AUSTRALIAN MANUFACTURING WORKERS' UNION

Supplementary Submission to the Productivity Commission Review of Bilateral and Regional Trade Agreements

September 2010

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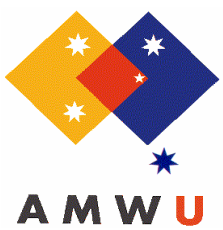

Introduction

This supplementary submission[1] is in response to the Productivity Commission Draft Research Report into Bilateral and Regional Trade Agreements (Draft Report). This response will address a number of areas mentioned in the Report that are of concern to the AMWU.

Recommendation

On the basis of many of the findings in the report, for example:

- that there is 'little evidence from business to indicate that preferential bilateral and regional trade agreements (BRTAs) have provided substantial commercial benefits,'[2]
- that the 'likely increase in national income flowing from BRTAs is likely to be modest,'[3]
- that 'evidence [from existing agreements] suggests that the anticipated benefits of their liberalising provisions have not been fully realised,'[4] and
- 'that the economic value of Australia's preferential BRTAs has been oversold'[5]

the AMWU submits that the primary recommendation that the Commission should be making is that Australia should not enter into any further BRTAs and should not continue to negotiate those that are currently being negotiated.

However, if the Government is to continue to pursue BRTAs the Commission should make a number of recommendations and observations aimed at improving the content of agreements and the current processes and methods surrounding their negotiation. Those of concern to the AMWU follow below.

Labour standards

The AMWU notes the Commission's consideration of labour standards and in particular the cautious approach that is urged as to whether they should be included in agreements. The AMWU accepts that there may 'be more direct and appropriate means of alleviating poverty and lift living standards in developing countries than through Australia seeking to include

[1] The AMWU's initial submission is available here: http://www.pc.gov.au/__data/assets/pdf_file/0011/95546/sub021.pdf
[2] P XIV
[3] ibid
[4] P XXII
[5] ibid

enforceable provisions on labour standards in BRTAs,'[6] (which appears to be the main reason why the Commission is recommending a cautious approach). The AMWU supports direct and appropriate action whenever and wherever it is determined to be of benefit, however, this does not mean that labour standards should be left out of any BRTA; their inclusion would at the very least add weight and support to any other action that may be taken and would impress upon those countries that Australia may be negotiating with the importance that our nation attaches to labour standards. The absence of labour standards from BRTAs may also be interpreted as a tacit endorsement of labour practises that fall short of the minimum ILO standards and aid in their undermining.

The Commission's observations that linking minimum labour standards to trade agreements 'are sometimes seen as raising national sovereignty issues by developing countries,'[7] is spurious at best, as is the empty assertion that 'attempts to enforce compliance with labour standards through trade agreements have limited prospects of affecting the wellbeing of the workforce in developing countries, not least because the vast bulk of workers operate in the informal and domestic sectors of developing economies.'[8]

The AMWU continues to press for the inclusion of labour standards in BRTAs together with mechanisms allowing for the remedy of any violation, no credible reason for their omission has been identified.

Investor-State Dispute Settlement

The AMWU notes that while the Commission recognises that a dispute settlement mechanism has a role to perform in facilitating investment between countries, its assessment is that 'such dispute settlement processes should not afford foreign investors in Australia with access to litigation options not normally afforded to local investors.'[9] The AMWU wholly supports this contention, and further supports and endorses Aisbett and Bonnitcha's conclusion quoted in the Draft Report[10] that, 'Given that there are few benefits and potentially significant costs to offering post establishment protection to foreign investment, [it is recommended] that these provisions be omitted in future Australian FTAs.' This recommendation is in accord with the AMWU's position; their inclusion would further the interests of corporations over the interests of the nation and its democratic institutions. The

[6] P13.22
[7] P13.22
[8] ibid
[9] P13.20
[10] ibid

Commission's final report should more strongly align to the Commission's own findings and contain a recommendation that dispute settlement mechanisms should not be included in any future agreement.

