



Office of International Law

**SUBMISSION BY THE ATTORNEY-GENERAL'S DEPARTMENT
TO THE JOINT STANDING COMMITTEE
ON TREATIES**

CANBERRA

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OVERVIEW

The World Trade Organisation (WTO) provides the institutional framework for the conduct of trade relations among its 138 Member Governments. The goal of the WTO is to contribute to global economic development through reducing the barriers to trade. As decisions of the WTO are made by Members, its decisions are directly attributable to Governments. Each Member is also accountable for the performance of its obligations to other Members and this accountability can be enforced through the dispute resolution procedure within the WTO. Individual Members are accountable through their own national processes such as parliamentary scrutiny.

The dispute settlement procedures introduced as part of the WTO represent one of the most significant achievements of the Uruguay Round. The WTO is widely recognised as providing a more effective dispute settlement procedure compared with the General Agreement on Tariffs and Trade. The growth in the number of disputes under these procedures and the diversity of the matters considered have required additional resources and a broader skills base in both managing and conducting the litigation.

The Office of International Law is the focal point within the Attorney-General's Department for providing advice and other services on international law. The Office has a depth of knowledge, expertise and experience in international law including in the conduct of international litigation. The Office provides a wide range of services including:

- specialist legal advice on international law and on the implementation of international law;
- assistance in domestic and international litigation involving international law;
- international legal aspects of policy development;
- assistance in the conduct of treaty negotiations; and
- the conduct of litigation before international courts and tribunals.

The Office of International Law is committed to working with the Department of Foreign Affairs and Trade and other agencies in advancing Australia's interests in the WTO.

INTRODUCTION

1. The Attorney-General's Department welcomes this opportunity to make a submission to the inquiry by the Joint Standing Committee on Treaties into the nature and scope of Australia's relationship with the World Trade Organisation (WTO). This submission focuses on the legal aspects of the terms of reference.

THE TRANSPARENCY AND ACCOUNTABILITY OF WTO OPERATIONS AND DECISION MAKING

General decision making in the WTO

2. The WTO was established by the Marrakesh Agreement which also created a secretariat to assist Members.¹ The WTO provides the institutional framework for the conduct of trade relations among the 138 Member Governments ('Members'). The WTO evolved from the General Agreement on Tariffs and Trade ('GATT'), which had no status as an international organisation. Although some WTO decisions require a vote by Members, most are made by consensus. The WTO has a secretariat of 500 and a budget of 127 million Swiss Francs.²

3. The goal of the WTO is to contribute to global economic development through reducing the barriers to international trade. The central functions of the WTO in this regard are: to administer the agreements of the WTO; to act as a forum for trade negotiations; and to provide a forum for the settlement of trade disputes. As part of its role the WTO also reviews national trade policies and assists developing countries through technical assistance and training programmes.

4. The highest decision making authority within the WTO is the Ministerial Conference which is composed of Members and can make decisions on all WTO matters. The General Council, which is also composed of Members, acts on behalf of the Ministerial Conference. The General Council also meets under different terms of reference as the Dispute Settlement Body and as the Trade Policy Review Body. As the Dispute Settlement Body, the General Council is responsible for settling disputes between Members and, as the Trade Policy Review Body, the General Council is responsible for analysing the trade policies of Members to ensure compliance with WTO agreements.

5. As decisions of the WTO are made by Members, its decisions are directly attributable to Governments. Each Member is also accountable for the performance of its obligations to other Members and this accountability can be enforced through the dispute resolution procedure within the WTO. Individual Members are accountable through their own national processes such as parliamentary scrutiny.

¹ *Marrakesh Agreement Establishing the World Trade Organisation.*

² This amount was roughly 136 million Australian dollars at the time this submission was finalised.

6. Although there is already a wide range of information available regarding the WTO, additional steps are being taken to increase the dissemination of documents including through the WTO website which includes information regarding the functions and work of the organisation.³

7. In 1996 the General Council adopted the Decision on Procedures for the Circulation and Derestriction of WTO Documents. This Decision applies retrospectively to all WTO documents circulated since the establishment of the WTO.⁴ Essentially, working documents of the WTO, other than those classified as confidential, are either derestricted upon the adoption of the report pertaining to their subject matter or considered for derestriction six months after their circulation, whichever is sooner. In line with this Decision the WTO has established a Document Dissemination Facility.⁵ The Facility contains selected documents distributed by the WTO since its creation in January 1995. Information regarding the status of WTO disputes as well as Panel and Appellate Body reports are also available on the WTO website.⁶ The WTO also plans to commence publication of a series containing official dispute settlement reports.

