Submission to the Joint Standing Committee on Treaties
Inquiry on Australia's relationship with the World Trade Organisation
from the Australian Fair Trade and Investment Network

Dr Patricia Ranald
Public Interest Advocacy Centre
Convenor, Australian Fair Trade and Investment Network
Level 1
46-48 York St
Sydney 2000

Ph 02 9299 7833

Fax 02 9299 7855

Email pranald@piac.asn.au

The Australian Fair Trade and Investment Network (AFTINET)

The Australian Fair Trade and Investment Network is a network of thirty-five community organisations. It encompasses major peak bodies, national organisations, state based organisations and local organisations from a wide range of areas, including the following:

Australian Council for Overseas Aid
Australian Council of Social Service
National Council of Churches in Australia
Australian Conservation Foundation
Australian Council of Trade Unions
Uniting-Care NSW / ACT (Uniting Church)
Public Interest Advocacy Centre
World Vision Australia

Many network members are making separate, more detailed submissions on areas of particular interest to them. This submission deals only with the general issues concerning Australia's relationship with the World Trade Organisation (WTO) which are contained in the network's principles.

The network supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. However the collapse of the negotiations on the Multilateral Agreement on Investment (MAI) in the OECD and the failure to launch a new WTO negotiating round at the WTO Ministerial Meeting in Seattle in November 1999, in our view, show that changes are needed to the international trade negotiation framework.

Introduction

The WTO is five years old. It is a bold experiment with greater enforcement powers than its predecessor, the General Agreement on Tariffs and Trade (GATT). WTO agreements have broadened in scope compared with previous GATT agreements and they affect many more areas of government policy. Our network reflects the fact that there is widespread community concern about the WTO and Australia's trade policy. There is a growing demand for more public debate and more accountability at the national level.

There are also concerns about the structure of the WTO, the relationship between WTO agreements and other areas of international law, the way the WTO disputes system operates and its ability to over-ride some areas of domestic regulation.

These concerns are not confined to community organisations but are reflected in debates amongst WTO member governments, including developing countries, and international trade law experts. Developing country governments at Seattle refused to agree to a new round of negotiations until structural issues are addressed. This submission addresses those concerns under the terms of reference indicated.

1. Opportunities for community input into developing Australia's negotiating position

Since 1995 WTO agreements have broadened in scope to affect many more areas of government policy. It is therefore essential that government policy be open, publicly discussed and publicly accountable before agreements are signed.

Historically the negotiations have been confidential and Australia's policy position has not been publicly accountable.

Formal trade bodies only have business representatives but no community representatives. The Trade Advisory Policy Council has only business representatives. The Australian delegation to the WTO Ministerial Meeting in Seattle in November 1999 included eight business representatives but none from any other community organisations.

Recently there have been more attempts at wider community consultation, which we welcome. However there is little evidence that these have influenced policy.

The form of consultations in 1999 (submissions and meetings) did not give much confidence to community organisations. Submissions were received and summarised but there was no indication of how, if at all, they would influence policy. At the meetings Department of Foreign Affairs and Trade (DFAT) officials appeared reluctant to listen and argued against critical points put to them by community organisations. In some cases the process appeared as DFAT's opportunity to tell community groups what policy should be rather than vice versa.

There have been further consultations in 2000 which we welcome. However, many have been oriented towards business participation rather than general community participation. Some DFAT briefings were only accessible to industry groups and not community organisations because of entry fees and the times they were held. For example the Sydney briefing on the WTO disputes process held on May 5 was a breakfast meeting at the Intercontinental Hotel. It cost $50 and was held at 7.30 am.

Better consultation processes will enhance not only democratic decision-making, but also the effectiveness of trade policy.

Recommendations

- Information and community consultation on trade policy should be held in accessible forms. They should be well publicised in advance, free of any costs, held at convenient times and locations and have time for genuine input from the community.

- Consultation and public debate on policy positions should take place before negotiations.

- Australia's policy for negotiations should be public and documents should be made available.

- There should be full public scrutiny and parliamentary debate of draft agreements before they are signed.

- There should be representation of community organisations on the Trade Advisory Policy Council and on WTO delegations.

2. Transparency and Accountability of WTO decision-making

The discussion of these issues requires some background on the General Agreement on Tariffs and Trade, (GATT). GATT was a much looser organisation with weaker powers.

GATT

GATT was founded by governments after World War Two - a child of the post war era of reconstruction and national regulation. It was one of three key institutions for post-war reconstruction designed to promote free markets and economic growth through free trade in the context of the Cold War.

