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Trade Restrictions on Local Food Production and Distribution

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Environmental Law Clinic

UNIVERSITY OF VICTORIA

To: Frank Moreland, Edible Strategies Enterprise Ltd.

From: Kendra Milne, Environmental Law Centre

Re: File 2007-01-04 – Trade Restrictions on Local Food Production and Distribution

Date: April 20, 2007

I was asked to research existing legal barriers to increased local food production and distribution in British Columbia. I hope this memo will provide further information on barriers created by international trade agreements, identify possible areas that allow for supporting local food production within those agreements, and a summary of past disputes that are relevant to local food production. To summarize, this memo:

- (1) lays out a brief summary of the international trade agreements that will be examined and how they restrict local food production,
- (2) summarizes key cases that challenged trade agreement provisions on an environmental basis,
- (3) examines possible room for a domestic support program geared towards encouraging local, sustainable agriculture, and
- (4) examines other ways in which local food distribution could be encouraged or supported and how these initiatives have been interpreted in trade disputes.

In summary, there have been a limited number of state disputes based on environmental concerns in international trade. The disputes that have arisen have been focused on restrictions on imports produced in a harmful way, defended by the arguments that the trade measures were non-discriminatory or fell under an exemption provision in the trade agreement. Although these disputes have not resulted in a lot of success for environmental protection measures, they have created a doctrine that suggests that states may act for the protection of the environment and that action may be unilateral.

Domestic supports are restricted under the WTO agreements, but the agricultural agreement created “green box” subsidies, which may provide authority for environmental protection programs. These provisions may create room for domestic subsidized programs that encourage sustainable agricultural practices.

Finally, most of the traditional methods to encourage and support local food producers fall within prohibited or restricted trade measure categories. There have been state disputes resulting from many of these trade measures, and although some of these disputes were settled without a dispute panel report, the numbers of states involved suggest that the disputes have been resolved in a way that prohibits these measures.

(1) The Agreement in Agriculture

Before exploring how the agreement examined in this memo creates difficulties for environmental protection and the local production and distribution of food, it is useful to briefly outline the applicable agreements.

The primary international trade agreement that will be considered in this memo is the World Trade Organization (WTO) *Agreement on Agriculture*,¹ which was preceded by the *General Agreements on Tariffs and Trade* (GATT) in 1995 and is adopted into Canadian law.² The WTO *Agreement on Agriculture* based on a theory known as competitive advantage. This refers to the notion that if one state has a natural advantage in producing a particular product, then that state should produce that product and other states that do not have a natural advantage producing the product should import it.³ The *Agreement on Agriculture* has three main goals: first, to reduce subsidies that encourage and support the exportation of products, second, to increase market access by eliminating non-tariff barriers and reducing tariffs on imported goods, and third, to eliminate domestic support measures.⁴ The WTO agreements are the only international trade agreements with a binding dispute resolution system,⁵ so for that reason, the *Agreement on Agriculture* will be the focus of this memo.

(2) Leading environmental cases

There have been five major international trade disputes based on environmental or health concerns. These cases are not specific to agriculture, but they provide insight into the possible types of challenges that arise and how they are resolved.

The first cases were brought under the GATT dispute resolution process. The first discussion of environmental measures came in the early 1990s with the *Tuna-Dolphin* complaints⁶ brought against the United States. Although never part of trade law officially since the panel report was not accepted, the cases are important because they show the initial response to cases with environmental foundations. The cases concerned an importation ban imposed by the US that aimed to protect dolphins. Certain methods of catching tuna that were harmful to dolphin populations were caught by the ban, and the US applied the standard to American fisheries as well. GATT prohibited import bans, so

¹ *WTO Agreement in Agriculture*, available online at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

² *World Trade Organization Agreement Implementation Act*, R.S. 1994, c.47, available online at: <http://laws.justice.gc.ca/en/showtdm/cs/W-11.8>.

³ Lauren Poser, *Unequal Harvest: Farmers' Voices on International Trade and the Right to Food* (Montreal: International Centre for Human Rights and Democratic Development, 2001) at page 7.

