SUBMSSION TO THE JOINT STANDING COMMITTEE ON TREATIES

AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANISATION

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This is a response to the invitation from the Joint Standing Committee on Treaties to make a submission to its Inquiry on the nature and scope of Australia's relationship with the World Trade Organisation. Given the extent of the Inquiry, this submission must be fragmentary. But I would be happy to expand it on another occasion.

The submission is made in my personal capacity as a Professor of Law at Bond University. Although I am Chair of the International Law Section of the Law Council of Australia, a separate submission has been developed by the Section through its International Trade and Business Committee. I would, however, respectfully endorse and adopt the views in that submission.

General remarks

My perspective on these issues is that of one who has been involved in teaching and researching issues of international trade law and investment for some 40 years in Australia and throughout the world. I have concentrated on East and Southeast Asia, and also (when it was more relevant) on trade between socialist and non-socialist systems in East and Central Europe, as well as Asia. I have acted as consultant over many years to the Asian Development Bank and as Expert Adviser to the European Bank for Reconstruction and Development, and have been a member of Australian delegations to the United Nations Commission on International Trade Law (UNCITRAL) and to UNIDROIT.

My work has been built around international transactions, rather than the framework of international institutions. But the divorce can not be complete. Just as Australian domestic law has become internationalised in response to our place in the international community, the work of those involved professionally in advising and teaching in international trade and investment transactions is more and more tied to the processes and activities of international institutions and their output and attitudes.

Many of those I have taught during this time have come and still do come from developing countries, and from those with emerging

economies. I have had a constant and continuing exposure to their needs and attitudes. I keep in touch with many of them and regularly visit their countries. As for Australian students, there is not as yet in Australia the range of opportunities for international trade work that exist in other countries - apart from government. Most of those I teach go overseas to work, or move into other fields of interest.

Lawyers have played only a small role in the development of policy and management of issues. This is also true in the WTO. The greater contribution has come in the past from trade officials who are for the most part economists. There are fewer long-term Australian trade officials than there were. Especially in the 1960s, 1970s, and early 1980s, my work in the field was greatly helped by the assistance and insights of Australian trade officials working in a widespread net of offices. The advantage that Australia enjoyed in this regard was much envied by my colleagues from other countries. But there are fewer overseas offices now, and fewer officials with long-term grass roots experience of the problems experienced by Australian traders and investors abroad.

Specific Issues

1. Opportunities for community involvement in developing Australia's negotiation position on matters before the WTO.

This heading includes a number of diverse aspects.

The first is the community defined as the trade interests directly affected. There is a set of existing mechanisms for this in place, both formal and informal. In the context of negotiations, there has always been an openness in seeking contributions from this group and in updating progress. But Rounds are huge complex affairs. Trade interests can be involved only by the provision of data and by giving advice on strategy.

A broader view should be taken of the community as constituted by ancillary professional advisers. There may a suspicion of second guessing by public servants, and also a view that all professionals are hired guns. Those of us (a small group) who work in international trade law are usually willing to assist in the process of developing policy or considering a range of options. But the lines of accountability for development and communication of government policies and strategies are often blurred by the number of separate departments that may be involved in working up an appropriate set of tactics or working out day to day problems. It is often difficult to know both where the responsibility lies and when crucial decisions are being made. This fragmentation seems to lie at the heart of many

of the problems that Australia experiences in this area.

The widest definition of community is that of the public at large. There is a lack of understanding shown by much of the public and by some interest groups and loose alliances such as S11. What is needed is education of the electorate in the way Australia is involved in and discharges its responsibilities in international affairs, including international trade. This ignorance is not assisted by cheap opportunism by politicians or by cashing in on xenophobia. Some of the attempts to provide public hearings for interested groups have been admirable, both in their content and tolerance of diverse views. Others have been woeful - conducted in a patronising manner and have been a waste of time.

Finally, negotiating is a tactic frequently employed in the WTO. The WTO is as much concerned with process as with rule making and enforcement. It is still largely an area of diplomatic activity, built on relations of trust and confidence. Negotiating may be in connection with a negotiating Round, a Dispute, a Working Group, the development of an agenda for a Ministerial meeting, or a session before the Trade Policy Review Mechanism. Each of these varies in range and complexity, the requirements of commercial confidentiality, and the preliminary preparation required by government. There can not be "A one size fits all" approach, even in terms of government relations with a particular part of the public. At the end of the day, government in our system takes responsibility for the policy it puts forward, and the decisions to which it agrees.

