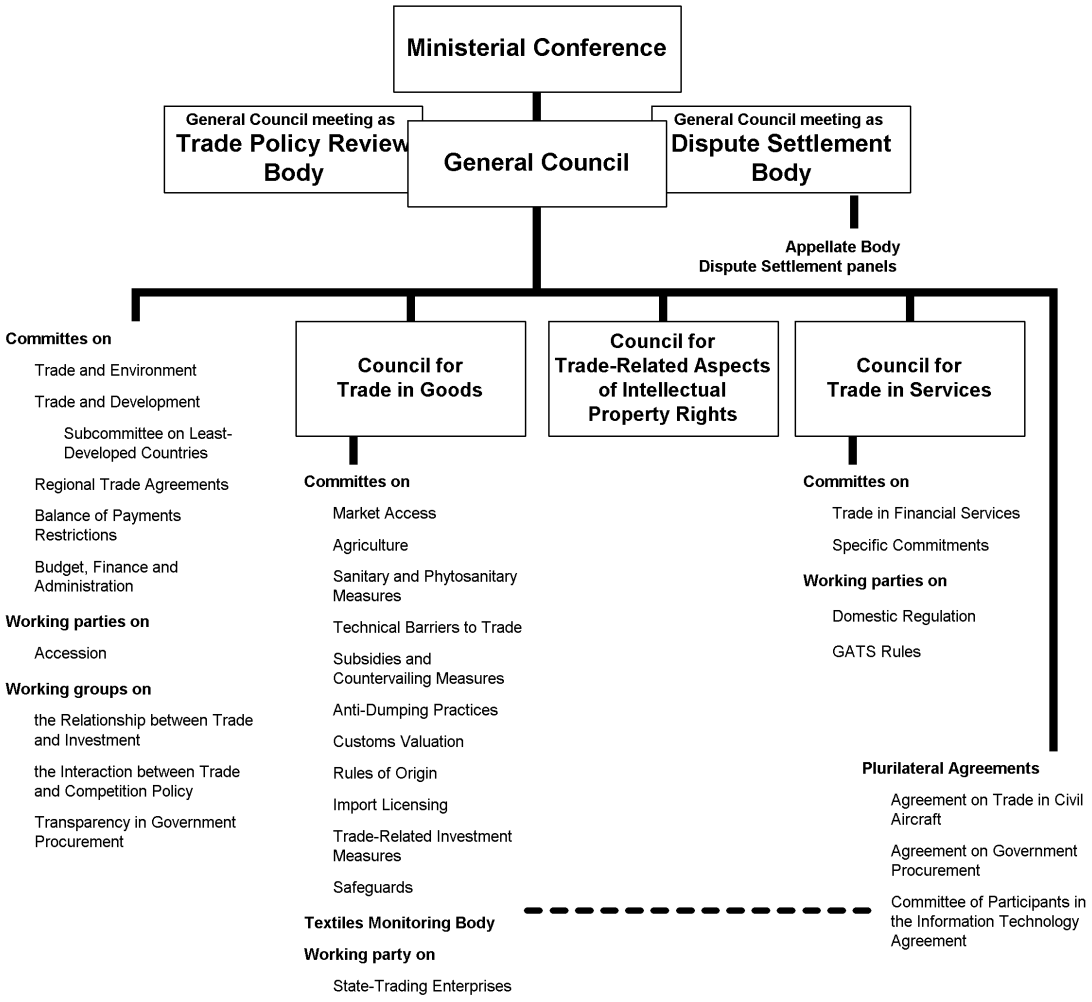
Each council is responsible for the operation of its respective Agreements and reports to the General Council. These higher level councils comprise all WTO Members and each has a number of subsidiary bodies and committees. For example the Goods Council has eleven committees dealing with issues such as market access, agriculture, anti-dumping, rules of origin and safeguards (Chart 1).

Six separate Committees also report to the General Council. They cover trade and development, the environment, regional trading arrangements, and administrative issues. While their scope is different to the subsidiary councils, they still consist of all WTO Members. The Singapore Ministerial Conference in December 1996 also created a number of new working groups to examine the relationship between trade and investment, trade and competition policy and transparency in government procurement.

The Plurilateral Agreements

Three more subsidiary bodies dealing with the plurilateral agreements (which are not signed by all WTO Members) keep the General Council informed of their activities. The Plurilateral Trade Agreements, which cover Government Procurement, Civil Aircraft and, most recently, Information Technology do not create either obligations or rights for Members that have not accepted them.

WTO Organisational Structure



Source: WTO, www.wto.org, and updated by the Department of Foreign Affairs and Trade.

OVERVIEW OF WTO MULTILATERAL TRADE AGREEMENTS

The WTO Agreements cover goods, services, intellectual property and dispute settlement. The 'legal texts' of the Uruguay Round comprise about sixty agreements, annexes, decisions, and understandings. The agreements and texts:

- set out the principles of liberalisation and the permitted exceptions
- set procedures for settling disputes
- prescribe special treatment for developing countries
- require governments to make their trade policies transparent
- include individual country commitments to lower tariffs and non-tariff barriers and to open services markets.

The agreements for the two largest areas of trade – goods and services - share a common three-part outline, comprising: broad principles; extra agreements and annexes dealing with special requirements and sector specific issues; and detailed lengthy schedules of individual Members' commitments.

Key WTO Agreements

General Agreement on Tariffs and Trade (GATT 1994): agreement containing key WTO principles and commitments on tariffs and non-tariff measures for goods.

General Agreement on Trade in Services (GATS): rules covering trade in services.

Agreement on Trade–Related Aspects of Intellectual Property Rights (TRIPS): internationally agreed trade rules to introduce greater order and predictability into intellectual property protection and enforcement.

Agreement on Agriculture: commitments on agricultural tariffs, tariff quotas, domestic support and export subsidies.

Agreement on Implementation of Article VI of GATT 1994 (also known as the Anti-Dumping Agreement): permits and disciplines anti-dumping actions.

Agreement on Safeguards: Conditions under which WTO Members can restrict imports temporarily if domestic industry suffers or is threatened by serious injury.

Agreement on Technical Barriers to Trade; ensures regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade.

Agreement on Rules of Origin: requires WTO Members to ensure rules of origin are transparent, and do not have restricting, distorting or disruptive effects on international trade.

Understanding on Rules and Procedures Governing the Settlement of Disputes (also known as the DSU); introduced a structured and clearly defined process for Members to settle trade disputes.

WTO DECISION MAKING AND ACCOUNTABILITY

All major WTO decisions are made by the membership as a whole, either by ministers in Ministerial Conference, or by Member government representatives in the General Council. Decisions are taken by consensus, outside of dispute settlement. The Member driven nature of the WTO differs from institutions such as the World Bank and the IMF, where authority is delegated to a board of directors and those where voting is the norm.

WTO rules that impose disciplines on Members' trade policies are the outcome of negotiations among the WTO Members themselves. The Members enforce the rules under agreed procedures that they negotiated. Sometimes enforcement includes the threat or the taking of trade sanctions. But member countries collectively authorise those sanctions, not the Organization or its Secretariat.

The WTO Members accept the rules of the WTO as an international treaty through their own constitutional processes. Australia does not ratify new and amended agreements until the Joint Standing Committee on Treaties (JSCOT) has subjected them to Australian parliamentary scrutiny.

While consensus decision making is the WTO practice, there are four prescribed circumstances in which votes can be taken if consensus is not possible:

- interpretations of any of the multilateral trade agreements - by a three-quarters majority of WTO Members
- waivers of obligations under WTO rules - by a three-quarters majority of the Ministerial Conference
- decisions to amend specific provisions of multilateral agreements - by all Members or by a two-thirds majority of all Members, depending on the provision concerned
- decisions to admit new Members - by a two-thirds majority in the Ministerial Conference, or the General Council in between Ministerial Conferences.

Informal Consultations and Groups

Informal consultations in a wide range of groupings, particularly at head of delegation level, play a vital role in building effective coalitions of support for specific objectives and forging agreement among a diverse and large membership. Australia is an active player in the informal processes. To maximise our influence we have been active in building coalitions around specific negotiating objectives. Currently, Australia is a member of some fourteen "informal" groups, including chair of the Cairns Group of Agricultural Fair Traders. The Cairns Group has continued to expand its role as the preeminent group supporting agricultural trade liberalisation.

WTO REFORM

Public concerns about globalisation, particularly in the lead up to, and following the Seattle Ministerial Conference, have led to debate on the need for WTO reform, including calls for greater transparency in how the WTO operates and interest by non-government organisations (NGOs) and private individuals in participating in WTO processes.

Some of these issues are amenable to solution by Members taking decisions. Others reflect larger issues that go beyond the current mandate of the WTO and have more to do with the 'civil society' debate within each Member country.

Measures to Improve Internal Transparency

There is a continuing debate within the WTO on how to improve the functioning of the organisation in handling both day-to-day business and in negotiations. Proposals for mechanisms such as an Executive Board based on constituencies have not attracted wide support to date. The adherence to the consensus principle as the basis for decisions that potentially affect trade rights and obligations will make it difficult to move away from an intensive consultative process of decision making. The process of reaching broad agreements prior to Ministerial Conferences in order to avoid a repeat of Seattle continues to be discussed. Nonetheless, most Members do not see the need for a new formal structure to deal with what is in essence a negotiating issue.

Members have recognised the need to ensure that the WTO's internal processes are sufficiently inclusive and transparent for all Members. However, most Members, including Australia, do not consider major changes are required. Though as more countries become actively involved in the WTO, the smaller, traditional methods for consultation have had to evolve. Members agree that decisions should continue to be reached by consensus. Efforts are now underway to enhance the process of decision making, information flow and communication among Members. Developing countries, in particular, are concerned at the number of WTO meetings and the difficulties of servicing those of interest to them. In part, many developing countries problems with the WTO reflect resource constraints and lack of expertise on WTO issues. These constraints are being addressed in part through technical assistance and capacity-building efforts to which Australia contributes.[17] Australia's assistance has included capacity building to help developing countries enhance their WTO expertise, implement WTO commitments, address the social impacts of trade liberalisation and participate in WTO meetings.

[17] A wide range of initiatives are in train to assist the least developed countries and other low income countries including: capacity building to enhance trade expertise; efforts to improve representation in Geneva; and measures to strengthen developing country access to information and research. The WTO also has established a work program to address developing country concerns about implementation of existing agreements. In addition, six core international agencies (WTO, World Bank, IMF, UNCTAD, UNDP and the International Trade Centre) recently have reviewed the Integrated Framework for technical assistance to least developing countries.

Measures to Improve External Transparency

WTO Members already have agreed to take steps to enhance transparency and outreach to interested community groups. Many measures were implemented in advance of the Seattle Ministerial Conference. In particular there have been a number of initiatives to improve the public's access to WTO documents. Most WTO documents are now issued without restriction and quickly available to the public, for example, through posting on to the WTO's website (www.wto.org). Discussions are continuing on improving the release of documentation, especially in the area of dispute settlement.

The WTO Secretariat also has enhanced dialogue with NGOs, including through the organisation of symposiums and meetings. These have brought together NGOs, academics, other international organisations and WTO Members to discuss issues such as trade and the environment, trade and development, and trade and competition policy. They have provided opportunities for NGOs to contribute to policy issues being debated in the WTO. NGOs have been given access to plenary sessions of Ministerial Conferences and can make material available to WTO Members.[18]

The Secretariat also has strengthened the WTO media service to keep pace with the increased media interest and increased the flow of publications on WTO activities.

At the same time, however, there is a strong view among Members that as an intergovernmental organisation the primary responsibility for consultation with civil society on WTO issues rests with Member governments. Reforms to improve WTO external transparency require Members' recognising the importance of ongoing national communication strategies to improve the WTO's institutional image, and communicating the global benefits of open markets (See Section 2).

[18] NGOs can submit material to the WTO Secretariat, which circulates lists of what is available to Members.

Section 4

DISPUTE SETTLEMENT

Terms of reference:

- *The effectiveness of the WTO's dispute settlement procedures and the ease of access to these procedures*
- *Australia's capacity to undertake WTO advocacy*
- *The involvement of peak bodies, industry groups and external lawyers in conducting WTO disputes.*

THE EFFECTIVENESS OF THE WTO'S DISPUTE SETTLEMENT PROCEDURES

Dispute settlement is a fundamental and longstanding feature of GATT/WTO trade policy and has been a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements.

The WTO dispute settlement system built upon and strengthened the procedures incorporated in the GATT. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) established an integrated system of rules and procedures for the settlement of disputes under all the covered agreements and was one of the cornerstones of the WTO. The DSU provides for a system of both compulsory and binding jurisdiction, with remedies for the enforcement of rulings.

Since its inception in 1995, 203 complaints have been notified to the WTO, 160 of which involve distinct matters.[19] The United States and the European Communities have registered more than half of complaints made, with 64 and 52 respectively, but they are also the most frequently cited by other governments as not being in compliance with WTO rules. However, smaller and low-income countries are also active users of the system, with developing countries registering 45 complaints. Australia has initiated four complaints. Five complaints, involving three distinct matters, have been taken against us.

