FEATURE

NEW DEVELOPMENTS IN INTERNATIONAL ADVOCACY

AMCIUS CURIAE AND THE WORLD TRADE ORGANISATION

by Megan Davis

In 2002 the Interior Alliance of British Columbia successfully submitted an amicus curiae brief to the World Trade Organisation ('WTO') panel established to resolve the US-Canada Softwood Lumber dispute. The decision of the panel to accept the brief is not a novel juridical development within the WTO dispute settlement system. However, for Indigenous peoples the decision is significant.

Indigenous people are increasingly frustrated by the non-binding determinations of international human rights forums and the conduct of states like Australia, who more often than not castigate UN human rights treaty committees for any adverse comments rather than deal substantively with the criticisms.[1] Indigenous peoples are now looking to more powerful forums with innovative ideas to address the lack of accommodation of substantive Indigenous rights within their own domestic legal frameworks.

This article reports on the case of the Interior Alliance who submitted an amicus curiae brief to the WTO panel set up to resolve a dispute between Canada and the US. They argued that the non-recognition of Indigenous rights to land in British Columbia has conferred a benefit to Canada's domestic timber industry, constituting a subsidy contravening the WTO agreement on Subsidies and Countervailing Measures ('SCM').[2]

This paper addresses the development of amicus curiae at the WTO, its significance in terms of access to the WTO by non-members, in particular Indigenous peoples, and the potential role that the WTO agreements may have for Indigenous peoples as an alternative to human rights forums.

WHAT IS AN AMICUS CURIAE SUBMISSION ?

In Latin 'amicus curiae' means 'friend of the court'. It is a submission made by a person or entity that has a significant interest in a particular issue or outcome of a case, yet has no standing or 'no direct legal interest in the dispute'.[3] Though given by someone who is actually not a party to the proceedings, amicus curiae submissions are considered to 'offer new factual details or new legal argument' to the court.[4]

In the relatively short history of WTO dispute settlement there is a growing corpus of amicus curiae submissions at the Panel and Appellate Body level. However, the advent of amicus curiae remains embroiled in controversy because the law is not clear as to the formal acceptance of submissions from non-member entities, and because many member states jealously guard the WTO from the influence of non-state member interests.

DISPUTE SETTLEMENT UNDERSTANDING: THE DEVELOPMENT OF AMICUS CURIAE

Perhaps the most significant development in terms of amicus curiae at the panel level of dispute settlement was the decision of the Appellate Body to overturn a Panel ruling in the *US Shrimp* case.[5] The Panel ruling had argued that the submission and acceptance of amicus curiae could not be textually supported by Article 13 of the Understanding on Rules and Procedure Governing the Settlement of Disputes ('DSU').[6] Article 13 states that 'each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate'.[7] The Panel argued that they did not specifically seek out the information from the environmental NGOs and refused the amicus curiae on this basis.

In contrast, the Appellate Body interpreted the right to seek information as not necessarily being a prohibition on such reception, and held that the panel could exercise discretion. The Appellate Body stated that the right to seek information is:

> Not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.[8]

In a later case, the *Steel Bar* case,[9] the Appellate Body determined whether it was within its own powers to accept amicus curiae. The Appellate Body held, in effect, that Article 17.9 of the DSU provided it a capacity to accept amicus curiae similar to that of the Panels.

BACKGROUND TO THE CANADIAN US SOFTWOOD LUMBER DISPUTE[10]

The Canadian US Softwood Lumber dispute is a lengthy ongoing trade dispute between the US and Canada. The

fundamental trade law issues of this dispute are complex, and are further complicated by the very different forestry ownership and management cultures in the US and Canada. For example, in Canada over 90 percent of timber is publicly owned compared to just over 40 percent in the US.[11]

In brief, the softwood lumber companies in the US argued that stumpage fees (the fee that is given per standing timber) in Canada were below the market value and constituted a countervailable subsidy to Canadian softwood lumber companies. Moreover, the US argued that the price at which Canada sold to the US constituted illegal dumping because of the artificially low price of the timber. The US Department of Commerce eventually placed countervailing duties upon the Canadian timber, to counter the unfair subsidies. Canada alleged that the imposition of such a duty constituted a breach of the SCM. A WTO panel was set up to resolve the dispute.

