



Hunt & Hunt
LAWYERS

Australian Senate, Foreign Affairs, Defence & Trade Committee

Inquiry into Australia's Relations with China

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Executive Summary

The relationship between Australia and China is currently strong and robust and vital for our future prosperity and security.

A Free Trade Agreement is of critical importance to our relationship with China.

China has earned the right to be recognised as a Free Market Economy.

A Free Trade Agreement provides a framework to encourage further reforms.

We need to consider focussing on Partnering Agreements treating China as an equal and not an Aid recipient.

Give credit for enormous progress achieved rather than focussing on the negatives.

Introduction

Hunt & Hunt provides this submission in response to a letter dated 20 December 2004 inviting the firm to make a written submission to the Committee.

In providing this submission we have assumed that the Committee has full access to a range of statistical and other data relevant to the Chinese Australian bilateral relationship.

Hunt & Hunt did provide a submission in the 1990s when the Committee previously reviewed Australia's relations with the Peoples Republic of China and Mr Harrowell was invited to give evidence before that Committee in October 1994.

Accordingly in this submission, whilst addressing in broadly the terms of reference, we seek to focus on changes, which we have observed relevant to the terms of reference in relation to the bilateral relationship, as it exists in 2005 together with some observations as to issues to be considered in further developing this relationship.

Hunt & Hunt

Hunt & Hunt is one of six major Australian law firms who have been granted a licence to operate in China, following the grant of the licence Hunt & Hunt opened its Shanghai office in 1998.

Hunt & Hunt's relationship with China extends back to the 1980s. Our involvement with the China market has included acting for primarily Australian and Chinese clients seeking to trade or invest in each jurisdiction but in recent times has also seen the firm representing the interests of other foreign companies in China from jurisdictions including the United Kingdom, Germany and the United States.

In addition Hunt & Hunt has been involved in a number of projects and seminars in the last 16 years related to capacity building in China on issues ranging from seminars on corporate structures, contract law, dispute resolution and governance issues.

In 2003 Hunt & Hunt conducted a program in Shanghai sponsored by AusAid and the Australian Department of Foreign Affairs & Trade relating to a range of legal topics to assist in capacity building.

More recently Hunt & Hunt has been involved both as a commentator and adviser on issues relating to the proposed free trade agreement with China. More information on Hunt & Hunt is contained in Appendix 1 to this submission.

The Importance of the Relationship between Australia and The Peoples Republic of China

Overview

There are many relationships which are important for the future prosperity and security of Australia and relationships in terms of economic or security issues can and do change over time.

We would submit that as Australia and the world enters the 21st century that the relationship between Australia and the Peoples Republic of China is one of the most critical relationships for Australia's economic prosperity and regional security.

There is nothing novel or surprising in this submission.

Australia gained a huge advantage as a result of its early recognition of the Peoples Republic of China and has very successfully built on the goodwill created by that decision since the 1970s.

Early recognition of China however is not fully explain the success achieved to date.

Whilst western countries including Australia sought to engage with China in the last part of the 20th century it has taken a little time to understand the importance of relationships created by the interaction of people as distinct from relationships created by treaties, memoranda of understanding or contracts.

In 2005 the public and private sectors in Australia have a much greater understanding of what is really meant by the Chinese word "Guangxi" which is at the heart of the Asian way of doing business.

Relationships and networks are of much greater significance in China and indeed Asia generally than black letter law or legal agreements.

Australians have done well in coming to grips with this concept, indeed we would venture to suggest that Australia has done better than many other western countries and this explains the successes achieved and is the key to realising future opportunities.

It is also quite significant that Australia and Australians are able to deal with China on their own merits rather than being regarded simply as ally (junior) of other Western powers, it is extremely helpful that we have our own identity at all levels in our relationship with China.

Economic Relationship with China

China today is one of the most important trading partners for Australia in relation to raw materials, goods and services.

China, unlike other markets in the United States and Europe, is still developing and there is still considerable room for growth across the full range of raw materials, goods and services exported to China.

The completion of a Free Trade Agreement ("FTA") with China is critical for Australia's future prosperity and has the prospect of delivering the greatest benefits out of any of the free trade agreements recently negotiated or still under consideration.

For example the implementation of a FTA to remove tariffs on Australian wool will be of considerable benefit to hard-pressed woolgrowers even if only half the tariff cut is reflected in price increases on the auction floor.

The great advantage Australia has in relation to its economic relationship with China is that this huge market is in our region, transport and travel distances are not as great and costs are lower to get products to market in comparison to. Europe or North America and business can be conducted essentially within the same time zone.

The growth of the Chinese economy is such that if anything the demand is increasing and the only obstacle or limitation is the available capacity to meet that demand.

Political Relationship

Clearly China is increasing its influence across East Asia and the South Pacific and also increasing its influence globally on a range of issues.

Whilst there will in any relationship be points of difference or emphasis, fortunately there is, between China and Australia, a considerable alignment on issues where both China and Australia would seek to exercise influence in the region and globally.

The robustness and depth of the relationship between Australia and China has ensured that notwithstanding points of difference, some of which are significant, there is a very good working relationship, which continues to strengthen.

China's Emergence as a Regional Power

China is increasingly building and strengthening relationships in East Asia and the region generally and it is also significant that China is building relationships with South America and notwithstanding past conflicts, India.

The closer relationship developing between China and India in particular is very positive for Australia.

Australia is uniquely placed to participate in and gain benefits from the two largest emerging economies in the world as we enjoy good economic, political and social relationships with both countries.