The other two were the International Monetary Fund (IMF) which provided emergency loans at times of currency crisis**,** and the World Bank which financed longer term loans for the rebuilding of infrastructure.

GATT aimed to prevent a return to the high tariffs and shrinking world trade of the 1930s depression. It operated in the post war framework of fixed national currency exchange rates and national regulation which allowed the development of welfare state and labour rights together with trade liberalisation.

GATT Principles ensured that reconstructing postwar economies would be open to trade with the United States and Europe. They were:

- free trade is good for all countries and peoples;
- any measures taken to restrict trade should take the form of visible tariffs (taxes on imports);

- tariffs should then be reduced through a series of negotiating rounds between member governments;
- tariff levels should be "bound" in legal agreements so that future governments could not raise them, and
- non-discrimination between GATT members, also known as the "most favoured nation" principle.

GATT was intended to have stronger powers but this was blocked by the US Congress as a threat to US sovereignty. GATT became a treaty organisation with a limited agenda - to reduce tariffs on manufactured goods through negotiation rounds. Each member government was in theory equal but there was no majority voting - agreement was reached by consensus. The consensus was dominated by governments of the strongest economies (US, Europe, Japan) which set the agenda and drafted documents. There were special arrangements for developing countries which were allowed higher tariffs for developing industries. GATT also had relatively weak enforcement powers, since all members had to agree before sanctions could be imposed on a government which broke the rules.

The role of the IMF, the World Bank and GATT changed following the oil crises of the 1970s and the debt crises of developing countries in the 1980s. The IMF and the World Bank became the enforcers of debt repayment through Structural Adjustment Programs. These programs pioneered what we now call economic rationalist or neo-liberal policies in developing countries, which were then also implemented by some governments in industrialised countries. The transition from GATT to the WTO through the Uruguay Round negotiations from 1986-1994 took place in the context of these new economic policies.

Growth of Transnational Corporations (TNCs) and their influence

The last two decades have seen exponential growth in the numbers and size of transnational corporations. Many are now larger than national economies, and have greater mobility and flexibility in choosing where to invest (United Nations Conference on Trade and Development, (UNCTAD) 1999).

They are able to exert massive influence on national governments which compete to attract investment. This occurs at many levels, through individual corporate lobbying, through industry associations, and through national, regional and global business organisations. This influence is quite visible and conducted in part through the media by organisations like the Australian Chamber of Commerce and Industry and the Business Council of Australia.

Bodies like the International Chamber of Commerce, or the Business Advisory Council to the OECD focus their efforts on particular international institutions. In the WTO the influence of TNCs and their activist role in agreements like intellectual property rights and services agreements are well-documented. There are accounts of corporate players, often members of national delegations, playing a key role in WTO negotiations (Braithwaite and Drahos, 2000, Chs 7and 20). Thus business has a strong influence on government policy and often a direct voice in the WTO.

The WTO's expanded agenda

The WTO replaced GATT in 1995 as a child of the economic rationalist era. It has a far wider agenda than GATT and has much stronger powers to enforce its agreements.

Whereas GATT only dealt with manufactured goods, the WTO agenda includes the reduction of "non tariff" barriers to trade. There are 12 agreements including Agriculture, Services, Trade in Intellectual Property Rights (TRIPS), and Trade-related Investment Measures (TRIMS). The Sanitary and Phyto Sanitary Measures Agreement defines relatively low global regulatory standards as the means for assessing whether national health and environment regulation is a barrier to trade. These agreements have the potential to impact a much wider range of government policies than did GATT agreements.

Many WTO agreements apply without requiring national legislation to implement them. Some require national legislation. For example, the TRIPS agreement extends the intellectual property rights on patents for inventions to all forms of technology and means that royalties must be paid for 20 years. The agreement requires governments to pass domestic legislation to ensure that TRIPS rights can be enforced locally. It also makes it more difficult than before for governments to have exceptions to the rules – for example, to manufacture essential medical drugs locally at affordable prices - hence the recent difficulties experienced by African countries over access to affordable drugs for the AIDS epidemic. Developing countries were given longer times for implementation. Many developing countries are still unhappy with the terms of the agreement and are seeking changes in a review process which is now proceeding.

The WTO, transparency and accountability

The WTO objective is to develop one set of global rules to maximise free trade for corporations and to limit national regulation by governments. As US trade expert Fred Bergsten put it, it aims to "lock in" current and future governments to a free trade agenda and to assign alternative policies to "the dustbin of history" (Bergsten, 1996). Another US negotiator said of APEC "APEC is not

about governments. It is about getting governments out of the way so that business is free to do business" (Spero, 1996). Thus some powerful players see international trade agreements precisely as a way of implementing global policies without troublesome national public debate or accountability.

