SUBMISSION OF THE

UNITED NATIONS YOUTH ASSOCIATION OF AUSTRALIA

Joint Standing Committee on Treaties

Inquiry into Australia's Relationship with the World Trade Organisation

Introduction

The United Nations Youth Association of Australia (UNYA) welcomes the opportunity to contribute to the Joint Standing Committee on Treaties Inquiry into Australia's relationship with the World Trade Organisation (WTO). The WTO is an international institution which has immense significance within today's global economy and which exerts influence over communities worldwide through its policies and decision-making processes. UNYA believes that this inquiry is particularly pertinent due to the controversy that has surrounded the WTO since its inception in 1994, particularly in the areas of transparency and public consultation. Hence, it is vital that the issues surrounding the operation and nature of the WTO are discussed in open fora such as this.

UNYA is a non-governmental organisation with a national membership of over 1000 young people under 25 years of age. UNYA is dedicated to providing a voice for youth, particularly on global issues, and has been actively educating young people about UN and international issues within Australia for over 40 years. Thus, we are ideally placed to provide a youth perspective on the WTO and the issues surrounding it.

The roots of the World Trade Organisation extend back as far as the 1940's to the Bretton Woods era when the benefits of international economic cooperation were acknowledged and there was a great deal of discussion about the benefits of reduced trade barriers. The General Agreement on Tariffs and Trade (GATT) was signed in 1947 and has been instrumental in liberalising international trade for the greater part of the second half of the twentieth century, along with subsequent agreements reached at the Kennedy and Tokyo Round negotiations.

In response to concerns that the GATT was becoming an insufficient mechanism to regulate international trade and reflecting the original intent of the founders of the Bretton Woods system, the Uruguay Round of negotiations established the World Trade Organisation. The WTO is an "umbrella" organisation which oversees the implementation of the GATT, as well as a raft of other new agreements such as the General Agreement on Trade in Services (GATS), Trade Related Intellectual Property rights (TRIPs), and Trade Related Investment Measures (TRIMs), and the Dispute Settlement Understanding (DSU).

The WTO was viewed as a much-needed organisation when it was formed. Now however, it is faced with a collection of problems, and a number of states and non-state actors have called for reform. These calls for reform were brought into stark relief as thousands of people demonstrated against the WTO in Seattle in 1999.

This submission will address the following terms of reference;

- *Opportunities for Community Involvement in Developing Australia's negotiating positions on matters with the WTO;*
- *The transparency and accountability of WTO operations and decision making;*
- *The Effectiveness of the WTO's Dispute Settlements Procedures and the Ease of Access to These Procedures;*
- *Australia's capacity to undertake WTO advocacy and the involvement of peak bodies, industry groups and external lawyers in conducting disputes;*
- *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 extent to which social, cultural and environmental considerations influence WTO priorities and decision making.*

Opportunities for Community Involvement in Developing Australia's negotiating positions on matters with the WTO

It is imperative that the public be involved in a genuine way in developing Australia's negotiating position on matters within the WTO. Public consultation has been a strong feature in the development of negotiating positions for other international fora, particularly in the area of human rights, and this should be extended to the area of trade. In a globalised world, trade policy is no longer regarded as a technocratic domain that the public takes little interest in. Rather, international trade is fundamental to the functioning and interaction of both domestic and international markets and ultimately impacts upon society and people's everyday lives

Community consultation on issues being discussed within the WTO is essential if Australia considers itself a mature democracy. It is clear that there is great public interest in and concern surrounding trade issues. If genuine public consultation is not held in the lead up to the next round of WTO negotiations, not only will this undermine processes of democracy, it will also heighten tension in the community in terms of perceived exclusion from the discussion of trade issues.

A greater emphasis on community consultation would also serve an educative purpose in terms of dispelling some of the myths that are held about the WTO. Whilst public consultation cannot possibly produce consensus on negotiating positions, it can lead to a much more constructive debate about the issues at hand. The level of detailed public awareness about the WTO is very low and without public consultation, people are more likely to adopt positions that do not reflect a nuanced understanding of the WTO. Hence, public consultation would also be of benefit to the Government leading up to the next round of negotiations.

