Law Council
OF AUSTRALIA

Review of bilateral and regional trade agreements – Draft Research Report

Productivity Commission

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Introduction

1. The Law Council of Australia (Law Council) welcomes the opportunity to make a submission to the Productivity Commission in response to the Commission's Draft Research Report on 'Australia's Bilateral and Regional Trade Agreements' (BRTAs). This submission has been prepared by the International Trade and Business Group of the International Law Section of the Law Council.

2. The views of the Law Council regarding BRTAs were set out in the Law Council's submission and supplementary submissions to the Commission in February and March 2010.

3. In the light of those considered, previously expressed views, the Law Council generally supports the recommendations of the Commission as set out in the Draft Research Report.

4. Specifically, the Law Council supports the following propositions in the Commission's Draft Recommendations:-

   (a) the Australian Government should pursue BRTAs to reduce foreign barriers to trade and investment only when multilateral means, such as through the World Trade Organization, are not practicable (**Draft Recommendation 1**);

   (b) the Australian Government should pursue BRTAs to reduce foreign barriers to trade and investment only when the prospective arrangements are, as far as practicable, non-discriminatory and non-trade distorting and provide a demonstrable net economic benefit to Australia (**Draft Recommendation 1**);

   (c) the Australian Government should adopt rules of origin in its BRTAs that limit to the maximum degree possible the degree of distortion caused by the preferential arrangement (**Draft Recommendation 3**);

   (d) the Australian Government should not include matters in BRTAs that would increase barriers to trade, increase industry costs or affect established social policies without a comprehensive assessment of the implications and available options for change. Such an assessment, in the Law Council's view, should be transparent and involve both the public and private sectors (**Draft Recommendation 4**); and

   (e) the Australian Government should institute measures to enhance the scrutiny of the potential impacts and benefits of prospective BRTAs. In order to be meaningful, such measures need to be taken before and during the trade negotiations process in order to generate a dynamic relationship between the negotiating process and the objective assessment of likely impacts and benefits (**Draft Recommendation 6**).

<u>Draft Recommendation 6</u>

5. In relation to **Draft Recommendation 6**, Law Council previously submitted that there should be a mechanism for private sector involvement in determining whether a proposed BRTA has the potential to achieve outcomes that are of relevance to the private sector because, ultimately, it is the private sector that the proposed agreement is intended to benefit.

6. The model for such a mechanism that was previously put forward by the Law Council was one modelled on the process used by the United States in its evaluation of trade agreements it enters into.

7. That model is set out in section 2104(e) of the *Trade Act of 2002* (USA), which requires advisory committees to provide the President of the USA, the U.S. Trade Representative and Congress with reports required under section 135(e)(I) of the *Trade Act of 1974* not later than 30 days after the President notifies Congress of his intent to enter into an agreement. Under section 135(e) of the *Trade Act of 1974*, each advisory committee is required to include in its report an advisory opinion as to whether, and to what extent, the agreement promotes the economic interests of the United States and achieves the overall and principal negotiating objectives set out in the *Trade Act of 2002*.

8. The Law Council reiterates its belief that a similar model could be adopted in Australia. Such a model could operate on a smaller scale in Australia and consist of a number of committees representing various sectoral interests that report directly to the Minister for Trade and to Parliament on whether a the terms being negotiated for a trade agreement trade agreement meets the principles recommended by the Mortimer Review.

9. The Law Council agrees with the introductory language to **Draft Recommendation 5** that the Australian Government should be cognisant of the capacity of legal systems in prospective partner countries to resolve disputes arising from international trade and investment relations. However, the Law Council submits that discussion in the Draft Report of the relationship between dispute settlement frameworks and the potential benefits of trade agreements, misses several important points which are set out below.

Dispute settlement provisions

10. In relation to dispute settlement provisions generally, the report fails to analyse the incidence of disputes under Australia's trade agreements and does not consider whether this incidence represents an optimal amount of dispute resolution activity, having regard to the degree of economic integration and reform generated by trade agreements, and the likelihood that a certain level of dispute activity will arise in normal commercial relationships. The evidence is, of course, that disputes arising out of Australia's free trade agreements are extremely rare. These issues have generally arisen in the domestic courts, for example in the Project Blue Sky litigation in the 1990s, which related to Australia's implementation of the national treatment provisions of the CER protocol on trade in services. The general absence of dispute resolution activity raises a number of questions, including about the accessibility of effective mechanisms to resolve issues when they arise.