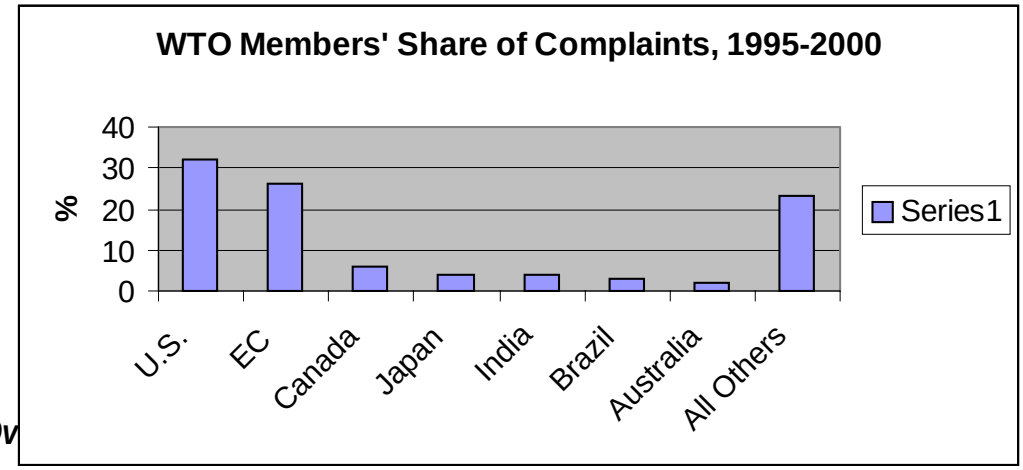
The dispute settlement system also permits Members to become involved as third party participants. Many smaller and developing country Members regularly use this opportunity to defend the WTO rules and their trading interests without having to undertake the more resource-intensive responsibilities of a complaining party. Australia is an active third party participant, having been involved in fifteen disputes in this way, nine of which proceeded to a panel process.

[19] Figures provided by WTO Secretariat, last updated 8 August 2000, includes implementation panels and arbitration on retaliation

The Dispute Settlement Body

The Dispute Settlement Body (DSB), which is made up of all WTO Members, administers all dispute settlement rules and procedures.[20] The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions or other obligations under the WTO Agreement.

Decision-making by the DSB is by consensus, that is, where no Member formally objects to the proposed decision. However, adoption of panel and Appellate Body reports is by *negative* consensus. A panel report therefore shall be adopted unless a party to the dispute notifies a decision to appeal or the DSB decides by consensus *not* to adopt the report. The same applies to Appellate Body reports.[21] This is a significant departure from dispute settlement under the GATT in which panel reports could remain un-adopted on the basis of the refusal of a single contracting party to agree to adoption.



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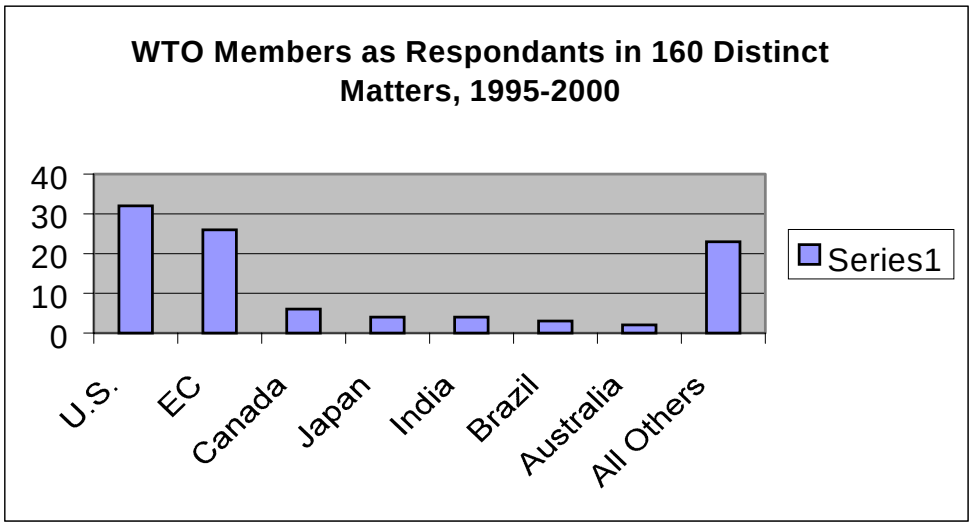

The aim of the dispute settlement mechanism is, foremost, to secure a positive solution to a dispute, which is mutually acceptable to the parties to the dispute and

[20] Article 2.1, DSU

[21] Article 16.4 and 17.4, DSU

consistent with WTO rules. Only WTO Members have access to, and rights under, the WTO's dispute settlement mechanism. And it is the actions of Member governments, not private entities that must be the subject of dispute. However, the dispute settlement provisions may be invoked in respect of measures taken by the actions of State and Territory governments within the territory of a Member.[22]

The dispute settlement process consists of four stages: consultations, the panel process, Appellate Body review and implementation. Time limits apply to each stage of the process. Including an appeal, panel processes can take up to 14 months from the date of request for consultations, to the date of the adoption of the panel/Appellate Body report. The entire process, including the reasonable period of time for implementation, panel review of the consistency of the implementation measures, and arbitration on the level of suspension or retaliation, can take between 24 and 30 months.

Resort to formal dispute settlement processes normally occurs only after bilateral efforts to resolve the dispute, including through using the leverage of the DSU and WTO rules, have failed.

Consultations

The DSU emphasises the importance of consultations in securing dispute resolution[23], requiring a Member to enter into consultations prior to any request for adjudication by a panel. A Member is required to enter into consultations within 30 days of a request for consultations from another Member, and Members should "attempt to obtain satisfactory adjustment of the matter" before resorting to further action under the DSU.[24]

The majority of disputes are resolved through consultation. For example, during the period 1995-1999, 77 disputes were resolved, of which 41 were resolved without going to the panel stage. Australia successfully resolved its complaints against Hungarian export subsidies and Indian quantitative restrictions at the consultation stage. The Director-General of the WTO has emphasised the importance of negotiated settlement of disputes:

> "Without this system, it would be virtually impossible to maintain the delicate balance of international rights and obligations. Disputes would drag on much longer, have a destabilising effect on international trade, which, in turn could poison international relations in general. The system's emphasis on negotiating a settlement could serve the same governments equally well in other areas of international relations."[25]

Panels

If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Panel establishment is

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[22] Article 22.9, DSU

[23] Article 4 of the DSU

[24] Article 4.5

[25] "WTO's unique system of settling disputes nears 200 cases in 2000", 5 June 2000, www.wto.org

"quasi-automatic" in that a panel will be established at the meeting of the DSB following that at which a request is made, unless the DSB decides by consensus against establishment.[26] The DSU also sets out specific rules and deadlines for deciding the terms of reference and composition of panels. Standard terms of reference apply unless the parties agree to special terms within 20 days of the panel's establishment. And where the parties do not agree on the composition of the panel within the same 20 days, this can be decided by the Director-General. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. The WTO Secretariat maintains a list of experts suggested by Members.

The function of panels is to review the facts and arguments submitted by the parties to a particular dispute and to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such findings as will assist the DSB in making recommendations and rulings."[27]

It is envisaged that a panel will normally complete its work within six months or, in cases of urgency, within three months.[28] Panel reports may be considered by the DSB for adoption 20 days after they are issued to Members. Within 60 days of their issuance, they will be adopted unless the DSB decides by consensus not to adopt the report or if one of the parties notifies the DSB of its intention to appeal.

Appellate Review

The concept of appellate review is an important new feature of the WTO. Either of the principal parties can appeal. An appeal is limited to issues of law and legal interpretation covered in the panel report. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.[29] It is common practice for parties to appeal a panel report, but rare that the Appellate Body has completely reversed the legal findings and conclusions contained therein. Appellate proceedings are not to exceed 60 days from the date a party formally notifies its decision to appeal.

Adoption and Implementation

Once the panel report, in some cases as modified by the Appellate Body, is adopted by the DSB, the party concerned must notify its intentions with respect to implementation of the adopted recommendations. If it is impracticable to comply immediately, the party concerned shall be given a reasonable period of time, to be decided either by agreement between the parties or through arbitration within 90 days of adoption. The guideline for arbitration is that the reasonable period of time should not exceed 15 months from the date of adoption. Arbitrators have interpreted 15 months to be the outer limit for the reasonable period of time, and the period could be considerably shorter where implementation could be effected by administrative and non-legislative means, and longer where implementation necessitates legislative

[26] Article 6, DSU

[27] Article 11, DSU

[28] Article 7 idem

[29] Article 17.13, idem

amendment. The DSB keeps implementation under regular surveillance until the dispute is resolved.

In the case of a finding of inconsistency against a regional or local authority of a Member, such as a State or Territory government in the case of Australia, the WTO Member involved must take such reasonable measures as may be available to it to ensure observance with the covered agreements. In the event that it has not been possible to do so, compensation and retaliation provisions of the DSU (see below) apply.[30]

Article 21.5 Implementation Panels

Article 21.5 of the DSU provides accelerated panel procedures to examine implementation by a Member. In the event of disagreement as to the existence or consistency of measures taken to comply with the recommendations to rulings of the DSB, such a dispute shall be examined by a panel, including wherever possible the original panel. The panel shall circulate its report within 90 days of the date of referral of the matter to it.

Compensation and Retaliation

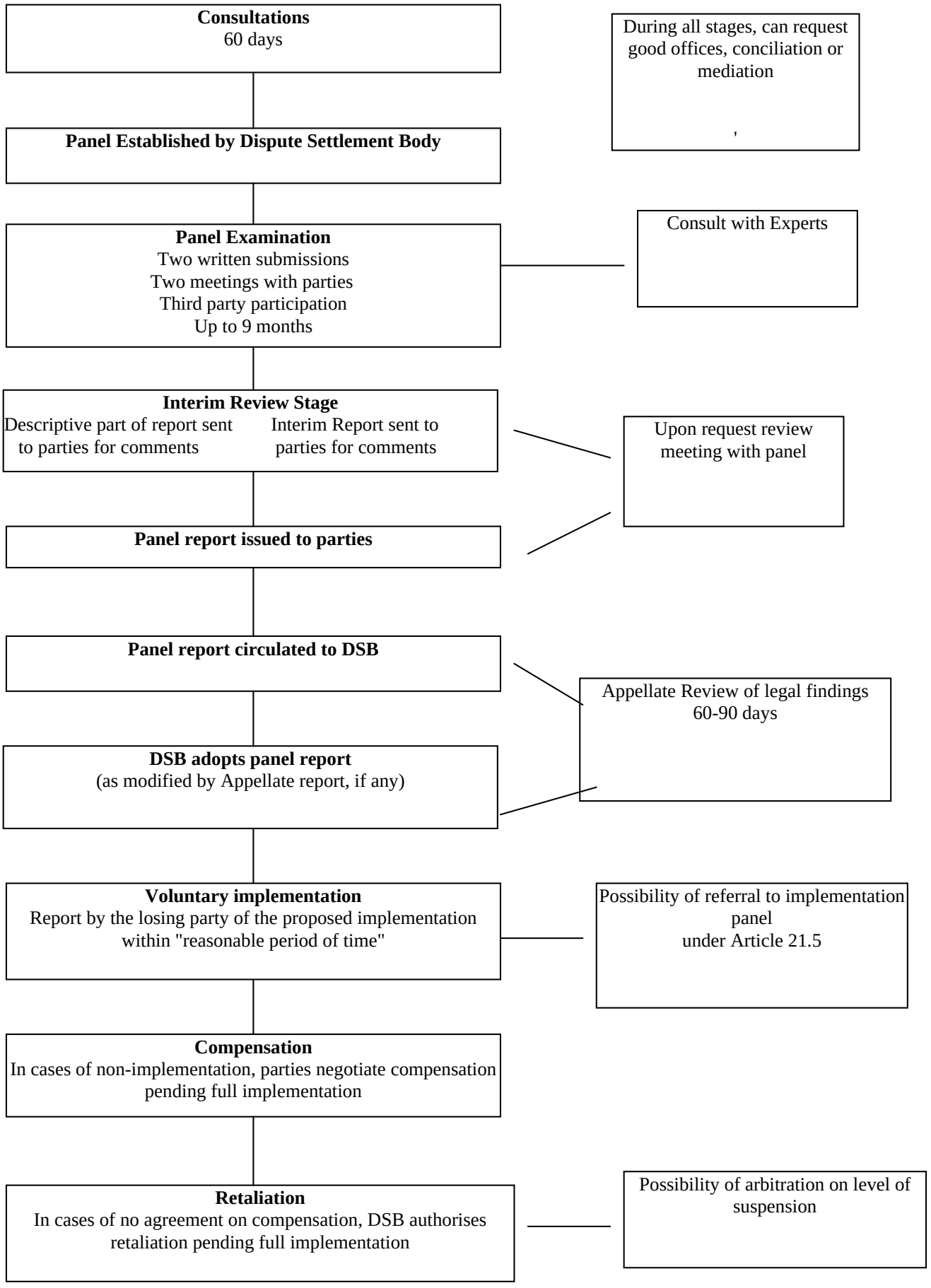
Where a Member fails to implement the recommendations and rulings of the DSB within the reasonable period of time, the DSU provides for compensation or the suspension of concessions (retaliation). Compensation, usually in the form of tariff concessions on products of interest to the complainant country, is voluntary and, if granted, must be consistent with WTO rules, including the most-favoured-nation clause. All Members can therefore potentially benefit from compensation packages.