INTERIOR ALLIANCE AMICUS CURIAE: ABORIGINAL LAND RIGHTS

The main argument of the Interior Alliance was that British Columbia's conduct, in failing to recognise Aboriginal title, amounted to a subsidy under international trade law. The argument from the Interior Alliance was that:

> Canada is arguing that its competitive advantage comes from the fact that Canada has more trees. When in reality it comes from the fact that it gives the forests over to the companies who pay only a small extraction fee and no-one pays a dime to the Aboriginal co-owners of the forests or even to the people of Canada.[12]

Grand Chief Stan Beardy of Nishnawbe Aski Nation in Ontario who supported the brief stated that:

> In our area, half of our 49 First Nations have experienced significant depletion of their natural resources without receiving any compensation in recognition of our proprietary interests in the resources, as intended by the Treaty ... if the proprietary Treaty interests of our First Nations were to be properly implemented, it would have a significant impact on the market price for lumber taken in Ontario and that it would be more of an accurate reflection of the true value of the wood harvested from our territory.[13]

The WTO panel accepted the submission from the Interior Alliance. The panel while commenting on the submissions declined to comment upon the substantive issues raised in the submission. The report simply stated that:

> As a preliminary matter we noted that in the course of these proceedings we decided to accept for consideration one unsolicited amicus curiae brief from a Canadian NGO; the Interior Alliance.[14]

The employment of trade agreements by Indigenous peoples signals an important development in international law for Indigenous peoples. This may be a new and effective way of framing arguments in seeking the recognition and protection of Indigenous rights by linking trade with human rights, and in particular seeking adequate recompense for the exploitation of natural resources on Indigenous land that is providing an advantage to particular states. The WTO and its agreements are unexplored territory for indigenous peoples. However, there are many unresolved questions in relation to international trade law and trade forums.

JUDICIAL ACTIVISM: CONTROVERSY OVER AMICUS CURIAE

The position to accept amicus curiae remains controversial among member states and indeed regarded sceptically by civil society. For example, Charles Gastle argues that no meaningful participation will arise until NGOs are given standing at the WTO:

> [O]ne should recognise the relative futility of filing an amicus curiae brief. One may question whether they are meaningful, or simply a device for the WTO and its panels to pay lip service to NGOs clamouring for access.[15]

Indigenous Australia is no stranger to the controversy of judicial activism given the hysteria over *Mabo*[16] and *Wik*.[17] Similarly, at the WTO some member states and 'critics accuse the WTO's appellate tribunal of improper judicial activism, much as conservative American jurists lambasted the US Supreme Court in the 1960s and 1970s.'[18]

Member states typically hold a conservative stance with regard to the participation and access of civil society to internal deliberations of the WTO. One of the obvious reasons for this is the compulsory and binding nature of dispute resolution in the WTO. As Esserman and Howse point out:

> Nowhere else has international conflict resolution by judges emerged more forcefully or developed more rapidly. As in a domestic court – but unlike in most international bodies – WTO dispute settlement is both compulsory and binding. Member states have no choice but to submit to it and must accept the consequences of the WTOs ruling.[19]

SIGNIFICANCE OF ACCESS TO THE WTO

The WTO has a seemingly implacable image problem underpinned by the argument that 'the rights and interests of citizens and civil society are inadequately reflected in WTO decisions'.[20] Criticism of the WTO and what it represents has often resulted in violent protest, as witnessed at the Seattle Ministerial forum, the Trade Ministers forum in Sydney last year, and other demonstrations.

The 146 Member States of the WTO strive to convince a sceptical civil society that trade liberalisation is a panacea to poverty and the disproportionate allocation of wealth between first world and third world nations. Meanwhile, the WTO has become synonymous with the most negative aspects of free trade, such as the seemingly unregulated power of multi-national corporations (MNCs) and the exploitation of third world countries.[21]

The scenes of protest from Seattle have come to symbolise the growing cynicism and mistrust of the motives and methods of the WTO in its advocacy of global free trade. While the legitimacy and actual impact of the protests upon the trade liberalisation process is a source of diverse comment, the importance of the increasingly mobile global opposition cannot be discounted. This is reflected in ongoing discussions over amicus curiae and access by civil society. Interestingly on 10 February 2003, the WTO dispute settlement body received a communication from the US regarding the transparency of dispute settlement in the WTO and proposed guidelines for amicus curiae submissions.[22]

While it may seem insignificant, given that there was no comment made on the submission by the Interior Alliance, the acceptance of the amicus curiae submission is a positive albeit small development in terms of WTO transparency and access. It is an even more interesting development for Indigenous peoples.