Transparency in documents arising in dispute settlement in the WTO

8. Members may seek consultations in the event of a dispute arising in relation to an agreement covered by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'). All requests for consultation under Article 4(4) of the DSU are submitted to the WTO in writing. The WTO website contains information noting pending requests.⁷

9. Written submissions to Panels and the Appellate Body are deposited with the WTO Secretariat for immediate transmission to the Panel or Appellate Body and to the other parties to the dispute. Article 18(2) of the DSU provides that submissions are confidential and are only available to parties to the dispute. Panel and Appellate Body proceedings are also confidential. Parties are not precluded, however, from disclosing their own submissions subject only to the obligation not to reveal information submitted by other Members. If requested by a Member a party is also required to provide a non-confidential summary of its submissions. The United States routinely makes its own submissions publicly available⁸ and other Members provide varying degrees of access to their submissions.⁹ The WTO internet site also includes information on consultations.¹⁰

³ See <<http://www.wto.org>>

⁴ *Procedures for the Circulation and Derestriction of WTO Documents—Decision Adopted by the General Council on 18 July 1996, WT/L/160 (July 22, 1996)*

⁵ See <<http://www.wto.org/wto/ddf/ep/public.html>>

⁶ See <<http://www.wto.org/wto/dispute/>>

⁷ See <<http://www.wto.org>>

⁸ Uruguay Round Agreements Act § 127(c)(1) requires this of the United States Trade Representative.

⁹ The European Union <<http://www.europa.eu.int/comm/trade/miti/dispute/overview.htm>>

Canada <<http://www.dfait-maeci.gc.ca/tna-nac/dispute-e.asp>>

New Zealand <<http://www.mft.govt.nz/foreign/wto.html>>

¹⁰ See <http://www.wto.org/english/docs_e/legal_e/bulletin.htm>

10. Article 10 of the DSU provides that the interests of parties to a dispute and those of other Members shall be fully taken into account during the Panel process. Members with a substantial interest in a dispute are provided with the opportunity to be heard by the Panel and to make written submissions. Members who have provided notice of their interest in a dispute may also receive the first written submissions of the parties to the first meeting of the Panel, although provision is not made for them to receive the second or any subsequent submissions and they are not provided with a right to appeal the Panel report.

Amicus Briefs

11. Whilst some NGOs have started to prepare amicus briefs¹¹ for particular cases, no set procedure exists for submitting such briefs to Panels. Under Article 13 of the DSU Panels are empowered to ‘seek information from any relevant source and may consult with experts to obtain their opinion on certain aspects of the matter’. In the *Import Prohibition of Certain Shrimp and Shrimp Products Case (United States)*¹² the Appellate Body considered that attaching an amicus brief to the submission of a party, ‘no matter how or where such material may have originated, renders that material at least prima facie an integral part of that participant’s submission’.¹³ This decision was followed in *Measures Affecting Asbestos and Asbestos – Containing Products (European Communities)*.¹⁴

THE EFFECTIVENESS OF THE WTO’S DISPUTE SETTLEMENT PROCEDURES

12. The DSU is one of the most significant achievements of the Uruguay Round and a central pillar of the WTO. The DSU sets out a regime which rests on the impartial and timely settlement of disputes. Between 1 January 1995 and 28 September 2000 a total of 205 complaints were notified to the WTO.¹⁵ As of 28 September 2000 18 cases were active,¹⁶ 39 Appellate Body and Panel Reports had been adopted¹⁷ and 34 cases had been settled or were inactive.¹⁸ At the time

¹¹ The term ‘amicus brief’ is used to refer to those submitted by ‘*amicus curiae*’ a phrase which translates from the Latin as meaning a friend of the court. The term is used to refer to one who is permitted by a court to advise it regarding a matter of law or practice under consideration.

¹² *Import Prohibitions of Certain Shrimp and Shrimp Products (United States)*, WT/DS58/AB/R, 12 October 1998.

¹³ *Ibid* at paragraph 90.