There is no evidence, since the 1990s, that China's emergence as a regional power will create any instability in the region, the very responsible and considered way in which China has sought to exercise influence has been a positive and stabilising influence in the region.

During the Asian financial crisis China's decision not to devalue the Chinese currency played a considerable part in limiting economic impact of the financial crisis in Asia. It should be recognised that this decision by the Chinese Government was courageous as it created some risks in terms of the Chinese domestic economy but reflected consideration of the broader impact of such a decision rather than self-interest.

Another example in recent times of the positive influence of China has been their attempts to find a solution for the current tensions in North Korea. The fact that China seeks to take an active role is of itself significant more so because the outcome they are seeking to achieve from exercising influence is aligned with the desire of the other nations involved, to secure peace and stability.

In terms of how Australia should respond to Chinese emergence as a regional power we believe Australia should encourage the increasing engagement of China in the region and give credit for the considered and measured way in which China seeks to demonstrate a sense of responsibility for economic prosperity and security in the region.

Free Trade Agreement with China

General Endorsement of a Proposed Free Trade Agreement

The successes of the teams in the Australian Department of Foreign Affairs & Trade in negotiating free trade agreements in our regions should not be under-estimated. This work is of considerable importance not simply because of economic benefits that may flow through but because of the way it enhances and builds relationships in the region and enhances political, social and cultural links.

Whilst there has been some criticism of the final outcome of the United States Free Trade Agreement with Australia that should not be allowed to divert or discourage attempts to secure a Free Trade Agreement with China.

In contrast with the United States experience the Chinese Government is not faced with the same domestic political pressures. There is considerable support across the board in China for a closer economic relationship with Australia they want to come to the table and get on with the task and finalise an agreement.

Unlike the United States free trade negotiations where, for political reasons, some issues could not be put on the agenda by both sides there are relatively few issues relating to the Australia/China trade relationship, which cannot be included in the negotiations because of domestic political pressures.

In terms of tariffs relating to inbound goods from China compared with the United States Australia is in a good position to encourage China to open up its market and

reduce tariffs and there are relatively few tariffs, which Australia could be pressed to concede.

We also believe that an FTA represents a unique opportunity to address a range of specific issues, which create problems for Australian traders in China.

For example, Australia could secure additional protection for the Intellectual Property of its companies trading in Australia. Further, Australia may also be able to secure agreement from the Chinese national Government to limit the additional levels of regulation or interference from provincial and local Governments.

There is significant anecdotal evidence of problems experienced by Australian traders who believe that they have secured national Government approvals for investment or trading but are then faced with significant (and regularly changing) regulations and restrictions imposed by lower levels of Government. The removal (or limitation) of these restrictions would afford significant opportunities for Australian traders.

Anti-Dumping Concerns

The loudest arguments against negotiating a Free Trade Agreement with China in Australia relate to the issue of "dumping".

At the present time protection of Australian industry from dumping Chinese goods is governed by WTO protocols. The dumping problem needs to be put in perspective notwithstanding the enormous amount of trade with China, there are less than 10 anti-dumping cases outstanding and whilst not diminishing the significance of any dumping problems expressed by those running these anti-dumping cases they must be put into the context of the total trade.

A Free Trade Agreement can in fact better address the concerns of Australian Industry in relation to dumping as it can include a framework, which is more effective in dealing with dumping issues, and customised to have regard to the specific needs of Australian industry.

Whilst undoubtedly there may be vigorous negotiations between Australia and China as to the form of any anti-dumping framework included in a Free Trade Agreement those issues we believe can and will be worked through because of the primary reason which drives China to seek a Free Trade Agreement with Australia.

We understand that in recent times, the Australian Customs Service has indicated that it will make changes to the administrative procedures to be adopted when considering whether domestic prices or markets in China are an appropriate basis to determine "normal values" as part of any dumping inquiry. Press reports suggest that the Australian Industry Group believes this practice goes a long way to address its concerns with the existing anti-dumping regime.

Further, when considering the anti-dumping issues, Australia should be mindful that specific changes to "target" or "toughen" inquiries against Chinese goods to ease findings of dumping might be contrary to Australia's commitment to China pursuant to the World Trade Organisation ("WTO").

Negotiations as to Free Market Economy Status

At the heart of China's desire to enter into a Free Trade Agreement with Australia is its wish to be recognised as a Free Market Economy ("FME") as part of its broader engagement in the global economy following its accession to WTO.

In recent weeks there has been some controversy as to whether Australia should be prepared to recognise China as a FME and some criticism that this negotiating chip is being too easily given up by Australia to secure a FTA.

In fact in our submission there is little downside in being "open" with China that we will be prepared to recognise them as a FME if a Free Trade Agreement is established

providing they understand that we will require significant tariff reductions leading to removal of tariffs and quotas and a tighter anti-dumping framework.

The Committee should also be aware that pursuant to the Trade and Economic Framework between Australia and China it is expressly acknowledged that an FTA will only be achieved if Australia accords FME status to China. Accordingly, the FME status has been "on the table" for some time and there is no suggestion that it is now being "given up" for an FTA, it is an agreed condition to an FTA rather than a current negotiating point.

One should not underestimate the importance of being one of the first countries to negotiate a Free Trade Agreement with China. The advantages, which flow, are similar to the advantages we are already receiving as a result of the early recognition of China in the 1970s.

Whilst one can debate the value to Australia of the United States Free Trade Agreement on a cost benefit analysis a Free Trade Agreement with China strongly advantages Australia and the whole Australian economy.

