LAW COUNCIL OF AUSTRALIA

INTERNATIONAL TRADE AND BUSINESS COMMITTEE

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES

AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANISATION

This submission is in response to the Treaties Committee's call for comments on Australia's relationship with the WTO. It deals briefly with each of the items that the Committee has identified for its report. Before dealing with the specific topics identified by the Committee, some brief introductory comments are made.

Introduction

International trade has always been of vital interest to Australia. There are important legal issues involved. There is a need for effective international regulatory mechanisms to ensure that international trade can be conducted on a fair and efficient basis. Australia has always placed great reliance on multilateral rules and institutions in support of such goals.

While the World Trade Organisation (WTO) is in many senses unique, it is an element of public international law. For a country of the size of Australia, international legal institutions are important means by which rights may be protected. As an international legal institution, however, it suffers from the common problems of similar institutions. These include difficulties of negotiating optimal rules, adjudicating disputes and enforcement of rights and obligations. While all international legal institutions suffer from these problems to some degree, careful attention to their design and utilisation can maximise their utility.

The GATT/WTO system has generally been in Australia's interests. Recent developments will further enhance Australia's pursuance of international trade, although there remain significant problems in specific areas such as agriculture.

Opportunities for Community Involvement in Developing Australia's Negotiating Position on Matters with the WTO

It is difficult to combine efficient negotiation strategies with fully democratic rights for all interested sectors of the Australian community. WTO negotiations are particularly complex dealing with all goods sectors together with services, intellectual property and some investment issues. Current negotiations need to be conducted with some 138 countries. In this kind of environment it is difficult to develop a clear and open negotiating mandate with input from all sectors of Australian society. Nevertheless, those interests remain important. Australia has utilised the Trade Negotiations Advisory Group in previous negotiating rounds. It is important to investigate whether this is fully representative of all sectors of society. The Law Council would welcome an opportunity of being involved in the development of such positions.

A further reason for wider involvement flows from the problematic nature of negotiations themselves. All economists would agree that it is misguided to speak of "concessions" made in negotiations. The reduction of Australia's own trade barriers should be part of our own carefully thought out policy initiative and supported by appropriate adjustment mechanisms. In these circumstances, those who might be adversely affected in the short term through potential negotiating positions should have as much advance notice and opportunity for input as possible.

Legal issues of design, adjudication and implementation should be of concern at the negotiation stage.

The Transparency and Accountability of WTO Operations and Decision Making

Many commentators and participants are calling for increased transparency in the WTO. The term is often used in quite different ways by those commentators. Suggestions range from making documents more readily available, having dispute settlement hearings open to the public to at the other extreme, calling for non-government organisations or private parties to have standing before the WTO Dispute Settlement Body. These issues are quite conceptually different and should not all be considered under the rubric of transparency.

The WTO has recently made significant changes in terms of access to documents, rules and procedures and also as to liaison with non-government organisations. It could follow the International Court of Justice practice of allowing open hearings, although this is unlikely to have any impact on the quality of decisions. Private parties should not have direct standing.

It is not clear what is meant by accountability of WTO operations and decision making. The WTO takes decisions by full consensus. It is not a separate institution that needs to be accountable to its Members.

The Effectiveness of the WTO's Dispute Settlement Procedures and the Ease of Access to these Procedures

The Dispute Settlement Understanding (DSU) negotiated during the Uruguay Round has been a significant improvement on the previous GATT system for dispute resolution. Nevertheless, there are still gaps and uncertainties. Negotiators during the Uruguay Round sought to have a review of the DSU which should have been completed by now. It is highly desirable that this review be completed.

WTO disputes are becoming more and more complex. They deal with factual and economic issues as well as with analysis of domestic legislative provisions for compliance with WTO obligations. There is little in the way of guidance on many key procedural questions. Panel and Appellate Body decisions are making some important determinations that have significant impact on the nature and effectiveness of the system. While it is not suggested that these decisions are necessarily incorrect, it is desirable that the Members themselves give more consideration to some of these foundational questions.

One of the most serious challenges to the system relates to the fundamental obligation on Members in the face of an adverse Panel finding. Recent disputes where the European Community has been a respondent have seen the Community take the view that it can choose not to bring measures into compliance but instead invite the successful complainant to retaliate. While the WTO can never force a Member to bring measures into compliance, it is important to confirm that this is the primary legal obligation. If the system allowed Members to see it as their choice whether to do

so or invite retaliation, this would be to the disadvantage of smaller countries like Australia.