This strategy of removal of regulation from the national to the international level without democratic accountability can restrict domestic policy debate and policy choices and thus can restrict democratic and accountable government. It also reduces the credibility of the WTO as an institution.

Critics of WTO structures have compared it unfavorably with the United Nations. The UN was founded after World War Two as a democratic forum to resolve international issues peacefully and to establish international human rights standards. It has public debates, majority voting, and there are non-government observers. Agreements are implemented through domestic legislation. Implementation can be tested through international law, but there are no external sanctions. Thus there is public debate and accountability at the international and national levels.

In the WTO there is no public debate, and no majority voting. Article 1X of the agreement establishing the WTO provides for voting at the Ministerial Conference and General Council, but this provision has not so far been used (World Trade Organisation, 1995: 11). The WTO has no process for community non-government observers at its discussions. However business groups have the resources to lobby the governments informally before meetings and are also often included in government delegations. The Australian Seattle delegation included eight business representatives and no other community organisations. WTO agreements are often legally binding whether or not there is domestic

legislation -often there is no international or national public debate before agreements are signed.

Unlike the UN, the WTO has teeth. Ultimately its agreements can be enforced through its disputes process which can enforce trade sanctions. This process is discussed further below. The greater enforcement powers of the WTO should require correspondingly greater transparency and accountability in its structures. Paradoxically, this is not the case.

Developing Countries in the WTO

The WTO has 138 member countries. WTO Agreements are supposedly reached by consensus, but in reality the United States, Canada, Europe and Japan (the "quad" governments) often draft agreements which are then discussed with a select group of 20-30 governments in what is called the "green room" process. They are then presented to the majority smaller and developing country governments which have not been involved in devising them (Braithwaite and Drahos, 2000:199-200, Das, 2000, Bridges Weekly Trade News Digest, 2000). The Cairns group which includes developing countries is an exception to this structure.

Thus developing country governments are excluded from most drafting meetings and often lack the numbers of negotiators required and the resources needed for negotiations.

Moreover the special provisions in some agreements intended to take into account the needs of developing countries have proved inadequate. There is widespread acknowledgment by commentators that the Uruguay Round agreements succeeded in opening many developing country markets but that

developing countries still lack access to the markets of major industrialised countries (Raghaven, 2000, Khor, 2000, Stiglitz,1999).

For example, the Agreement on Agriculture has reduced tariff barriers in many developing countries. But the agreement enabled the USA and EU to keep some forms of subsidies to their farmers which mean their products can now undercut local producers in developing countries, contributing to unemployment, rural poverty, migration and the swelling of overcrowded cities (Cairns Group, 2000). The TRIPS agreement enables transnational corporations to patent traditional seed varieties which have been developed by poor farmers over many centuries, and to patent the traditional knowledge of indigenous peoples (Coombe, 1998).

The view that the WTO structures marginalise developing countries was summarised by a recent International Federation of Human Rights report which concluded that

> "whether one considers the dispute settlement procedures, the mechanisms for implementing agreements or the areas selected for negotiations, one comes to realise that the WTO structure is heavily tilted in favour of developed countries, such that developing countries, are, de facto, kept away from decision-making mechanisms, and from policy making; similarly, their own specific problems are not taken into account" (Habbard and Guirand, 1999).

A report by consultants to the United Nations Sub-Commission on the Promotion and Protection of Human commented that "for certain sectors of humanity-particularly the developing countries of the South - the WTO is a veritable nightmare". (Oloka-Onyango and Udagama, 2000).

Seventy developing country governments at the Seattle WTO Ministerial Meeting refused to proceed with another major round of negotiations unless there were changes to WTO structures. There are now alternative proposals emerging from developing countries about restructuring negotiating processes and voting procedures (Das, 2000).

A review of WTO structures is urgently needed to address all of these issues. Such a review should take place before any new negotiating round.

Recommendations

A comprehensive review of WTO structures is required before a new negotiating round and should include the following issues:

- Open public debate at the WTO and publication of all relevant documents;
- Changes to decision-making structures to give more voice to smaller and developing countries through voting and / or other means;
- Greater technical and funding assistance for developing countries to assist meaningful participation;
- Greater recognition of the special circumstances of developing countries in agreements, and
- Recognition of non-government observers and inclusion of non-government community organisations in government delegations.

3. The Relationship between WTO agreements and UN international agreements on human rights, labour standards and the environment.

International law on human rights, indigenous rights, labour rights, the environment and health and safety is based on pre-eminent social values recognised by most governments through the UN. These values are enshrined in UN Declaration on Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, ILO Conventions on labour rights and various environmental agreements.

