SUBMISSION TO JOINT STANDING COMMITTEE ON TREATIES

ON

AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANISATION

SUMMARY

1.1 This submission focuses on the following issues which the Committee is examining on the nature and scope of Australia's relationship with the World Trade Organisation (**WTO**) :

- the effectiveness of the WTO's dispute settlement procedures;
- the relationship between WTO agreements and other multilateral agreements, including in particular those on environmental and health standards;
- Australia's capacity to undertake WTO advocacy;
- the involvement of peak bodies, industry groups and external lawyers in conducting WTO disputes.

1.2 Our conclusions and recommendations are:

A *The present dispute resolution procedures are generally adequate, but achieving effectiveness under them will require proper preparation and presentation of Australia's position, and forceful advocacy.*

B *We refer in particular to the need for Australia to be forceful in using the WTO's dispute settlement procedures to emphasise the international legal principle that international agreements must be performed in good faith and to expose the double standards maintained by some WTO members that operate to favour manufacturing over agricultural exports, and to produce unfair restrictions and unfair competition.*

C *As to the relationships between WTO Agreements and other multilateral agreements, another responsibility of WTO advocacy should be to maintain recognition of a proper role for member states in decisions and standards in relation to such matters as environmental and health standards.*

D *Australia's WTO advocacy would be enhanced by greater use of external lawyers experienced in international and other litigation, who are able to make proactive contributions to the development of principles that serve Australia's proper interests in the progressive development of international law relating to world trade.*

E *Australian industry and external lawyers need to be more actively involved in conducting WTO disputes.*

A THE WTO'S DISPUTE SETTLEMENT PROCEDURES

2.1 A strengthened, more rules-based and more "legalistic" trade dispute settlement system was one of the key achievements of the 1994 Marrakesh Conference which adopted the Agreement Establishing the World Trade Organisation. The dispute settlement system was established by the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the WTO).

2.2 The **first tier** of the system consists of panels composed in accordance with Article 8 of the Understanding, of three panelists unless the parties to the dispute agree to a panel of five. There is no specific requirement of a panelist or panelists with international trade law qualifications and there will be many disputes where such an appointment would be desirable. The function of the panels is to assist the Dispute Resolution Board (the **DSB**) in discharging its responsibilities under the Understanding and under what are described as the "covered agreements", these being the WTO and WTO related agreements referred to in Appendix 1 to the Understanding (Article 11). In the absence of an appeal, the report of the panel is to be adopted by the DSB unless the DSB decides by consensus not to adopt the report (Article 16.4).

2.3 The **second tier** consists of a standing Appellate Body to be established by the DSB, consisting of persons "with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" (Article 17.3) The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (Article 17.13).

2.4 The **top tier** consists of the **DSB** which is the WTO General Council convening for that purpose. Where there has been an appeal the Appellate Body's report shall be adopted by the DSB unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the members (Article 17.14).

2.5 A tight time frame is laid down aimed at ensuring that the DSB is considering a panel or Appellate Body report within 9 or 12 months respectively from the date of establishment of the panel (Article 20).

2.6 One of the expressed objects of the dispute settlement system of the WTO is to clarify the existing provisions of the "covered agreements" in accordance with customary rules of interpretation of international law (Article 3.2). The Understanding has been described as –

> "a significant drift away from the traditional approach to the resolution of disputes under the multilateral trade agreements. The GATT dispute settlement system favoured an approach which emphasised pragmatic, mutually acceptable solutions. It had not relied to any appreciable extent on the rules of public international law." (KOHONA, pp.28-29).

2.7 At the same time appropriate provision is made for other measures for resolving disputes, such as agreed good offices, conciliation and mediation (Article 5).

2.8 Our conclusion is that the balance of the existing provisions on the WTO dispute resolution procedures is appropriate. What needs to be addressed is the way in which they are being implemented.

B FORCEFUL ADVOCACY THAT EMPHASISES THE OBLIGATION TO PERFORM WTO AGREEMENTS IN GOOD FAITH AND THE NEED TO AVOID DOUBLE STANDARDS AND ACHIEVE EQUITY

3.1 The principle that international agreements should be fulfilled in good faith and not merely in accordance with the letter of the agreements has long been recognised (CHENG, p.144). Performance of a treaty obligation means carrying out the substance of the mutual understanding embodied in the treaty honestly and loyally.

3.2 In this respect, the double standards that have been identified in the way existing world trade rules are applied (HOWARD) should be tested and challenged whenever possible. This is not to deny the importance of reform of the existing world trading rules. That would be the best solution but realistically it will be hard to achieve because that involves the consent of the countries that apply double standards. In the meantime, the dispute settlement forum needs to be used forcefully, wherever possible, for the same ends.