China's other FTA Agenda

The Committee should be aware that China has already completed other FTA. For example it has completed the "CEPA" with Hong Kong and a form of FTA with other ASEAN countries. Accordingly, there are concerns that other countries may secure FTA benefits, which exceed current advantages, or benefits afforded to Australian traders if an FTA is not achieved.

Failure to Secure an FTA

Whilst unlikely we should make a comment on the situation of what if Australia does not achieve a FTA with China.

The failure to achieve a FTA with China would, in our submission have a dramatic adverse impact on all our relations with the China. It would be a significant setback to the relationship and would, we submit, also impact on China's willingness to deal with Australia in its own right with the risk that Australia would be considered not on its own merits but as part of a coalition of super powers seeking to impose its views on China rather than have a balanced bilateral relationship as exists today.

Submission on Proposed FTA with China

The Committee may not be aware that Hunt & Hunt had made a submission to the Joint Feasibility Study, being conducted into the FTA. A copy of the submission is attached in Appendix 2.

Can Australia reasonably accept that China has achieved the status of a free market economy?

Historical Perspective

Sadly some delight in pointing to the problems and weaknesses of China ignoring considerable successes achieved since the implementation of the open door policy.

Only 105 years ago an Emperor with a feudal system governed China and regional and local families controlled the economy and every aspect of government.

The Chinese Government recognised that the only way to secure sustainable economic prosperity and social stability was to move away from a strict centrally planned economy with power totally held by a central government.

The economic and structural reforms in China over the last 20 years have compressed a process which "developed" countries commenced with the Industrial Revolution in the 18th century. The end result for China whilst perhaps not perfect in

the eyes of economists in developed countries in an historical context is really quite remarkable.

In examining whether China has achieved Free Market Economy status one must be fair and recognise the results actually achieved in terms of reforms particularly since the 1990s and be sympathetic and realistic in any demands to be placed upon China as part of any free trade framework.

It is almost impossible to comprehend in a country such as Australia the huge challenges faced by the Chinese Government in putting into place economic reforms, which have underpinned the current economic success of China.

The original philosophy of the Communist Party when taking power in China was to guarantee to every Chinese citizen:

- a home;
- adequate food;
- a job.

These key planks of the Chinese Communist Party were known as the three irons. In the late 1970s and early 1980s China recognised that these benefits could not be delivered indefinitely unless China engaged with the rest of the world, the Chinese population was increasing dramatically, China's capacity to feed its people could no longer be satisfied with thousands working in the field and new technology was urgently required.

Chinese industry had to take advantage of new technology and skills to improve productivity and profitability by drawing on the whole world to supplement their own skills and technology.

The economic reforms that have taken place in China have not been without some considerable pain and presented real challenges to the Chinese central government, provincial governments and government at a municipal level. Closing down inefficient government businesses, corporatisation/privatisation of government enterprises has come with not inconsiderable social cost.

As an example in the 1990s the central government determined to reduce considerably the number of public servants. In Shanghai over a period of two years they reduced the size of the public service by 1.5 million people. No government in Australia of either political persuasion would be prepared to try and make the same reduction in our public service.

Reduction in the number of public servants was well handled. There were several innovative programs, one of which included giving the opportunity for senior public servants to retire but to undertake university studies, something that they were unable to do when leaving school because of the Cultural Revolution. The Government through this strategy was able to capture and enhance the skills of outgoing public servants.

At the end of the process well over 1million people were retrained and placed in new positions, often positions with many of the new companies moving into the Shanghai region where they are able to earn considerably more than what they had previously been paid as public servants.

Another example of a major reform was the decision that the Peoples Liberation Army should not be involved in business activities.

For Australians we would find it strange to say the least if the Australian Defence Forces ran a factory, telephone company or property development companies. In China however one must remember that all work units including army units were expected to be self-sufficient under the philosophy that existed in the 1950s.

This meant that army units were expected to create schools for the children, to provide hospitals for the families of soldiers and aged care facilities for the old soldiers who could no longer work.

Many of the commercial activities undertaken by elements of the Peoples Liberation Army were in western or isolated regions of China. When the policy was introduced that the army should sell out of its businesses a major employer in many isolated regions withdrew.

Many of the businesses were not sustainable but in order to maintain social stability and preserve the jobs of those working in army-based businesses the government was forced to provide some subsidies to assist in the transition process.

Observations

We offer the following observations in relation to consideration of whether Australia can or should recognise China as a Free Market Economy.

Avoid Applying Unrealistic Economic Criteria

No economy in any "developed country" has a "perfect" FME. All have different levels of conditions, restraints and seek to protect national interests. The United States has a FME but no one could seriously argue that there is a true "level playing field", interest groups and the broad electorate would not allow the President, the Congress and the Senate of the United States to totally expose all parts of the American economy to competition from outside.

China has clearly demonstrated a very strong commitment to economic reform and indeed has been courageous in taking risks and moving very quickly in the 1990s to make dramatic changes.

China's efforts and achievements in relation to reforming its economy although not perfect in our submission fully justify recognition as a FME.

Focussing on "imperfections" in the Chinese economy should not preclude a FTA rather the FTA should be a framework to encourage building on the successes achieved to date.

We considering the imperfections that exist in the Chinese economy we would submit that the focus should be not on those imperfections but the achievement to date and China is entitled to be judged fairly and objectively.

The Importance of a Stable China

It is very hard sitting in Sydney or Canberra to understand the enormous challenges faced by China in reforming its economy having regard to its population, regional and cultural diversity. The Chinese approach to economic and structural reform has been quite different to that seen in Russia.