¹⁴ *Measures Affecting Asbestos and Asbestos – Containing Products (European Communities)*, WT/D S135/R, 18 September 2000, at paragraphs 8.12-8.14

¹⁵ This category includes all requests for consultations notified to the WTO, including those requests which have led to Panel and Appellate review proceedings. See *Overview of the State of Play of WTO Disputes* <http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc>

¹⁶ This includes all pending or suspended Panel or Appellate review proceedings with the exception of proceedings pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

¹⁷ This does not include reports resulting from proceedings pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

¹⁸ *Overview of the State of Play of WTO Disputes* <<http://www.wto.org/wto/dispute/bulletin/htm>>

of writing Australia had been a party in 24 cases under the DSU, 4 as complainant, 5 as respondent, and 15 as a third party.¹⁹

13. The WTO is widely recognised as providing a more effective dispute settlement procedure than the GATT. The DSU includes specific time frames to progress disputes including an overall timeframe of 18 months from the establishment of a Panel.²⁰ The new regime includes an Appellate Body and a process for the adoption of decisions which no longer allows a single Member to block the adoption of reports. Dispute settlement under the WTO is subject to detailed procedural rules for the establishment of Panels and the implementation of decisions is monitored. The regime includes a specific obligation to comply with the rules and procedures of the DSU and a prohibition on unilateral action.²¹ In the event that a Member decides not to implement the findings of a Panel or the Appellate Body, as endorsed by the Dispute Settlement Body, provision is made for compensation or the suspension of concessions pending full implementation of these findings.

14. The increasing use of the WTO dispute settlement system has provided a strong incentive for the mutual resolution of disputes. At the WTO Singapore Ministerial Meeting Members endorsed the system stating that it:

offers a [dispute settlement system] that is unique in international agreements. We consider its impartial and transparent operation to be of fundamental importance in assuring the resolution of trade disputes, and in fostering the implementation and application of the WTO agreements. The Understanding, with its predictable procedures, including the possibility of appeal of panel decisions to an Appellate Body and provisions on implementation of recommendations, has improved Members' means of resolving their differences... We are confident that longer experience with the DSU, including the implementation of panel and appellate recommendations, will further enhance the effectiveness and credibility of the dispute settlement system.²²

AUSTRALIA'S CAPACITY TO UNDERTAKE WTO ADVOCACY

15. There is substantial existing capacity within the Attorney-General's Department, the Department of Foreign Affairs and Trade and the Australian Government Solicitor (which is a separate statutory authority within the Attorney-General's portfolio, operating as a government business enterprise) to undertake WTO advocacy. Within the Attorney-General's Department this capacity is to be found within the Office of International Law which has responsibility for the conduct of Australia's international litigation before the

¹⁹ See *Australia and WTO Dispute Settlement*

<http://www.dfat.gov.au/trade/negotiations/wto_disputes.html#aus>

²⁰ See Article 21(4) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

²¹ *Ibid*, Article 23.

²² Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC, 18 December 1996, paragraph 9.

International Court of Justice and other international tribunals. The Office has been involved in the conduct of a range of such litigation including the following:

- *Phosphate Lands in Nauru (Nauru v. Australia)*;
- *East Timor (Portugal v. Australia)*;
- *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*; and
- the *Southern Bluefin Tuna cases (Australia and New Zealand v. Japan)* before the International Tribunal for the Law of the Sea and the Annex VII Tribunal established under the United Nations Convention on the Law of the Sea.

16. The Office of International Law has significant expertise in international law. Officers from the International Trade and Environment Law Branch of the Office specialise in the practice of international trade law, including WTO matters. Officers from the Branch assist in the conduct of WTO cases at both Panel and Appellate Body levels. Representatives of the Office of International Law attended the Appellate Body hearing in *Measures Affecting Importation of Salmon (Australia)* and recently attended the Panel hearing in *Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb (United States)*. Additionally, the Australian Government Solicitor has significant international law and advocacy expertise.

17. The Office of International Law is committed to working with the Department of Foreign Affairs and Trade and other agencies on WTO matters. Drawing on the strengths of different agencies and combining resources and expertise enhances Australia's capacity to undertake WTO advocacy.

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

External Lawyers

18. There has been some consideration by Panels and the Appellate Body regarding the involvement of private sector lawyers in dispute settlement proceedings. This consideration has come particularly at the behest of Members who are still building the legal expertise within their bureaucracies to advise on WTO issues and to provide advocacy in dispute settlement under the WTO.

19. Under the DSU there has been a growing recognition of the need for litigation experience in the conduct of WTO proceedings and this recognition has included a wider role for lawyers from both public and private sectors. In the *Regime for the Importation, Sale and Distribution of Bananas (European Communities)*²³ the Appellate Body found that it is for the Member concerned to determine who shall

²³ *Regime for the Importation, Sale and Distribution of Bananas (European Communities)*, WT/DS27/AB/R, 9 September 1997, Adopted 25 September 1997.

form part of its delegation and that this may include private sector lawyers. The Appellate Body stated:

We note that there are no provisions in the *Marrakesh Agreement Establishing the World Trade Organization* (the 'WTO Agreement'), in the DSU or in the Working Procedures that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to the GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance - especially for developing-country Members - to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.²⁴

20. Following this decision no rules or guidelines have been adopted by the WTO concerning the ways in which Members can work with or retain lawyers from the private sector. The WTO Secretariat merely determines whether an individual has been named as part of a Member's delegation allowing any delegation to decide for itself who may serve that Member.