3.3 This is a strategy that is in line with the object and purpose of the Understanding itself which has been referred to in paragraph 2.6 above, namely to clarify the existing provisions of the covering agreements in accordance with the customary rules of interpretation of public international law. Article 31.1 of the Vienna Convention on the Law of Treaties, which has been accepted in the jurisprudence of the International Court as embodying customary international law (BROWNLIE, p.632), supports this approach. It reads:

> "31.1 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

C THE RELATIONSHIP BETWEEN WTO AGREEMENTS AND OTHER MULTILATERAL AGREEMENTS, PARTICULARLY THOSE ON ENVIRONMENTAL AND HEALTH STANDARDS

4.1 It is clear from the trajectory of WTO negotiations and decision-making in this area over the last decade that the WTO structure has often been used to attack national laws based on health and / or environmental concerns.

4.2 Also, one country may use WTO structures to attack such a law made by another country and at another time defend its own laws against such an attack.

4.3 Another aspect of the matter is that the processes of negotiations and decision making can be time intensive, as is illustrated by the handling of Australian import restrictions in relation to salmon which were successfully challenged by Canada under the WTO disputes procedure.

4.4 The relevant covered agreements include:

(a) General Agreement on Tariffs and Trade 1994 (the "**GATT 1994**")

The GATT 1994 was adopted at the 1994 Marrakesh Conference. Australia is a party to the current GATT and associated Agreements.

Pursuant to GATT, regulatory restrictions relating to health and the environment must comply in particular with Articles I, III and XX:

Article I refers to the general most-favoured-national treatment.

Article III refers to the national treatment on internal taxation and regulation.

Article XX refers to general exceptions:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures:

(a) …

(b) necessary to protect human, animal or plant life or health;

…

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

…"

(b) Associated Agreements:

The Agreement on Technical Barriers to Trade (the "**TBT**") and the Agreement on the Application of Sanitary and Phytosanitary Measures (the "**SPS**") constitute annexures to the Marrakesh

Agreement. The SPS and the TBT are mutually exclusive in their application (SPS, Art. 1.4 see also TBT, Art 1.5).

The SPS deals with the additives, contaminants, toxins and disease-carrying organisms in food, beverages and foodstuffs while the TBT applies to all other product standards. Risk assessments must be carried out to substantiate any measures taken by a member state.

4.5 It is important to stress that the provisions of GATT 1994, the TBT and the SPS leave scope for discretion and evaluation for member countries in deciding what is permissible, even in relation to what is "necessary" to protect human, animal or plant life or health. This can be illustrated by the following (STEINBERG, pp.237. 240, 255):

- The general rule under the GATT 1994, the SPS and the TBT is that each country may maintain regulations necessary to protect life and health, and conserve exhaustible natural resources, and may determine for itself the level of risk it deems appropriate to embody in its products standards (SPS, Arts 2, 5; TBT preamble; GATT Art XX(b) & (g)) – see also GATT Dispute Panel, Thailand – Restrictions on Importation and Internal Taxes on Cigarettes, Nov 7, 1990, GATT, B.I.S.D. (37th Supp) at 200 (1990);

- US and EU negotiators sought ways to narrow the use of sanitary and phytosanitary measures as barriers to trade. Environmental and consumer groups on both sides of the Atlantic joined the fray in 1990, demanding that the SPS include provisions affirming the right of each country to establish a level of risk to health and the environment that it considers appropriate. The final text ensured the right of each country to engage in environmental protection, balanced with rules intended to ensure that environmental regulations are not used as a means of trade protectionism.

- The NAFTA and GATT/WTO legal standards are designed to permit each country to impose import bans to enforce the level of risk it deems appropriate; this approach has maintained domestic health and environmental protection within each country.

4.6 A further general point we would make in this particular context is that while the WTO structures are designed to avoid or prevent unlimited unilateralism on the part of countries, there is scope for what is described as "creative unilateralism". One defensible basis for this is that what begins as a unilateral act can, under the processes under which international legal principles develop, mature into accepted norms of international law and practice. The *Tuna-Dolphin* dispute (1991) can be regarded as one of the successful uses of "creative unilateralism" on the part of the United States.

4.7 The WTO panel in the *Tuna/Dolphin* dispute, where the panel accepted a voluntary "dolphin safe" labelling scheme for tuna produced products sold in the United States; said

> "[T]he labelling provisions of the [US law] do not restrict the sale of tuna products; tuna products can be freely sold both with and without the dolphin safe label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the 'dolphins safe' label. The labelling provisions therefore do not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods." (*International Legal Materials*, Vol XXX, at 1622).

