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Andrew Farran [ac810@dial.pipex.com]

Treaties & the WTO
A Note for JSCT (WTO) by Andrew Farran

The Treaty Power

The ³treaty power² in Australia, as is well known, is a prerogative power exercisable by the Executive Council alone. However the legislative implementation (in domestic law) of treaty provisions is, of course, a function of the Parliament pursuant to its powers under Section 51 of the Constitution. Whether Parliament chooses to exercise closer supervision of the exercise of the treaty power is a political matter but that in itself would not diminish the Executive's prerogative. That would require Constitutional amendment. Theoretically, the High Court could hold that what purported to be a treaty matter with a genuine international connection was in fact a sham to extend Commonwealth legislative power into the State's legislative domain.

Trade Obligations

In the trade sphere, Australia's international obligations are largely effected through trade treaties and the multilateral process initiated by the General Agreement on Tariffs and Trade (GATT). However, oddly, the GATT was only applied provisionally by its members, so its international legal status was something of an anomaly. It was not until the World Trade Organisation was established as one of the outcomes of the Uruguay Round that many of these multilateral commitments were formalised. The subject matter of trade agreements can be wide and varied and it may be argued that in some instances they go beyond what is genuinely an international trade matter and affect areas otherwise governed by, in Australia's case, the States. The international community is wary of 'federal clause' in treaties, with the consequence that what the international community considers to be an international matter indeed is. This is one reason why those with village attitudes have become concerned about the scope of the major multilateral institutions.

Globalisation¹- Liberalism, Pluralism and integration of World Economies

This brings us to the issue of globalisation¹. Of course, the world has been globalising for centuries as transport and communications have developed, now with intense sophistication. In these respects there is no going back. The challenge is in meeting on-going change

and coping with the transitions. The alternative is a form of defeat. Obviously there will be winners and losers at any particular point of time but the world moves on, as do opportunities for all.

What then is the problem? Who objects to WHO (the World Health Organisation). After all Australia may be saved from the ravages of some exotic disease because of the preventative actions of that organisation. What about the ITO, FAO, UNESCO, UNICEF - and so on. All globalised phenomenon. What then with the WTO?

The WTO

Australia has and forever will depend on international trade for its capacity to live at the standards it has grown accustomed to. In the world jungle, trade can be arbitrary, brutal and unrewarded. But with rules and standards there can be order and mutual reward. That is what the WTO secures (if it is respected), based on the principles of openness and non-discrimination. And it does this with a relatively small secretariat - it is one of the least endowed of the inter-governmental institutions. Its decisions are those of governments, not multinational corporations. And most of the leading governments in its ranks are democracies elected by their people.

So the WTO is democratic, so much so that its decisions are taken by unanimous vote. Yes, people still have problems with government secrecy (that is a wider issue) - but the world-wide trend nonetheless (in the democracies) is towards accountability, transparency and openness (freedom of information¹, etc.). This trend is reflected also in the WTO. Let's look at that in three respects as pertaining to the WTO.

(i) The Secretariat - In terms of its day to day operations the WTO has never been more open. It has an extensive website which provides in-depth information on all aspects of its activities. Fora are held regularly to brief NGOs and the wider public on issues and developments. Country representatives are regularly assisted on the technical aspects of its work. How many people who complain about its secretive ways¹ have actually attempted to access its informational resources?

(ii) Negotiations - Obviously governments are not going to negotiate their trade deals in a fish bowl. To claim direct access to these negotiations is being naive in the extreme. However interest groups, whether industries, unions, or civil society¹ in character, have access to their own governments (who they elect) - as to which see further below. If they can't reach their own governments at home why should they intrude on their government's business abroad? This is an area for national governments and their own people inter se.

(iii) Dispute Settlement - this has become a legal process which is fully publicised and recorded. Indeed, the decisions of WTO panels are published on the web almost simultaneously with their making. One area where there may be scope for innovation would be to allow interested parties or groups in relation to a dispute to submit their views to adjudicatory panels through the web. It would be better also if major WTO member states did not resort to the dispute settlement process simply in order to put off the inevitable when one or other is clearly in the wrong. An area of concern is where trade and non-trade issues intersect - and the WTO is the first to admit that technical questions from another sphere should be debated and resolved in the most appropriate forum or through some joint resolution process. Matters such as intellectual property rights, food standards, and the protection of natural habitats are not trade issues per se, but may be used indirectly and inappropriately to obstruct trade, and that where misunderstanding about the role of the WTO can and does arise.

Getting Views Domestically

During the Uruguay Round I served (if that is the term) on the Trade Negotiations Advisory Group and the Trade in Services Advisory Group, which advised the responsible Minister. Personally this was an interesting and rewarding experience. The Groups, serviced by DFAT, represented a cross-section of business and societal interests, though the term civil society¹ hadn't been coined then. Contributions were uneven. Least of all were those from the trade unions and more than once I drew attention to the fact that although nominally these were represented at the highest level their attendance was infrequent. Perhaps they had other ways of influencing policy!

I also participated actively in the business of the Law Council of Australia's Trade Law Committee, and initiated a graduate course that incorporated international trade law at Monash University.

From such bases public presentations and consultations on U.R. issues were launched. The main difficulty in getting up a vigorous debate was the seemingly esoteric nature of the subject matter and the detailed level at which discussion needed to be conducted.

Nonetheless the elements of present-day globalisation¹ and their ramifications were evident even then and one needed only a little imagination to appreciate their implications. All the same, wider interest at that time was minimal and difficult to arouse. It may be different today - but this has come about largely through a deliberate and calculated distortion of the real facts and issues and a perverse refusal to acknowledge the central role that trade (and international investment) has in maintaining and improving living standards not only in our society but worldwide.

Trade is a serious business that warrants serious analysis and comment - not trivialisation or beat-ups by public attention seekers or those who might have ulterior (undisclosed) political purposes. The situation calls for strong parliamentary leadership in shaping the public debate.

Andrew Farran
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