The Legal Services Directions

21. Under the Legal Services Directions issued by the Attorney-General under the *Judiciary Act 1903*, the provision of legal services to the Government in a limited number of areas is tied to government providers of legal services.²⁵ Tied work includes Constitutional, Cabinet, national security and certain public international law work. These categories of work relate to the core executive activities of Government and are strategically or politically sensitive. By tying these areas to Government providers, the Government seeks to achieve a consistent, whole of Government approach and to protect the Commonwealth's financial and legal interests.

22. International litigation and arbitration, that is litigation between Governments, is work tied to the Attorney-General's Department, the Australian Government Solicitor and the Department of Foreign Affairs and Trade. This work covers proceedings before WTO Dispute Panels and the WTO Appellate Body. The Office of International Law provides a wide range of services in this regard including:

- specialist legal advice on international law and on the implementation of international law;
- assistance in domestic and international litigation involving international law;
- international legal aspects of policy development;
- assistance in the conduct of treaty negotiations; and

²⁴ Ibid, at paragraph 12.

²⁵ Legal Services Directions issued by the Attorney-General pursuant to section 55ZF of the Judiciary Act 1903, with effect from 1 September 1999 <<http://www.ag.gov.au/>>

- the conduct of litigation before international courts and tribunals.

23. The Legal Services Directions do not prevent the Attorney-General granting approval, either in a specific case, or generally, for this work to be conducted in a different manner, nor do they prevent counsel or other legal experts being engaged to assist in the conduct of international work.

THE EXTENT TO WHICH SOCIAL, CULTURAL AND ENVIRONMENTAL CONSIDERATIONS INFLUENCE WTO PRIORITIES AND DECISION MAKING

Environmental standards

24. The WTO Agreement makes a number of references to the environment. In its preamble one of the objectives included is ‘...the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so...’. Article XX of GATT, incorporated into the WTO, supports this objective. Article XX allows Members to take measures ‘necessary to protect human, animal or plant life or health’; or that relate ‘to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’.

25. A number of agreements under the WTO also take environmental concerns into account. For example, the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures* reaffirms the right of Members to adopt and enforce measures necessary to protect human, animal or plant health²⁶ provided such measures are not applied in a manner amounting to unjustifiable discrimination or to a disguised trade restriction.²⁷ Additionally, at the end of the Uruguay Round in 1994 a Committee on Trade and Environment was established under the auspices of the WTO to identify and make recommendations regarding the relationship between trade and environmental measures with a view to promoting sustainable development.

Labour standards

26. Labour standards are currently not subject to the WTO rules and disciplines. The International Labour Organisation has primary responsibility for labour issues.

²⁶ See footnote 4 to *Agreement on the Application of Sanitary and Phytosanitary Measures*. Other general environmental measures not included in the definition in Annex A(1), such as measures to protect consumer interests or for the welfare of animals, continue to be regulated by other WTO Agreements, such as Article XX of the GATT or the *Agreement on Technical Barriers to Trade* which covers technical regulations, voluntary standards and the required procedures to comply with these regulations or standards. See Article 1(4) of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

²⁷ See *Agreement on the Application of Sanitary and Phytosanitary Measures*, preamble, Article 2(1) and Article 2(3) the latter of which provides: ‘Members shall ensure that their sanitary and phytosanitary measures do not *arbitrarily or unjustifiably discriminate* between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a *disguised restriction on international trade*’ (italics added).

The first WTO Ministerial Meeting in Singapore in December 1996 rejected calls for a 'social clause' within the WTO although the Ministerial Declaration adopted by the Meeting noted that Ministers 'renew' their 'commitment to the observance of internationally recognised core labour standards'. The Declaration went on to note that the International Labour Organisation 'is the competent body to set and deal with these standards' and affirmed 'support for its work in promoting them'.

CONCLUSION

27. The caseload of WTO litigation is likely to continue to increase as countries become increasingly more active in pursuing the resolution of their trade disputes. In a globalised world economy with countries aggressively seeking greater access to new markets and opportunities, no country can afford to be relaxed in the manner in which it pursues its interests. The Office of International Law has a depth of knowledge, expertise and experience in international law including in the conduct of international litigation. The Office is committed to working with the Department of Foreign Affairs and Trade and other agencies in advancing Australia's interests in the WTO.

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