⁴ *Ibid.*

⁵ Donald McRae, "Trade and the Environment: Competition, Cooperation or Confusion?" (2003) 41 *Alta. L. Rev.* 745 at page 749 [McRae].

⁶ [United States — Restrictions on Imports of Tuna](#), Panel Report: August 16, 1991, (1991) 30 I.L.M. 1594; [United States — Restrictions on Imports of Tuna](#), Panel Report: DS29/R, June 16, 1994, (1994) 33 I.L.M. 839, both available online at: http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm. Please also see McRae, *ibid.* for a summary of the case and the decision. Much of the case summaries below follow that article.

complaints were brought against the US and these complaints resulted on one of the first examinations of the interaction between trade agreements and the environment.⁷

The *Tuna-Dolphin* cases were argued on two points by the United States, and these two points continue to be the main arguments in environmental and health based disputes. First, they argued that the ban was not discriminatory since US and foreign products were being treated the same. Essentially, they argued that the US had the right to discriminate between products based on the way they are produced, keeping all environmentally harmful tuna out of the America market no matter where it was produced. The GATT dispute resolution panel did not accept this argument and said that when looking at whether a trade practice is discriminatory, one must look at the likeness of the products, not the manner in which they were produced. The panel essentially said that since all tuna is a similar product, it should all be treated the same. Any harm resulting from the production process should not be the bases for differentiating trade requirements.

The second argument made by the US was based on Article XX of GATT, which allowed for exceptions related to human, plant and health and environmental protection (specifically “the conservation of an exhaustible natural resource” in XX(g)). Prior to the *Tuna-Dolphin* case, a requirement that the trade measure in question be “primarily aimed at” environmental conservation was established.⁸ The *Tuna-Dolphin* cases did not clarify the issue much, and applied a very narrow interpretation of “primarily aimed at” which resulted in the second argument by the US also being unsuccessful.

After the implementation of the WTO agreements and a binding dispute resolution process, there were several more important environmental cases that relied on the two arguments in the *Tuna-Dolphin* cases. Dealing with the first argument, that differentiating between products with different production processes is not discriminatory, the next important case was the *Asbestos* case.⁹ This was a complaint brought by Canada against France for banning all asbestos products. In this case, the dispute panel reconsidered the “likeness” requirements and found that the asbestos products could be considered alike because of the inherent harm to health. The panel moved away from the idea that all products similar to each other, regardless of harmful content, should be treated alike. One important note about this case is that the product in question was inherently harmful itself, as opposed to the *Tuna-Dolphin* cases, where the process of producing the product was harmful. It is unclear if this new idea of likeness extends to products that are not harmful, but are the result of a harmful process.¹⁰

Concerning the second argument from the *Dolphin-Tuna* cases, which relied on the exceptions under the GATT agreement for provisions aimed at environmental protection,

⁷ McRae, *ibid.* at page 750.

⁸ *Ibid.* at page 752.

⁹ [European Communities — Measures affecting asbestos and asbestos-containing products](http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm) (2001), WT/DS135/AB/R (Appellate Body Report), (2001) 40 I.L.M. 1193, available online at: http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm.

¹⁰ McRae, *supra* note 5 at page 753.

there have been two subsequent cases. The first is the *Gasoline* case,¹¹ which was brought against the US in response to an initiative aimed at achieving clean air by limiting impurities in gasoline. However, in this case, the US did not apply the same standards to its domestic producers and foreign producers. The result was a discriminatory trade practice since foreign producers were held to a different standard than American producers. As a result, the WTO dispute panel found the US measures in violation of the trade agreement, but in doing so, they clarified that the US had every right to reduce impurities in gasoline, but they could not differentiate between foreign and domestic producers. In stating this, the case reveals a broader idea of what the environmental exception can be used for: state actions no longer need to be very narrowly “primarily aimed at” environmental conservation. Instead, there appears to be some flexibility.¹²