The GATT Article XX provides that nothing in GATT agreements should prevent the adoption of measures necessary to protect public morals, measures necessary to protect human, animal or plant life or health, or measures relating to the conservation of exhaustible natural resources. These clauses were developed before the adoption of the UN human rights conventions and covenants (World Trade Organisation 1995: 519). The preamble to the agreement establishing the WTO makes reference to raising standards of living, full employment, and environmentally sustainable development (World Trade Organisation 1995:6). These provisions are very basic compared with UN international agreements. However some commentators argue that they were intended to enable the WTO to take account of some international law in areas like human rights, health and safety and the environment, and should enable reasonable national regulation in these areas (Howse and Mutua, 2000: 11-12).

In reality, these clauses in the GATT and the WTO are too restricted and have been interpreted too narrowly in the context of trade law. Decisions of the disputes panel have found that environmental regulation, food safety regulation, quarantine regulation and local industry development policies can be defined as barriers to trade. These decisions are constructing a body of case law on an *ad*

hoc basis which tends to undermine the principles of UN agreements and deny the right to regulation in these areas at the national level.

International trade law commentators have concluded that there are conflicts between aspects of trade law and other international law. For example, there are conflicts between individual and corporate intellectual property rights and the collective rights of indigenous people to their natural and cultural heritage (Coombe, 1998) . There are also conflicts between aspects of trade law and the precautionary principle which is a principle of international environmental law (Charnovitz, 1998).

Recommendations

- WTO agreements and processes should be changed and interpreted to give much clearer recognition to UN international agreements on human rights, labour standards health and safety and the environment.
- In the event of conflict between UN agreements and trade agreements, the UN agreements should prevail.
- There should be ongoing dialogue between the WTO and the UN, the ILO and other international bodies.
- WTO agreements should clearly recognise the right to have national regulation in these areas.

4. Effectiveness of WTO dispute settlement procedures and ease of access

Under the WTO disputes process, governments must seek to resolve disputes through negotiation and conciliation. If this fails, governments can complain about other governments' regulation to a disputes panel of trade law experts which has strong powers of enforcement over member governments. The panel can allow the successful complaining government to ban or tax the exports of the losing government and can extend these sanction powers to other governments.

The existence of a panel is in theory an advance over the use of unilateral sanctions by the most powerful economies. However the United States, for example, still uses unilateral sanctions in addition to using the WTO process.

Van der Borght notes that the existence of a disputes process is a step forward but that "to conclude that there is general satisfaction among all WTO members that dispute settlement is working well and is fair for all members would be a mistake", noting that developing countries " in many cases have neither the financial means nor the expertise to effectively protect their rights". Moreover, they may have no effective way of enforcing recommendations, as trade retaliation is "likely to hurt them more than a prospectively targeted developed country" (Van der Borght, 1999: 1226). The difficulties for developing countries in using the disputes process are reflected in the statistics. Although developing countries make up the vast majority of WTO members, only one quarter of the complaints to the dispute panel have come from them.

Unlike most national and international judicial processes, the disputes process is conducted behind closed doors and there is limited public access to documents. Information on decisions is difficult to access and the language is obscure. This lack of transparency is unacceptable for a process which is now setting

precedents in international law and this has been criticised by many international legal experts (Howse and Mutua, 2000, Van der Borght, 1999).

Usually only governments are heard by the disputes panel. Environmental organisations have established a legal right to appear as *amicus curiae* representing the broader public interest as is the case in most national and international judicial processes. However there is still resistance to this by some parties and panels are not bound to consider the evidence of public interest groups. The US and EU have supported open hearings, access to documents and mandatory consideration of *amicus curiae* submissions (Van der Borght, 1999: 1228).

Since it operates within the context of WTO agreement, the panel must give priority to free trade over other issues. Governments must use the "least trade restrictive" forms of regulation. The panel's decisions are building up a body of trade law precedents on an *ad hoc* basis which can undermine legitimate national regulation in areas like health and safety, the environment and industry development policy (Charnovitz, 1998, Howse and Mutua, 2000).

Australian policies and laws have been affected by this process. An industry development subsidy to the Howell leather company was declared inconsistent with WTO rules by the disputes panel. Australia's quarantine rules prohibiting the import of fresh salmon were also found to be a barrier to trade. Historically Australia as an island continent has been free of diseases found elsewhere and has had higher quarantine standards than other countries, including banning of some imports to prevent any risk of disease. Among the reasons for the WTO dispute panel decision was the argument that a low level of risk of disease was acceptable. The Tasmanian government has refused to accept this risk and has maintained its ban on fresh salmon imports.