4.8 Another example of progressive development of the law in this regard is the increasing acceptance of the **precautionary principle** is a norm of customary international law, which has great relevance to environmental matters, and also to health. The precautionary principle has been referred to since the 1980's but has only relatively recently received international endorsement. Earlier commentators had noted that it has been formulated in different ways in international agreements and that there is not yet an international consensus on the wording of the principle.

4.9 However a general consensus has developed since. The principle has also become recognised in municipal law. In *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 Stein J pointed out that,

> "the precautionary principle is a statement of commonsense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty and ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious."

4.10 This passage was cited with implicit approval by Sackville J in the 1997 Federal Court Decision in the cases of *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* [1997] 55 FCA 1. In that case the precautionary principle as formulated in the Intergovernmental Agreement on the Environment signed by the Commonwealth and the States and Territories in 1992, was discussed. The principle was formulated as follows:

> "In the application of the precautionary principle public and private decisions should be guided by:

i) careful evaluation to avoid, wherever practicable, serious irreversible damages to the environment; and

ii) an assessment of the risk weighed consequences of various options."

4.11 Returning to recognition of the principle in the international area, a further example is in the 1992 Convention on Biological Diversity where the precautionary principle is stated as follows:

"… where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat".

4.12 Article 3.3 of the 1992 Framework Convention on Climate Change referred to the precautionary principle in similar terms (although with a significant caveat on its application):

> "The Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."

4.13 A precise statement and application of the precautionary principle is to be found in the 1995 Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Australia ratified the Agreement, which is not yet in force, in 1999. The Agreement is very important for the management of Australian fishing resources which "straddle" Australia's Exclusive Economic Zone and the High Seas. Article 3 of the Agreement states that:

> "1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
>
> 2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures."

4.14 More recently, in the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region which Australia entered into in 1996, the precautionary principle was defined as follows:

> "Precautionary principle" means the principle that in order to protect the environment, the precautionary approach shall be widely applied by Parties according to their capabilities. Where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

4.15 The new Commonwealth environment legislation (the *Environment Protection and Biodiversity Conservation Act 1999*) recognises, in Section 3A, the precautionary principle as one of the principles of ecologically sustainable development, the promotion of which is one of the objects of the Act:

> "if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

4.16 Recognition of the precautionary principle is therefore spreading. Besides being used extensively in international law and in domestic legislation dealing with environmental protection generally, it is now being used in specific areas such as fisheries management, hazardous waste management and in the area of local government planning. It can be argued that the precautionary principle has application in an ever broadening range of situations where it is not yet possible to quantify the potential damage by reference to scientific research but regardless of this the potential risk to society is too great to delay introducing precautionary measures. It is an example of how progressive development of law can be brought about, and this can be done not only in agreements but also by decisions in the disputes settlement area.

D AUSTRALIA'S CAPACITY TO UNDERTAKE WTO ADVOCACY

5.1 It is important that Australia use the WTO dispute settlement mechanism in a way that achieves national objectives:

- attacking unfair completion and double dealing;
- arguing forcefully to break down trade access barriers in other countries in appropriate cases;
- defending measures to prevent harm to the Australian environment and adverse health effects for Australian producers and consumers; and
- seeking to break down trade access barriers in other countries.

5.2 There has been acute disappointment in the Australian business community about the outcome of some Australian involvement in some WTO dispute mechanism proceedings, notably the successful Canadian complaint against Australia's salmon importation arrangements.

- The Canadian government on 29 July 1999 asked for a ruling from the World Trade Organisation (WTO) on Australia's salmon importation arrangements arguing the recent overhaul of import requirements will fail to comply with global trade rules in that they were "arbitrary and more restrictive than necessary".

- A WTO dispute resolution panel was established to look into the restrictions on the importation of salmon into Australia in response to a Canadian government request in March 1997. An initial decision by the WTO dispute resolution panel which was unfavourable to Australia was made in June 1998 and was appealed by both the Canadian and Australian governments. It was the Appellate Body of the WTO which reported back in November 1998.

- The dispute settlement panel commented on the inadequacy of the risk analysis that was undertaken by the Australian government (see paragraph 9.1 of the Panel's Report: *Australia – Measures Affecting Importation of Salmon*). This comment was made in spite of the fact that the risk of analysis report presented by Australia appeared to be comprehensive and was supported by scientific evidence. The Australian Government appealed this decision arguing amongst other things that:

- the panel failed to interpret the requirement for a measure to be based on a "risk assessment" in accordance with the plain meaning and proper context of "risk";

- that "risk" is to be assessed in terms of the potential biological and economic consequences for Salmonoid populations in Australia, arising from the entry or establishment of diseases associated with the products and disputes.