Intellectual Property Considerations

The AMWU endorses the cautionary approach the Commission recommends to the Government[11] in relation to the protection and enforcement of intellectual property rights that may be contained in any agreements. The rejection of an 'automatic template' and the assessment on a case-by-case basis as to what IP provisions should be included in an agreement, or indeed whether alternative avenues should be explored in the pursuit of IP objectives, is a pragmatic and sensible position to adopt.

Restrictions on trade in audiovisual services and cultural matters

The Commission recommends that the Government take a cautious approach in relation to including exclusions in agreements and that alternatives should also be considered as part of a transparent benefit-cost analysis. The Commission is also seeking further comments 'in relation to the appropriate treatment of audiovisual services, cultural matters and like national interest issues in future BRTAs.' The AMWU presses for the exclusion of cultural matters from agreements. This position is in accord with the views of participants that the Commission mentioned in the Report and for the very good reasons that are given for their exclusion. For example, the Australian Fair Trade and Investment Network argued that cultural matters are one of the issues, like health and medicine, where 'governments need to retain the right to legislate in the public interest.'[12] When considering the Music Council of Australia's submission in relation to exclusions of cultural matters in agreements, the Commission itself recognised that 'restrictive trade measures are not necessarily the best means for supporting the audiovisual services sector or pursuing cultural objectives, and that 'it is likely that mechanisms such as transparent and dedicated financial support could target such cultural objectives more cost-effectively in some cases.' If this attitude is adopted there is no need for the inclusion of a clause in a BRTA similar to that in the AANZFTA. Australia should be unapologetic in this regard.

Future FTAs and the Negative List Approach

The AMWU is concerned that the Commission generally supports use of a negative list

[11] 13.14 – 13.17
[12] 13.23

approach. The major concern that the AMWU has with the negative list approach is the uncertainty that necessarily accompanies this approach. For instance, any new industries or sectors would automatically be encompassed by this approach without any analysis or consideration as to their appropriateness and regardless of the nature or suitability of the actual industry or sector. The AMWU appreciates that many of the FTAs that are considered to be 'more liberalising,' use the negative list approach,[13] and are considered to be generally more transparent, but even the Commission's own discussion of the negative list approach admits that this may not always be the case.[14] As the ACTU argued, 'the positive list approach is the best way to avoid unintended, unforeseen and excessive liberalisation;' it provides certainty. It also, as contended, 'would enable Australia to determine precisely which sectors to include thus protecting the government's rights and responsibilities to regulate.'[15]

The positive list approach also has the additional attraction and benefit of being in accordance with the approach adopted by the WTO in agreements such as the General Agreement on Trade in Services (GATS). The reasons that the positive list approach is adopted under GATS are similar to those mentioned above, primarily certainty and consistency, they apply to all the signatory nations.[16]

Unilateral Reform

As part of the Scope of the Study, the Commission was asked to, 'assess the impact of bilateral and regional agreements on Australia's trade and economic performance, in particular any impact on trade flows, unilateral reform, behind-the-border barriers, investment returns and productivity growth.' On reading the Commission's comments on unilateral reform it appears that the scope has been turned on its head. Instead of assessing the impact of bilateral and regional agreements, it would seem that the Commission undertook an assessment of the impact of unilateral reform on Australia's trade and economic performance, in particular any impact on trade flows, behind-the-border barriers, investment returns, productivity growth and bilateral and regional agreements.

The Commission calls for the abolition of the remaining import tariffs set at 5 per cent[17] as a means of achieving a 0.559 per cent increase in GDP according to 60 per cent of its

[13] XVIII
[14] 6.9
[15] 13.25 CPSU-SPSF
[16] For further reading, illustration and understanding of why this approach is adopted the reader is referred to *Managing the Challenges of WTO Participation: 45 Case Studies*. A publication funded by the Australian Agency for International Development (AusAID) and available for free from the following address: http://www.wto.org/english/res_e/booksp_e/casestudies_e/casestudies_e.htm (accessed 8 September 2010).
[17] 12.4

simulations.[18] It points out that it has made this call in the years 2000, 2003, 2005 and 2009.[19] It would appear that the Commission is using this Study as a vehicle for its doctrinal stance.