The last case concerning the environmental exemption provisions is the *Shrimp-Sea Turtle* case.¹³ This case was brought against the US in response to a ban on shrimp caught in an environmentally destructive manner that harmed sea turtles. Similarly to the *Dolphin-Tuna* cases, the US also banned the practices in domestic production, but unfortunately, the ban was not enforced uniformly against all states. The US excluded some states and not others, and assisted some with implementing sustainable fishing techniques, but not others. Although the measure was discriminatory, the case is important because it deals with whether the US could implement such a measure unilaterally. In this particular case, the US had not consulted with other states before implementing the ban, and the panel found this unacceptable. However, the dispute resolution panel did find that, as long as a state makes some attempt to consult with countries affected by the ban and try to reach a multilateral resolution, then that state is free to unilaterally impose a measure if no solution is found. The *Shrimp-Sea Turtle* case was important because it opened up a means for states to act for environmental conservation even if the other states involved do not agree.¹⁴

Although these cases have not been specific to agriculture, they do give some idea of what type of environmental protection action may be acceptable under the WTO agreements.

(3) Green box provisions – agricultural specific

One means of supporting local food production and distribution is to enable local farms to compete with larger, corporate producers by providing subsidies. Domestic support subsidies are, for the most part, prohibited or reduced by the WTO agreements and

¹¹ [United States — Standards for Reformulated and Conventional Gasoline](http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm) (1996), WT/DS2/R (Panel Report), (1996) 35 I.L.M. 274; (1996), WT/DS2/AB/R (Appellate Body Report), (1996) 35 I.L.M. 603, available online at: http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm.

¹² McRae, *supra* note 5 at 753-754.

¹³ *United States -- Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R (Appellate Body Report), (1999) 38 I.L.M. 118, available online at: http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm.

¹⁴ McRae, *supra* note 5 at page 755.

go against the foundational idea of trade liberalization: equal market access without trade distortion.

Turning specifically to the *Agreement in Agriculture*, there is some room for environmental protection programs specifically aimed at domestic producers. The *Agreement on Agriculture* has varying categories for support aimed at domestic producers.¹⁵ The system categorizes different classes of domestic support subsidies into boxes. Amber box subsidies are targeted for reduction under the agreement because they are considered to distort production and trade, and includes all domestic support that does not fit in blue or green boxes (explained below). Amber box domestic subsidies include measures that support prices or directly relate to production quantities. Some supports in this category are allowed as long as they are less than 5% of agricultural production (in developed countries).

Blue box support refers to subsidies that would normally be categorized in the amber box, but that in fact reduce trade distortion. This includes subsidies that encourage a limit in production. There is currently no limit on blue box subsidies.

The category that is most relevant to the encouragement of local food production and distribution is the green box category.¹⁶ This category of subsidy refers to support that does not distort trade and is decoupled from production. The support must be government funded and cannot include price support.¹⁷ Green box supports are typically not aimed at a particular product, but can be direct transfers to farmers as long as the support is decoupled from price and production levels. One category of green box support measures includes those provided under domestic environmental programs.¹⁸ These environmental programs are limited to the extra cost associated with complying with the governmental program. Canada utilizes green box environmental subsidies, and in 2000, spent seventy three million dollars on these programs.¹⁹

Although green box subsidies seem like a way to support local food production and distribution, more research is required to determine how such a program could look and whether it would meet the decoupling requirements. In addition, the WTO *Agreement on Agriculture* is currently being renegotiated and the green box provisions have been a point of dispute among state parties.²⁰ Canada takes the position that green box supports should be reviewed and limited because they currently have the potential to distort trade.²¹ It is

¹⁵ *Agreement on Agriculture*, *supra* note 1 at Article 6 and Annex 2; also see WTO, *Agriculture Background: Domestic Support Boxes*, available online at: http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm.

¹⁶ *Agreement on Agriculture*, *ibid.* at Annex 2.

¹⁷ Canada, *Canada's Domestic Agricultural Supports and The World Trade Organization* (2005), available online at: <http://www.parl.gc.ca/information/library/PRBpubs/prb0536-e.htm#1Unrestricted>.