The transparency and accountability of WTO operations and decision making

Whilst a number of initiatives have improved the transparency and accountability of WTO, most notably the range of information that is now available on the internet, its operation and decision making is still not as open as it should be. This is particularly so given the influence the WTO has on the world's citizens. This could be markedly improved if NGO involvement in the WTO was increased. Not only would this increase transparency and accountability, but it would also

serve to create a dialogue between the WTO and some of its critics, allowing a much more informed and constructive debate around issues that have up to this point polarised these groups.

While many UN bodies have a history of engaging actively with members of civil society, including NGO groups, in contrast the WTO has allowed for very little NGO involvement, especially in terms of formal participation on official delegations. It is interesting to observe the differences with respect to the role of civil society in other institutions, such as the Commission for Sustainable Development (CSD) which formally allows for inclusion of civil society.

Unlike the CSD meetings, the WTO has not actively engaged NGO's as stakeholders in the negotiations. To date most member states maintain that trade deliberations might be compromised if public interest groups were allowed to participate directly in its work.

UNYA believes that NGO participation within the international system and particularly the WTO is essential to increase public confidence in the organisation and to produce outcomes that are more balanced and appropriate. Also, NGO's can monitor standards set by the WTO resolving the issue of the difficulty and expense of monitoring - an argument put forward by those opposed to eco-labelling and human rights standards being linked to trade policy.

It is important to note that a vibrant civil society is central to processes of democratisation and empowerment and the emergence of interest groups reflects the trend towards the overall development of civil society and the quest for a more democratic, transparent, accountable and enabling governance. International political space is filled not simply by sovereign states but increasingly by social forces below and above the state level which are necessitating a reassessment of the dominant notion of political community.

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

The Dispute Settlement Understanding (DSU) which emerged from the Uruguay Round Negotiations in 1994 was designed to address many of the problems that had previously beset the GATT dispute settlement mechanisms. These problems included delay and uncertainty, absence of legal rigor and clarity in panel rulings, secrecy in panel proceedings, panelists not being expert or legally trained and coming from a closely knit technocratic elite, and timidity in the arbitration and enforcement mechanisms.

The DSU injected a new legalism into resolving disputes with the establishment of a Dispute Settlement Body (DSB). The DSB was empowered to establish adjudicatory Panels to assess disputes arising in relation to the various trade agreements falling under the umbrella of the WTO. There has also been the establishment of an Appellate Body with competence to rule on objections raised by member states regarding points of law associated with panel deliberations. Furthermore, there has also been the codification of strict timetables for dispute settlement procedures and the assertion of exclusive jurisdiction.

In contrast with previous procedures which were characterised by voluntary compliance (and thus produced diplomatic solutions), the new procedures are binding on states. The binding nature of the DSB decisions is enforced through the threat of wide ranging retaliatory trade measures, which are not restricted to the industry at issue.

If effectiveness is to be assessed according to achieved compliance, the WTO dispute settlement procedures are very effective. The WTO is one of the few international bodies which possesses real "teeth" with respect to its capacity to enforce decisions.

Whilst UNYA has concerns about the nature of some of the agreements that come within the purview of the DSB's jurisdiction, and the balance struck between free trade and other international issues such as the environment, UNYA is supportive of international organisations being able to effectively enforce agreements and obligations that states have willingly consented to. We do not subscribe to the argument that effective international regulation is undesirable. It is something that is not only desirable, but also imperative in an increasingly globalising world. UNYA has no objection to a strong WTO dispute settlement body *per se*, but rather believes that the way this body balances competing values is of concern, as is discussed below.

There are a number of reforms that would go some way to addressing these concerns, outside of amending agreements themselves. Often WTO Panels and Appellate bodies are comprised of trade experts who have little understanding of the implication of their decisions in other areas, for example on the environment or in public health and safety. Ideally, Panels should be consisted of individuals who can bring a multidisciplinary approach to decision-making.