11. In relation to dispute settlement, it may be that the current approach focussed mainly on state-to-state dispute settlement does not provide adequate 'access to justice' to traders and investors. If that is right, the Commission's work could usefully think creatively about how to craft dispute settlement frameworks which are more effective in promoting the benefits of trade agreements. For example, it may not serve the interests of commercial operators in Australia to reiterate in a BRTA a process like the complex and virtually inaccessible WTO framework for dispute resolution. The process under BRTAs could be simplified and streamlined to provide effective opportunities for smaller issues to be resolved in the event of a dispute, without the need for a large-scale intergovernmental processes.

Investor-state dispute settlement provisions

12. In relation to investor-state dispute settlement, the Commission's chief concerns appear to be that foreign investors in Australia should not benefit from protections not available to domestic stakeholders. Although submissions from the Law Council are quoted in support of the proposition that rights of foreign investors should be limited to such a 'National Treatment' level, the concern quoted from the Law Council's earlier submissions pertained not to this issue, but rather to questions of jurisdiction in ICSID proceedings.

13. In fact, the Law Council takes a more nuanced view on this point. The Commission appears to focus only on Australian governments' 'defensive' interests and the possibility that Australian measures may be challenged by a foreign investor. It fails to take into account that in many cases it is more likely to be Australian enterprises that will be seeking to avail themselves of dispute settlement options in the face of measures by a foreign government that are inconsistent with the treatment standards expected under international law for Australian investors.

14. Additionally, although the Commission's work understandably takes a forward-looking view, any recommendation relating to the limitation of treatment rights to a 'National Treatment' level needs to address issues of Australia's existing international law rights and obligations. Australia's existing treaty and customary international law rights and obligations are a relevant consideration in making recommendations about policy in this area going forward.

Alternative dispute resolution

15. Finally, an additional critical issue not considered in the Commission's discussion of investor-state dispute settlement is that a failure to provide a forum for investors (and traders) to seek a remedy for illegal measures taken by a foreign government means that the underlying rights given to those investors (and traders) are illusory. Although it is open to the Commission to take the view that investor-state arbitration is not always an appropriate mode for resolution of disputes, in making this recommendation, the Commission should also consider what are the alternatives. For example, in the absence of any agreement on a supra-national dispute resolution process of dispute resolution, it may be appropriate to empower domestic courts to consider claims made under the terms of an investment treaty or FTA investment chapter. Other models could also be considered.

WTO requirements

16. The Law Council agrees with the opening language of **Draft Recommendation 2** that Australia should continue to comply with WTO requirements in entering BRTAs. It does not, however, agree with the proposition that Australia should avail itself of the additional flexibility that the relevant WTO provisions may allow. Australia has an appropriate and long-standing policy of seeking to negotiate high-quality and comprehensive BRTAs. The Law Council commends Australian Government efforts to negotiate a tightening of WTO requirements for BRTAs. The ultimate objective should be to improve WTO rules to ensure that BRTAs complement rather than undermine the multilateral trading system.

Experience of the legal profession in relation to trade-liberalising activities

17. Lastly, turning to the experience of the legal services sector with trade agreements, the Law Council reiterates a point made in its earlier contributions. In its supplementary submission of March 2010, the Law Council provided evidence of experience in relation to trade-liberalising activities pertinent to the legal services sector. That submission made the point that removal of barriers to the export of legal services has been best achieved through direct negotiation with stakeholders in the relevant jurisdiction rather than through preferential trade agreements. It recognised, however, the fact that government-to-government negotiations on, and conclusion of a trade agreement could provide a helpful platform for direct negotiations – and this role for BRTAs should be taken into account when assessing their overall benefits.

18. The legal profession provides numerous pertinent examples of increased trade in legal services from negotiations facilitated by the existence of a BRTA or a feasibility study into the efficacy of such an agreement. The Law Council's recent engagement with the Bar Council of India illustrates this point.

19. During Commonwealth negotiations with India into the *Australia-India FTA Feasibility Study*, the Law Council was engaged in parallel dealings with the Bar Council of India which ultimately resulted in the signing of a Memorandum of Understanding intending to promote further integration and cooperation between each body. In addition to this, a Partnership Agreement was subsequently entered into between the Law Council, the Bar Council of India, the International Legal Services Advisory Council and the Council of Australian Law Deans. Copies of these documents are available from the Law Council website.

20. A further illustration is provided by the arrangements concluded with New Zealand under the broad rubric of Closer Economic Relations. Although Trans-Tasman Mutual Recognition is not itself an element of the CER agreement or services protocol, this important initiative would have been unlikely in the absence of the broader CER platform.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.