In Russia the concept of a centrally planned economy administered by an all-powerful central government responsible for all decisions was replaced very quickly and without time to develop the skills and infrastructure to ensure a smooth transition both in economic and social terms. Russia and its people had democracy with prosperity, standards of living declined, corruption was rife and economic growth stalled.

The writer was in China in 1989 and observed that the visit of then Russian President early in 1989 concerned many in China (not just government officials protecting their own position) should such a process be adopted in China.

It is vital for the region and globally to ensure stability in China during the process of changing from a centrally planned economy administered out of Beijing and one must be cautious not to force changes for the sake of meeting economic models, which create instability.

Already the challenges created by the pace of economic reform have created tension and there has been a considerable social cost, whilst many in China have significantly improved their position and many also have lost their jobs.

The Chinese Government is making considerable efforts to maintain broad support and since the mid 1990s has addressed particularly the disparity between the rapidly developing economy in east China compared with the west. We have been directly involved in several capacity building projects initiated by the Chinese Government to encourage economic development in the west and more isolated provinces to try and reduce tension between the "haves" and "have nots".

We would submit that it is vital for Australia and the region that China remains stable and this requires the processes of reform must be measured and not forced.

Recognition by Other Countries

The Committee should be aware that many other "western" countries (such as New Zealand) have already acknowledged that China has achieved FME status. There is a real risk that our failure to do so may be considered purely as a political decision.

Observations on Changes in China Since Previous Senate Review

We do not propose to canvas statistical matters but felt that it may be useful to Senators to have some observations on some specific matters observed since the Senate last reported in June 1996.

General Observations

Some have described China as being in the third phase of its development since the implementation of the open door policy.

The **first phase** was when China made the decision to open the door to encourage foreign trade and investment.

At the time there was very little established law, infrastructure, local skills and experience to facilitate this new trade and investment and many of those who first walked through the newly open door lost money and became dissatisfied with China as a potential market.

The **second phase** began in the late 1980s and early 1990s when the Central Government recognised the importance of having rules and structures in place to facilitate and encourage investment.

A number of Chinese bureaucrats and business people had gained experience in dealing with the first wave of trade and investment so that their skill levels increased but it was still difficult and the commercial infrastructure was immature.

The newly established laws were little understood and applied inconsistently in different parts of China and whilst senior Government officials and business people were now given the authority to make decisions they had lived under a regime for so long without that power they were reluctant to exercise it. Some businesses and investments succeeded but there was still a heavy level of frustration.

We are now in a **third phase**, which really began in the late part of the 1990s, the infrastructure needed to make the open door policy work has matured.

There is a new generation of bureaucrats and business leaders, many of whom have had training outside China who are prepared to make decisions and stick to those decisions.

The laws introduced as part of the policy of economic reform are better understood and more uniformly applied across China and foreign business is making money in

China (for example, one of the most profitable parts of Motorola's global operation today is that based in China).

Many examples can be given of how China is a much easier environment in which to work but probably the best example is the time it now takes for foreign business to establish a wholly foreign owned enterprise ("WFOE").

The WFOE concept was unknown in the 1980s, joint ventures were mandatory but now depending on the industry sector in which you seek to operate all requirements for the establishment of your own WFOE in China can be completed in six to eight weeks at a modest cost, including the incorporation of a company and obtaining all relevant government approvals.

In many large Chinese cities the government has recognised to encourage foreign investment there must be a dramatic reduction in the time required and the bureaucratic processes to obtain approvals. In part these processes become easier because authority to make decisions has devolved from Beijing.

Only the very largest investments in sensitive areas now require approval in Beijing and in most cases relevant approvals can be obtained in the city where the foreigner is intending to commence business.

In Guangzhou last October the writer was taken to the city's investment centre where all relevant approving authorities were conveniently located in one building enabling a foreign investor to move from one booth to the other to obtain all required approvals, permits and authorities at the same time.

Profile of Businesses Trading with and Investing in China

Since the mid 1990s there has been a dramatic change in the profile of Australian businesses seeking to work in and with Chinese companies.

When China first opened up the very large Australian companies with huge resources immediately sought to enter this market either with trading contracts or direct investments. At the early stage some had limited success, many lost substantial amounts on their investments and pulled out, those that have remained are starting to produce a positive return on their investment.

At the other end of the spectrum during the early phase of opening China were the very small traders seeking to source Chinese goods taking advantage of low costs and that these goods could attract a premium in the Australian market being "exotic".

In the last 10 years there has been the growth of small to medium Australian businesses seeking to either work with China or in many cases establish their own office in China.

This has been particularly so in the service industries with Australian architects and engineering firms establishing branches in China which are proving very successful with major projects relating to the Olympic Games and capturing work generally because of the demand in the Chinese market for these skills.

Smaller Australian listed companies are also venturing into China with success for example gold mining companies including Sino Gold NL and a recently Golden Tiger Mining NL.

On the trading front as the Australian media often notes a great number of manufactured goods are now being sourced out of China ranging from sophisticated electronics through to the traditional clothing goods.

It was interesting to observe on visiting Guangdong Province last year however that manufacturing costs in China are beginning to increase as the economy develops.

Guangdong Province has become a major manufacturing base for operations previously conducted in Hong Kong and Singapore but as Vietnam develops and opens up its lower costs both in terms of labour and land for manufacturing facilities may well see a further move of manufacturing facilities for low cost items from Southern China into Vietnam and the need for Guangdong Province to encourage new industry and activities which are sustainable with the increased labour and land costs in that province.

The fact is that it is now considerably easier to do business in China and this opens up the prospect for a much greater number of Australian businesses looking to China for trade and investment and establishing operations in China.

