

**Submission No. 5
Treaties Referred on 16 November 2010**

**JOINT STANDING COMMITTEE ON TREATIES
PUBLIC HEARING INTO TREATIES TABLED ON 15, 21 and 24 JUNE 2
RESPONSES FROM THE DEPARTMENT OF FOREIGN AFFAIRS AND
TRADE TO QUESTIONS TAKEN ON NOTICE IN RELATION TO THE
AGREEMENT ESTABLISHING THE ADVISORY CENTRE ON WTO LAW
(ACWL)**

Further to the Public Hearing by JSCOT on 22 November into the Agreement Establishing the ACWL and proposed accession by Australia, the Department of Foreign Affairs and Trade (Elizabeth Ward, Assistant Secretary, Trade Policy Issues and Industrials Branch) would like to provide the following responses to the questions taken on notice.

WOULD A SMALL CLAIMS PROCEDURE BE BETTER SUITED TO THE CHALLENGES FACING DEVELOPING NATIONS AND WOULD IT REDUCE THE FINANCIAL COSTS OF THE DISPUTE RESOLUTION PROCESS? IF THE IDEA IS TO OVERCOME THE CHALLENGES FACED BY DEVELOPING COUNTRIES, WOULD THESE CHALLENGES BE BETTER OVERCOME BY DEVELOPING A SMALL CLAIMS PROCEDURE IN THE WTO DISPUTE RESOLUTION FRAMEWORK?

The WTO Dispute Settlement Understanding (DSU) currently makes no distinction between a claim of \$100,000 and a claim of \$100 million. There is usually no direct correlation between the complexity of a dispute and its commercial value - the same procedures, complexity and necessary expertise may apply for both small and large claims, which may be a disincentive for developing countries with limited resources to access the current system. The solution to this problem is to support organisations that provide independent legal advice and support, such as the Advisory Centre on WTO Law (ACWL), at reasonable rates. The WTO Secretariat cannot provide these services for reasons of impartiality.

The DSU already provides some options for increasing access to the dispute settlement system and minimizing litigation costs. Under Article 5, the DSU encourages the parties to resolve their disputes amicably using the alternative instruments of good offices, conciliation and mediation. The DSU also provides for arbitration at the will of the parties, under Article 25. Resort to these mechanisms is rare. Under a 1966 GATT decision, developing country Members may also seek recourse to the good offices of the WTO Director-General. This mechanism was invoked for the first time by Colombia, represented by ACWL, in the long-running dispute concerning the European Communities' regime for the importation of bananas. As a result, the Director-General facilitated negotiations between the European Union and the Latin American MFN banana suppliers, which ultimately led to an agreement between the two parties in December 2009. The ACWL assisted Colombia throughout the negotiation of this agreement.

Observers of the system have also suggested the possibility of adopting less demanding litigation procedures for 'small claims' as another solution worth pursuing. Issues that would need to be resolved to better consider such a proposal however include:

- What is a ‘small claim’?
- Which body should hear these claims?
- In what circumstances would a WTO dispute be considered small”?
- Would such a procedure be subject to the right to appeal?

Australia is interested in considering all options, including a small claims procedure, for improving the operation of the DSU so that it better serves the interests of developing countries. We take an active role in Geneva on review of the DSU, as well as other aspects of WTO reform. DSU review, however, will take some time and does not include proposals on alternative dispute mechanisms. At this stage, the WTO procedures under the DSU provide developing countries with the best way to fully realise their WTO rights, and the services provided by the ACWL assists them in doing this.

DO YOU KNOW IF THE SMALL CLAIMS TRIBUNAL IDEA HAS ANY TRACTION AMONGST WTO MEMBERS?

The idea of a ‘small claims procedure’ has not received much formal support by Members in the context of the DSU review. While there are various special and differential treatment proposals currently being considered as part of the DSU Review, a ‘small claims procedure’ is not on the agenda.

WOULD AUSTRALIA SUPPORT THE INCLUSION OF A SMALL CLAIMS PROCESS IN THE WTO’S DISPUTE RESOLUTION SYSTEM OR WTO DISPUTE SETTLEMENT BODY?

Australia’s general position is that the current DSU is working well. Australia has preferred to express support for developing countries’ participation through existing mechanisms such as the ACWL. We have expressed willingness to consider other proposals to address the challenges faced by developing countries’ participation in the context of the DSU review negotiations.

COULD THE EXISTENCE OF ACCESSIBLE AND RELIABLE LEGAL ADVICE MAKE WTO MEMBERS MORE LITIGIOUS? DO YOU THINK THERE HAVE BEEN ANY TRENDS IN THAT DIRECTION?

We do not believe there is any reliable evidence that subsidised legal advice, such as that provided by the ACWL, makes WTO Members more litigious. It does however allow them to participate in the WTO system to fully realise their rights – and respect their WTO obligations.

Of the legal advice offered by the ACWL, 82 per cent in 2008 and 69 per cent in 2009 concerned systemic issues or developing countries’ own compliance with WTO obligations rather than the measures of other countries. Such advice can in fact forestall potential litigation, as it assists developing country members in implementing measures in a WTO consistent manner. The number of ACWL legal opinions on measures of other countries has however increased from 18 in 2005 to 60 in 2009 (representing an increase from 22% to 31% of the total number of ACWL legal opinions).

While the ACWL assists countries in all stages of the WTO's regular panel and Appellate Body Proceedings as complainants, respondents and third parties, it also assists countries in Doha negotiations.