[30] Article 22.9, DSU

If compensation is not agreed within 20 days after the expiry of the reasonable period of time, the complainant may request DSB authorisation for the suspension of concessions. Suspension must be equivalent to the level of nullification or impairment. In the event of disagreement between the parties, Article 22.6 and 22.7 provide for arbitration to determine whether the level of proposed suspension is equivalent to the level of actual nullification and impairment.

In practice, arbitrators have substantially discounted the level of suspension claimed by complainants. This partly reflects the practice of complainants of inflating claims as a tactical method. For example, in the *EC - Hormones* dispute, the level of nullification and impairment was assessed by the arbitrator to be USD 116.8 million and CND 11.3 million for the United States and Canada respectively, far less than the USD 202 million and CND 75 million sought. The United States and Canada have introduced 100 per cent penalty tariffs on the assessed value of EC trade.

The WTO Dispute Settlement Process



THE NATURE OF DISPUTE SETTLEMENT IN THE WTO: NOT A TRIAL BY JURY

The panel and Appellate Body process of examining WTO disputes is quasi-judicial in nature. It is primarily geared to a practical resolution of trade disputes, while at the same time providing predictability in the interpretation of rules.

Panels are composed of governmental and/or non-governmental individuals well qualified in a range of disciplines relating to trade and trade policy issues. The indicative list of possible panel Members includes persons who have served on or presented a case to a panel, served as a representative of a Member, or taught or published on international trade policy or law, or served as a senior trade policy official of a Member government. Panel Members are to be selected with a view to ensuring the independence of the Members, a sufficiently diverse background and a wide spectrum of experience.[31] A panel is usually made up of three people, although it is possible for parties to a dispute to agree to a five-person panel.

The process of examination of a dispute by a panel is conducted through two written submissions[32] from each of the complaining party (or parties) and the defending party, and in two meetings with the panel.[33] The majority of factual evidence and legal argumentation is contained in the written submissions, as is the bulk of evidence. Since they are the primary vehicle for persuading the panel, submissions must address in great detail both the facts of the case and legal arguments relating to the specific trade rules alleged to have been breached.

Third party WTO Members are entitled (but not obligated) to file one written submission and to attend a session of the first meeting with the Panel. Third parties also receive the first written submissions of the principle parties to the dispute, but not rebuttal submissions. Panels can, and do, draw on third party submissions in making their factual and legal findings. For this reason, third parties can have an important influence on the outcome of a dispute.

"Oral" statements made at the panel meetings are in fact written and provided to the panel and other parties just prior to delivery. Although practice varies between panels, questions are also often provided in writing, and while parties are invited to respond at the panel meetings, written responses are generally permitted, particularly on questions of a technical nature. Questions from one party to the other are put through the panel.

Witnesses are not called by any party to a dispute. Rather investigative powers rest with the panel which has the right to seek information and technical advice from any individual or body which it deems appropriate. Panels may also consult experts. For example, in the *Australia - Salmon* dispute the panel called experts on risk assessment, quarantine practice and fish science. Similarly in the asbestos dispute

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[31] Article 8, DSU

[32] The sequence of submissions is for the complaining party to file a first submission, followed within a 3-6 week period by the defending party's first submission. Rebuttal submissions are filed at the same time, following the first substantive meeting with the panel.

[33] A third meeting is possible for a review of a panel's interim findings, but such meetings are increasingly rare.

involving Canada and the EC, the panel sought expert opinion on scientific and technical issues raised by the dispute.

Either side in a dispute can appeal the issues of law and legal interpretation arising out of the panel report. The seven Members of the standing Appellate Body are broadly drawn from the WTO Member countries and are to be people with demonstrated expertise in law, international trade and the WTO Agreements. Three Appellate Body Members consider each appeal. The parties submit one written submission each and there is one meeting with the Appellate Body. Third parties cannot initiate an appeal, but can make a submission.

Panels and Appellate Body are limited to making a finding of whether a measure is consistent with the covered agreements and, if the measure is found to be inconsistent, recommending that the DSB request that the measure be brought into compliance with those agreements. While panels and the Appellate Body may suggest ways this might be done,[34] they do not have the power to impose a particular method of implementation. While changes may be necessary to regulations, laws or policies in the event of a finding of inconsistency, the flexibility to decide the means of bringing about compliance remains the prerogative of the defending WTO Member.

Furthermore, both panels and the Appellate Body are expressly prohibited from adding to or detracting from the rights and obligations provided in the WTO Agreements.

QUALITIES OF GATT/WTO IN INTERNATIONAL LAW

The WTO system not only provides a legal framework for the conduct of international trade, but also a forum for trade policy dialogue and negotiation, a consolidated inventory of the results of negotiations over more than fifty years and an organisation committed to economic cooperation and development of trade and investment opportunities.

WTO rules make up a highly specialised area of international law. In general WTO rules are more explicit and more prescriptive than the provisions of most other treaties, which normally deal with a single subject matter. For example, the WTO rules cover taxation systems with trade effects, subsidies, manufacturing and agricultural assistance programs, tariffs, quarantine measures, trade-related intellectual property measures, services, trade related environment measures and technical barriers to trade.

The dispute settlement system operates in this context. It is distinctive in the field of international law in that it has a compulsory and enforceable system of binding jurisdiction as part of an integrated treaty embodying a number of Agreements having treaty status and involving contractual rights and obligations on a multilateral basis.

[34] Article 19.1, DSU

THE STRENGTHS OF THE DISPUTE SETTLEMENT SYSTEM

The WTO system of compulsory and binding jurisdiction has resulted in positive outcomes in terms of improved market access. With the exception of two high-profile cases (*EC-Hormones* and *EC-Bananas*), the WTO dispute settlement system has been effective in resolving disputes and Members have generally changed their practices to comply with WTO rules. An indicator of the legitimacy the system enjoys is its frequent and expanded use, with the number of disputes in the last five years far surpassing 50 years of GATT cases.

Furthermore, the rules-based system of dispute settlement provides certainty and predictability to WTO Members, particularly smaller countries and developing and least-developed countries. The system clarifies the provisions of specific WTO Agreements and provides a climate of greater legal certainty in which trade can occur.

The dispute settlement system also ensures that Members are protected from unilateral retaliation from another Member. Article 23.2 of the DSU provides that "…Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding…". Panel interpretation of the DSU has reinforced the fact that Members are not permitted to take retaliatory action against any other WTO Member in the absence of a multilateral determination of WTO inconsistency. [35]

CHALLENGES

Implementation

There are limitations on the system's ability to force implementation and resolve a dispute, particularly where it is politically difficult or legally impossible for a Member to comply. Both the *EC - Hormones* and *EC - Bananas* disputes remain unresolved, with suspension of concessions applied by the United States at over USD 300 million per year. In these instances there is a concern that the dispute settlement system is leading to trade restricting rather than trade creating outcomes.

Retaliation

An important problem, which was exposed by the *EC - Bananas* dispute, relates to where there is disagreement between the parties to the dispute as to whether implementation has actually taken place. It is not clear from the text of the DSU whether a complaining party can move directly to authorisation for compensation or the suspension of concessions ("retaliation"), or whether the complaining party first needs to seek a ruling on consistency of implementation from a panel established pursuant to Article 21.5. It is also not clear what rights, including access to consultations and an appeal, adhere to an Article 21.5 Panel. Some aspects of this

[35] See *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, subject to appeal

issue have been addressed by a dispute settlement panel, which has found that there must be a multilateral determination of inconsistency, but legal uncertainties remain.[36]

Another concern for WTO Members subject to retaliation is how to ensure that the actual level of retaliation imposed by a complaining party is consistent with the authorised level of retaliation. There are also questions about whether a complaining party can systematically change the list of products subject to retaliation (the "carousel" approach to retaliation) as US legislation now requires, in response to EC non-compliance in the *Bananas* and *Hormones* disputes.[37] These issues are currently subject to dispute settlement consultations between the EC and the US.

Transparency

As a forum for the resolution of disputes between Member governments, rights in relation to dispute settlement, including the right to be heard, to receive and submit documents at prescribed intervals, to comment on draft panel reports and to appeal decisions, rest with the parties to the dispute. Third party Members to a dispute have similar, but more limited, rights in this regard. No other Member, or any other organisation or person has any such rights.

There is considerable disagreement between WTO Members on the question of whether there should be increased public access to the dispute settlement processes. There has been some opening of the system, including earlier public release of panel reports and permission for private legal counsel to attend proceedings if they are made part of a disputing party's delegation. Similarly industry representatives are more regularly being included as members of an official delegation to a dispute. There is, however, strong resistance from many WTO Members to permitting any further opening of the system, such as public attendance at panel and Appellate Body meetings.

A particularly contentious issue is the question of *amicus curiae* ("friends of the court") briefs. The Appellate Body has determined that Panels and the Appellate Body may accept such non-Member briefs and panels are doing so with increasing regularity. According to the WTO Secretariat, the majority of such submissions derive from the business community. However, the practice of accepting *amicus* briefs has highlighted the need for agreement among WTO Members on procedures to govern the acceptance of such briefs. Such procedures could address a number of issues, including due process rights for the parties to the dispute and declarations of interest(s) by those submitting briefs.

Access for Developing Countries

A feature of the DSU, compared to the GATT, is the high level of activity of developing countries. India, Brazil and Korea, for example, have been active as complainants and have successfully challenged the measures of developed countries.

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[36] See *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, subject to appeal

[37] Under carousel legislation, the United States will rotate suspension between different products with retaliation lists reviewed every six months. The EC has claimed carousel legislation to be inconsistent with the DSU, for example by providing for a cumulative level of retaliation that exceeds the level authorised by the DSB.

The continued legitimacy of the system will depend on the ability of all Members, including developing countries, to benefit from it. For this reason improvements in the ability of developing countries to participate in, and benefit from, WTO dispute settlement processes will be important.

Many of these issues were the subject of negotiation in the context of a review of the DSU, including the need for possible amendments. There is as yet no consensus on this issue.

AUSTRALIA AND WTO DISPUTE SETTLEMENT

Overview of Australia's Involvement in WTO Dispute Settlement

Australia is among the more active participants in the WTO dispute settlement system. It has been involved in more than 20 disputes since the inception of the WTO system in 1995 and was involved in 16 disputes in the previous decade under the GATT system.

Australia, along with other Members who are active participants in the WTO system, has responded to the increased level of dispute settlement activity in the WTO compared to that of the GATT system. The Minister for Trade has introduced improvements in Australia's capacity to utilise the WTO dispute settlement process. The Government has strengthened significantly relevant resources in DFAT and this is to continue, with the establishment of a new Trade Law Branch. It also has introduced an initiative designed to maximise the productive use of the WTO legal system by Australian exporters. The WTO Disputes Investigation and Enforcement Mechanism (DIEM) is designed to exploit the leverage of enforceable WTO legal rights, whether through bilateral negotiations, in WTO formal dispute settlement proceedings or related negotiated settlements.

Wins and Losses

Australia has performed strongly in WTO disputes. We have been successful in three of the four complaints prosecuted to date under the WTO system (one complaint against the US on lamb is pending). The dispute with India resulted in the phasing out of quantitative restrictions on a range of agricultural and manufactured goods, without resort to a panel process. Similarly, the dispute with Hungary on agricultural export subsidies was resolved at the consultation stage.

The panel examining Korea's measures on imported beef has found that these measures variously discriminate against Australian beef, impose quantitative restrictions on imports and exceed Korea's reduction commitments under the *Agreement on Agriculture*. Korea has announced it will appeal the report. The outcome of the Appeal is due in mid to late November.

The Panel examining US safeguard measures on lamb is scheduled to finalise its report by December 2000.

Australia also has had to defend its measures in two panel disputes. While Australian measures were found to be inconsistent with the WTO Agreements, both disputes have now been resolved, without recourse to retaliatory measures.

In Canada's complaint against Australia's revised measures for salmon, Australia successfully defended its quarantine system and all but one of the eleven measures applying to salmon. The WTO upheld Australia's right to apply the most stringent quarantine conditions of any WTO Member to salmon and trout. Furthermore, the important economic interests of Australia's tuna and lobster industries were fully safeguarded.