Rule of Law – Dispute Resolution

In the 1980s most businesses had a view that if a problem developed in their joint venture relationship with China there was no prospect of achieving a fair hearing and the only solution was to walk away and write-off the cost as a bad experience.

The Chinese Government recognised that if China was not to be regarded as a high risk economic environment where inevitably foreign investors added a risk premium there had to be established proper commercial laws and dispute resolution procedures, which were seen as credible, transparent and fair.

The Chinese Government has passed a number of laws to ensure that there is a legal infrastructure, which encourages trade and investment. These laws have included basic company law, insolvency laws and laws relating to dispute resolution together with the development of credible arbitration bodies.

It is no longer the case in China that a foreign business finding itself in dispute has no option but to walk away and write-off the investment. Whilst there are still inefficiencies in the Chinese court system and the process can be slow and a little mysterious to foreigners (the Chinese find our processes equally mysterious) the Chinese legal system is rapidly improving and no more challenging than the systems, which currently exist in India or Indonesia.

The Chinese Government in the early 1990s encouraged the re-establishment of a private legal profession, which had ceased to exist during the Cultural Revolution. There are now a large number of very bright, well-trained Chinese lawyers, many of whom had experience working outside China in Australia, the United States, Britain or Europe.

Chinese arbitration bodies have been opened up to include foreigners. It is no longer necessary if you have a dispute in China to choose a Chinese arbitrator. Bodies such as China International Economic Trade Arbitration Commission ("CIETAC") include in the panel of arbitrators many foreigners. There are six Australians on the CIETAC panel of foreign arbitrators.

Foreign companies including Australian companies have won arbitrations in China and have successfully enforced arbitral awards. It is not suggested that the system is today perfect or without challenges created by culture and language but in the last 10 years there has been a dramatic change in the capacity of foreign parties to exercise their legal rights and enforce same in China.

More recently the Chinese government, as with all governments around the world, has embarked on a policy to improve corporate governance and accountability both at government level and in the private sector.

Whilst it would not be suggested that bad or improper business practises have been eliminated in China there has been dramatic improvements in terms of transparency, accountability and business ethics and before criticising China it is important to have a balance remembering that even in the most developed economies there are many examples of bad or improper business practises.

Skills and Experience of Key Decision-Makers in Government and Business

When the writer first travelled to China in the 1980s nearly every business meeting had to be conducted through an interpreter and the skills of the interpreter were often limited because the interpreter may have had social English skills but not a sound understanding of business English.

Many of the senior executives with whom foreigners would deal with because of the cultural revolution had not had the opportunity to undertake tertiary studies and many had little, if any, experience of the business world and business systems outside China.

A whole new generation of bureaucrats and business leaders is now in place in China. Many of them are well travelled, a large number have had overseas experience, they thoroughly understand international business, hold qualifications from foreign universities and their skills are more than comparable with those in any western country.

The new generation of bureaucrats and business people are keen to capitalise on the economic opportunities in China and to enhance the growth of their own businesses and are keen to partner with foreign business people and contrary to the myths propagated by the media outside China they have found most to be honourable and determined to ensure they meet obligations which they undertake.

Infrastructure Generally

In the 1980s infrastructure in China was a major inhibiting factor on foreign investment and trade.

Whilst there is still a great deal of work to be done in relation to the infrastructure in China the last 10 years there have been dramatic improvements in a number of areas including:

Telecommunications

Data transmission and mobile communications in most parts of China are comparable with those available throughout Australia.

Power Generation

China has substantially increased its power generating capacity whilst brown-outs have not been totally eliminated across China the allocation of brown-out days in different areas of Beijing has gone and the power system is much more reliable and in most cities as reliable as anywhere in Australia.

Roads

A large number of world-class freeways have been built throughout China and into the centre of major Chinese cities.

A stark example is that the trip from our office in Shanghai to Hong Qiao Airport which at times could take up to 1 hour and 30 minutes has been reduced to 20 minutes, the airport freeway entrance is within 100 metres of our office.

There is however an unfortunate by-product of China's rapid economic development and that is the rise in the number of motor vehicles. Whilst bicycles have been banned from many areas in large Chinese cities to improve traffic flow the huge increase in the number of vehicles seen most clearly, for example, in Beijing has meant that the development of the road network is only barely keeping pace with the substantial increases in motor vehicle traffic.

Railways

Major rebuilding programs are underway to improve the Chinese rail network system particularly in the last two years. This is probably one area where whilst great

improvements have been made they are not as dramatic as in other areas in part because of the huge cost involved and the size of the Chinese rail network.

Many Chinese cities are now, as a result of the pressure of increased motor vehicle traffic, developing metro systems for example Beijing and Shanghai, which utilise western technology and have the advantage of being relatively new, unlike the general rail network.

Ports and Cargo Handling Facilities

These have been a key focus of the Chinese Government, as with Australia at present, increased demand for imports and exports is seeing the Chinese port and cargo handling facilities operating in spite of new facilities at close to capacity.

Foreigners Living and Working in China

In the 1980s it was extremely difficult for foreigners to live and work in China. It was very much perceived as a hardship post.

These difficulties often prevented foreign business from establishing an operation in China quite aside from the other business issues, which might have discouraged establishing a branch in China.

Foreigners can now live comfortably in China in cities such as Beijing and Shanghai and the ability to speak Mandarin is not a prerequisite for sending Australians to successfully live and work in China.

Accommodation suitable for foreigners and their families is now readily available in places such as Shanghai together with school facilities and medical facilities.