¹⁸ *Agreement on Agriculture*, *supra* note 1 at Annex 2, s.12.

¹⁹ *Canada's Domestic Support*, *supra* note 17.

²⁰ *Agricultural Background*, *supra* note 15.

²¹ Agriculture and Agri-Food Canada, *WTO Negotiations on Agriculture*, available online at: <http://www.agr.gc.ca/itpd-dpci/english/current/wto.htm>.

important to note that the green box provisions of the *Agreement on Agriculture* may change significantly with the renegotiated agreement, which is scheduled to be completed sometime in 2007.

(4) Trade response to different ways of encouraging local food

I thought it would also be helpful to go through different methods of encouraging local food production and distribution and how they fit within the WTO agreements. Although some of the disputes used as examples below did not result in binding decisions, they give an idea of how different types of initiatives are viewed by the WTO and its signatory countries.

a) Tariffs on imported goods

One means of encouraging local food production and distribution is to tariff imported food to enable local food to compete since it has a higher production cost. Article 4.1 of the *Agreement on Agriculture* requires nations to reduce tariff rates according to a country-specific schedule. Any fee associated with importing goods must comply with the schedule.

b) Non-tariff restrictions on imported goods

Non-tariff restrictions on imports can include quantitative restrictions on the amount of a good imported or license requirements for imported goods. Article 4.2 of the *Agreement on Agriculture* prohibits countries from adopting any import restriction other than tariffs, and the agreement required that all non-tariff restrictions be converted into tariff-based restrictions.

Disputes considering this element of the agreement include a case where the US challenged multiple quantitative restriction implemented by India and India was found to be in violation of Article 4.2 of the *Agreement on Agriculture*.²² Licensing regimes that apply to imported goods have also produced dispute in a case where the US brought a complaint against Venezuela for establishing a discretionary licensing system for agricultural imports that was unclear and unpredictable.²³ Although the dispute is still in consultations and a dispute panel has not been established, six other states have joined the complaint against Venezuela and are now involved.

c) Minimum import prices

Minimum import prices would ensure that local food producers are able to compete with larger, more efficient corporate producers. There has not been a dispute panel report on the issue of minimum import prices requirements, but disputes have arisen over the issue. The US brought a complaint against Romania for a program that established

²² *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (1999) DS90, available online at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds90_e.htm.

²³ *Venezuela – Import Licensing Measures on Certain Agricultural Products* (2002) DS275, available online at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds275_e.htm.

minimum prices for imports during the customs valuation process, claiming that, among other provisions, the program violated Article 4.2 of the *Agreement on Agriculture* as a non-tariff restriction on imports.²⁴ Although there was no panel report for the dispute, the parties did reach a mutual resolution.

d) Differential tax rates

Differential tax rates would create a purchasing incentive for local food and also allow local food producers to compete with large, corporate imports. Brazil brought a complaint against the US for a Florida program that imposed taxes on citrus products.²⁵ The program exempted products made from domestically produced fruit and Brazil held that this constituted support for domestic producers and restrained imports, and that the taxation program violates Articles II and III of GATT. Although a dispute resolution panel was never formed, four other states became involved in the dispute before a mutually agreeable solution was found.

These cases give a brief outline of the restrictions the WTO agreements place on Canada with respect to possible incentives and support for local food production and distribution.

(5) Summary

To summarize, although the *Agreement on Agriculture* creates significant restrictions on the actions Canada can take to support and encourage local food production, there is some international trade case law that supports trade restrictions based on environmental conservation. In addition, the *Agreement on Agriculture* green box subsidy category may be a possibility for local food production subsidies that are not tied to production or price levels. More research is required on the current Canadian green box subsidy programs and how the *Agreement on Agriculture* provisions may change in the renegotiated agreement.

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²⁴ *Romania – Measures on Minimum Import Prices* (2001) D198, available online at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds198_e.htm.

²⁵ *United States – Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products* (2004) DS250, available online at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds250_e.htm.

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