The settlement of the Howe leather dispute is also a positive one for Australian industry, removing the threat of retaliation against Australian exports to the United States and protecting the access of Australian exporters, including Howe, into the US market.

Although the WTO rulings on salmon and leather were not in Australia's favour, accepting the decisions of the umpire is critical to the well-being of the rules-based system which is vital to Australia's broad economic and trade interests. It is a measure of the success of the WTO dispute settlement system that, with two exceptions, all Members who have lost a dispute have brought their measures into conformity.

Australia also has been involved in WTO consultations as the party complained against on three other occasions, although two of the three were concerned with the salmon and leather disputes. The third complaint was withdrawn after consultations.

Tactical Third Party Role

Australia has participated in fifteen disputes as a third party. For smaller countries like Australia, third party participation is a cost-effective means of ensuring Australia's trade interests are protected in any dispute, particularly in circumstances where we are not a leading supplier of the product in question and/or where there are significant systemic interests in the interpretation of rules.

Australia has achieved important market access wins from third party participation, for example, gaining access to the US prawn market and protecting royalty rights for Australian musicians in the US. Australia's legal reasoning has also influenced the interpretation of WTO rules in important areas such as agricultural export subsidies, trade and the environment and trade related intellectual property. In addition, outcomes of some other disputes involving Australia as a third party have indirectly served to confirm the WTO consistency of Australia's industry and trade-related policies, thus heading off the threat of direct challenge to Australia's domestic policy settings.[38]

[38] For example the outcome in *Canada : Pharmaceutical Patents* confirmed the consistency of Australia's own legislative approach to this area of intellectual property, even though the EC had taken issue with provisions of Australian law.

THIRD PARTY PARTICIPATION IN THE SHRIMP/TURTLE DISPUTE

Australia's participation as a third party in the *Shrimp/Turtle* dispute is a good example of how third parties can achieve market access wins and influence the interpretation of multilateral trade rules of systemic importance to Australia, such as those that relate to trade and the environment.

The dispute concerned a ban by the United States on imports of shrimp from countries that did not have national programs requiring the use of Turtle Protector Devices (TED). Australia prawns had been subject to this ban since 1996.

Australia's concerns were not about the validity of the environmental objectives of the US to protect and conserve turtles, but the particular measures it had chosen to use in pursuit of these objectives and their consistency with its WTO obligations.

In its submissions, Australia argued that the US import embargo on certain shrimp caught in other locations, imposed on the basis of unilaterally determined US standards for the protection of turtle life and for the conservation of turtles in the US, did not meet the requirements for the exceptions under Article XX of GATT for environmental protection.

Specifically, the ban had the effect of prohibiting imports from certain countries whether or not the particular shrimp was harvested in a manner that harmed or could harm turtles, and whether or not these countries had shrimp harvesting practices and policies that harmed or could harm turtles.

The Australian submissions also emphasised that a cooperative rather than a trade-restrictive approach to addressing sea turtle conservation concerns would provide a means to pursue these concerns that would be fully consistent with WTO obligations and fully effective from an environmental perspective.

The Appellate Body drew heavily on Australia's legal reasoning when it confirmed that the US was in breach of its WTO obligations, particularly given the unilateral and non-consensus basis of the import ban, and the fact that the US had not seriously pursued diplomatic alternatives for addressing its sea turtle conservation concerns. The Appellate Body also expressed concern with the inflexibility of the administration of the import ban.

Australian prawns from the Spencer Gulf and the Northern Prawn Fishery have since been granted access to the US market. Australia has also led regional efforts for greater collaboration in the conservation and management of marine turtle populations in the Indian Ocean.

Australia's Involvement in WTO Disputes

Dispute	Australia's Involvement	Status
Hungary : Export Subsidies	Complainant	Resolved at consultation. Time limited waiver agreed
India : Quantitative Restrictions	Complainant	Resolved at consultation
ROK : Beef	Complainant (with US)	Panel found in Australia's favour, Korea will appeal. Appeal report due end of year
US : Lamb	Complainant (with NZ)	Panel report due end of year
Australia : Salmon (Canada)	Respondent	Resolved. Ban lifted, replaced by 11 measures on imports of salmon and other fish. Commonwealth required to seek observance of WTO disciplines by Tasmania.
Australia : Salmonids (US)	Respondent	Panel processes suspended, given outcome of Canadian dispute.
Australia : Howe Leather (US)	Respondent	Resolved. Bilateral commitment until 2012 for no further subsidies, repayments by the company.
Australia : TCF Import Credit Scheme (US)	Respondent	Precursor to Howe dispute. Resolved at consultations.
Australia : Anti-dumping (Switzerland)	Respondent	Complaint withdrawn at consultations.
US Shrimps (India, Pakistan, Malaysia, Thailand)	Third Party	Market re-opened to Australian prawns; Legitimacy of environmental concerns upheld, when pursued multilaterally.
EC : Hormones (US, Canada)	Third Party	EC yet to lift ban. Australia's interests in supplying HGP-free beef to EC protected. Important jurisprudence on SPS Agreement.
Canada : Dairy Subsidies (US, NZ)	Third Party	Disciplines on agricultural export subsidies upheld.
Canada : Pharmaceutical Patents (EC)	Third Party	Findings support WTO-consistency of Australian pharmaceutical patent legislation
EC : Pharmaceutical Patents (Canada)	Third Party	Consultations held
US : Copyright (EC)	Third Party	Confirmed royalty rights of Australian musicians in US
Canada : Aircraft Subsidies (implementation panel) (Brazil)	Third Party	Allowed early access to developments in interpretations of Subsidies Agreement

Brazil : Aircraft Subsidies (implementation panel) (Canada)	Third Party	As above
US : Wheat Gluten Safeguards (EC)	Third Party	Early access to developments in interpretations of Safeguard provisions, in preparation for Lamb Meat panel; and defending against allegations of a discriminatory deal in favour of Australia.
US : Export Restraints (Canada)	Third Party	Panel Established
India : Customs Duties (EC)	Third Party	Consultations held, matter has lapsed
India : Import Restrictions (EC)	Third Party	Consultations held, matter has lapsed
Brazil: Import Financing (EC)	Third Party	Measure modified following consultations
EC : Cheese (US)	Third Party	Consultations held, matter has lapsed
US : Import Duties on Cars (Japan)	Third Party	Resolved

WHEN AND HOW DOES AUSTRALIA DECIDE TO TAKE A DISPUTE

The Minister for Trade decides whether Australia should formally challenge another WTO Member through the WTO dispute settlement system. In the event that another portfolio has an interest in the issue, that other portfolio's Minister would be consulted as part of the decision-making process. The Minister for Trade's decision is based on a number of factors, as outlined below.

Factors Considered in Taking a Dispute

The determination as to whether Australia should challenge another Member's measure is based on a series of steps and calculations, which are put to the Minister for Trade based on consultations with a variety of stakeholders. Officials seek to address the following considerations in providing information to the Minister:

- commercial interests, for the specific industry or Australian industry more generally
- strength of industry support for action
- broader community interests (eg on a dispute with environmental aspects)
- systemic or policy interests in ensuring compliance with particular WTO rules, including to ensure negative examples are not followed
- strength of arguments and defences

- whether there are any similar Australian programs or policies which might be affected as a result of a challenge
- impact on the bilateral relationship, including on the trading relationship and the specific commercial sector
- likely outcome in the event of a successful challenge.

In the event of another Member challenging an Australian measure – Commonwealth or State – there is no choice as to whether to defend the measure. For as long as the measure is in place, Australia defends it, provided a bilateral settlement is not feasible.

WTO Rules as Leverage

WTO rules, backed by a suitable analysis, are also used as leverage in bilateral trade disputes. For example, where another country has, or is about to implement, a measure that is detrimental to Australia's trade interests, bilateral representations may be made to amend or remove such measures. Because of the compulsory nature of the WTO dispute settlement system, any arguments that we can make based on the WTO-inconsistency of the measure help to strengthen these representations.

The Relevance of Dispute Settlement to Australia's Negotiating Objectives

Both the GATT dispute settlement system and the current WTO system have ensured that the benefits to Australia of other Members' commitments are not eroded, either by the failure to remove certain measures, or the imposition of new measures. Importantly, however, the dispute settlement system can also serve to assist our preparations for and participation in multilateral trade negotiations. There may be occasions where a case is pursued for strategic reasons, for example with the aim of exposing certain practices of other Members as leverage in future negotiations.

AUSTRALIA'S CAPACITY TO UNDERTAKE WTO ADVOCACY: THE TASKFORCE APPROACH

The Role of the Department of Foreign Affairs and Trade and other Government Agencies

Australia normally adopts a task force approach to the prosecution and defence of WTO disputes. With the Department of Foreign Affairs and Trade (DFAT) as the lead agency, there is close cooperation between the department and other responsible agencies, as well as with specific industry groups.

In accordance with the Administrative Arrangements Order, DFAT has responsibility for relations with other governments, treaties (including trade agreements), trade policy, international trade and commodity negotiations and trade promotion. Within the department, matters relating to trade policy and the WTO legal system are managed by the Trade Negotiations Division. DFAT has responsibility for managing all aspects of WTO disputes, as a core element of its responsibility for, and carriage of, trade policy.

DFAT officers have extensive experience in formal dispute proceedings, both in the WTO and in its predecessor the GATT. Departmental trade law experts bring multi-

disciplinary policy skills to the pursuit of dispute settlement in the WTO. Those skills include technical expertise in areas such as agriculture, manufactures, subsidies, safeguards, quarantine, services and trade-related intellectual property, as well as broader legal, economic and trade policy skills. Departmental officers involved in disputes customarily have considerable experience in bilateral and multilateral negotiations involving trade issues and agreements and thus possess well-developed and focussed advocacy skills.

This expertise is continually strengthened by monitoring of the twenty-nine WTO Committees and various Working Groups and analysis of the many disputes through which WTO commitments and obligations are constantly being interpreted.

This expertise enables officers to provide advice on the WTO consistency of domestic policies and measures and to provide advice to Ministers, other Government departments and agencies, including State and Territory agencies, on WTO-consistent options for achieving policy goals and objectives. DFAT's WTO experts also provide advice on the programs of other WTO signatories and are called upon to identify WTO leverage in resolving trade problems at the bilateral level, to apply the WTO rules, develop legal strategies and conduct disputes at the consultation, panel and Appellate Body stages of formal disputes. No other government agency or private sector entity carries out this legal monitoring, analysis and advisory role or has similar depth of engagement with WTO rules and issues.

This approach is similar to that adopted by Australia's major trading partners including the United States, the EC, Canada and New Zealand, where the conduct of WTO dispute settlement and WTO-related legal and policy advice are provided from the agency responsible for trade and trade policy.[39]

At the beginning of each potential dispute, the department assembles a team of appropriately skilled staff to manage the matter. At least one trade law expert from the Trade Negotiations Division will be assigned to the dispute and is involved in undertaking factual research and drafting the formal submissions. As appropriate, the department also calls upon other specialist advice. For example, in circumstances involving wider issues of international treaty interpretation and domestic law, expertise in the department's Legal Branch and the Attorney-General's Department is called upon, and in matters engaging the WTO rules on agriculture or industry policy, AFFA, DISR, DOCITA are closely involved. Other agencies have been involved with disputes on other issues (eg Environment Australia on the shrimp/turtle dispute). DFAT can also draw on its extensive overseas network to assist in gathering information and to assess the ongoing potential for a negotiated settlement to the dispute.

In the salmon dispute, the department led a team which included representatives from AQIS, AFFA, the Attorney-General's Department, and the Australian Government Solicitor.

[39] In the US this function is undertaken by Office of the United States Trade Representative, in Canada by the Ministry of Foreign Affairs and International Trade, in New Zealand by the Ministry of Foreign Affairs and Trade and in the European Communities by the Trade Directorate in cooperation with the Commission's Legal Services

The Role of Industry

Industry support and participation is a key part of the effective conduct of any dispute in the WTO. At the outset, industry input is critical to establishing whether the particular trade problem would best be met through the formal dispute settlement process, in light of industry's commercial goals in a particular market.

If formal dispute settlement is supported by industry as an appropriate means of resolving a problem, concerned exporters and industry groups play an active and important role in the preparation of dispute submissions, working closely with the department's trade law experts, line agency representatives and overseas posts to marshal supporting factual evidence. Industry representatives have also travelled to Geneva for panel meetings, providing an important advisory role, particularly on factual aspects of a dispute.

Industry is also closely involved in the department's ongoing research into several trade measures that have the potential to be resolved through WTO dispute settlement.

Cost-Effectiveness

The government/industry team approach has proved a successful, cost-effective method of pursuing Australia's trading interests through the WTO dispute settlement system, particularly given the lengthy timeframes involved. By using the government's considerable trade policy, WTO legal and other international law expertise and industry's detailed knowledge of specific markets, disputes have been resolved successfully while at the same time avoiding the very high costs often associated with international dispute resolution.

