THE NINETEENTH INTERNATIONAL TRADE LAW CONFERENCE

by

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The International Trade Law Conference held in Canberra on 6 and 7 November 1992 was the nineteenth in the series of such annual Conferences (or Seminars) conducted under the aegis of the Commonwealth Attorney-General's Department. The nature of these Conferences and the purposes they achieve have been well-stated as follows:

> "Participants, composed of representatives from both Commonwealth and State governments, business circles, educational institutions, professional and trade associations, the Australian judiciary and the Australian legal profession, have been given the unusual opportunity of acquiring first-hand, up-to-date knowledge of the progress of international trade law, and of the various institutions contributing to its development and improvement, such as the United Nations Commission on International Trade Law (UNCITRAL), the Rome International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law and the International Chamber of Commerce (ICC)."[1]

Sustained by the expertise and resources of the Attorney-General's Department, the Trade Law Conference has clearly established itself as the premier forum in Australia for the discussion of international trade law issues.

For the first time, the International Law Section (ILS) of the Law Council of Australia in 1992 officially co-hosted the Conference. This successful arrangement broadened the client base of the Conference and allowed for additional input into the program from business circles and legal practice. The 1992 Conference placed an increased emphasis on the practical aspects of international trade law, having been "particularly designed with the needs of the business community and their legal advisers in mind."[2]

The opening address to the Conference by Mr Michael Duffy, then Commonwealth Attorney-General, provided the occasion for a review of Australian attitudes and action in areas of international trade. The address included the following points of interest:

1. On the GATT Uruguay Round, it was reiterated that Australia still regards multilateral rules as the only universally acceptable method for resolving trade distortions on a global basis; but this did not preclude Australia from vitally important bilateral and regional initiatives in furtherance of trade liberalisation and co-operation.

2. In regard to relationships between Australia and its neighbours in the Asia-Pacific region, real efforts are now being made to improve regional linkages and co-operation: noteworthy are the activities of the International Legal Services Advisory Committee (ILSAC) in promoting Australia's legal services involvement in the region, negotiating on market access and mutual recognition of legal qualifications, and developing programs of legal assistance.

3. The Pacific Economic Co-operation Council (PECC), at the suggestion of the Australian Pacific Economic Co-operation Committee (AUSPECC) is working on an initiative to achieve more widespread adoption in the Asia-Pacific region of major international trade and business related instruments.

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1 JG Starke 'International Legal Notes: Bicentennial International Trade Law Conference, Canberra, 4-6 November 1988' (1989) 63 *ALJ* 129.

2 Circular Newsletter (from CC Creswell, Attorney-General's Department, Canberra) dated 18 September 1992, headed '19th International Trade Law Conference'.

4. The Law Council of Australia has recently released its Policy Statement on International Legal Practice which argues for a uniform regulative framework allowing foreign lawyers to practise foreign law in Australia; the Commonwealth commends the policy and encourages the States and Territories to implement it.

5. Australia is strengthening its involvement in the international legal system for protection and enforcement of intellectual property rights by joining, with effect from 1 October 1992, the 1961 Rome Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organisations.

6. A new stage of consolidation has been reached in the unification and harmonisation of laws affecting international trade and business: law formulating agencies (such as UNCITRAL, the Hague Conference and UNIDROIT) have developed through international consensus a body of conventions and model laws, and it is time to examine these more closely, with a view to more widespread adoption of them.

Session 1 of the Conference was devoted to global trade policy and the international trading system - "The Changing Landscape of International Trade: The GATT Uruguay Round and Beyond".

Mr Peter Field (Deputy Secretary, Department of Foreign Affairs and Trade) gave an overview of the international trade scene and argued persuasively that for Australia, as a small middle power, the first best interest is to promote an open multilateral trading system. Nonetheless, Australia has all its options open, and a long term stalemate in the Uruguay Round could well mean that Australia has to examine preferential trade arrangements. In any event Australia continues to address bilateral impediments to trade, its efforts being reinforced by the development of the National Trade Strategy, and trade promotion initiatives through AUSTRADE. Mr Field also noted the range of trade facilitation issues which Australia was actively pursuing, especially with countries of the Asia-Pacific: such issues include Investment Protection Agreements (IPAs), harmonisation of standards, alignment of customs procedures, copyright agreements and mutual recognition of professional qualifications.