CONCLUSION: RECENT DEVELOPMENTS

While many lament that 'the story of amicus curiae briefs is a perfect illustration of the limits that WTO institutions face:. contrary to the popular belief, the WTO remains an essentially Members-driven organisation',[23] there are some important considerations arising from this case for Indigenous people.

With the proliferation of international tribunals and in particular the success of the WTO dispute settlement system in the enforcement of decisions, some Indigenous groups have begun to turn away from traditional forums such as the United Nations human rights system to economic forums like the WTO:

> The fact that aboriginal groups are looking to the World Trade Organisation, underscores the failure of the International Labour Organisation or the United Nations collection of institutions to effectively deal with aboriginal issues.[24]

This turning away from traditional institutions is evident in the domestic arena where in recent times the Aboriginal and Torres Strait Islander Commission has commenced discussions in relation to trade issues, such as establishing an Indigenous regional economic forum and establishing firmer trade links with Indonesia.[25] The Business Council of Australia reports that there are many Indigenous people engaged in international trade in some form, and therefore 'aboriginal groups are particularly vulnerable to trade issues as they are engaged in traditional and primary industries that are often targeted by trade prohibitions or trade actions'.[26]

Having highlighted the frustration with the human rights system, one must not discount the important role the system does play in highlighting and indeed attempting to deal with the complex issues of Indigenous dispossession globally. The United Nations, essentially a states body, has been instrumental in providing a forum for Indigenous voices within its structures. Recent years have seen the establishment of initiatives such as the Permanent Forum[27] and a Special Rapporteur on Indigenous issues[28]. However, the most important standard setting exercise, the Draft Declaration,[29] has been subject to protracted and controversial debate. It has been deliberately hamstrung, with only three articles being passed in seven years. It remains to be seen what substantive contribution the Permanent Forum can make given its internalised, rigid functionality within the member states body of the UN.

Trade law is a complex arena embodying complex agreements and issues that are often inflexible. It is not an obvious and readily suited forum for the advocacy of Indigenous rights outside that of a formal trade dispute. We must acknowledge the reality that participation of the world's 300 million Indigenous people in international trade is only the exception not the rule. Nevertheless, as Indigenous Australia increases its participation in international trade the WTO dispute resolution mechanics will increase in relevance. Indigenous people must begin to carefully explore the rights afforded to them under the complex trade agreements, and investigate accessibility to the WTO. As Gabrielle Marceau concludes, 'the limited domain of the WTO does not mean that the WTO Agreement exists in an hermetically sealed system, closed off from general international law and human rights law.'[30] For indigenous people that remains to be seen.

Megan Davis is an Aboriginal lawyer from Eagleby in South East Queensland (Wakka Wakka). She is a Principal Researcher at the Jumbunna Indigenous House of Learning UTS, investigating the impact of International Trade Law agreements and the WTO upon Indigenous peoples' rights. She is based at the Gilbert + Tobin Centre of Public Law UNSW as the Director of the Bill of Rights Project and lecturer in Public Law. She has held an Indigenous Fellowship at the United Nations High Commissioner for Human Rights in Geneva, and has just completed a Master of Laws (International Law) from the Australian National University.

1 For example the Australian Federal Government reaction to the United Nations Committee on Elimination of Racial Discrimination report in 2000, later guised as benign recommendations for overhaul of UN Treaty Committees; See Committee's Concluding Observations, UN Doc:CERD/C/304/Add 101, 19 April 2000; ABC, 'Government Calls for UN Overhaul', 7.30 Report, 29 August 2000, <http://www.abc.net.au/7.30/s168960.htm>; Minister for Foreign Affairs, Australian Initiative to Improve the Effectiveness of the UN Treaty Committees, Press Release (5 April 2001), <http://www.dfat.gov.au/media/releases/foreign/2001/fa043a_01.html>.