GOVERNMENT/INDUSTRY COOPERATION IN DISPUTE SETTLEMENT: KOREA BEEF

The Korea beef dispute was a model for government industry cooperation. The dispute involved several aspects of the highly complex Korean imported beef market, which were unravelled with the assistance of industry. The detailed market analysis undertaken by industry, combined with the department's analysis of the regulatory environment was critical to efforts to convince the panel of the very existence of certain measures. These important findings of fact cannot be overturned on appeal. If the panel's findings are upheld there are significant opportunities to boost Australian beef sales to Korea, now worth $150 million per year.

The Role of Private Sector Lawyers

To date, private sector lawyers in Australia have not been engaged by the department to assist in the conduct of WTO disputes. The Legal Services Directions Applicable to Commonwealth Legal Work ties public international law matters to DFAT; the

Attorney-General's Department and the Australian Government Solicitor. [40] However, these agencies have the discretion to seek expert legal advice from a range of sources, including academia and the private sector.

Both the department and industry have sought private sector advice from experts in other jurisdictions. In the lamb meat case currently before a WTO panel, the Australian industry engaged a private US law firm to provide legal assistance. DFAT has sought US legal advice on domestic law aspects of the US sugar program. Similarly, in disputes where Australia is being complained against, complaining Members have sought private sector legal advice in Australia on aspects of Australian law. In the automotive leather case, the Department of Industry, Science and Resources (DISR) used its legal consultant on aspects of the case. The company involved employed a trade consultant and also sought advice from a legal firm in Washington on US domestic issues. The company and DISR also employed a private law firm in respect of Australian domestic legal requirements. We understand that the Tasmanian salmon industry also sought independent legal advice in that dispute.

There is a potential role for the private legal sector to identify WTO rules applicable to market access problems faced by clients and to act on behalf of those clients in bringing such problems to the government. However, this potential role is at present circumscribed by the limited pool of identifiable specialist WTO expertise in the Australian private legal sector. Until relatively recently, there has been little or no private sector interest in the development of specialist WTO legal expertise and, with the possible exception of the ANU, specialist academic courses have attracted few students.

The department is attempting to remedy this situation, in response to increased interest from legal firms and law societies. The Trade Negotiations Division is expanding its outreach programs to conduct seminars for State government officials and members of law societies, chambers of commerce and private law firms in the basics of WTO rules and dispute settlement. In the second half of 2000, for example, the Division will conduct seminars for the Law Institute of Victoria, the Queensland Law Society and the Victorian Department of State and Regional Development. This is in addition to the training provided to other Commonwealth agencies and ad hoc lectures, seminars and conferences at which the department's WTO experts are requested to speak, as well as co-operation with academic bodies in the design and delivery of WTO legal courses. Through the Australian National Internship Program, and on an ad hoc basis, TND also provides placements for university students to conduct research projects on WTO rules.

THE DISPUTES INVESTIGATION AND ENFORCEMENT MECHANISM (DIEM)

The WTO Disputes Investigation and Enforcement Mechanism (the "DIEM") is a challenge to the private sector to use the leverage of Australia's WTO membership for the benefit of Australia, and individual Australian exporters. The DIEM was established in recognition of the need for cooperation between the Government and the private sector to maximise the benefits of Australia's WTO membership. It seeks to ensure equity of access for all Australian exporters to Government support and

[40] Legal Services Direction 2.1 and Annex A, "Directions on Tied Areas of Commonwealth Legal Work".

assistance. The Minister for Trade, Mr Vaile, announced the DIEM's establishment on 16 September 1999.

The DIEM is the means by which any exporter, no matter the exporter's size, can request the Government's assistance where another WTO Member government is not honouring its obligations under the WTO Agreement. It involves an exporter working with DFAT officials to address the specific access problems being encountered by the exporter. It involves a series of procedural steps to which strict time lines are attached for responses by DFAT officials to the exporter. The Minister for Trade will have an active role under the DIEM, including by ensuring that matters raised are actioned within specified time frames. More detailed information on the operation of the DIEM is in the department's publication entitled *The WTO Disputes Investigation and Enforcement Mechanism: A Government-Industry Partnership*. It is available online at www.dfat.gov.au/trade/negotiations/wto_disputes.html

In assessing means to provide access to Government support and assistance for individual Australian exporters, the processes of a number of other countries were examined, including the so-called "Section 301" US petition process. An administrative process was considered to best meet the needs of exporters while not imposing legislative constraints on the Government's capacity to take account of broader national interest issues.

Costs of the DIEM to the Private Sector

There is no charge for officials' services under the DIEM, but an exporter should expect to meet at least some associated costs where these are necessarily to be incurred. If the exporter cannot meet the associated costs, the case will be considered on its merits. However, a preliminary submission under the Mechanism should not involve substantive costs for any exporter as the type and level of information required at this stage would likely already be known to the exporter.

The department has deliberately avoided being overly prescriptive on this issue. The department recognises that the circumstances of potential users of the DIEM will vary widely. It would not be realistic to expect a small exporter to be able to meet the same levels of associated costs as umbrella industry associations or large exporting entities.

Role and Opportunities for Private Sector Legal Practitioners

The WTO system is about the behaviour of governments in world trade. Its dispute settlement mechanism may therefore only be invoked by WTO Member governments, and only WTO Member governments may be parties to a dispute. It is not possible for non-government entities to invoke the WTO dispute settlement system directly. Having regard to the principle of equity of access for all Australian exporters to Government support and assistance under the DIEM, the department would not support a requirement that an exporter present a fully-documented WTO case under the DIEM as is the case under the US "Section 301" process.

Nonetheless, as noted above, the department sees scope for private sector legal practitioners to play a role in a number of ways, depending on the level of WTO expertise of the individual legal practitioners:

- to have an awareness of the potential applicability of WTO rules to situations affecting their clients' export interests and of the availability of the DIEM as an avenue to progress an issue;
- to act for exporting clients who seek the Government's assistance through the DIEM process by undertaking detailed factual analysis and providing advice for exporting clients on applicable WTO rules and potential leverage, either as a stand alone course of action or as part of a "menu" of possible remedies.

THE PRACTICES OF OUR TRADING PARTNERS IN WTO DISPUTE SETTLEMENT

Australia's approach to dispute settlement closely resembles that adopted by many of our major trading partners. The following provides a brief description of the approach of the United States, European Communities, Canada and New Zealand to the management of disputes, including the role of private sector lawyers.

United States

The United States is the most active of the WTO Members, both as a complainant and as a respondent. The level of US activity reflects its role in world trade but is also legislatively-driven by Section 301 of the Trade Act which requires strong grounds for Office of the US Trade Representative (USTR) to reject a private sector petition, and which also requires the US to act within strict time frames. Many of the US complaints are dormant.

A recent report by the US General Accounting Office concluded that the US has benefited more than it has lost in dispute settlement, that there are systemic benefits for the US and that win/loss ratios are not the sole determinant of benefits.[41]

USTR has primary statutory responsibility for monitoring and enforcing US trade agreements (including WTO, NAFTA and bilateral trade agreements). USTR is the sole federal agency authorised to initiate actions to enforce US rights under bilateral, plurilateral and multilateral trade agreements at its own discretion or as petitioned by private enterprises or individuals.

USTR does not have exchange programs with private sector law firms due to conflict of interest constraints. Nor does USTR contract out work to legal firms. Nevertheless, USTR draws heavily on input from private legal practitioners, provided on behalf of, and financed by, businesses and industry associations, particularly under the Section 301/Special 301 mechanisms. There is also a high degree of cross-fertilisation between USTR and the private sector, with leading US practitioners having formerly served in USTR, reflecting the level of direct legal, practical and political experience sought by business. Trade law practices of leading firms are generally headed up by former USTR lawyers.

Some WTO Members, including developing countries, have recruited ex-USTR lawyers as legal counsel in WTO dispute settlement.

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[41] United States General Accounting Office: Briefing Report to the Chairman, Committee on Ways and Means, House of Representatives: "World Trade Organization - US Experience to Date in Dispute Settlement System"

European Communities

The EC is a major player in WTO dispute settlement, and is involved in the second largest number of disputes after the United States.

Disputes can be initiated by the EC, in consultation with Member State committees or at the request of Member States, on a consensus basis established through committee systems. The private sector can also directly petition the Commission, but decisions are taken through EU Committee processes.

The EC does not as a general rule contract outside lawyers, although it occasionally contracts outside consultants (mostly academics) to undertake special projects such as work done on the Foreign Sales Corporations Act. Some private sector lawyers based in Europe have also been retained by other WTO Members as legal counsel for the conduct of disputes. Anecdotal evidence suggests that many of these have Commission or WTO Secretariat experience.

Canada

Canada is active in dispute settlement both as a complainant and as a respondent, pursuing fifteen complaints and defending its measures in seven cases. It is also an active third party participant in disputes.

Responsibility for legal matters is vested in the Department of Foreign Affairs and International Trade (DFAIT). DFAIT has a trade law office responsible for WTO, NAFTA and other trade agreements, including advising and dispute resolution.

Canada has employed foreign lawyers on contract to provide advice on foreign law. For example, Canada engaged an Australian lawyer to provide advice on Australian quarantine law and practice in relation to the salmon dispute.

Canada has on one occasion contracted a private lawyer to argue a WTO case for the Canadian Government. This was a former DFAIT lawyer who worked on the salmon case and who left DFAIT during the course of the case. The lawyer was contracted by DFAIT for the duration of the salmon case to retain his expertise. Otherwise, DFAIT trade lawyers have argued Canadian cases at the WTO.

Canadian industries involved in WTO disputes often seek their own counsel from a large number of trade law firms based in Ottawa and Toronto. These are often staffed by former DFAIT officers. While private trade lawyers are not part of official delegations to WTO disputes, they often visit Geneva to provide legal advice to their clients.

New Zealand

New Zealand has initiated five complaints, only two of which have proceeded to the panel stage. To date there have been no complaints against New Zealand.

Responsibility for WTO disputes is exclusive to the Ministry of Foreign Affairs and Trade (MFAT). Depending on the issue, New Zealand may engage private sector expertise to provide input on the systems of another WTO Member, which it did for example in the *Canada - Dairy* dispute.

Section 5

REGIONAL TRADE ARRANGEMENTS AND THE WTO

Terms of reference: the relationship between the WTO and regional economic arrangements.

Regional trade agreements (RTAs) is a term used to cover arrangements where countries exchange preferential access. They can be bilateral or plurilateral. RTAs steadily have become a more important feature of the international trading system – over two hundred RTAs have been notified to the WTO and over half of all global trade takes place through RTAs. All but three of the WTO's Members belong to at least one regional agreement.

RTAs can be an effective means for dealing with some of the challenges of globalisation, as they offer a vehicle for promoting closer regional ties and greater trade liberalisation, which can then result in increased economic welfare for the parties. All RTAs are discriminatory arrangements, with the direct benefits accruing to the parties to the agreement (although there may be 'dynamic' flow-on effects for non-parties). Thus, there is a debate about whether RTAs are 'building blocks' or 'stumbling blocks' for the multilateral trading system. Most commentators conclude that it depends on the individual RTA. RTAs which comply fully with the WTO rules are likely to result in greater benefits for the parties as well as the multilateral system.

RELATIONSHIP BETWEEN THE WTO AND REGIONAL TRADE AGREEMENTS

RTAs are an exception to the WTO rule that reductions in trade barriers should be applied, on a most favoured nation basis, to all WTO Members. Instead, in an RTA, preferential arrangements (including tariff reductions, non-tariff barriers, rules of origin and other measures) only apply to the countries that form the agreement. The WTO rules contemplate two types of regional agreements: customs unions and free trade areas. Customs unions are arrangements where parties reduce barriers among themselves and maintain a common tariff barrier against non-parties. The European Union is the most well known example of a customs union. A free trade area is an arrangement where parties reduce barriers among themselves, but the parties maintain separate tariff regimes. The North American Free Trade Agreement (NAFTA) and the Australia New Zealand Closer Economic Relationship Agreement (CER) are well known examples of a free trade agreements.

The major WTO rules governing RTAs are Article XXIV of the General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS). RTAs are required to cover "substantially all the trade" in goods and "substantial sectoral coverage" for services within (usually) a ten year timeframe (The 1979 Decision on Differential and More Favourable Treatment of Developing Countries – also known as 'the Enabling Clause' - allows for assistance to developing countries, and exceptions to the WTO rules on RTAs). The majority of RTAs deal with trade in goods, but a growing number deal with trade in goods and services. There is no precedent for an agreement dealing with trade in services alone, but there is no legal impediment under the WTO rules to such an agreement.