- The Appellate Body upheld the dispute settlement panels decision that the risk assessment carried out by Australia was inadequate to support Australia's prohibition on the importation of fresh, chilled or frozen ocean-caught pacific salmon

- A second expedited Import Risk Analysis was released on 19 July 1999 and, unlike the first risk analysis went to great lengths to emphasise that the methodology used was modelled on the Office International des Epizooties (OIE). Revised quarantine measures were announced at the same time.

- A WTO Panel on the remaining Australian restrictions on salmon imports found *inter alia* on 18 February 2000 that the Australian "consumer ready" requirements were more trade restrictive than necessary to meet Australia's appropriate level of protection.

5.3 Key lessons of the outcome of the salmon dispute for the way Australia deals with WTO issues are:

- Government agencies (Commonwealth, State and Territory) with functions which affect Australia's import or export interests must be made aware in detail of Australia's WTO obligations.

- That awareness must extend to the possibility of such functions as the operation of quarantine measures being challenged under the WTO dispute resolution process.

- When Australia becomes a party as complainant or respondent to a WTO dispute, the Commonwealth Government has to focus on the need to win the dispute, as with any form of litigation. A focus on winning does not preclude compromise but it is the essential pre-condition to a compromise which supports Australian interests.

- The focus on winning means that Australia's interests as a party to a dispute must involve an expert, well coordinated team of lawyers combining expertise in international law and litigation and the developing principles of international law.

- Such a team could usefully draw on the resources of a national law firm. Such firms are used to develop strategies for lengthy complex litigation and carrying them through.

- The use of external lawyers would require more flexible re-drafting of the existing directions on tied areas of Commonwealth legal work. The existing directions tie such work to the Attorney-General's Department, the Australian Government Solicitor and the Department of Foreign Affairs and Trade.

E THE INVOLVEMENT OF PEAK BODIES, INDUSTRY GROUPS AND EXTERNAL LAWYERS IN CONDUCTING WTO DISPUTES

6.1 The outcome of the Canadian salmon complaint has therefore raised concerns, reflected elsewhere in the Committee system of the Parliament, about whether existing procedures for litigating Australia's interests in the WTO dispute mechanism are strong and effective enough.

6.2 We believe Australian business needs to be more actively engaged. The Department of Foreign Affairs and Trade (DFAT) records (as at 1 September 2000) that "since the inception of the WTO dispute settlement system in 1995, Australia has been involved or had an interest in 31 disputes". These figures are not, however, broken down into the three categories of involvement: those disputes to which Australia was a direct party, those in which Australia sought access as a third party with a stake in the outcome of the dispute, and those in which "Australia has a more general interest". Australia therefore may not be involving itself actively enough as a complainant in the WTO dispute settlement mechanism.

6.3 At the same time DFAT has recognised the need to encourage Australian business more actively to pursue the market access and other issues which

are addressed in the WTO dispute settlement process. The DFAT website records that on 16 September 1999, the Minister for Trade, Mr Mark Vaile, announced the establishment of a WTO Disputes and Enforcement Mechanism which is conducted by the section of that name in DFAT's Trade Negotiations Division.

6.4 As lawyers, we must stress that disappointing litigation outcomes do not necessarily indicate that the unsuccessful litigant was not effectively represented. However, we agree that the high profile nature of the Canadian salmon case and the criticisms of its outcomes make it very timely for the Joint Committee to consider whether Australia's capacity to undertake WTO advocacy should be strengthened.

6.5 We have therefore suggested that external lawyers with the resources of the larger national firms should be involved in the conduct WTO disputes on behalf of Australia.

6.6 International trade law is a branch of international law, governed by the same principles and calling on the same skills of creative analysis in an area where certainty is harder to identify than in domestic law. The increasing body of international trade law means that international lawyers, in the public or private sector, by necessity have to have expertise in this area.

6.7 The increased involvement of external lawyers would have the following benefits:

- Australia's case would be prepared and argued by lawyers who would be able to call on both highly skilled litigators and experts in international law used to working as a team.
- We have access to litigators of international standing;
- The responsibility for the conduct of the dispute would fall, as it should, on professional experts and would not therefore be perceived as adversely affected by perceived conflicts of policy interest.
- We can assist in the necessary role of progressively developing the general principles of international law relating to trade, and for Australia to take a proactive role in that regard.

6.8 Such external lawyers would, of course, need to be instructed by the client, in this case the Commonwealth represented by the Minister of Foreign Affairs and Trade and in fruitful collaboration with the Departmental WTO team and Government lawyers..

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