The Mineral Policy Institute
Submission to the Joint Standing Committee on Treaties Inquiry on Australia 's relationship with the World Trade Organisation

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Introduction to the Mineral Policy Institute and our concern over Australias relationship with the WTO.

The Mineral Policy Institute is a non-government orgnaisation that focuses on the human rights and environmental impacts of mining in Australia and the Asia Pacific. MPI supports the development if trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. However the collapse of the negotiations on the Mulitnational Agreement and Investment (MAI) in the OECD and the failure to launch a new WTO negotiating round at the WTO Ministerial Meeting in Seattle in November 1989, in our view, show that changes are needed to the international trade negotiation framework. MPI is particularly concerned with changes that take into account the environmental and human rights concerns of each nation.

Opportunities for community input into developing Australia's negotiating position

WTO agreements have broadened in scope to affect many more areas of government policy. It is therefore essential that government policy be open, publicly discussed and publicly accountable before agreements are signed.

Historically the negotiations have been secretive and Australia's policy position has not been publicly accountable.

Formal bodies only have business representatives but no community representatives - the Trade Advisory Policy Council and WTO delegations.

Recently there have been more attempts at wider community consultation but little evidence that these have influenced policy.

The form of consultations in 1999 (submissions and meetings) did not give much confidence to community organisations. DFAT officials appeared not to listen, argued against any critical points put to them and generally saw the process as their chance to tell community groups what policy should be rather than vice versa.

Some DFAT briefings in 2000 were only accessible to industry groups and not community organisations because of entry fees and the times they were held.

We need accessible forms of information and community consultation, public debate on policy positions before agreements are signed and representation of community organisations on formal bodies.

Reccomendations:

- Information and community consultation on trade policy should be held in accessible forms. They should be well publicised in advance, free of any costs, held at convenient times and locations and have time for genuine input from the community.
- Consultation and public debate on policy positions should take place before negotiations.
- Australia 's policy for negotiations should be public and documents should be made available.
- There should be full public scrutiny and parliamentary debate of draft agreements before they are signed.
- There should be representation of community organisations on the Trade Advisory Policy Council and on WTO delegations.

2. Transparency and Accountability of WTO decision-making

The scope and content of agreements has widened under WTO but the WTO is neither transparent nor accountable compared with UN structures. It has closed meetings, no majority voting, no public debate, no formal NGO observers at debates, and the drafting process is dominated by the Quad countries (US, Canada, EU and Japan).

Developing countries are excluded from most drafting meetings (the Cairns group is an exception), and lack resources. They have made specific requests for structural changes. Some WTO advocates see the WTO as an opportunity to "lock in" current and future governments to a wide range of domestic policies (Bergsten 1996). The WTO is seen precisely as a way of implementing global policies without troublesome national public debate or accountabilty.

This removal of regulation from the national to the international level without democratic accountability restricts domestic policy debate and policy choices and thus restricts democratic and accountable government.

A review of WTO structures is urgently needed to address these issues. Such a review should take place before any new negotiating round.

Recommendations:

A comprehensive review of WTO structures is required before a new negotiating round and should include the following issues:

- Open public debate at the WTO and publication of all relevant documents;
- Changes to decision-making structures to give more voice to smaller and developing countries through voting and/or other means;
- Greater technical and funding assistance for developing countries to assist meaningful participation;
- Greater recognition of the special circumstances of developing countries in agreements, and
- Recognition of non-government observers and inclusion of non-government community organisations in government delegations.

3. **3. The Relationship between WTO agreements and UN international agreements on human rights, labour standards and the environment.**

International law on human rights, indigenous rights, labour rights, the environment and health and safety is based on pre-eminent social values recognised by most governments through the UN. These values are enshrined in UN Declaration on Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, ILO Conventions on labour rights and various environmental agreements.

The GATT Article XX provides that nothing in GATT agreements should prevent the adoption of measures necessary to protect public morals, measures necessary to protect human, animal or plant life or health, or measures relating to the conservation of exhaustible natural resources. These clauses were developed before the adoption of the UN human rights conventions and covenants (World Trade Organisation 1995:519). The preamble to the agreement establishing the WTO makes reference to raising standards of living, full employment, and environmentally sustainable development (World Trade Organisation 1995:6). These provisions are very basic compared with UN international agreements. However some commentators argue that they were intended to enable the WTO to take account of some international law in areas like human rights, health and safety and the environment, and should enable reasonable national regulation in these areas (Howse and Mutua, 2000:11-12).

In reality, these clauses in the GATT and the WTO are too restricted and have been interpreted too narrowly in the context of trade law. Decisions of the disputes panel have found that environmental regulation, food safety regulation, quarantine regulation and local industry development policies can be defined as barriers to trade. These decisions are constructing a body of case law on an *ad hoc* basis which tends to undermine the principles of UN agreements and deny the right to regulation in these areas at the national level.
International trade law commentators have concluded that there are conflicts between aspects of trade law and other international law. For example, there are conflicts between individual and corporate intellectual property rights and the collective rights of indigenous people to their natural and cultural heritage (Coombe, 1998). There are also conflicts between aspects of trade law and the precautionary principle which is a principle of international environmental law (Charnovitz, 1998).

Recommendations :

- WTO agreements and processes should be changed and interpreted to give much clearer recognition to UN international agreements on human rights, labour standards health and safety and the environment.
- In the event of conflict between UN agreements and trade agreements, the UN agreements should prevail.
- There should be ongoing dialogue between the WTO and the UN,the ILO and other international bodies.
- WTO agreements should clearly recognise the right to have national regulation in these areas.