The WTO rules on RTAs are drafted in a way that seeks to ensure such agreements add to global economic welfare. Thus, an agreement which complies with GATT Article XXIV and GATS Article V is more likely to provide benefits for the parties and the wider trading system. For example, an agreement will involve meaningful liberalisation if it meets the criteria for covering 'substantially all the trade' for goods and providing 'substantial sectoral coverage' for services within the ten year timeframe, which is required in most circumstances. This will lead to increased welfare by ensuring all parties to the agreement benefit, and by ensuring the agreement will be a spur to greater trade liberalisation efforts. The WTO requirement that barriers should not be increased to non-parties following the conclusion of the agreement helps to ensure that the 'trade diversion' effects of the arrangement are minimised. That is, regional integration should complement the multilateral system and not threaten it.[42] The requirement that all regional agreements must be notified to the WTO helps to maintain the transparency of such agreements, and allows WTO Members to examine the agreements in the Committee on Regional Trade Agreements (CRTA).

WTO Committee on Regional Trade Agreements

The Committee on Regional Trade Agreements was created as part of the Uruguay Round Agreements. The Committee was designed to provide a mechanism for checking the consistency of RTAs with the WTO rules. It has the following terms of reference:

- to carry out examinations of bilateral, regional and plurilateral preferential trade agreements and report on them;
- to consider how the required reporting on the operation of regional agreements should be carried out;
- to develop procedures to facilitate and improve the examination process;
- and to consider the systematic implications of regional agreements for the multilateral trading system.

The Committee is seeking to finalise examinations of a number of agreements. The Committee has not operated as effectively as it could. The department is concerned that some RTAs negotiated to date may not fully meet the WTO rules in ways which could be unhelpful to Australia's interests. The chief problem in concluding examinations is the ongoing debate between WTO Members about the interpretation of the criteria set down in the WTO rules (especially the interpretation of such expressions as "substantially all the trade" and "other regulations of commerce" in Article XXIV of GATT). The department believes the CRTA's failure to reach a consensus on any RTA is a major problem. The CRTA is currently considering measures to ensure greater transparency and efficiency in the examination of regional agreements, but ultimately, only greater clarification of the rules will meaningfully progress the work of the CRTA. Australia and others have called for further work on RTAs to be considered as part of the next WTO round.

[42] WTO, 1998, 'Trading into the Future', Second Edition, Revised, Secretariat of the WTO, Geneva, p 53.

It is possible that tighter rules on regional trade agreements will come about through dispute settlement decisions, rather than a new round. More countries are resorting to the WTO's dispute settlement mechanism, which is building up a greater body of law on a diverse range of issues. RTAs could well become the subject of dispute settlement procedures. This has already occurred once, in the 1999 WTO Appellate Body decision of *Turkey – Restrictions on Imports of Textile and Clothing Products*, where Turkey was found to have breached the WTO rules on regional agreements. It was held that an RTA should facilitate trade amongst the parties to the agreement, but that it should not do so in a way that raises barriers to trade with other countries. This was a significant decision, underlining the necessity for RTAs to be WTO-consistent.

IMPORTANCE OF THE WTO'S RULES ON REGIONAL TRADING ARRANGEMENTS TO AUSTRALIA

Australia, as a medium sized economy with diverse exports to a wide range of markets, has a strong interest in promoting effective multilateral rules to regulate regional agreements. Australia relies on a wide range of markets for its exports. A global web of interlocking RTAs which did not comply with the WTO rules could make exporting considerably more difficult for Australian businesses.

AUSTRALIA'S POSITION ON RTAS

Australia is open to concluding regional agreements which deliver meaningful gains to Australia, which cannot be achieved in a similar timeframe elsewhere. In August 1999, Prime Minister Howard, along with then New Zealand Prime Minister Shipley, outlined our policy on regional agreements in a Joint Prime Ministerial Statement:

> "New Zealand and Australia are willing to consider [regional] trade agreements with other significant individual economies or regional groupings, where they would deliver faster and deeper liberalisation than the multilateral process, with the objective of gaining better market access for our exporters, faster economic growth and stronger employment growth. Such arrangements would need to reflect the principles underpinning CER including WTO consistency."

Australia is currently a member of only one 'reciprocal' RTA (where both parties have reciprocal obligations). This is the Australia New Zealand Closer Economic Relations Agreement, or 'CER', which entered into force in 1983. CER has been recognised as the world's most comprehensive, effective and WTO-compatible RTA. CER assisted in building up momentum for trade liberalisation in goods and services in both countries. All tariffs and quantitative restrictions were removed from trans-Tasman goods trade by 1990, five years ahead of schedule. Since 1983 total trade in goods has increased fivefold to AUD11.3 billion in 1999. New Zealand's exports to Australia have grown by 380 per cent since 1983, and Australia's exports to New Zealand have grown by 300 per cent since 1983. Two way investment between Australia and New Zealand has increased at a rate almost double that for investment with the rest of the world.

Australia also has "non-reciprocal" regional trade agreements with Papua New Guinea (PATCRA) and the South Pacific countries (SPARTECA) within which we offer free access to their export trade. In addition, a new Pacific Regional Trade Agreement (PARTA) currently is under negotiation. A high level task force from Australia, New Zealand and ASEAN countries is currently exploring the feasibility of

a reciprocal free trade agreement linking CER with the ASEAN Free Trade Area (AFTA). The high-level task force examining this issue is due to report to ASEAN and CER Ministers in October 2000. An FTA covering CER and ASEAN could provide an important opportunity to further our economic integration with ASEAN. It could also give Australia an additional avenue to pursue market access and provide enhanced economic benefits for the region.

In addition, the department believes that Australia should continue to press for progress in regional trade liberalisation to be multilateralised as soon as possible through WTO negotiations. This will help to minimise the discrimination non-parties, including Australia, may suffer from not being in particular regional agreements.

FACTORS UNDERLYING INCREASED INTEREST IN RTAS

Generally, regional trade agreements reflect a desire by countries to gain maximum short-term trading advantages in advance of a WTO round, or to capture strategic advantages from establishing closer links between particular countries, or to trial/test sectoral liberalisation in a smaller, less threatening environment than the multilateral one. Historically, interest in RTAs has picked up in the periods between multilateral trade negotiating rounds. For example, a new wave of regionalism was triggered by slow progress in the Uruguay Round, but interest in RTAs waned immediately after the round's successful conclusion.

There has been renewed interest in RTAs recently, particularly following the failure of the Seattle Ministerial Conference to launch a round. However, even prior to the Seattle Conference, the European web of agreements was expanding, and discussions had commenced on a 'Free Trade Area of the Americas.' What is new about this latest wave of interest is that it extends to the Asia Pacific. Some countries, such as Singapore, are now very actively pursuing regional agreements for a range of political, strategic and trade policy reasons. Japan, Korea and Hong Kong – the three WTO Members which had previously been committed solely to multilateral liberalisation – have all been involved in discussions about possible regional agreements over the past year or so. However, it is difficult to predict how many of the proposals will proceed to formal negotiations amidst the various studies by non-government bodies and suggestions by business organisations - much of the interest in RTAs is generated at academic and business level, rather than at a government to government level.

The most successful regional trade agreements are comprehensive, allowing a small number of exceptions and minimising trade-restrictive features.

Section 6

RELATIONSHIP BETWEEN WTO AGREEMENTS AND OTHER MULTILATERAL AGREEMENTS

Terms of reference: the relationship between WTO Agreements and other multilateral agreements, including those on trade and related matters, and on environmental, human rights and labour standards.

THE WTO AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

The relationship between WTO rules and the trade-related provisions of multilateral environmental agreements (MEAs) has come under increasing international scrutiny. The major forum for policy debate by governments on the issue has been the Committee on Trade and Environment (CTE), established in 1995. Australia participates actively in this Committee. Debate has focused on how to ensure that trade agreements do not limit the scope for measures to protect the environment and on how to ensure that environmental agreements do not inappropriately restrict international trade.

Committee on Trade and Environment

The CTE's work program focuses on the following key areas:

- the relationship between the WTO rules and the use of trade measures for environmental purposes, including trade measures taken pursuant to multilateral environmental agreements (MEAs)
- the relationship between the WTO rules and new and emerging environmental policy instruments, including environmental taxes, product requirements and environmental labelling
- the effects of environmental measures on market access
- the relationship between trade liberalisation and the environment.

The CTE has been looking at these issues from two perspectives:

- how to ensure that trade agreements, including the WTO, do not limit inappropriately the scope for domestic or international actions necessary to protect the environment
- how to ensure that environmental treaties and environmental measures taken at the national level do not inappropriately restrict trade or interfere with the benefits of a non-discriminatory and open multilateral trading system.

Framework Approach

In a major report on the relationship between trade and environment policies to the 1996 Singapore Ministerial Conference, the CTE noted that WTO Members' views differed on the need for modifications to the WTO rules to take account of trade-

related provisions of MEAs. The report set out a framework for continuing work. The framework:

- highlighted Principle 12 of the Rio Declaration on Environment and Development on avoiding unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country
- emphasised the complementarity between the work of the WTO in seeking cooperative multilateral solutions to trade concerns and multilateral cooperation to tackle transboundary and global environmental problems
- pointed out that trade measures were included in a relatively small number of MEAs, that to date there had been no GATT or WTO dispute about such measures, and that a range of provisions in the WTO including Article XX of GATT 1994 could accommodate the use of such measures
- noted that where parties to an MEA agreed to apply specifically mandated trade measures among themselves, disputes between them over the use of such measures were unlikely to occur in the WTO
- pointed out that, in the negotiation of MEAs, particular care should be taken in considering the application of trade measures to non-parties
- stressed the importance of national policy coordination in reducing the possibility of legal inconsistencies.

Improved Dialogue Between the WTO and MEAs

Since the Singapore report, the CTE has continued its work with a focus on improving dialogue on trade and environment issues. The CTE regularly invites the secretariats of MEAs to report on developments within their respective agreements and to exchange views with WTO delegations. Australia welcomes these information sessions. They help ensure that trade officials are aware of trade-related aspects of environmental negotiations and that MEA secretariats can provide information on WTO perspectives to Members negotiating or implementing the various MEAs. But ultimately, the success of this initiative will depend on the extent to which it contributes to enhanced national coordination to ensure that negotiating positions in both trade and environmental fora represent whole-of-government positions.

Proposal to Place MEA Issues on a New Round Agenda

In the lead-up to the 1999 Seattle Ministerial Conference some WTO Members, particularly the EC, proposed that the relationship between WTO rules and trade-related measures in MEAs should be on the agenda of a new round of WTO negotiations. But this proposal received little support among the wider WTO membership. Most WTO Members, including developing countries, have continued to argue that trade measures in MEAs are adequately catered for under existing WTO rules.[43] They also argue that the focus should be on improving policy coordination on trade and environment issues rather than seeking clarification of the WTO rules.

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[43] Most WTO Members have taken the view that there is no need to further clarify these rules. In particular, they have pointed to Article XX of GATT 1994 as being relevant to such trade measures. Article XX is a general exception provision that allows trade restrictions otherwise inconsistent with GATT provisions for important public policy purposes. This is subject to compliance with a number of

Australia's Position

Australia has supported the framework approach, regular dialogue between the WTO and MEA secretariats and improved policy coordination efforts to ensure cooperative multilateral approaches to trade and the environment. The Department has worked closely with other government departments and agencies to coordinate national policy positions, and to ensure that both trade and environmental negotiations reflect the full range of Australian interests. In discussions with other governments, Australia has promoted the importance of national and international policy coordination to help prevent any conflict between the obligations assumed by countries under different multilateral agreements.

Trade Provisions of MEAs

Most MEAs do not contain trade provisions. Those that do tend to be MEAs designed to address specific environmental problems associated with trade in certain substances or products, for example

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

Some MEAs contain trade provisions to address concerns that unregulated trade may undermine the effectiveness of controls agreed by the parties to the MEA on the production and consumption of products or substances associated with an environmental problem, for example the Montreal Protocol on Substances that deplete the Ozone Layer.

Biosafety is an area in which environmental issues potentially could be misused for trade protectionist purposes. The department has examined whether any provisions of the Biosafety Protocol would require or allow a country to act inconsistently with its WTO obligations, notably with respect to the "precautionary approach". Our initial view is that this is not the case as the WTO can accommodate reasonable use of precaution in science-based decision making. The onus therefore is on Parties to both the WTO and the Biosafety Protocol fully to respect their obligations under both treaties when implementing the Protocol.

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safeguards against abuse of this provision to impose measures that are a disguised restriction on trade or involve arbitrary or unjustifiable discrimination.

WTO AND LABOUR STANDARDS

The Government supports adherence to core labour standards. But it considers that organisations such as the International Labour Organization (ILO), rather than the WTO, are best placed to deal with these issues. Core labour standards, the subject of conventions and recommendations adopted by the ILO, include:

- freedom of association
- the right to organise and bargain collectively
- non-discrimination in respect of employment and occupation
- freedom from forced or compulsory labour and
- freedom from exploitative child labour.

The relationship between trade and labour standards has been contentious in the GATT and the WTO for many years.

Most developing and some developed countries (Japan, Korea) believe the issue has no place in the WTO. Developing countries view the campaign to bring labour issues into the WTO as a bid by industrialised nations to undermine the comparative advantage of lower wage trading partners and see the argument for workers' rights as disguised protectionism.