Shanghai in particular is rapidly resuming its place as a major centre for foreigners as it was prior to 1949, indeed, in the last 10 years Shanghai has become to look very like Hong Kong and have the same cosmopolitan atmosphere and large foreign population living and working in the city.

Environmental Issues

Chinese cities in the 1980s usually had heavy industry in the suburbs. The environmental conditions were poor, air quality and waterways heavily polluted.

The Chinese Government in Beijing and at provincial and municipal levels has placed a strong focus on improving the environment.

Whereas 15 or 20 years ago it was difficult to see blue sky on any day in Beijing or Shanghai the efforts of government and industry to improve air quality are beginning to show with air quality particularly in Shanghai significantly improving and plans in place by the time the 2008 Olympics commence in Beijing to achieve substantial improvement in that city as well.

Environment protection laws have been introduced across China and significant efforts are being made by Chinese authorities to enforce the new laws and standards on government and industry. Those efforts are beginning to pay off.

Regulations Allowing Direct Investment

The Committee should be aware that as part of its commitments on joining the WTO China has made significant strides in regulations pending direct foreign investment in China.

Regulations such as the "Tentative Procedures" (of March 2003), the "Administration of the Establishment of Foreign Investment Export Procurement Centres Procedures" (November 2003), the "Procedures for Foreign Invested Commercial Enterprises" (April 2004) and new "Franchising Regulations" (January 2005) demonstrate provisions, which allow increased direct foreign investment.

Further, the "Foreign Trade Law" (April 2004) sets a framework for the types of "western" style regulations required by WTO, such as new competition laws.

These all represent significant relaxations on previous restrictions on foreign investment and trading in China.

Australia China Relationship, what is next, what is important?

Free Trade Agreement

Establishing a Free Trade Agreement with China is a high priority and of utmost importance to our relationship with China.

An FTA will be achieved if there is a willingness to recognise China as an FME and the benefits of a FTA with China are much wider than economic benefits, they include:

- Significantly enhancing the broad based relationship, which already exists with China and sending a very positive signal to other nations in the region with whom we are also working to build relationships.
- It is important for Australia's future prosperity and security in our region to show that Australia is a leader and not a follower of other major western nations; our independent identity is a valuable asset.
- As China and India develop their own relationship, an FTA with China, will, we believe, create flow on benefits for Australia's relationship with India, which is already on a sound footing but will confirm our desire to engage and work with both major developing countries.
- On issues, which inevitably must be compromised when negotiating a Free Trade Agreement, there are no fundamental issues, which prevent an Agreement being achieved with China.
- The key areas of concern to Australian industry in relation to recognising China as a FME, in particular, dumping issues can in fact be resolved more effectively within a Free Trade Agreement framework rather than relying on the current status quo and utilising remedies available through WTO.
- Failure to achieve a Free Trade Agreement with China will significantly set back a relationship, which has already produced considerable economic benefits for Australia, and which has the potential for considerable future benefits.

Capacity Building

China is seeking to build its capacity in a range of areas including:

- Infrastructure- ranging from legal structures to civil works;
- Public sector administration;
- Good governance and business practices;
- Professional services.

China recognises that Australia has expertise and a willingness to share such expertise.

Clearly, the private sector has recognised the opportunities in China as evident from the number of Australian companies directly involved in construction projects relating to road, rail and air transport projects.

An example of a considerable success in the last ten years has been the successful sale to China of expertise and infrastructure in the area of air traffic control systems with China electing to utilise technology from the Australian Advanced Air Traffic System ("TAAATS") for their domestic system.

Other examples include growing interest in technology, which can be utilised in the Chinese mining industry to improve both productivity and safety. In this regard, relatively small regional companies in Australia have successfully sold their technology and expertise to China.

There are also opportunities for the public sector in Australia to offer its expertise to China they include:

- Technology and expertise relating to the administration of the taxation system that exists within ATO
- Expertise that exists within Australian Securities Investment Commission ("ASIC") relating to the regulation and good governance of corporations.
- Expertise in the management of insurance and superannuation companies which exists within APRA.
- Management of issues relating to an ageing population and care of the aged, which exists within the Department of Health & Ageing and Australian Government companies such as the Aged Care Standards and Accreditation Agency.
- Legal skills and expertise, which exists within the Attorney General's Department and the Law Reform Commission.

Whilst there may be opportunities to produce economic benefits for the public sector from consulting arrangements, the engagement of the public sector from Australia sharing skills and expertise with the public sector in China can also produce considerable benefits and positive influences within the Chinese public sector through Australian and Chinese public officials working together.

Helping China Develop the West

Clearly one of the challenges for Australia in developing partnerships to assist in capacity building is how and where to target projects.

In this regard, consideration should be given to assisting China in relation to its policy of encouraging economic growth in western and more isolated provinces.

One of the issues for the Central Government in China is to ensure a more even spread across China of the benefits of economic growth seen in East China and in particular, to ensure that the improvements in the quality of life and standard of living of those in large cities such as Shanghai and Beijing are available to people in provinces such as Inner Mongolia and Xingjian province in Western China.

A key concern to the Central Government is to address the increasing gap developing in living standards between East and Western China.

We believe there would be significant benefits and visibility for Australia if it were prepared to assist the Chinese Government with implementing its policy of "developing the West".

Exchange Programs for Government Officials

Consideration should be given to developing programs to allow and encourage key Chinese bureaucrats to spend time on exchange working within the infrastructure of the Australian Government.

Such a programs would steadily build a group of people who not only can take useful skills and expertise back to China, but also as they move upwards through the levels of the Chinese public service, they will be well disposed to Australia.

