

National Interest Analysis [2010] ATNIA 24

with attachment on consultation

**Accession to the Agreement establishing the Advisory Centre on WTO Law,
done at Seattle on 30 November 1999**

[2010] ATNIF 20

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Accession to the Agreement establishing the Advisory Centre on WTO Law, done at Seattle on 30 November 1999 [2010] ATNIF 20

Nature and timing of proposed treaty action

1. It is proposed that Australia become a Member of the Advisory Centre on WTO Law (ACWL) by acceding to the *Agreement establishing the Advisory Centre on WTO Law* (the Agreement).
2. The Agreement was opened for signature during the third Ministerial Conference of the World Trade Organization (WTO) in November-December 1999. The original ACWL Members signed the Agreement in 1999 and the ACWL was officially established after the Agreement came into force in 2001.
3. Pursuant to Article 16, the Agreement will enter into force for Australia 30 days after the instrument of accession is deposited with the Depositary (the Government of the Kingdom of the Netherlands). It is proposed that this will occur as soon as is practicable.

Overview and national interest summary

4. The ACWL is a Geneva-based intergovernmental organisation, independent of the WTO, which assists developing countries by providing subsidised legal advice and training on WTO law, as well as support in WTO dispute settlement proceedings. By joining the ACWL Australia will raise its trade and development assistance profile and demonstrate its commitment to assist developing countries engage in the multilateral trading system.
5. The Australian Government recognises the importance of developing countries' participation in the open, transparent and rules-based global trading system of the WTO. Improving developing countries' ability to trade internationally, particularly in the Asia-Pacific region, will directly benefit Australia by leading to larger and more reliable export markets for Australian goods and more sources of imports for Australian consumers and manufacturers.
6. Trade law assistance helps developing countries build policy expertise and capacity to take full advantage of the WTO system. Increased access to the WTO dispute settlement system, for example, helps developing countries to fully realise their rights under WTO law. The ACWL also assists developing countries to ensure that domestic laws are WTO consistent. Improving developing countries' trade performance and economic growth contributes to greater stability and global prosperity, promoting Australia's broader foreign and trade policy objectives.

Reasons for Australia to take the proposed treaty action

7. Australia's membership of the ACWL will add to Australia's longstanding support of developing countries' interests in the multilateral trading system. Existing initiatives include our efforts to reform global agricultural trade as Chair of the Cairns Group and a wide range of 'Aid for Trade' programs in the Asia-Pacific region. Australia's contribution to and participation in, the ACWL falls within the Aid for Trade component of our overall aid program and complements Australia's existing trade development activities.

8. A robust and equitable trading system based on respect for rules, which are upheld for all concerned, is important to Australia's interests. ACWL comprises highly skilled and well regarded lawyers who contribute effectively to strengthening the WTO dispute system, as well as prosecuting their developing country clients' interests. The ACWL has made a significant contribution to the development of the WTO dispute settlement system as a cornerstone of the WTO. The involvement of developing countries is essential for the ongoing legitimacy of this system, as is developing countries' equal enjoyment of rights within that system. By joining and contributing to the ACWL, Australia will be helping to increase developing countries' access to legal services and the WTO dispute settlement system. In turn, this will foster a sense of confidence and equity in the multilateral trading system, as developing WTO Members become better able to enforce their rights under international trade law.

9. Joining the ACWL is a valuable way to demonstrate Australia's commitment to assist developing countries' engagement in international trade, because the ACWL assists a large number of clients in a range of WTO matters. Countries can approach the ACWL both for advice on WTO law and support in dispute settlement proceedings. The ACWL's schedule of fees provides that countries receive discounted advice proportionately according to their level of development, with least developed countries (LDCs) receiving the cheapest advice (Annex IV). The 44 LDCs that are Members of the WTO or in the process of acceding to the WTO are entitled to free legal advice on WTO law (and a significant discount on support in dispute settlement proceedings) without having to become Members of the ACWL. Thirty developing countries are entitled to free advice (and discounted dispute settlement support) by virtue of their membership of ACWL. Thus, Australia's joining the ACWL will demonstrate its support for services that are available to 74 countries, or approximately half of the Members of the WTO and boost Australia's trade development assistance profile in these countries.

10. As a Member, Australia will be able to promote Australian foreign and trade policy interests while contributing to the operations of the ACWL. Members sit in the ACWL's General Assembly and are consulted on the appointment of the Executive Director, who manages day-to-day operations (Article 3). Decisions in the General Assembly are made by consensus or, in the event of disagreement, by a four-fifths majority vote (Article 4). As one of only two non-European developed Members (together with Canada), there is a significant opportunity for Australia to provide a unique perspective to the ACWL's deliberations and to engage constructively in the ACWL's decision-making. While the ACWL's services are demand-driven and not focused on particular regions, Australia could, for example, usefully promote ACWL services to Pacific island countries in support of Australian foreign and trade policy interests.

11. It is possible that developing countries may use ACWL services to bring a WTO dispute against Australia, as occurred when the Philippines launched two quarantine-related disputes

against Australia in 2002.¹ The probability of the WTO dispute settlement mechanism being invoked by a developing country against Australia is low, but a dispute would not necessarily be problematic in any case. Maintaining the robustness and integrity of the multilateral trading system depends on all parties, including developing countries, being actively and constructively engaged. The possibility of developing countries taking action against developed countries, including Australia, helps to ensure that WTO rules are appropriately upheld by developed and developing members alike. In any case, 82 per cent of legal advice offered in 2008 and 69 per cent in 2009 concerned issues relating to WTO decision making and negotiations or developing countries' own compliance with WTO law rather than the measures of other countries. Of the disputes in which the ACWL has been involved, close to half were between developing countries rather than between developing and developed countries. Further, Australia is already committed to assisting the ACWL having pledged significant financial assistance.