Developed countries in favour of WTO work on trade and labour (notably the United States and, to some extent, the EC) have tended to focus on both labour and human rights considerations. They have queried whether non-adherence by countries to core labour standards has enabled them to avoid some production costs, thus giving them an unfair competitive advantage in international markets. But they have also pointed to the importance of core labour standards as a basic human right for workforces in all countries.

Some proponents of WTO consideration of trade and labour standards have argued that the ILO is unable to enforce its own standards and that the more rigorous disciplines available under the WTO would provide a powerful incentive for member nations to improve workplace conditions.

Efforts to put Trade and Labour Issues on the WTO Agenda

In 1986, the United States tried to place the issue on the Uruguay Round agenda. Developing countries rejected it then and have continued to resist subsequent attempts to put the issue on the WTO agenda, including at Seattle.

At the 1996 Singapore Ministerial Conference, WTO Ministers renewed their previous commitment to the observance of internationally recognised core labour standards and reaffirmed the ILO's primary carriage of labour standards issues. They agreed that the WTO and ILO Secretariats would continue to collaborate but would not set up committees or working parties. They rejected the use of labour standards for protectionist purposes and agreed that the comparative advantage of particularly low wage developing countries should not be jeopardised.

Since 1996, the ILO has responded to the challenge given to it by WTO Members, including through the adoption of the ILO Declaration on Fundamental Principles and

Rights at Work in 1998. The Government strongly supported the adoption of the Declaration and played a key role in its universal acceptance. The Government remains committed to the ILO, and will continue to play a constructive role in that forum in the future.

In the lead up to Seattle, the US proposed the adoption of a forward work program to address labour issues, including the establishment of a Working Group on Trade and Labour to operate under the supervision of the WTO General Council. This proposal, and President Clinton's subsequent comments at Seattle that the WTO should incorporate core labour standards in trade agreements and eventually use sanctions to enforce them, was strongly opposed by developing and some developed countries. The US has had some support from the EC, which has proposed establishing a joint ILO/WTO Standing Working Forum on trade, globalisation and labour issues. The US is not a signatory to many ILO Conventions.

Australia's Position

The department has been concerned to find constructive ways to address legitimate concerns about trade and labour issues in international fora. For example, we supported the proposal to establish an international forum outside the WTO - including the ILO, World Bank, UN and the WTO - to address labour issues: a compromise almost reached in Seattle. Since Seattle, the Australian Permanent Mission to the WTO in Geneva has been convening meetings with WTO Members from all sides of the debate to explore ways forward, consistent with our national interests in an effective multilateral trading system and in the promotion of human rights.

The department does not support more radical proposals to include trade and labour issues as part of the WTO's core work or to use trade sanctions to enforce labour standards. On a practical level, the department considers that over-burdening the WTO agenda with non-trade issues is likely to make consensus on core WTO activities more difficult to achieve and that WTO initiatives on labour standards risk undermining the role of the ILO. Also, trade remedies are unlikely to target the root causes of labour standards deficiencies. Instead, they are more likely to lead to distortions in international trade and increased hardship for workers in those countries most in need of economic development and improved social welfare

Recent analysis, including by the OECD, points to a positive association over time between sustained trade liberalisation and improvements in core labour standards.[44] OECD analysis has shown that low labour standards do not confer a significant trade advantage on developing countries. Instead, it shows that more developed countries are likely to have stronger trade performances and higher labour standards. The studies suggest that to the extent trade promotes economic growth and development, opening markets further to developing countries could make a positive contribution to raising labour standards.

TRADE AND HUMAN RIGHTS

[44] OECD (1996 and 2000), *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, OECD, Paris

Human rights issues are not specifically dealt with in the WTO. However, more broadly, the objectives of the WTO, as highlighted in the preamble of the Marrakesh Agreement Establishing the WTO, explicitly recognise principles such as the importance of raising standards of living, optimal use of the world's resources in accordance with sustainable development and protecting the environment. International consideration of human rights issues takes place multilaterally within the United Nations and pursuant to specific human rights treaties. Australia remains committed to the promotion and protection of human rights and to fulfilling its obligations under UN treaties. Australia is also working towards improving the effectiveness of the UN human rights treaty body system.

At the 1996 WTO Ministerial Conference and in the lead up to Seattle there was considerable international debate about links between trade and human rights in the context of labour standards. Deliberations on these issues are covered in the previous section on trade and labour.

As with labour issues, Australia would be concerned that placing specific human rights issues on the WTO agenda could over-burden the WTO with non-core trade issues, risk unfair and counter-productive resort to protectionism and detract from the UN's work on human rights. But we are not aware of any proposals by WTO Members to incorporate human rights in the WTO agenda.

WTO AND INVESTMENT

The multilateral system lacks a comprehensive framework for investment. But a number of WTO Agreements deal with specific investment issues, notably the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS). WTO consideration of the relationship between trade and investment is handled in a Working Group established by the 1996 WTO Ministerial Conference. Australia is an active member of the Working Group.

WTO Working Group on Trade and Investment

Key issues under consideration in the Working Group include: establishing a common definition of investment; handling of sensitive sectors (that is, whether there should be permanent exceptions); transparency and predictability issues; dispute settlement; and developmental issues related to trade and investment. Discussions in the Working Group have been constructive. But they have also highlighted continuing divisions on the desirability of a multilateral investment agreement and its possible framework, mainly because of lingering sensitivities over the scope of the OECD's failed negotiations on a comprehensive Multilateral Agreement on Investment (MAI).[45]

Proposals for WTO Negotiations on Investment Rules

At the Seattle Ministerial Conference, the EC and Japan (as well as Korea and some Latin American countries) strongly advocated a negotiating mandate for a framework agreement on investment rules in the WTO as part of a new round agenda. This was strongly opposed by a group of developing countries including India, Malaysia and

[45] Several OECD Members had significant difficulties with the breadth of the proposed agreement extending beyond basic pursuits, and negotiations ceased in 1998.

Indonesia. The US too opposed it, expressing concern that the EC and Japan's level of ambition might prejudice outcomes in other areas, including with respect to securing agreement on the agenda for a new WTO round. Other WTO Members fell somewhere between the two poles. Many were interested in improving the international investment climate but thought the time was not yet ripe for negotiations on a multilateral framework, particularly given the failure of the MAI.

Australia's Position

While Australia may be prepared to accept some limited work on investment as part of a balanced new WTO round agenda, we are not a proponent of full-fledged investment negotiations in the WTO. Australia has urged those seeking negotiations to be realistic about what might be achievable within the desired three-year timeframe for a market access-focussed round. The scope of a WTO investment framework would also need to be realistic, particularly as developing countries have expressed concerns about their capacity to implement new measures.

Australia already has a relatively open and transparent foreign investment policy. The Australian Government welcomes foreign investment and has a close interest in the development of clear and transparent rules governing international trade and investment. This would help ensure better and secure access for Australian goods, services and investors in important export markets and, ultimately, promote domestic economic growth and the creation of jobs.

Public consultations undertaken by the Department in the lead up to the WTO Ministerial Conference in Seattle revealed that there was still considerable community concern about negotiating an investment agreement following the failed MAI. These concerns were similar to those in other OECD countries and focused on: possible loss of national sovereignty from international investment rules; the possible diminution of governments' rights to regulate, particularly on services and environmental issues and the possibility of increased power to multinational corporations.

Under any possible future investment agreement, foreign investors operating in Australia would continue to be required to adhere to Australia's laws and regulations, including environmental and labour standards.

Possible Impact of an International Investment Agreement on Australia

At this stage, it is difficult to analyse the likely impact of any international investment agreement on Australia's investment flows. As Australia already has a generally open and transparent foreign investment policy, an international agreement would be unlikely to have a significant impact on inwards investment flows. But it could potentially encourage opportunities and conditions for Australian outwards investment in some overseas markets, particularly in the Asian region.

WTO AND COMPETITION POLICY

As with trade and investment, there is no multilateral agreement on trade and competition policy in the WTO. Under the GATT, international trade rules largely did not address competition issues. Some WTO Agreements touch on aspects of trade and competition policy. But consideration of negotiations on more comprehensive WTO rules has been contentious. Many Members consider the time is not ripe for

negotiating rules on competition policy. The Singapore Ministerial Conference set up a Working Group on the Interaction between Trade and Competition Policy to examine the issues. Australia has been an active participant in the Working Group.

WTO Working Group on the Interaction between Trade and Competition Policy

As agreed at Singapore, the Working Group has developed an educational program focused on:

- the relevance of fundamental WTO principles on national treatment, transparency and MFN treatment to competition policy
- approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and
- the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

Efforts to put Trade and Competition Issues on the WTO Agenda

As with trade and investment issues, divisions among WTO Members on trade and competition policy has meant that the Working Group has not been able to bridge the gap between those WTO Members seeking negotiations on competition and those wishing to continue with the Working Group's educational program.

- The principal proponents of WTO negotiations on competition policy are the EC, Japan and Korea. They want WTO Members to commit themselves to adopting competition laws, with some degree of common approach.
- The key opponents are the US (in part to avoid discussions on anti-dumping) and developing countries, including ASEAN. Many developing countries are concerned about negotiations on competition policy because their domestic competition regimes are not well developed. They would prefer to see educational work continue in the Working Group. At the same time, some countries are attracted to multilateral competition rules as a potential means of controlling the power of multinational firms and combating anti-competitive practices.

Trade and Competition Policy: Key Areas of Interest

The reasons some countries are interested in establishing clearer rules on trade and competition policy, include:

- a wish to ensure that market access improvements, in the form of tariff reductions or lowered non-tariff barriers, are not negated through the regulatory environment or the use of restrictive business practices within the market
- wanting to adapt the regulatory framework to the needs of a more competitive international market, and
- wanting to explore how best to deal with the so-called "globalisation of production" as firms increasingly seek the optimal mix of trade and investment activities relevant to their needs.

Australian Position

Australia's competition laws are primarily contained in the *Trade Practices Act 1974* and enforced by the Australian Competition and Consumer Commission (ACCC). The law is intended to promote and preserve fair and free competition in the domestic market. Through a series of reforms over the past decade, Australia has developed one of the most advanced competition regimes in the world with a comprehensive competition policy covering all businesses regardless of their ownership, and applying to all aspects of industry and commerce

Australia is not opposed to WTO negotiations on competition as part of a balanced package for a new round. But we remain of the view that proposals for negotiations on competition should be realistic, both in terms of the likely level of developing country support and in terms of objectives that are achievable within a reasonably short WTO round of negotiations. Also, our experience working with developing countries, especially in APEC, suggests that an incremental, capacity-building approach to competition policy development may be more appropriate at this point rather than negotiations on binding international rules.

As with investment there are some community concerns about the potential for governments to lose national sovereignty or control under a binding set of international competition rules. Under any possible future competition agreement, companies operating in Australia would continue to be required to adhere to Australia's laws and regulations, including environmental or labour standards.

Section 7

SOCIAL, CULTURAL AND ENVIRONMENTAL CONSIDERATIONS IN THE WTO

Terms of reference: the extent to which social, cultural and environmental considerations influence WTO priorities and decision making

THE WTO AND SUSTAINABLE DEVELOPMENT

The preamble of the Marrakesh Agreement Establishing the WTO explicitly recognises the need to ensure that the WTO's work contributes to sustainable development, including through protecting and preserving the environment and through securing the benefits of international trade for developing countries. Specific provisions have been included in WTO Agreements to ensure that WTO rules do not prevent Members from pursuing important public policy objectives, such as the protection of the environment, and to ensure that the particular needs of developing countries are taken into account.

The commitment to these issues is further reflected in the establishment of WTO committees on environment and development issues. These committees undertake analytical work and dialogue on these issues and make recommendations on enhancing the WTO's role in promoting positive interaction between trade and environmental and developmental objectives, while avoiding trade protectionist measures. Australia plays an active role in these committees.

TRADE AND ENVIRONMENT

The agreement by Ministers, at the conclusion of the Uruguay Round at Marrakesh in 1994, to establish a Committee on Trade and Environment (CTE) responded to a number of important developments in international trade and environment policy. (See also Section 6*)* In particular, the United Nations Conference on Environment and Development (UNCED) in 1992 highlighted the importance of "promoting sustainable development through trade" and "making trade and environment policies mutually supportive". These concepts have been strongly endorsed by WTO Members through the work of the CTE. They reflect a desire for governments to find ways to pursue strong environmental protection policies in parallel with an open and non-discriminatory multilateral trading system.

A major focus of the CTE's work has been the role of subsidies and market access barriers in stimulating high levels of resource use and wasteful production processes in the economy. Sectors such as agriculture, fishing and energy have been prominent in its work. Australia has been active in pointing to trade reforms in these sectors that would benefit the environment as well as assist development and economic growth. Discussions have yielded general agreement on the importance of good environmental policies in complementing trade liberalisation.