2 Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on Trade in Goods, Agreement on Subsidies and Countervailing Measures.

3 Georg C Umbricht, 'An amicus curiae brief on amicus curiae briefs at the WTO' (2001) Journal of International Economic Law 778.

4 ibid.

5 For survey of facts of case see: Joel P Trachtman, 'Decisions of the Appellate Body of the World Trade Organization Current Survey United States–Import Prohibition of Certain Shrimp and Shrimp Products' (1999) European Journal of International Law.

6 WTO Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes.

8 Trachtman, above n 5, para 108-10.

9 'United States Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom', Report of the Panel, 23 December 1999, WT/DS138/R; Report of the Appellate Body (AB-2000-1), 10 May 2000 WT/DSD138/AB/R.

10 The dispute has a lengthy and complex history. The brief summary of this dispute is a superficial overview. For an in depth historical overview see: SM Osman Rahman and Stephen Devadoss, 'Economics of the US-Canada Softwood Lumber Dispute: A Historical Perspective', (2002) v2 n1 The Estey Centre Journal of International Law and Trade Policy.

11 This statistic varies though it is accepted that Canadian forestry is predominantly state owned in contrast to the US: Ibid 1.

12 Chief Arthur Manuel, Interior Alliance Native Leaders Join Together to Pursue Softwood, Press release (June 10 2002).

13 ibid.

14 'United States Preliminary Determinations with Respect to Certain Softwood Lumber from Canada', Report of the Panel, 27 September 2002, 7.2, WT/DS236/R.

15 Charles M Gastle, 'Shadows of a Talking Circle: Aboriginal Advocacy Before International Institutions and Tribunals' (2002) The Estey Centre Journal of International Law and Trade Policy 38.

16 Mabo v Queensland (No 2) (1992) 107 ALR 1.

17 The Wik Peoples v The State of Queensland & Ors (1996) 187 CLR 1.

18 Susan Esserman and Robert Howse, 'The WTO in Trial', (2003) Jan-Feb, Foreign Affairs.

19 ibid.

20 Gabrielle Marceau and Matthew Stilwell, 'Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies', (2001) Journal of International Economic Law 155-187, 156.

21 For example see: Peter Costello, 'Challenges and Benefits of Globalisation' (Speech at The Sydney Institute, Sydney, 25 July 2001), <http://www.treasurer.gov.au/tsr/content/speeches/2001/003.asp>.

22 'Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency: Communication from the United States', 11 February 2003, TN/DS/W/46.

23 Petros C. Mavroidis, 'Amicus Curiae Briefs Before The WTO: Much Ado About Nothing' (Working Paper, Harvard Jean Monnet), <http://www.jeanmonnet-program.org/papers/01/010201.html>.

24 Charles M Gastle, Shadows of a Talking Circle: Aboriginal Advocacy Before International Institutions and Tribunals (2002) 5.

25 See for example: 'Indonesian-Aboriginal business links' ABC Radio – AM Program, 2002, <http://www.abc.net.au/am/s688964.htm>; 'Jakarta keen on trade links with Aborigines', ABC Radio - Asia Pacific Program, 2002, <http://www.abc.net.au/ra/asiapac/programs/s688737.htm>.

