Australian Government
Attorney-General's Department

Office of International Law

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Ms Patricia Scott
Commissioner
Bilateral and Regional Trade Agreements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Ms Scott

Draft Research Report: Bilateral and Regional Trade Agreements

I wanted to write to you regarding a number of aspects of the Bilateral and Regional Trade Agreements Draft Report. The report is a welcome consideration of many of the issues concerning Free Trade Agreements. I thought that it may be helpful to set out some of the thoughts that we had in considering the report.

Investor-State Dispute Settlement - comments on the draft report

On page 13.17 the draft report observes that 'Australia's agreements often require it to provide foreign investors equitable and fair treatment (including national treatment) ...'. This statement appears to conflate the concepts of fair and equitable treatment and national treatment and seems to suggest that national treatment is a subset of 'equitable and fair treatment'. Fair and equitable treatment and national treatment are distinct obligations, both at international law and in Australia's agreements. In particular the principle of fair and equitable treatment is not a relative standard whereas national treatment is. As the Draft Report states at paragraph 4.1 national treatment '...requires that countries... set conditions for imported goods and services no less favourable than those for domestically produced products'. Further, it is uncommon for Australia's Investment Promotion and Protection Agreements to contain national treatment obligations. Of the Investment Promotion and Protection Agreements that refer to national treatment each does so subject to the country's laws, regulations and investment policies.

Also on page 13.17, the draft report discusses the importance of the definition of investment in constraining future claims. We agree that the definition of investment is important. However there are arguably more important safeguards in Australia's investment agreements, in particular, limitations on the scope of claims that may be brought in the provisions themselves, and in the crafting of individual obligations. Some of these developments are discussed in the extract from Aisbett and Bonnitcha (at page 13.19).

Page 13.19 the draft report considers the scope of Australia's Investment Promotion and Protection Agreements and the concept of 'post-establishment'. The draft report states that: 'Australia's

approach to date has been to include ISDS with third-party arbitration in agreements with developing countries ... and to offer protection only for post-establishment (that is, new) investments.' This suggests that post-establishment investments are any 'new' investments. The concept of the 'post-establishment' stage of investment is used in contrast to the 'pre-establishment' stage, where an investor is seeking to make an investment. Post-establishment is not synonymous with new investments and can include both existing and new investments.

At page 13.20 of the draft report, regarding investor-state dispute settlement, it is stated that:

> The second main issue with ISDS concerns the international rules of third-party arbitration. These rules are currently less certain than domestic legal systems for those countries with developed legal systems capable of processing complex cases. Cases are generally not appellable and arbitration frequently operates without the benefit of precedents (an important component of legal certainty).

We would like to note that although there may be no doctrine of precedent, arbitral panels do generally consider past decisions in reaching their findings.[1] Indeed these form a body of jurisprudence upon which future Panels draw.

Investor-State Dispute Settlement – response to the recommendations

Draft recommendation 5 states that Investor-State Dispute Settlement processes 'should not afford foreign investors in Australia or partner countries with legal protections not available to residents'. This recommendation is echoed in page 13.21 of the draft report which recommends that Investor-State Dispute Settlement 'not afford foreign investors in Australia with litigation options not normally afforded to local investors'.

We are concerned that this recommendation does not properly reflect the nature and intent of Investor-State Dispute Settlement. The basis of Investor-State Dispute Settlement is the right of a foreign investor to bring a claim in international arbitration against the host state in the event of a relevant investment dispute. It provides assurance to investors that should local courts not prove adequate, a remedy could still be sought for any wrongs through such a procedure. Accordingly, local investors are generally not eligible to take advantage of Investor-State Dispute Settlement against the state of their nationality as they are assumed to be able to rely upon domestic courts. Accordingly, this recommendation would in effect be a recommendation that Australia not agree to Investor-State Dispute Settlement in future agreements. Drawing on the rest of the draft report, this does not seem to be the Commission's intention, but rather the concern would appear to be that the content of the investment agreement should not accord more rights to foreign investors than are accorded to domestic investors.

Draft recommendation 5 also recommends that Investor-State Dispute Settlement procedures 'should be subject to regular review to take into account changing international best practice and the evolving legal systems in partner countries.' We note that currently negotiators and legal advisers working on the negotiation of agreements containing Investor-State Dispute Settlement provisions do have access to advice on developments and take these into account in determining negotiating positions.

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[1] See further: J W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51(2) *Harvard International Law Journal* 427 at 461.

Most Favoured Nation

The draft report proposes an alternative approach to Most Favoured Nation clauses at page 13.29:

> the Commission's draft assessment is that MFN clauses should avoid locking in a particular form of barrier. One alternative to this approach would be to negotiate MFN clauses that grant any further liberalisation to existing commitments on a non-discriminatory basis to BRTA partners ... Of course, this may lead to disputes between parties as to whether a policy reform results in further liberalisation or not.

Australia's Free Trade Agreement Most Favoured Nation obligations do not lock-in particular barriers. The focus of Most Favoured Nation obligations is the concept of 'less favourable treatment'. Therefore, it is not the individual barrier which is bound but the level of treatment which it accords. Australia's 'negative list' Free Trade Agreements make it clear that with respect to measures which are subject to reservations, Australia may modify or amend such a measure to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with the relevant obligations. In this way it seems that Australia's Free Trade Agreements may already provide the flexibility to adjust measures.

Processes for establishing Bilateral and Regional Trade Agreements

At paragraph 14.3 under the heading 'improving the process' it is stated that 'It is the Commission's draft assessment that the economic effects of any proposed BRTA should be analysed after the completion of negotiations and prior to the signing of an agreement. At this time, there should be meaningful economic analysis of the costs and benefits of the actual provisions of the agreement.'

It would be difficult, once an agreement has been negotiated to suspend its conclusion, usually signified by signature, until after further assessment. Rather the two stage process for States to become bound by a treaty, namely signature and ratification, allows such an assessment to take place between signature and ratification. Indeed after signature each treaty is considered by the Joint Standing Committee on Treaties prior to being ratified. The review by the Joint Standing Committee on Treaties could incorporate an economic analysis. We do not think that it is necessary to create a new body or process to deal with an economic analysis when there is already a process, such as the Joint Standing Committee on Treaties, which can be utilised.

Yours sincerely

Stephen Bouwhuis
Assistant Secretary