Discussions also have identified specific scenarios, whereby new or revised WTO rules could assist the achievement of environmental objectives. Examples include the

environmental benefits that would derive from the elimination of subsidies that contribute to fisheries over-capacities, and the negative environmental impact of continued export subsidies to agriculture.

There also has been recognition of the need to ensure that WTO Members have adequate processes in place to identify and consider environmental issues that may be raised by the WTO's work. The CTE provides a common forum for this. In addition, the department works closely with Environment Australia and other agencies, and through NGO consultations, to examine environmental issues raised by the WTO's work. Departments monitor international discussion on assessing the environmental impacts of trade agreements, including methodological work on environmental reviews of these agreements, to see whether there are aspects of this work which would enhance the effectiveness of Australia's policy development process.

The WTO's work on trade and the environment complements activities in other major international organisations, including the OECD, the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Environment Programme (UNEP). The WTO's contribution to these broader international efforts is focused on trade policies and trade-related aspects of environmental policies.

Disputes

Environmental issues have also figured in some WTO disputes, particularly a complaint by India, Pakistan, Thailand and Malaysia over a US ban on shrimp imports related to the use of turtle excluder devices (TEDs) in shrimping vessels. The US measure was found to be in violation of its WTO obligations in the dispute settlement process. The findings of the shrimp/turtle dispute have been held by many, including some environmental NGOs, to illustrate that WTO rules can accommodate environmental concerns while providing a strong safeguard against inappropriate trade action. This finding has also been seen as confirming the scope for existing WTO rules to cater for trade measures contained in an MEA, consistent with the conditions of GATT Article XX (the exemptions provision). (See Section 4 for additional detail.)

TRADE AND DEVELOPMENT

Approximately two-thirds of the WTO's 138 Members are developing countries. The Preamble to the Agreement Establishing the WTO clearly recognises that "there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". This concern is reflected in several ways:

- the inclusion of special provisions for developing countries in WTO Agreements, notably special and differential treatment (S&D) for developing countries, with particular attention to the situation of least developed countries (LDCs)
- the concept of non-reciprocity in trade negotiations between developed and developing countries. That is, developing countries are not expected to make

contributions inconsistent with their individual development, financial and trade needs

- the establishment of a Committee on Trade and Development (CTD)
- the provision of technical assistance, particularly training, to developing countries by the WTO Secretariat.

Least Developed Countries

WTO Members recognise that the 48 UN-designated Least Developed Countries (LDCs) can face significant difficulties in participating in the multilateral trading system.

In 1997 WTO Members endorsed an *Integrated Framework for Trade-Related Technical Assistance* (IF) that sought to increase the benefits derived by LDCs from the trade-related technical assistance available to them from six agencies (the WTO, UNCTAD, the International Trade Centre, the IMF, the World Bank and the UNDP). The IF was reviewed in early 2000 by the Heads of these agencies. The review recommended:

- increased emphasis on "mainstreaming" trade, to ensure that trade policy, trade-related technical assistance, and capacity-building needs are articulated in a broad development context, with the World Bank to lead and coordinate this aspect
- establishment of a steering committee, including representatives from LDCs and donor countries along with Heads of the core agencies, to oversee the functioning of the IF on a continuing basis, and
- the WTO to take on responsibility for coordinating and providing the secretariat for the working level Inter-Agency Working Group for the IF.

PROPOSALS FOR TRADE-RELATED WORK ON THE ENVIRONMENT AND DEVELOPMENT AT SEATTLE

In the lead up to the 1999 WTO Ministerial Conference in Seattle, a number of proposals were put forward to enhance the WTO's work on both environment and development.

Specific environmental proposals were put forward on: the relationship between the WTO rules and trade measures taken pursuant to MEAs (see previous section); eco-labelling; subsidies that contribute to fisheries overcapacity; and environmental assessments of trade negotiations. There was widespread support for including work on fisheries subsidies in a new WTO round. But WTO Members considered that most of the other issues were best addressed through continued policy debate in the CTE rather than through negotiations.

Specific proposals on a future WTO work program on development included: promoting trade liberalisation in sectors important to developing countries; improving technical assistance to developing countries; addressing developing countries' concerns about implementing existing WTO Agreements; and ensuring that small and vulnerable economies received assistance in coping with the impact of changes in international financial and monetary markets.

Confidence Building Package for Developing Countries

In May 2000, as part of continuing efforts to address developing countries' concerns post-Seattle, the WTO General Council agreed to a package of confidence-building measures proposed by Director-General Moore. The package included initiatives to enhance market access for LDCs (through the provision of tariff and quota-free access for products originating in LDC Members); enhanced capacity-building through technical co-operation; and the establishment of a special session of the General Council to consider developing countries concerns about the implementation of their Uruguay Round commitments.

THE WTO AND CULTURAL ISSUES

Some critics have argued that WTO rules threaten the diversity of cultural product and encourage global cultural homogenisation. But current WTO Agreements contain nothing which obliges WTO members to provide unrestricted access for foreign cultural products.

Under the General Agreement on Trade in Services (GATS), Members are only under a binding obligation to offer market access and national treatment (broadly speaking, treatment which does not discriminate between domestic and foreign suppliers) if they have made specific commitments under that sector. The audiovisual sector (film, television and radio) is a sensitive sector for a number of countries, and there are relatively few scheduled commitments. Australia has not made any commitments under this sector, and has also taken out exemptions from most-favoured-nation status (MFN). Australia will take into account its cultural policy objectives for the audiovisual sector in determining its negotiating strategy for the new WTO services negotiations. Australia has also not made any commitments in cultural services (entertainment, libraries, archives, museums and other cultural services).

In terms of the protection of cultural expression, the provisions of the WTO Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement have contributed to the protection of IP rights for WTO Members, thereby encouraging creativity and artistic expression.

Protection of expressions of indigenous culture is a matter of increasing practical and policy concern, and there is growing interest in how the intellectual property system - in its current form, or in an extended or adapted form - can work better to ensure that indigenous communities derive greater recognition and tangible benefits from their distinctive traditional cultures. On the international plane, there is active consideration of how to achieve this within the framework of integrated intellectual property standards established by the World Intellectual Property Organization (WIPO) and the WTO TRIPS Agreement. Opportunities are apparent in more strategic and flexible use of trade marks or certification marks (such as the Australian authenticity label), geographical indications, protection of confidential information, copyright and related rights, and the patent system. For instance, indigenous communities can make access to and use of their traditional knowledge conditional on an equitable share, enforced by contract, in the benefits accruing from its subsequent commercial use, such as when it makes a contribution to a patentable invention.

Australia has been an active participant in a WIPO program aimed at benchmarking best international practice in this area. TRIPS only sets minimum standards for IP

protection, and leaves open the possibility for new forms of protection more directly tailored to the needs of indigenous communities, an opportunity several countries are currently exploring. The practical lessons currently under consideration in WIPO and elsewhere may lead to suggestions for enhancing TRIPS standards in time - for instance, some developing countries have already called for recognition within TRIPS of distinct new rights covering traditional knowledge.

OTHER ISSUES RELATED TO AGRICULTURE

Under the broad set of agriculture issues, policy makers are also having to deal with the trade implications of a number of controversial issues - the use of biotechnology in agricultural production, food safety, animal welfare, and application of the precautionary principle or approach to WTO rules.

Biotechnology

International trade in the products of biotechnology has been growing but there is some uncertainty about the rules that cover that trade, especially for agricultural products and genetically modified (GM) food. Australia believes that the WTO rules provide an appropriate framework for managing international trade in products of biotechnology. For Australia, a key issue is that trade restricting measures adopted by countries to manage trade in biotechnology products should adhere to a risk-based approach based on science – as in the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement). Similarly, labelling of GM foods for consumer information falls under the WTO *Agreement on Technical Barriers to Trade* (TBT Agreement) and trade and intellectual property issues associated with biotechnology fall under the WTO *Agreement on the Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement).

Australia has an interest in these issues as both a developer and user of biotechnology products and processes. As a major agricultural and food exporter, it is in Australia's interests that other countries not arbitrarily impose regulations or requirements in ways that would damage our market access for agri-food exports. Maintaining open markets for biotechnology products while protecting human health and the environment from any risks associated with biotechnology is a particular challenge for governments. The Government's intention in proposing the Gene Technology Bill, currently before Parliament, is to have in place a new comprehensive national regulatory framework to assess and manage risks associated with dealings in GM organisms by 3 January 2001.

Food Safety

The SPS and TBT Agreements provide the basis for Members to implement domestic measures on food to protect human health, animals and plant life. Those Agreements require that trade restrictive measures intended to provide such protection be based upon scientific principles and technical information. This is designed to prevent countries from using measures such as non-tariff barriers to protect local industries by unnecessarily or unjustifiably restricting imports, and to provide consistency in decision-making internationally. The exercise of precaution is inherent in national and international regulatory approaches and standard setting for food safety.

Australia has significant national interests to promote and protect with respect to food safety. These are: to protect human health; to maintain public confidence in our science-based, high-standard domestic food safety regulatory framework; and to ensure ongoing market access for our $34 billion of agri-food exports. Australia remains committed to an open, rules-based international trading environment which also reflects international standards, including food standards established by the FAO/WHO Codex Alimentarius Commission.

Animal Welfare

Australia believes that animal welfare issues should be addressed by national policies which are evidence-based, address community expectations and avoid cultural bias. The WTO SPS Agreement and General Agreement on Tariffs and Trade (GATT) 1994 provide the basis for WTO Members to adopt measures to protect animal life or health, and thereby animal welfare, without unnecessarily restricting trade. However, the WTO is not a standards-setting body and discussion of standards on animal life or health take place in the international standards-setting body for animal health, the Office International de Epizooties (OIE). Australia has supported the inclusion of animal welfare issues in the OIE's strategic plan for 2001-2004 which will investigate scientific aspects of animal welfare and assess the feasibility of developing international standards and guidelines on the issue.

In its submission to the June 2000 Special Session of the WTO Committee on Agriculture, the EC has sought to link animal welfare and the WTO agriculture negotiations. The Government does not agree that such a link is appropriate and will resist attempts to use animal welfare claims as the basis for arbitrary or unjustifiable discrimination between WTO Members or disguised restrictions on international trade. National measures to address animal welfare issues should be decoupled from agriculture production to avoid distorting agri-food trade.

Precautionary Principle

Australia supports the precautionary approach as set out in Principle 15 of the *Rio Declaration on Environment and Development* (1992). This states that: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Australia is a signatory to some of the (more than a dozen) international treaties and declarations where the Precautionary Principle has been referenced. The Precautionary Principle is included in a number of environment related policy documents and legislation at the Federal, State and local government levels.

In our view, existing international rules and arrangements, including the WTO Agreements, enable governments to respond to circumstances where there is lack of scientific evidence as to the level of risk involved, in a way that protects human, animal and plant health and life. Precaution is reflected in existing provisions of the WTO Agreements and other established sets of procedures and guidelines linked to implementation of WTO rules, such as Codex Alimentarius (the international body under the FAO which identifies international standards for food). WTO rules also recognise the right of countries to adopt trade-restricting measures to protect people

and the environment. The SPS Agreement, in particular, provides for measures to protect human, animal and plant life or health, including when relevant scientific evidence is insufficient. In our view, it would be more appropriate for countries with those concerns such as the EC, to strengthen their own domestic regulatory arrangements.

While Australia supports appropriate use of the Precautionary Principle, we are concerned that some countries are seeking to misuse it. The EC, for example, wants a wider margin to respond to perceived risk and associated consumer concerns by giving greater weight to political and social factors such as consumer concerns, compared to scientific evidence and technical information.

The Australian Government considers that the EC's approach risks undermining the scientific basis for analysing and managing risks to human, animal and plant life or health which underpins the WTO SPS and TBT Agreements. It also risks the imposition of unjustified trade barriers that could put at risk Australia's agricultural and food trade and increase the potential for conflict between national policies and other international commitments, including WTO Agreements.

Multifunctionality

In the lead up to Seattle, the EC, Japan and others were promoting the concept of a unique "multifunctionality of agriculture" as a justification to maintain high levels of subsidies and protection for their agricultural sectors. "Multifunctionality" refers to positive spillover benefits, additional to the provision of food and fibre, for which the markets exist. These include environmental protection, cultural values, rural development and food security. The EC argues that these benefits justify production-distorting policies such as domestic support, export subsidies and market access barriers.

Australia considers these non-trade objectives to be important to all countries. The issue is how best to address them. Many of the issues linked with multifunctionality are wider social, economic and environment ones which can be addressed most effectively by transparent, targeted and efficient policies which avoid distortion of production and trade. Current agricultural support and protection policies, notably in Europe, sometimes exacerbate, rather than alleviate, the concerns covered by multifunctionality (for example with respect to the environment). In addition, such policies severely distort international trade in the agricultural sector. Australia and other members of the Cairns Group have argued in the WTO and elsewhere that multifunctionality does not provide a sound justification for denying the benefits of agricultural trade liberalisation.