In his commentary, Professor Richard Snape (Department of Economics, Monash University) examined regional trade agreements, particularly the North America Free Trade Agreement (NAFTA), and their consistency with a liberalising multilateral trading system. If Australia were to contemplate entering a bilateral or plurilateral trade agreement, the most feasible option at this point would be one with the NAFTA countries or with the US alone. But the draft NAFTA is not a truly free and open trading club, special conditions would no doubt be attached for new members, and joining it could have adverse consequences for Australia's vital trading relations with East and South-East Asia.

"Electronic Data Interchange (EDI) and International Trade Law" was the subject of Session 2 of the Conference.

A "Future Directions" paper delivered by Ms Janice Gessin (EDI Council of Australia) showed that EDI will facilitate international trade operations by opening up opportunities for quick response and access to information, for improved customer service and cost efficiencies, and reduction of paperwork. Ms Gessin referred to the work currently being undertaken (in fora such as the UN/ECE, the ICC and UNCITRAL) to eliminate technical and legal barriers to using EDI internationally. At the technical level, results are already being achieved, with the UN project EDIFACT (EDI For Administration, Commerce and Transport) continuing successfully to address the issue of common message formats and standards.

The next speaker, Dr Ian Lin (Lyn Maid Corporation), drawing on his experience in the Australian clothing industry, presented an "Exporter Case Study" in which he demonstrated how new communications/EDI technology will now enable small business to readily access world markets at low cost. Using a network of commercial services linked by EDI, small exporters can engage in micro-niche marketing, offering large variety and small quantities of product:

traditional importers/wholesalers can be bypassed, and credit terms and methods of payment equal to that of a local supplier can be provided. In particular, two services using EDI - customs clearance and international factoring - overcome major hurdles to small Australian companies developing export markets.

During the ensuing panel discussion, Mr Lawrence Chan (Australian Customs Service) alerted the Conference to the various "electronic initiatives" of Australian Customs: (a) the EXIT system for processing export transactions; (b) electronic lodgment of import declarations; (c) EDIFICE (EDI For Input of Customs Entries); (d) EFT for payment of customs duties; and (e) cargo automation schemes. These initiatives place Australian Customs at the forefront of the world movement towards EDI procedures for handling of exports and imports.

Session 3 dealt with international commercial dispute resolution, presenting a workshop and a panel discussion, both of which concentrated on arbitration.

Taking as a point of reference the scenario of an Australia/Taiwan transaction, Professor Michael Pryles (Minter Ellison Morris Fletcher of Melbourne) conducted a workshop on the drafting of international commercial dispute resolution clauses. The discussion here was mainly concerned with achieving an appropriate and effective arbitration clause: in this regard Professor Pryles identified relevant factors to be considered under the headings of Form and Terminology of the Arbitration Agreement, Scope of the Obligation, and Place and Nature of the Arbitration.[3] The workshop format was a practical means of highlighting the pitfalls of an ill-drafted arbitration clause, and the importance of having regard to the requirements of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the UNCITRAL Model Law on International Commercial Arbitration.

The panel discussion, on maritime arbitration, elicited industry viewpoints and other informative comment. The recent formulation of the Sydney Maritime Arbitration Rules and Terms (SMART)[4] further enhances Australia's suitability as a venue for international commercial arbitration. Mr John Levingston (Convenor, SMART) explained that SMART gives arbitrators wide powers for the effective conduct of proceedings and the making of awards; it incorporates such progressive features as a procedure for arbitration "on documents", expedited arbitration on oral hearing, and preliminary meetings with arbitrators. According to Mr Frank Beaufort (Australian Peak Shippers Association) overseas shipping lines now recognise that Australia has a sophisticated commercial arbitration system capable of handling large and complex international disputes. Despite maritime arbitration sometimes having its problems, the view of underwriters, offered by Mr Ralph Allan (Mercantile Mutual Insurance), was that arbitration was still preferable to litigation in regard to costs, speed and effectiveness of dispute resolution.

Sessions 4 and 5 titled "Doing Business in the Asia-Pacific Region" provided a timely examination of legal, commercial and regulatory issues entailed in doing business in four countries of the region (Indonesia, Malaysia, Thailand and Vietnam).

Introducing this segment of the Conference, Mr Philip Sacks (Sacks Australian International, Sydney) in a short talk on "Major Issues for Exporters" reviewed the various legal mechanisms available for overseas marketing (distributorship, agency, licensing, subsidiary and joint venture),[5] and concluded that the joint venture was generally the preferred option in the Asia-Pacific.