Furthermore, there needs to be greater recognition and participation of non-governmental and inter-governmental organisations in WTO disputes. NGOs and IGOs with expertise in relevant areas should have a right to submit intervention briefs to assist Panels during a dispute. Currently, such submissions must only be accepted when they are attached to a party's submission (which, for a range of reasons, a party may not agree to). Hence, in 1990 a World Health Organisation brief was rejected as irrelevant in a case examining Thai regulations on cigarette imports (*Thailand: Restrictions On Importation of and Internal Taxes on Cigarettes 1990*).

Despite the fact that the 1994 DSU requires Panels to make an "objective assessment of the matter before it" (DSU Article 11), there is wide discretion for a Panel to reject 3rd party submissions. In the *Shrimp Turtle case* (*United States: Importation Prohibition of Certain Shrimp and Shrimp Products, 1998*) which examined US environmental regulations with respect to fishing, the Panel refused to consider any evidence from NGOs. Greater involvement of NGOs in dispute settlement procedures would serve as a recognition of the increasing role of global civil society and would also operate to open up WTO processes and erode perceptions of secrecy and a lack of accountability in decision making.

Australia's capacity to undertake WTO advocacy and the involvement of peak bodies, industry groups and external lawyers in conducting disputes

In many other countries, external lawyers are involved heavily in conducting WTO advocacy, as well as providing advice to governments and relevant industry sectors. Large law firms based in Australia certainly have the capacity to undertake WTO advocacy and are developing detailed knowledge of the jurisprudence surrounding WTO agreements and dispute settlement. UNYA does not see any problems in outsourcing international trade legal work *in principle*, and does not see why, where appropriate, this should not be done for WTO disputes.

The relationship between WTO agreements and other multilateral agreements, including those on trade and related matters, and on environmental, human rights and labour standards

Human Rights and a Social Clause for the GATT

Currently, there is no codified relationship between WTO agreements and human rights and labour standards agreements. This is despite the inherent link between the international trading system and standards for workers, particularly in developing countries. Thus, there is currently no capacity for a contracting party to GATT to place import restrictions on goods which have been produced in a manner which violates fundamental human rights – such as through forced labour or highly detrimental forms of child labour.

UNYA believes that there is a great need to attempt new ways to combat the continuing problem of poor labour standards in the developing world. It is widely acknowledged that trade is intrinsic to the development of the world's poorer economies; the success of the South-East Asian tiger economies based on export enhancement strategies bears testament to this. However, the widespread employment of child labour, forced labour and poor working conditions is a sad but very real result of the competitive international economy.

UNYA does not advocate a harmonisation of labour standards and wages, and acknowledges that lower wages are regarded as a comparative advantage for many developing countries that they do not want to lose. However, the GATT must allow minimum labour standards that uphold basic human rights to be enforced. These standards would include prohibitions on forced labour, violence in the workplace and detrimental forms of child labour – practices covered by International Labour Organisation agreements.

At the very least, the GATT must contain an exception (a "social clause") to allow unilateral action in restricting imports produced in circumstances of severe and extreme cases of human rights abuse. In such circumstances the role of NGO's in WTO consultation would be vital in addressing the problems associated with monitoring of such inhumane standards and this is a further reason for opening the WTO up to civil society. If such a social clause were adopted, this would provide an incentive for all governments to ensure basic human rights standards are upheld. The WTO is one of the few institutions that can address such issues effectively, as it is essential that labour standards be lifted on a global scale and linked into the international trading system. Otherwise, states with poor labour records will be reluctant to address the issue for fear of losing their "comparative advantage" and hence losing international investment.

The extent to which social, cultural and environmental considerations influence WTO priorities and decision making

Social, cultural and environmental considerations do not influence WTO priorities and decision making as much as they should. The WTO often claims to deal solely with trade liberalisation, with all else falling outside its mandate. However, this position ignores the intrinsic relationship between social, cultural and environmental issues, which is only going to increase in a globalising world. The fact is that any trade but particularly unrestricted trade, ultimately impacts on these areas and as such, the WTO is a major determinant of the impact of trade on communities and the environment. Hence, the claim that such issues should be ignored by the WTO as they are peripheral to its main focus of trade liberalisation, is unsustainable.