In offering this suggestion, we recognise that already some very good work has been done to create partnerships and links have been established at various levels between the Australian public sector and the Chinese public sector.

Capacity Building Partnership Agreement

Without in any way seeking to be critical of the efforts to date, we would submit that consideration should be given to having a more structured and more focussed approach to working with China and sharing skills and would suggest that consideration be given to negotiating a Capacity Building Partnership Agreement which could be an adjunct to a Free Trade Agreement.

To be effective the establishment of a Capacity Building Partnership Agreement would require China and Australia to commit resources to put together a group of people to assess and prioritise needs and to develop strategies to meet those needs on a co-ordinated basis.

A Capacity Building Partnership Agreement could provide a framework which could maximise not only the allocation of resources but would also enhance the visibility of the contribution that Australia could make to China's economic development and could be a unique addition to a FTA and from a negotiating perspective something we can offer in exchange for concessions in the FTA process.

The process of developing and entering into such agreement at a Government to Government level could also provide a model which could be replicated elsewhere in our region and used to demonstrate the Australia is willing to share in the challenges faced by developing countries.

Some might argue that the existing frameworks for providing aid and specific grants make such a concept unnecessary or superfluous.

In anticipation of such an argument we believe there is a subtle but important difference between aid programs and the partnership concept we are suggesting. Aid programs are of critical importance particularly in times of crisis but can of themselves reflect that the giver and receiver are not equal.

If Australian fire fighters are sent to the United States it is not regarded as an aid project rather a reflection of a partnership, the Americans whilst appreciating some help they may be offended at thinking they were in receipt of aid from Australia.

The concept of a partnership reflects a more equal relationship is not patronising and most important and long term relationship.

China seeks to be acknowledged an equal in all its relationships on the basis of its achievements to date we believe a Capacity Building Partnership Agreement would be seen to recognise those achievements

Inbound Chinese Investment

Inbound Chinese investment is increasing but there are still substantial potential benefits from this part of the economic relationship with China yet to be realised.

We need to be careful and to avoid complacency in relation to this part of the bi-lateral relationship because of the tremendous growth in export of goods and services, which favours Australian interests.

In the long term good relationships can be tested when a relationship becomes one sided. Whilst we are not suggesting that government can or should press Chinese investors to come to Australia it is important in any FTA negotiations and generally that we do encourage two way trade and investment to maintain a sense of balance, which often from an economic perspective can be a key factor in long-term growth and sustainability.

Conclusion

A good relationship with China is critical, in 2005 that relationship is in great shape because of good work at Government-to-Government level, business relationships and social interaction.

Australia and China have no fundamental obstacles, which prevent the relationship deepening further and producing increased economic, political and social benefits to both countries and their people.

There are of course some difficult issues, which can challenge the relationship, but we believe that those issues can be worked through within the current relationship.

It is important to remember that our success to date has been because we are seen as friend with it's own identity not a messenger conveying the views of others and we are prepared to engage, listen and understand without being judgmental.

Finally lets give China and it's people credit and recognition for what they have achieved and partner with them to help continue the process rather than carp about the negatives, the success and prosperity of China is a an important key to Australia's prosperity and success.

Hunt & Hunt has derived many significant benefits from its relationship with China and is pleased to offer this contribution to give something back.

The work of the Senate Committee in reviewing this relationship with China is important for Australia's future we would be pleased to answer questions and provide further assistance.

Please feel free to contact the writer in Sydney and /or Mr. Andrew Hudson in our Melbourne office.

J.G.F.Harrowell

Partner

Hunt & Hunt

24 March 2005

Appendix 1

Hunt & Hunt
Partner Profile's
Our Offices



Hunt & Hunt

Hunt & Hunt is a leading Australian law firm with offices in every Australian State and Territory capital city. We also have a strong presence in the Asia Pacific region, with offices in Shanghai and Auckland.

Our clients enjoy the benefits of our global reach, through our involvement as the sole Australian member of Interlaw. This network strategically aligns us with commercial lawyers in 120 cities, including all parts of Asia.

We have over seventy years experience providing specialist legal and advisory services in our core areas of corporate, insurance and property law. Our offices across Australia also offer clients a depth of skill and expertise in taxation, litigation, intellectual property and information technology, employment law, mergers and acquisitions and trade practices law.

Partner Profile



Jim Harrowell

Partner

Legal and Management Experience

Jim qualified with degrees in Law and Accounting and has 27 years experience working as a commercial lawyer having joined Hunt & Hunt in 1977, he has been a partner of the Firm for 21 years

Jim has represented the interests of Australian and international companies in their business activities, including negotiating joint ventures and resolving disputes through mediation, litigation and arbitration.

He is an adviser to clients on legal, strategic, commercial, governance and reputation issues applying his legal skills and experience together with his experience in management both in Australia and overseas.

Since first being appointed to open and manage the Newcastle office of Hunt & Hunt in 1983, Jim has fulfilled a number of management roles within the firm. He is the immediate past Managing Partner of the firm and has also held the position of National Chairman of the Hunt & Hunt Legal Group; in this period the group grew significantly and now has offices throughout Australia, Shanghai and Auckland.

International Roles

Jim is the international Chairman of Interlaw, an association of 65 law firms with 6500 lawyers in 116 major cities throughout the world. A key areas of focus has been Asia, China in particular which Jim has travelled to regularly over nearly 15 years.