A comparative examination, from a broad commercial perspective, of the trade and investment opportunities in Vietnam and Thailand was made by Mr Paul Brown (Managing Director, Action Asia). Though the Vietnamese market has its complexities and suffers from inadequate

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3 Professor Pryles has examined such matters in 'Drafting Arbitration Agreements', a paper presented at the *Third Symposium on Commercial Arbitration* conducted by the Centre for Corporate and Business Law of the University of Adelaide, Adelaide 17 October 1992.

4 For the text of SMART, see (1991) *Australian Dispute Resolution Journal* 245.

5 Refer in this regard to P Sacks 'Structuring Exports: Overview' by P Sacks and J Malbon *Australian Export Manual* Longman Professional Melbourne 1992 at 1.

infrastructure, Australia is, according to Mr Brown, well placed to establish linkages which will yield valuable commercial opportunities. Thailand is now, after massive industrial development, a major manufacturer and exporter in the Asia-Pacific, and as such presents a relatively sophisticated market for Australia.

Detailed country analyses of the legislative and administrative framework for foreign business activity were presented on Indonesia (by Mr Peter Church, ASEAN Focus), Malaysia (by Mr Kumar Menon, Department of Business Law, University of Melbourne), Thailand (by Mr John Hancock, Baker & McKenzie, Bangkok) and Vietnam (by Mr Brian Weir, Freehill Hollingdale and Page, Sydney). Drawing on their own practical experiences of the commercial environments in the countries concerned, the speakers enlivened their presentations with insights into how legal regimes (often incomplete or drafted in broad terms) have to be understood in the context of local cultural factors and bureaucratic processes.

Some broad observations emerge as applicable to doing business in the Asia-Pacific as a whole:

1. The Asia-Pacific, especially South-East Asia, is a rapid growth area,[6] the countries of which have opted for export-oriented industrialisation as the means of economic development.
2. With relatively open and liberal policies on trade and investment, the region offers a range of increasing commercial opportunities for Australian exporters of goods and services.
3. While the legal/regulatory climate in the region is generally receptive to foreign business, national policies and sensitivities need to be taken into account: advice in this regard should be obtained from practitioners expert in the local law and "lore".
4. As the countries of the region are at varying levels of economic development, each country has to be approached with awareness of its own particular business scene and the commercial opportunities available: goods and services need to be evaluated carefully for their suitability for the individual market.
5. There is a need for patience and persistence in developing commercial relationships and in dealing with host governments; entering a market through ventures with a local partner will often minimise cultural barriers as well as difficulties in obtaining government approvals.

As is customary in the International Trade Law Conferences, the concluding Session was based around the Review of Developments in International Trade Law Paper submitted by the Commonwealth Attorney-General's Department. This paper provides an invaluable summary of work currently being undertaken by international law formulating agencies, and analyses that work from an Australian perspective; it also details Australian initiatives (whether on the bilateral, regional or multilateral level) in furtherance of the harmonisation and unification of the law of international trade. Usually (as occurred on this occasion) the Review of Developments Paper is made available at the start of the Conference, to enable participants to discuss the issues it raises with relevant officers of the Department.

Instead of one presenter speaking to what is always a lengthy paper, the Department has various of its officers deliver short presentations on selected items of interest. The 1992 Conference dealt with the following items:

1. the work of the International Maritime Organisation (IMO) towards the text of a Hazardous and Noxious Substances Convention, to provide a liability and compensation regime for damage caused by spills at sea (report from Dr Rosalie Balkin);
2. proposed cross-recognition by Australia and New Zealand of companies operating across the Tasman, pursuant to the July 1988 Memorandum of Understanding on Harmonisation of Business Laws between the Australian and New Zealand Governments (report from Mr Peter Barrett);

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6 An analysis of this region's economic growth and prospects for Australian business has been recently made in *Australia's Business Challenge: South-East Asia in the 1990s*, East Asia Analytical Unit of Department of Foreign Affairs and Trade, and Austrade, AGPS Canberra 1992.

3. amendments to the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) in regard to the limits of liability in international carriage of goods by air (report from Mr Bill Campbell);

4. the Pacific Economic Co-operation Council (PECC) initiative for regional harmonisation of international trade and related law (report from Mr Keith Wilson).

The Nineteenth International Trade Law Conference matched the high standards of content and presentation set by its predecessors. It is the practice for the proceedings of each Conference to be edited and published by the Attorney-General's Department. Despite the dynamic and changing nature of international trade law, the materials of past Conferences still yield much valuable information and analysis: those of the Nineteenth Conference will be similarly durable.