12. Developing countries have used many ACWL services in ways which are supportive of Australia's interests, either systemically or in respect of a specific trade issue. In particular, the ACWL represented Thailand when it joined with Australia and Brazil to mount a successful challenge against the European Communities' export subsidies for sugar.² Also, the ACWL was effective in supporting Chad (a West African cotton producer and LDC) as a third party in Brazil's dispute against the United States on cotton subsidies,³ and Costa Rica as a third party in the dispute against the European Communities concerning certain information technology products.⁴ In both cases, the ACWL's advocacy aligned with the interests of Australia, which was a third party to both disputes.

Obligations

13. Australia has already pledged to satisfy the once-only obligation on new Members contained in Article 6(2) to pay a one-time contribution to the ACWL, having committed A\$3 million to the ACWL on 12 November 2009. Following this single payment Australian membership of ACWL would not carry any ongoing obligation to contribute to the ACWL (Article 6(5)).

14. Australia will be expected to attend the meetings of the ACWL General Assembly in Geneva which occur at least twice a year (Article 3(2)).

Implementation

15. No legislative action by the Commonwealth or the States and Territories is required to give effect to the proposed accession to the Agreement.

Costs

16. Australia has pledged to satisfy the obligation on new Members contained in Article 6(2) to pay a one-time contribution to the ACWL.

¹*Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*, WTO DS270; *Australia – Certain Measures Affecting the Importation of Fresh Pineapple*, WTO DS271.

²*European Communities – Export Subsidies on Sugar*, WTO DS285 (Australia's complaint); Thailand's complaint, DS283; Brazil's complaint, DS266.

³*United States – Subsidies on Upland Cotton*, WTO DS267.

⁴*European Communities – Tariff Treatment of Certain Information Technology Products*, WTO DS375, DS376 & DS377.

17. The only other contingent financial cost to Australia associated with joining the ACWL will be the incidental costs of attending meetings of the ACWL General Assembly in Geneva. Australia will be represented by staff based in Geneva, minimising any associated costs. There are no other financial costs associated with this treaty action.

18. It is not envisaged that the Australian Government will request any legal advice or legal services from the ACWL which the ACWL would charge Australia for.

19. No provision is made in the Agreement for how debts will be paid if the ACWL is wound up and found to be insolvent. Nonetheless, it is unlikely in the foreseeable future that the ACWL will be wound up leaving substantial net debts.

Regulation Impact Statement

20. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

21. Pursuant to Article 11, any Member of the ACWL and Management Board may submit a proposal to amend a provision of the Agreement to the General Assembly of the ACWL. The Agreement may be amended, including alterations to the scale of contributions and fees, only with the consent of all Members (Article 11(1)). Amendments would take effect on the thirtieth day following the date on which the Depository has received the instruments of acceptance of all ACWL Members.

22. No reservations may be made in respect of any provision of the Agreement (Article 14).

23. The General Assembly of the ACWL may decide to terminate the Agreement and thereby close the ACWL (Article 11(5)). Upon termination, the ACWL's funds would be distributed among present and former Members in proportion to the total of each Member's contributions.

24. Any amendments to, or termination of, the Agreement would be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties (JSCOT).

Withdrawal or denunciation

25. Australia may withdraw from the Agreement at any time by giving written notice to the Depository (Article 11(4)). Withdrawal from the Agreement becomes effective on the thirtieth day following the date on which the notice has been received by the Depository.

26. Withdrawing Members are not entitled to a reimbursement of their contributions to the ACWL endowment fund and are obliged to pay for any services already provided to them by the ACWL (Article 11(4)).

27. A decision by Australia to withdraw from the Agreement would be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by JSCOT.

Contact details

Trade Policy Section
Office of Trade Negotiations
Department of Foreign Affairs and Trade

ATTACHMENT ON CONSULTATION

Accession to the Agreement establishing the Advisory Centre on WTO Law, done at Seattle on 30 November 1999 [2010] ATNIF 20

CONSULTATION

28. Initial consultations were held between officers of the Department of Foreign Affairs and Trade (DFAT) and the Australian Agency for International Development concerning the proposed treaty action and its consistency with Australian aid objectives and 'Aid for Trade' initiatives.

29. DFAT did not consult with States and Territories as the proposed action will not impact upon them.

30. DFAT announced the proposed action on its departmental website and in the February 2010 edition of the World Trade Organization (WTO) Doha Round Bulletin, published by DFAT's Office of Trade Negotiations.

31. The Department of Foreign Affairs and Trade called for public submissions from seven stakeholders by mail. Submissions were received from each of these stakeholders and were wholly supportive of Australia joining the Advisory Centre on WTO Law (ACWL). The main reasons given for this support were the need to better integrate developing countries into and assist them to realise their rights under, the WTO system. Dr Brett Williams and Mr Andrew Stoler also noted the high quality and efficiency of the ACWL.

LIST OF STAKEHOLDERS CONSULTED AND SUBMISSIONS RECEIVED

1. Dr Brett Williams (University of Sydney)
2. Professor Ann Capling (University of Melbourne)
3. Mr Andrew Stoler (University of Adelaide)
4. Professor Peter Drahos (Australian National University)
5. Professor Sam Blay (University of Technology Sydney)
6. Australian Fair Trade and Investment Network (AFTINET)
7. International Development Law Organization (IDLO)