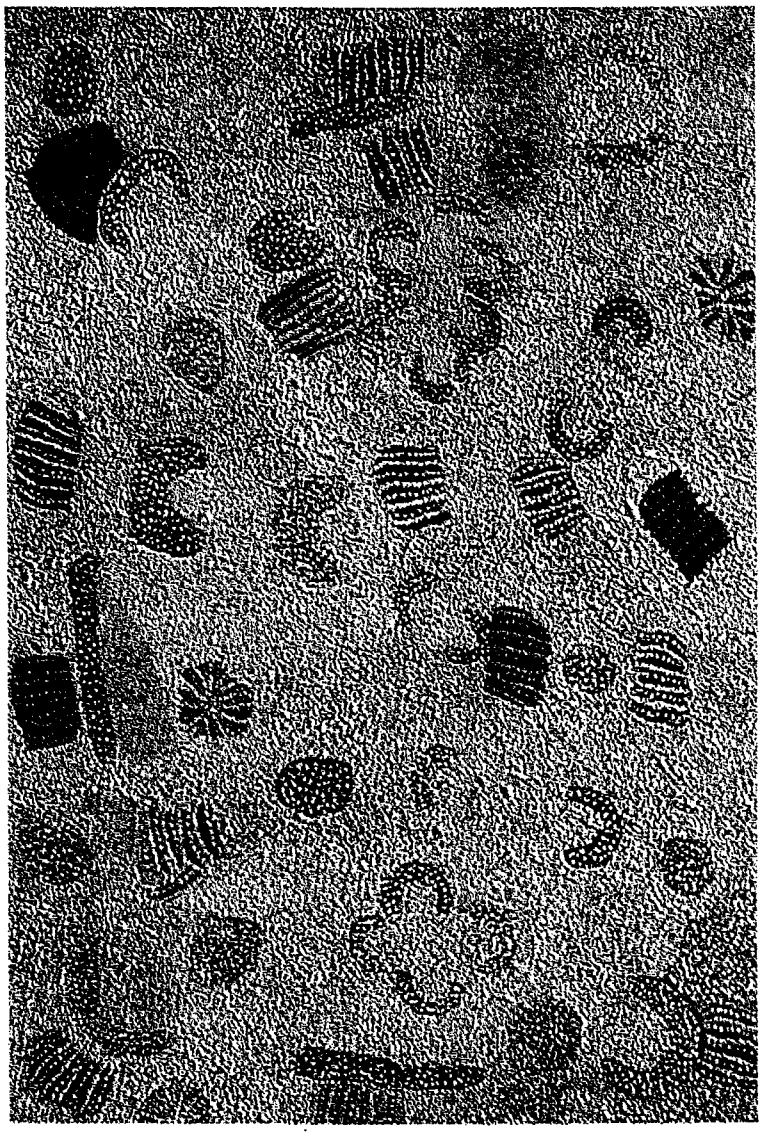
26 'Indigenous Communities and Australian Business', (Report, Business Council of Australia), <http://www.bca.com.au/content.asp?newsID=67643>.

27 UN E/RES/2000/22.

28 UN CHR RES 2001/57.

29 E/CN.4/Sub.2/1994/2/Add.1 (1994).

30 Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753-814.



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EDITORIAL

A FRESH DIRECTION for the **ILB**

The Indigenous Law Bulletin ('ILB') is moving in a fresh direction. We aim to be a means for sharing knowledge between those interested in Indigenous issues among the legal community, rights advocates, service providers, social policy advocates, and indigenous communities. This means articles written by our readers for our readers, which share innovative ideas, expertise and good practice across Australia.

The ILB will provide more updates on legal developments that affect Indigenous people. We will increase our focus on criminal law, family law, and discrimination law, however, all legal issues that affect Indigenous people will be covered. We will focus on being a knowledge resource for providers of legal services to Indigenous people ('PLS'). This will include providing comment on challenges faced by PLSs, profiling innovative service delivery initiatives from around Australia, producing a special issue on emerging issues faced by PLSs later this year, and holding a conference on the same topic at the end of the year. We will focus on providing a critique of social policy developments. For example, our forthcoming issues will focus on new forms of community based crime and substance abuse prevention measures, such as community justice groups, night patrols and circle sentencing. We will focus on being a knowledge resource for Indigenous rights advocates at the national and community level. For example, our upcoming issues will have a forum on how to use the United Nations human rights treaty system to lobby Australian authorities. We will focus on being a knowledge resource for native title participants. For example, our upcoming issues will contain an in-depth study of the Burrup native title negotiation with comments from the Land Council, the National Native Title Tribunal, and representatives from the claimant communities. We will focus on updating our readers on the latest research relevant to Indigenous rights and policy. We will focus on promoting an Indigenous voice on all issues, and encourage Indigenous authors to publish. For example, our upcoming issues will contain comment from local communities on how the native title process has affected them, and comment from Indigenous people who provide services in local communities on how they think the law can be improved. We hope to make the ILB a valuable, practical resource for our readers. If you have any suggestions on how we can improve our content please email or call us. We would really love to hear from you.

If you would like to write for us on any of these topics then please contact us. We would especially like to hear from you if are providing legal services or other services to Indigenous communities, or if you are involved in