4.Effectiveness of WTO dispute settlement procedures and ease of access

Definition of effectiveness - the WTO disputes settling framework is too narrow and places trade and commercial values above other values in international law. The disputes process may be effective for business but can undermine regulation on health, environment and human rights. The threat of potential complaints as well as actual complaints are now being used to influence domestic government policy, eg on GMO labelling.

Dispute hearings are closed to the public.

Information on decisions is difficult to access and the language is obscure.

Recommendations

- The disputes process should be public, as are most national and international judicial processes.
- All documents and decisions should be publicly available, with summaries of decisions in plain language.
- Community organisations representing broader public interest issues should have the right to be heard and their evidence should be considered with other evidence.

The disputes process should recognise other international law and the right to have national regulation based on the principles of those laws.

Relationship between WTO agreements and UN international agreements.

The WTO is a less transparent and accountable body than the UN which is the source of most other international agreements.

WTO agreements are more enforceable than UN agreements through its disputes body.

Thus WTO agreements can undermine principles established in other international agreements, eg the precautionary principle in international environment law.

Reccomendation:

- Mechanisms are needed which require trade agreements to comply with international agreements on the environment, human rights and labour rights.

5. Extent to which social cultural and environmental considerations influence WTO decisions

It can be argued that, like most institutions, the WTO has its own institutional culture and social structures which strongly influence its decision-making. Section two of this submission has explored aspects of that culture and its lack of transparency and accountability:the influence of the economic analysis used by the IMF and the World Bank, the influence of industry lobby groups, the secretive nature of meetings of the formal bodies and the informal "quad" and "green room" decision-making structures, etc.
The WTO's procedures, and its one-size-fits-all global rules do not take into account the specific historical, social, cultural, environmental and development context of particular countries.
These issues have been canvassed in the public debate which occurred in 1998 over the Multilateral Agreement on Investment and debates on the areas which should be included in the trade in services agreement. The draft MAI, which was developed in the OECD, sought to remove most national government powers to regulate transnational investment.
It would have prevented limits on foreign investment in general, or in particular industries, prevented requirements on foreign investors to use local products or train local staff and prevented the use of government purchasing to develop local industry. It also contained provisions to give transnational investors the right to compete for government funding for services like education and health (Ranald, 1999).
It was a top-down agreement which would have included all areas of government law and policy which were not specifically excluded. Even the exclusions would have had to be rolled back over time. This would in the long run have removed the power of national governments to regulate in areas like regional development policy, the cultural and land rights of indigenous peoples, national cultural industries like film and television services and even in areas like the environment.
The draft MAI met with fierce opposition when it became public precisely because it impinged on so many areas of national public policy and regulation which are seen as essential for social, cultural and environmental development. The negotiations in the OECD collapsed in 1998 after governments listed many exceptions to the agreement in the face of widespread public opposition and the French government withdrew . However, there are proposals to resurrect such an agreement in the WTO.
Some of these investment issues are also addressed in the General Agreement on Trade in Services (GATS). This flows from the fact that service provision often requires direct investment and a commercial presence in the country concerned. Once a commercial presence is established,

treatment must be non-discriminatory. The current GATS agreement is limited by several factors. It has a general exclusion for public services, if they are not provided on a commercial basis nor in competition with other service suppliers. It also retains the right for governments to regulate on the supply of services to meet national policy objectives and its specific requirements for non-discriminatory regulation are limited to qualifications, technical standards and licensing (World Trade Organisation, 1995:327-33). The agreement also includes only those services sectors specifically nominated by governments. Australia has so far not included areas of public service provision like public health, public education and social security. It has included private health and education services.

Some commentators have been explicit in their view that some aspects of the MAI could be pursued through an expansion of the GATS (Sciarra, 1998). A change in the structure of the agreement from an agreement by inclusion to a "top down" agreement like the MAI would mean that all services would be included unless excluded. A change in the right of governments to regulate to specify that all regulations must be "least trade restrictive" could open the door for challenges to regulation in areas like quality standards, access to and pricing of essential services. If all services were included, and regulation restricted, the public provision of services could be challenged by corporations seeking access to public funding.

Such proposals would meet with fierce community opposition, as they would remove from national regulation areas of fundamental importance to the cultural rights, human rights, living standards and identity of people. Public policy on these areas should be determined at the national level, not through WTO agreements.

Recommendations

- The agreement establishing the WTO should be changed to ensure that certain areas can be excluded from trade agreements and remain in the domain of national public policy, eg, the cultural and land rights of indigenous peoples, other national cultural activities, public health, social security and public education. Access to essential services like water and electricity should also remain regulated under national arrangements.
- The Australian government should oppose the inclusion of social security, public health, public education and cultural industries in the trade in services agreement.
- The Australian government should support the right of governments to regulate services to meet national policy objectives and should oppose changes to the definition of government regulation which would require it to be "least trade restrictive" to ensure that regulation of services remains at the level of national public policy.
- The Australian government should oppose the expansion of the scope of coverage of government regulations in the GATS beyond qualifications, licensing and standards issues.
- The Australian government should ensure that the trade in services agreement and any proposals on competition policy do not require privatisation of social security, public health services or public education services, or reduce the right of government to determine the distribution of government funding in these sectors.
- Following the widespread community opposition to the failed Multilateral Agreement on Investment in the OECD the Australian government should not support any similar agreement on investment in the WTO, and should oppose the expansion of the services agreement to include aspects of the MAI.