Where ease of access is concerned, there is presumably no problem of access from the government's perspective. Here it may be desirable to explore the reasons why Australia is commonly a third party in other Members' disputes but has not shown a strong inclination to bring many complaints in its own right. If there is a concern about any adverse political or economic backlash as a result of doing so, this would detract from its effectiveness as a legal system. If that is not a concern, it would be interesting to explore why we have not used these procedures more often to try and open up market access.

If ease of access is referring to private parties, Australia's approach should be contrasted with that of the US and the EC. Both have legislative mechanisms to allow complaints to be made, which can in turn require governments to bring actions before the WTO. From an individual rights perspective, that may be highly desirable to overcome any risk aversion on behalf of the bureaucracy. On the other hand, concern with those individual rights may not be in Australia's long term strategic interest. This could be further explored.

Australia's Capacity to Undertake WTO Advocacy

Australia appears to have a small team of highly competent and experienced WTO advocates. While their past endeavours are to be commended, it is likely that increased resources and community liaison could only enhance that capacity. Effective representation through the WTO requires a combination of various fields of professional expertise. The Australian Mission has not had a strong tradition of legal representation as part of the team in Geneva although this may have changed recently. Larger economies have very significant legal resources both in Geneva and in domestic bureaucracies.

Capacity also involves proper inclusion of the affected private interests and their legal advisers. While the WTO is an intergovernmental organisation, it is seeking to protect the rights of private traders to engage in transactions without unreasonable governmental interference. WTO advocacy that does not sufficiently include those private interests is highly problematic. For example, in the recent *Howe Leather*

dispute, there was an intergovernmental agreement not to appeal the outcome of the Panel's findings. When there was a decision adverse to Howe's interests, including a surprising decision to demand retrospective repayment of the subsidy, the private company lost out on the potential for challenging that finding.

Capacity should also explore the role of various government departments both in dispute settlement and dispute prevention. Certain branches of government such as the Department of Industry, Science and Resources need significant advice about the compliance or otherwise of proposed industry assistance schemes. Where disputes arise, they have an interest in the outcome and preparation of the matter. The Attorney-General's Department would also have significant expertise in public international law in general. WTO dispute settlement has become much more akin to other public international law adjudicatory processes.

The very tight time frames in WTO litigation also suggest that increased resources are necessary to develop appropriate capacity. For a country like Australia that is unlikely to be involved in a large number of ongoing disputes, capacity may mean the need to bring together ad hoc expert teams at short notice.

The Involvement of Peak Bodies, Industry Groups and External Lawyers in Conducting WTO Disputes

There are two aspects to this question. The first is whether various bodies ought to be involved simply because their interests are affected. As indicated above, because WTO disputes are really proxies for the rights of individual parties, they, their industry bodies and their lawyers ought to be entitled to be involved.

The second aspect of the question is whether such involvement is likely to increase the quality of preparation of the case. This will depend on the persons and expertise involved. It is certainly important to be careful to guard against too many outside persons adding to the bureaucracy's workload without appropriate valued added. Any such problems could easily be overcome with appropriate processes. In addition, there is growing expertise in the private sector in relation to WTO matters. The private sector has a number of ex-government officials, private lawyers and academics all involved in analysis of this arena.

A further reason to involve such interests is to develop Australia's general capacity and expertise, not only in terms of conducting its own disputes but also in educational and advice work for developing countries. Australia has had a strong tradition through AusAid projects in capacity building for developing countries where the WTO is concerned. American and European law firms are actively pursuing advisory and advocacy work on behalf of developing countries in representing their interests before WTO dispute settlement Panels. There is no reason why Australian law firms, with their strong relationship in the Asian region, could not through appropriate liaison with government, develop similar expertise and abilities.

The Relationship Between the WTO and Regional Economic Arrangements

From a legal perspective there are certainly problems with the vast array of multilateral, regional and bilateral treaty arrangements. It gives rise to potential conflicts and jurisdictional questions for organisations and dispute settlement bodies. While this is a concern, the WTO generally has appropriate priority over regional arrangements although Article XXIV of GATT 1994 has not been an effective legal means of ensuring that regional arrangements are only allowed to function as trade promoting rather than trade diverting mechanisms.

The Relationship Between WTO Agreements and other Multilateral Agreements

Here there is greater cause for concern. The international organisations need to speed up their analysis of interrelationships and integration issues. In addition, at the domestic level we should ensure that these are not seen as separate policy areas. Recent developments in the international environmental arena suggest that more attention could be given to consideration of the impact of such initiatives on existing trade rights.

The Extent to which Social, Cultural and Environmental Considerations Influence WTO Priorities and Decision Making

WTO decision making is entirely dependent on the actual treaty provisions. There are already provisions that allow for trade measures. Cultural issues are currently a contentious area. It is not clear what is meant by social issues in the context of WTO priorities and decision making.