A cursory evaluation of the arguments against the removal of tariffs is contained in the Draft Report[20] but is then quickly dismissed, as are the alternative types of reform including multilateral, critical mass agreements and to an extent bilateral and regional agreements. This is contrary to the many of the findings discussed elsewhere in the Draft Report (see for instance the discussion on multilateral reform).

The Commission does however concede that 'there is a legitimate policy rationale for bilateral and regional agreements to reduce barriers in partner countries, and that such agreements can also promote economic cooperation and integration.'[21] Naturally there is the caveat that the potential benefits will depend on the nature and design of those agreements.[22]

Multilateral Reform

Although the Commission strongly urged for the continuance of unilateral reform it did observe that:

> The benefits of trade liberalisation are greatest if the liberalisation is undertaken on a multilateral basis, a result reflected in the modelling presented in the report. By lowering barriers to all countries, multilateral reform avoids the potential for trade diversion inherent in PTAs, and affords the liberalising economies with access to lowest-cost imported supplies.[23]
>
> [I]n terms of an overall approach to trade policy, multilateral agreements or BRTAs can yield additional benefits by providing frameworks for trade and investment between countries and for coordinated reductions in trade and investment barriers.[24]

The Commission noted[25] that Australia's main attempts at multilateral reform have been through the institutions of the GATT and WTO. Although the WTO Doha Round of

[18] 12.1
[19] 12.4
[20] bargaining coin arguments at 12.3 and 12.4
[21] 12.12
[22] Ibid
[23] P XXI
[24] P 12.2
[25] P12.4

negotiations, which began in 2001, may have stagnated, the AMWU notes that the Government rates the conclusion of these negotiations as their highest trade policy priority. The AMWU supports this position and urges the Government to continue this policy and not to be distracted by other forms of agreements. Considering the Commission's own findings and conclusions the recommendation that multilateral agreements should be the preferred type of agreement that should be pursued ought to be given greater prominence.

Transparency and Accountability

The final recommendation in the Report requires DFAT to publish estimates of the expenditure incurred in negotiating agreements. The AMWU supports this recommendation; it will contribute to the area of transparency of the process.

Consultation

Although finding that DFAT does undertake extensive consultation prior to the negotiation of agreements, the Commission noted that various stakeholders held significant concerns about the consultation process followed by DFAT.[26] The Report notes the US model as a potential model to be used to address concerns, but does not take the next logical step in recommending substantive reforms to the consultation and investigative processes that undoubtedly improve this area of concern and instead seeks further views on the merits of different models for improving consultation processes. The AMWU submits that the propositions referred to in the Draft Report by the Law Council of Australia and the Business Council of Australia provide a sensible basis from which to proceed to greater transparency and democracy in the making of trade agreements and these reforms should be adopted.

Related to the democratic processes of consultation and transparency is the issue of greater parliamentary oversight of trade agreements. The Commission notes that the Senate Foreign Affairs, Defence and Trade Committee in its 2003 report Voting on Trade, concluded that reforms to the system were necessary such that there was greater parliamentary oversight of trade agreements. The Commission also noted that the Joint Standing Committee on Treaties (JSCOT 2008) during its study of the Australia-Chile FTA made the recommendation that:

> prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic regional, social, cultural, regulatory

[26] PP 14.8 – 14.10

and environmental impacts which are expected to arise.

The Commission however has held back in supporting these views; it should not continue to do so. The ability to have parliament scrutinise any proposed agreement would ensure that the reviews of agreements were transparent and democratic. If the agreements currently being negotiated are to continue being negotiated these processes should also apply to them.

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