The relationship between trade and the environment is extremely contentious and multifaceted. It is often divided between those who believe that environmental aims and free trade are incompatible and those who believe they are mutually beneficial. Environmental trade measures (ETM's) include sanctions, tariff barriers, subsidies, environmental regulations and in some cases eco-labelling. The debate is defined by different perspectives on ETM's, for example, while free trade advocates view high environmental standards in an importing country as a 'non tariff barrier', environmentalists are disturbed that the WTO does not recognise that low pollution regulations may act as a subsidy.

UNYA recognises that the WTO has gone some way to addressing these concerns with the establishment of the WTO Trade and Environment Committee. The Committee has developed a number of proposals that would have a strong role to play in improving the relationship between trade and the environment. However, most proposals of substance that have been developed by the Committee have failed to progress past the discussion phase, which raises questions about the real commitment of the WTO to addressing environmental issues. Moreover, the Committee has not gone far enough in addressing some of the major problems that exist in terms of the jurisprudence that surrounds trade and environment decisions by GATT Panels and the WTO.

Whilst Article XX(b&g) of the GATT provides an exception for environmental regulations which would otherwise breach GATT rules, this exception has been applied exceptionally narrowly. An examination of the jurisprudence environmental cases demonstrates that the WTO DSB, and before it the GATT Panels have chosen to prioritise trade liberalisation above measures designed to protect the environment.

The best example of this is the distinction that has been drawn between the product itself and production standards. In general, if a state's laws provide national treatment (that is, treat foreign and domestically produced products alike), this satisfies the requirements of the GATT. However, in the *Tuna Dolphin I case* (*United States – Restriction on Imports of Tuna* 1991), a GATT Panel held that this did not apply to laws that regulated the production standards of a product – in this case tuna caught in a "dolphin unfriendly" way. The laws were also found to not fall within the Article XX environmental exceptions, due to a very narrow interpretation of those exceptions. This decision ignored the fact that the environment is adversely affected during the production process and thus there is no basis for the product/ production methods distinction.

Whilst the jurisprudence has developed in some areas that relate to environmental regulations since the *Tuna Dolphin I case*, troubling elements still remain. For instance, many laws which relate to environmental aims (such as eco-labelling, recycling and packaging requirements) will now come under the 1994 *Technical Barriers to Trade Agreement* (TBT). The TBT contains a requirement that the measures taken for a particular aim (including environmental) must be the least trade restrictive measure. That is, the aim cannot be pursued in a less trade restrictive way. However, the history of GATT Panel and WTO decisions on the interpretation of "least trade restrictive" reveals an approach that is highly technocratic and often ignores regulatory practicalities and cost. This is despite the fact that these are crucial factors in designing environmental regulation.

Thus, it is clear that there needs to be a shift in the approach taken by WTO Panels to environmental questions. This could be facilitated by increased involvement of NGOs in such disputes who are often able to provide expert advice, and who can also act as watchdogs and sources of information and insight on the operation of environmental laws.

Conclusion

In summary, UNYA recommends;

1) That there be a greater emphasis on genuine community involvement and consultation in the development of Australia's negotiating position in the lead up to the next round of WTO negotiations;
2) That further transparency and accountability of WTO operations and decision-making can be facilitated through the greater involvement of NGOs and civil society in the WTO, a development that is central to processes of democratisation;
3) That effective international dispute settlement procedures which achieve compliance are crucial in a globalising world, but that there needs to be a multidisciplinary approach to decision-making and greater involvement of relevant NGOs to ensure balance in the outcomes of dispute settlement;
4) That outsourcing legal work in WTO disputes is certainly viable, and should at the very least be further investigated;
5) That a social clause be inserted into the GATT to produce a codified relationship between trade and recognised minimum labour standards, and thus ensure the protection of basic human rights;
6) That environmental considerations assume a much higher priority than has previously been the case in the WTO and GATT jurisprudence on trade and the environment.

UNYA is happy to provide further information to the Committee if it is requested.

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