2. Transparency and accountability of WTO operations and decision making.

In this area, I would respectfully adopt the views put forward by Gabrielle Marceau and Peter Pedersen in their article "Is the WTO Open and Transparent", published in (1999) 33 Journal of World Trade Law 5. Although it was published before the public demonstrations in Seattle and more recently in Melbourne, the authors concentrate on the balance required in dealing with NGOs within the WTO, the particular focus that has emerged for transparency.

It needs to be remembered that the international legal system has moved only slowly and incompletely from being a system regulating relations between States to one that recognises individual rights. Rarely do individuals have standing in international law: they work through and are represented by their own State. But NGOs, if interest-focussed, tend to be cross-border organisations. Their position is reinforced by modern forms of communication, and they are true multinationals. There is no responsible State. Especially in the area of the environment, NGOs have made a significant contribution to the development of an international regime, but the WTO has moved slowly to tackle this issue. Not all NGOs are the same. The politicisation of some is a severe deterrent to future progress. But where there is expertise available, it should be used. There is little enough of it anywhere. But the WTO is not an institution answerable to an electorate. It is more widely representative than the OECD and it is a body governed by consensus. So transparency does not have the same ring as it has with a democratic institution of government.

What the WTO (and its developing member countries) need is more effective use of expertise - no matter where it resides. It is not a polymath like the UN, but a small tight under-resourced organisation serving many countries which, in trade matters, have less expertise and resources than does the WTO itself.

3. The effectiveness of the WTO's Dispute Settlement Procedures

In the 1980s, I was part of a small group of Australian legal scholars that closely considered the workings of the dispute settlement process and ways in which it could be improved. The DSU sought to have a more open rule-based and predictable system and it has gone far towards that goal. But there are a number of improvements which can be made, mainly through procedural changes and adding supports to the system.

International trade rules are often obscurely-worded, as the products of hard-won compromise that deliberately fudges to obtain agreement. "Any one who reads GATT is likely to have his sanity impaired". Both the content of the rules and process of the DSU are open to this charge. It is fundamentally not an adversarial but an inquisitorial system, and it emerged from a diplomatic process. Trade is politically too sensitive to be pinned down by rigid procedures. The process will yield to the pressure. So a delicate balance needs to be kept.

Some obvious problems have emerged:

- The place of third parties (Contracting Parties) and the need to have a legal interest for standing needs reconsideration.

- Much more could be made of the consultative process in order to facilitate the resolution of disputes. It often appears to be a pro forma situation, with the objective of consultations already being exhausted.

- Implementation of decisions is still largely uncharted territory. The right to retaliate seems a blunt instrument - one that it would be hoped is outmoded.

- Assistance is needed for developing countries to support their use of the system. As against e.g. the EU or the US, it may be a case of "David and Goliath".

- The access to expertise is still haphazard, and it should be built into the process. In what circumstances a panel may decide that information proffered is information it has sought is speculative on the present state of jurisprudence.

- How far hearings should be public is probably a peripheral issue, but as many documents as possible should be made public for the guidance of others.

- Inevitably it will be necessary to develop an appropriate system for settling facts, getting access to documentary evidence, and evaluating expertise.

4. Australia's capacity to undertake WTO advocacy

I would like to enlarge this to include the management of WTO disputes. It appears from the outside that problems do not arise at the stage of arguing before a panel, but in the preliminary stages in which the strategy for a dispute is settled. The dispersal of responsibility between many arms and levels of government for acts which may have GATT consequences is the starting point of difficulty. Many levels of government are not aware of the significance of their actions. So the accidental breach is the trigger of a problem. Then the management of the process is dispersed between ministries and departments both

state and federal. To avoid fatal errors of tactics or unfortunate admissions, some effective co-ordination must be put in place. The problem is similar to that of a large multinational that needs to keep track of its potential claims and liabilities. Streamlined administration and education are the keys to this. The necessity to record information and to be subject to the Trade Policy Review Mechanism are generating a higher level of consciousness. But any litigator knows that a good case can be compromised by an unsteady course of conduct at the outset.