Recommendations

- The disputes process should be public, as are most national and international judicial processes.

- All documents and decisions should be publicly available, with summaries of decisions in plain language.

- Community organisations representing broader public interest issues should have the right to be heard and their evidence should be considered with other evidence.

- The disputes process should recognise other international law and the right to have national regulation based on the principles of those laws.

5. The extent to which social cultural and environmental considerations influence WTO priorities and decision-making

It can be argued that, like most institutions, the WTO has its own institutional culture and social structures which strongly influence its decision-making. Section two of this submission has explored aspects of that culture and its lack of transparency and accountability: the influence of the economic analysis used by the IMF and the World Bank, the influence of industry lobby groups, the secretive nature of meetings of the formal bodies and the informal "quad" and "green room " decision-making structures, etc.

The WTO's procedures, and its one-size-fits–all global rules do not take into account the specific historical, social, cultural, environmental and development context of particular countries.

These issues have been canvassed in the public debate which occurred in 1998 over the Multilateral Agreement on Investment and debates on the areas which should be included in the trade in services agreement. The draft MAI, which was developed in the OECD, sought to remove most national government powers to regulate transnational investment.

It would have prevented limits on foreign investment in general, or in particular industries, prevented requirements on foreign investors to use local products or train local staff and prevented the use of government purchasing to develop local industry. It also contained provisions to give transnational investors the right to compete for government funding for services like education and health (Ranald, 1999) .

It was a top-down agreement which would have included all areas of government law and policy which were not specifically excluded. Even the exclusions would have had to be rolled back over time. This would in the long run have removed the power of national governments to regulate in areas like regional development policy, the cultural and land rights of indigenous peoples, national cultural industries like film and television services and even in areas like the environment.

The draft MAI met with fierce opposition when it became public precisely because it impinged on so many areas of national public policy and regulation which are seen as essential for social, cultural and environmental development. The negotiations in the OECD collapsed in 1998 after governments listed many

exceptions to the agreement in the face of widespread public opposition and the French government withdrew . However, there are proposals to resurrect such an agreement in the WTO.

Some of these investment issues are also addressed in the General Agreement on Trade in Services (GATS). This flows from the fact that service provision often requires direct investment and a commercial presence in the country concerned. Once a commercial presence is established, treatment must be non-discriminatory. The current GATS agreement is limited by several factors. It has a general exclusion for public services, if they are not provided on a commercial basis nor in competition with other service suppliers. It also retains the right for governments to regulate on the supply of services to meet national policy objectives and its specific requirements for non-discriminatory regulation are limited to qualifications, technical standards and licensing (World Trade Organisation, 1995: 327-33) The agreement also includes only those services sectors specifically nominated by governments. Australia has so far not included areas of public service provision like public health, public education and social security. It has included private health and education services.

Some commentators have been explicit in their view that some aspects of the MAI could be pursued through an expansion of the GATS (Sciarra, 1998). A change in the structure of the agreement from an agreement by inclusion to a "top down" agreement like the MAI would mean that all services would be included unless excluded. A change in the right of governments to regulate to specify that all regulations must be "least trade restrictive" could open the door for challenges to regulation in areas like quality standards, access to and pricing of essential services. If all services were included, and regulation restricted, the public provision of services could be challenged by corporations seeking access to public funding .

Such proposals would meet with fierce community opposition, as they would remove from national regulation areas of fundamental importance to the cultural rights, human rights, living standards and identity of people. Public policy on these areas should be determined at the national level, not through WTO agreements.

Recommendations

- The agreement establishing the WTO should be changed to ensure that certain areas can be excluded from trade agreements and remain in the domain of national public policy, eg, the cultural and land rights of indigenous peoples, other national cultural activities, public health, social security and public education. Access to essential services like water and electricity should also remain regulated under national arrangements.

- The Australian government should oppose the inclusion of social security, public health, public education and cultural industries in the trade in services agreement.

- The Australian government should support the right of governments to regulate services to meet national policy objectives and should oppose changes to the definition of government regulation which would require it to be "least trade restrictive" to ensure that regulation of services remains at the level of national public policy.

- The Australian government should oppose the expansion of the scope of coverage of government regulations in the GATS beyond qualifications, licensing and standards issues.

- The Australian government should ensure that the trade in services agreement and any proposals on competition policy do not require privatisation of social security, public health services or public education services, or reduce the right of government to determine the distribution of government funding in these sectors.

- Following the widespread community opposition to the failed Multilateral Agreement on Investment in the OECD the Australian government should not support any similar agreement on investment in the WTO, and should oppose the expansion of the services agreement to include aspects of the MAI.

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