In any event, formal dispute settlement proceedings before a panel is the last step in the WTO dispute settlement process. First members engage in an important process of consultation – around half the disputes brought since 1995 have been settled at the consultation phase. Under the DSU, a WTO member can initiate a dispute by requesting bilateral consultations if it considers that another WTO member has acted inconsistently with its WTO obligations. Only where consultations fail to resolve a matter can a WTO member request the establishment of a dispute settlement panel. Of the 418 complaints initiated under the DSU since 1995, only 274 have proceeded to a request for a panel to be established to resolve the dispute – even fewer have resulted in a panel determination. An increasing number of WTO members participate in WTO dispute settlement proceedings as third parties generally where they have significant commercial or systemic interest in the dispute.

More broadly, despite increases in the WTO membership and the global financial crisis, the number of disputes has in fact decreased slightly over recent years.

ARE THERE ANY AUSTRALIANS – TRAINED LAWYERS – WHO THROUGH THEIR OWN RESOURCES ARE PART OF THE TEAM?

Ms Tegan Brink has been Counsel at ACWL since September 2010. She was a member of Australia's delegation to the WTO in Geneva from 2005 to 2008. In this capacity, she represented Australia in the WTO on intellectual property, technical barriers to trade (TBT) and trade and development matters, including in treaty negotiations and dispute settlement. She also participated as a speaker in several WTO- and WIPO-sponsored technical cooperation and training activities in Geneva and abroad.

Prior to her posting to Geneva, Ms Brink worked at the Australian Department of Foreign Affairs and Trade (DFAT) in Canberra in the Office of Trade Negotiations and the Legal Branch, providing policy and legal advice on a range of matters, including bilateral trade and investment treaties and WTO dispute settlement proceedings.

Ms Brink has a Masters of Laws (LL.M) from Columbia University, which she attended as a Fulbright scholar. She also has First Class Honours degrees in Laws (LL.B) and International Relations (B.A) from the University of Sydney. Ms Brink speaks English and French.

WHO ESTABLISHED THE ACWL?

The ACWL is an inter-governmental organisation, funded by its members, fees for its services and contributions from other governmental and non-governmental sources (see below for more detail). It is independent of the WTO. As noted in the NIA the Agreement establishing the ACWL was opened for signature at the Third Ministerial Conference in November-December 1999 and came into force in 2001. However this does not mean the organisation is a WTO body or under WTO auspices.

Nine developed countries - Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden and United Kingdom accepted the Agreement Establishing the ACWL in 2001. One developed country, Switzerland, subsequently acceded to the ACWL. These ten developed country members comprise the developed country membership. Twenty one developing countries also accepted the Agreement in 2001. Latvia withdrew from the ACWL in May 2004 upon its accession to the European Union. Ten developing countries have acceded to the ACWL since its establishment, bringing the total number of developing country Members to 30. The complete list of developing country members can be found at <http://www.acwl.ch/e/documents/reports/FINAL%20FOR%20WEBSITE%20Report%20On%20Operation%20PP%20INT.pdf>.

ACWL'S FUNDING

During the hearing, the matter of ACWL's funding and status was discussed. We would like to make clear that ACWL receives its funding from the following sources:

- Each ACWL developed country member – see above - has contributed at least US\$1,000,000 to the Endowment Fund (fund created from the contributions of both the developed and developing country Members) or to the annual budgets of the ACWL or to both.
- The ACWL charges fees for legal support in WTO dispute settlement proceedings in accordance with the Schedule of Fees set out in [Annex IV of the Agreement Establishing the ACWL](#). These are CHF162 per hour for Category C Members, CHF243 per hour for Category B Members, and CHF324 per hour for Category A Members. LDCs pay CHF40 per hour. These fees are based on a [time budget](#) adopted by the Management Board, which indicates the maximum number of hours that the Member or LDC may expect the ACWL to charge for each procedural step in a typical WTO dispute settlement proceeding. Developing countries that are not ACWL Members may also use the ACWL's services. For these countries, the hourly rate varies between CHF405 and CHF567, depending on their share of world trade and per capita income.
- The ACWL may also accept contributions from other governmental and non-governmental sources for specific purposes that are not related to dispute settlement cases, such as training and the traineeship programme. In 2002, the ACWL received funding from the World Bank to finance the ACWL six-month Training Programme on WTO Dispute Settlement procedures.

WHEN WAS THE A\$3 MILLION ADVANCED TO THE ACWL?

The former Minister for Foreign Affairs, the Hon Stephen Smith, and the former Minister for Trade, the Hon Simon Crean, announced Australia's voluntary contribution to ACWL, along with other initiatives, at the APEC Ministerial Meeting in Singapore on 12 November 2009. ACWL received the funds from Australia on 17 June 2010.

WHY WAS THE PAYMENT MADE WITHOUT CONSULTATION WITH JSCOT?

Australia's contribution to the ACWL is consistent with and complements other Aid for Trade efforts that are funded across a number of programs. The decision to support the ACWL was based on development considerations, the ACWL's financial needs and the merits of supporting the organisation's important work. The contribution to ACWL was in accordance with Australian Government policies on development assistance, and is an effective use of funds. This voluntary contribution to the ACWL did not involve entering into a treaty.

Following the announcement of Australia's intention to provide ACWL with funding assistance, the Executive Director of ACWL, Mr Frieder Roessler, invited Australia to become a member of the ACWL. This invitation was communicated through former Trade Minister Crean in the margins of the Seventh WTO Ministerial Conference in Geneva (1 December 2009). After consultation and consideration of the additional benefits membership would provide, Ministers Smith and Crean agreed in February 2010 that Australia should become a member of ACWL, subject to normal treaty making processes.