5. The involvement of peak bodies, industry groups, and external lawyers in conducting WTO disputes

On this issue, I would particularly endorse the views of the Law Council of Australia International Law Section on the importance of the involvement of lawyers in the Trade Policy Advisory Group. As to external lawyers, the Australian government has a panel process for much of its work and this is merely another aspect of that management decision. However, early involvement of lawyers on a proactive and preventative basis is important so that options are not foreclosed. Where an identified person, whether a company or not, is the basis of a WTO dispute, particular care needs to be exercised in synchronising the private lawyers, the person's interests, and those of government. The Howe leather case is an unfortunate precedent.

6. The relationship between the WTO and regional economic arrangements

I still support the view that a multilateral trade arrangement is the optimal trade regime, although there are important purposes to be served by regional economic arrangements.[See Institutional Co-operation in Asia and the Pacific in **Asia Pacific Regional Trade Law Seminar**, A.G.P.S., 55-124, (1985) (with D.E. Allan and A.C.C. Farran)]. It is too late to put the genie back in the bottle and undo the waivers for NAFTA and the EU.

Trade blocs are a major issue, especially when one is on the outside.[see Trade Between Developing and Developed Countries: the Problem of International Trade Blocs, 387 - 404, in **Essays on Comparative Commercial and Consumer Law**, Fred B. Rothman, Littleton, Colorado.(with Allan, D.E.) 1992]

But a more positive role is twofold: when there is a hitch in the multilateral situation so that progress is retarded, as with the current failure to set up the Millennium Round; and to bench mark regional developments.

The task of review of progress can still continue even though no multilateral round is under way. Particularly with ASEAN, and

its expanded membership, meeting the requirements of the ASEAN version of WTO obligations is a target and a path for economic development and the emergence of an appropriate legal infrastructure to support it. This has been evident in countries such as Laos, Cambodia, and Vietnam. It was the picture in Eastern Europe also.

7. *Relationship between WTO Agreements and other Multilateral Arrangements*

The issue of linkage between trade rules and other rules is contentious and complex. Experience of DSU cases in the last few years has shown how the parallel development of environmental rules and trade rules leads to distortion when inevitably activities of governments bring them together. This was also a major stumbling block with the Multilateral Agreement on Investment. It may be possible through skilful architecture to build international bridges between the obligations of governments under a range of international conventions. The difficulty is that government tends to quarantine its own officials into groups that do not match this convergence. So environmentalists complain that trade officials "interfere", and trade officials struggle with metaphysical issues of whether an environmentally-sustainable process means a different or a like product. Furthermore, the dispute resolution processes and appropriate countermeasures also need to be brought into synchronisation. At present, I think we can just about manage the environmental issues. But, just as human rights and labour issues have an ambivalent place in international politics, they will continue to have a similar role in the development of a unified international trade regime. The ILO is equally a specialised arm of the UN as is the WTO. In my view, in the foreseeable future these issues will be dealt with separately simply because of their extreme political sensitivity. We need to work through other areas of distrust of developed country views, such as intellectual property measures first, before we are likely to persuade developing countries that this extension of issues is not just another form of protectionism or neo-colonialism.

8. *The extent to which social, cultural and environmental issues affect WTO priorities and decision-making*

I do not have any comments on this heading.

9. *Concluding Remarks*

In my judgment, Australia has received many benefits from its membership of and commitment to the WTO.

Australia also has an important role in the education and training of persons from developing countries. In my current group of international trade law students, there are students from Papua New Guinea, Indonesia, Peoples Republic of China, Taiwan, Hong Kong, Cambodia, Malaysia, India, Kenya, as well as from USA, Norway, Sweden, and Germany. These students learn at first hand of each others' problems in trade, and also to understand different attitudes and expectations. This is much more durable than the law they learn. If Bond University were closer to Canberra, I would hope for more input and interaction with government to appreciate those views. But being in regional Queensland and so outside the southeast triangle has meant a distant relationship in more ways than one.

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