

Kluwer Arbitration Blog

Reviewing Australia's Approach to the Negotiation of Trade and Investment Treaties

Esmé Shirlow (Associate Editor) (Australian National University) · Tuesday, September 8th, 2015

The Report from the inquiry of the Australian Senate's Foreign Affairs, Defence and Trade References Committee into Australian treaty-making practices comes at a time when increasing pressure is being placed upon governments to adopt more transparent and consultative approaches to the negotiation of trade and investment treaties. The report, titled "[Blind Agreement: Reforming Australia's Treaty-Making Process](#)", expresses the Committee's concern with Australia's current approach to the negotiation of trade and investment treaties, and makes a number of recommendations for reform.

This post will consider two of the recommendations made by the Committee in its Report, which calls, *inter alia*, for:

1. the conduct of cost/benefit analyses of trade/investment treaties prior to their negotiation; and
2. the development of a model treaty to underpin future negotiations.

Both of these recommendations were prompted by concerns raised in submissions received by the Committee, and particularly by the perception that there is a "lack of a coherent strategy surrounding trade negotiations due to the 'agreement-by-agreement' approach taken by Australia" (para 5.2).

The Conduct of Cost/Benefit Analyses Prior to the Initiation of Treaty Negotiations

Currently, treaties concluded by Australia are tabled in parliament following signature, along with a "National Interest Analysis" and regulatory impact statement. The Committee's Report notes that it was "perplexed" by the fact that such cost/benefit analyses of trade and investment treaties are only prepared *subsequent* to treaty negotiation (para 5.29). Rather, the Committee considers that:

an independent cost-benefit analysis of proposed FTAs...around the time of the

commencement of negotiations would have benefits not just for transparency, but for informing the negotiations themselves (para 5.29).

Other States have also recognised the potential benefits of *ex ante* economic cost/benefit analyses of trade and investment treaties. The Committee's Report notes, for example, [the Trade Sustainability Impact Assessment](#) commissioned by the European Commission in relation to its trade negotiations with Japan. In fact, some 22 such assessments have been undertaken by the EU, the first having been prepared in 1999 to inform the EU's approach to the WTO Doha Development Agenda negotiations. The OECD has also developed [guidance](#) on the conduct of "Sustainability Impact Assessments", which appear to pursue similar goals.

The Committee's call for more detailed cost/benefit analyses of trade and investment treaties reflects a similar recommendation recently made by Australia's Productivity Commission. As explored in a [recent blog post](#), the idea that agreements should be subject to an *ex ante* cost/benefit analysis has been criticised, including on the basis that States lack the tools necessary to properly measure the economic impacts of provisions typically included in trade and investment treaties. Whilst it may be impossible to comprehensively analyse *all* of a treaty's implications (especially prior to its conclusion), it is clear that such analyses might nevertheless offer valuable guidance to negotiating States. Indeed, at the level of negotiating strategy, [research indicates](#) that up-front identification of the benefits that the treaty seeks to achieve for the negotiating State/s could provide important guidance as to the types of provisions which should be included. The [European Commission's guidance material](#) on the preparation of such analyses similarly notes their potential value to both outcomes and transparency, observing that:

The process of developing Trade SIAs is very much a learning by doing exercise with each study shedding new light on issues and bringing new perspectives. Everyone involved in Trade SIAs – trade negotiators, consultants, academics and civil society – has a contribution to make by adding to the accumulation of knowledge their own perspectives and experiences.

The Australian Research Council is currently funding a [project](#) which undertakes econometric modelling of the costs and benefits of Australia's investment policy, including in an effort to identify the "optimal methods of investor-state dispute prevention, avoidance and resolution". It will be interesting to see how such projects impact upon and/or are factored into Australia's trade and investment treaty policy.

Development of a Model Trade/Investment Treaty

Australia does not currently have a model investment or trade treaty. Australia's [previous](#) model investment treaty appears to have fallen out of use sometime in the mid-1990s. As [Professor Luke Nottage](#) noted before the Committee, the current absence of an Australian model BIT is:

...quite unusual, in the sense that dozens of economies, including all the major ones, both developed and developing, have a template that they start with, and which they elaborate, and sometimes update quite regularly, based on public consultation.

Indeed, the 2015 UNCTAD World Investment Report notes that at least “50 countries or regions are currently revising or have recently revised their model IIAs” (see pp. 108-110). [N. Jansen Calamita](#) refers to such model treaties as “the *sine qua non* of best practice in the formulation of international investment policy globally”.

The Report observes that the Committee had been “surprised to learn that, despite the number of trade agreements entered into in recent years, negotiations still start with a blank sheet of paper” (para 5.33). Recommendation 9 of the Report therefore urges for the development of a model trade/investment agreement capable of forming a “template” for Australia’s future treaty negotiations. The Committee notes, in particular, that any such model treaty ought to “cover controversial topics such as investor-state dispute settlement...and be developed through extensive public and stakeholder consultation”.

There are a number of advantages which could accrue from the development of an Australian model treaty. As the Report recognises, a model agreement would improve transparency insofar as it could:

- allow for earlier, and more detailed, internal consultation and analysis of the range of possible approaches that Australia could take to particular issues;
- provide information to stakeholders and interested members of the public as to Australia’s position on key issues; and
- form the basis of public consultations.

The development of a model treaty could also contribute to improving Australia’s treaty practice more broadly, including by:

- prompting consideration and discussion of the goals that Australia seeks to achieve by entering into trade and investment treaties;
- promoting consistency across agreements; and
- allowing Australia to capture and build upon ‘lessons learned’ in the negotiation of previous agreements or in the settlement of disputes under them.

A model agreement might also conceivably come to be of utility in the conduct of arbitral proceedings under Australian treaties. To the extent that negotiated treaties ultimately reflect provisions of the model treaty, for example, the model may provide useful guidance to litigants as to the intended operation and scope of those treaty provisions. The Austrian model investment treaty, for example, is the subject of a [detailed IISD Report](#) which provides valuable guidance as to the reasoning behind the adoption of specific provisions, as well as information as to how similarly worded provisions have been interpreted by tribunals in previous cases. To the extent that future treaties do not precisely reflect the model, it may nevertheless still inform aspects of treaty interpretation. In the Churchill Mining Tribunal's [2014 Decision on Jurisdiction](#), for example, the Tribunal and Parties made numerous references to the *travaux* to the Indonesia-UK BIT, which indicated how (and why) the language in that treaty differed to that in the UK's model BIT. A [study conducted by Ole Kristian Fauchald in 2008](#) similarly indicates that a number of tribunals have referred to model investment treaties as a form of State practice relevant to interpretation.

On the Road to Reform?

The Report was tabled in the Senate at the end of June, and has already been cited before other Parliamentary Committees, including the [Joint Select Committee on Trade and Investment Growth](#). It is, however, unlikely that the Report's recommendations will be adopted in full, particularly in light of the Coalition Senators' dissent to the Report in which they expressed their disagreement "with all of the findings and recommendations in the majority report" (para 1.1, Dissent by Coalition Senators). It is also worth noting that many of the recommendations in the Report reflect previously made (and as yet unadopted) recommendations.

Nevertheless, the Report forms an important aspect in a broader debate around Australia's approach to the negotiation of trade and investment treaties. In light of the Report's observation that "community confidence in the negotiation of FTAs is probably at its lowest ebb in Australia", the Report provides an interesting and timely snapshot of the debate around Australia's trade and investment policy, and identifies a range of reform options worthy of consideration and further discussion.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Tuesday, September 8th, 2015 at 9:05 pm and is filed under [Uncategorized](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.