He was responsible for Hunt & Hunt obtaining one of six licences granted to Australian law firms. He opened the Shanghai office of Hunt & Hunt in 1998 and assisted both local and foreign enterprises doing business in the region. Jim is also an accredited foreign arbitrator with the China International Economic & Trade Arbitration Commission ('CIETAC') and is also the only Australian who has been accredited as a foreign arbitrator by the Shanghai Arbitration Commission.

Other Roles and Activities

Jim has been a director and is currently Chairman of the Aged Care Standards and Accreditation Agency in the period where the Agency successfully completed two cycles of mandatory accreditation for Aged Care facilities throughout Australia.

Partner Profile



Andrew Hudson

Partner

Andrew provides legal services to all parties involved with the Customs Industry including Importers, Exporters, Customs Brokers, Freight Forwarders, Shippers and Trade Financiers.

The advice he provides covers all aspects of trade ranging from International Trade Conventions, Arbitrations to resolve disputes, Trade Financing options, Commodity and Freight Contracts, dealings with Inquiries and prosecutions by the Australian Customs Service in such matters as Dumping and alleged underpayments of Customs duty, together with all related litigation.

As well as providing legal services in the Customs and Trade Industries, Andrew has been extensively involved in Law reform issues through his capacity as Chair of the Customs and International Transactions Committee of the Law Council of Australia and as a member of the Steering Committee of the International Law Briefing Committee of the Law Institute of Victoria. This has included submission (both written and oral) to the Senate Inquiries on Trade Modernisation Legislation, Legislation imposing strict and absolute liability offences (including for Customs offences) and new Anti-Dumping Legislation.

In addition to his many publications, Andrew has also spoken extensively on Customs and Trade issues including a presentation on “Adaptation of Customs Procedures for E-Commerce and Paperless Trading” at the APEC Customs/ Business Dialogue in Shanghai in August 2001. He was a presenter on the topic of “Customs Issues in Classification and Valuation” at the World Conference of the International Federation of Customs Brokers Association in Venice in May 2002.

Andrew has also conducted (and continues to conduct) seminars around Australia for the Customs Brokers and Forwarders Council of Australia on the recent Australian “Trade Modernisation” Legislation, new Australian Privacy Laws and Liability of insurers for goods damaged in transit. This has included developing and presenting with the CBFCA, training programs to assist Industry with the changes effected by the Trade Modernisation Legislation.

Further, Andrew was a panelist for the on-line seminar entitled “Practising Law in a Global Economy” conducted by law.com.

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Appendix 2

China Free Trade Agreement – Hunt & Hunt Submission July 2004

Invitation to Provide Submission

Hunt & Hunt refers to the letter dated 2 April 2004 from David Holly (as the Head of the China FTA Study Taskforce) inviting submissions into the Feasibility Study being conducted by the Department of Foreign Affairs & Trade as forming part of the Trade and Economic Framework between Australia and the People's Republic of China ("PRC").

Hunt & Hunt is delighted to accept the kind invitation to make a Submission into the Feasibility Study which is set out below.

Our Experience in Working with China

Hunt & Hunt has been working with China for over 16 years, acting for Chinese and foreign clients on matters ranging from traditional joint ventures, trading contracts, dispute resolution/arbitration, establishing branch offices and more recently wholly owned enterprises (WOFE).

We were granted a foreign lawyers licence for Shanghai in 1998 and have had the experience of dealing with legal and logistical requirements to establish our office in Shanghai.

We have worked with both Australian & Chinese Government agencies to assist to develop skills relating to business structures and commercial law and improving dispute resolution processes.

As a result, Hunt & Hunt has the unique capacity to reflect on the changes to the PRC, the current status of its economy, commercial infrastructure and the prospects of a Free Trade Agreement ("FTA") between Australia and the PRC.

General Endorsement of an FTA with PRC

We very strongly support the efforts to establish an FTA with PRC.

It is clear that PRC and its economy will be key drivers for the global economy well into the 21st Century and for Australia this presents a unique opportunity within our region to share in the benefits of the growth and development of PRC.

Australia has established a very strong and warm relationship at many levels with PRC and whilst there are many challenges on both sides the strength & warmth of the relationship provides an excellent bridge upon which a FTA can be developed.

Hunt & Hunt appreciates that the Trade and Economic Framework between Australia and the PRC ("Framework") sets out the process to be adopted by the countries to bring their economies closer together and the criteria to be considered when making a decision whether to proceed to a FTA.

As a general proposition, we endorse the process described in the Framework and believe that having observed that process, the interests of both nations would be served by a FTA.

We believe that the PRC has made significant strides in moving away from a centrally planned economy, through its status under the World Trade Organisation ("WTO") as an "economy in transition" towards a Full Market Economy ("FME").

While we are not experts in assessing the status of an economy (or what constitutes a FME in economic terms), we believe that PRC satisfies a majority of normal criteria for acceptance as a FME as generally accepted under the WTO arrangements and, to the extent that it may not yet satisfy all those criteria, it is strongly committed to implementing procedures to reach that status.

Acceptance of current status and then a phased approach to further reform for the PRC

In making any determination as to whether the PRC has achieved the status of a FME to support a FTA, the Australian Government should take into account the specific and unique characteristics of the PRC economy and social structure.

It is easily forgotten that just over 100 years ago PRC was still essentially operating with the Emperor under and a feudal system with regional and local families controlling every aspect of daily life.

The economic and structural reforms in PRC in the last 20 years have compressed a process which in “developed” countries commenced with the Industrial Revolution in the 18th Century, the end result in PRC whilst not perfect in an historical context is quite remarkable.

Hunt & Hunt notes that the Framework (Article 8) obliges Australia to recognise the PRC as an FME as a precursor to negotiating an FTA.

Whilst clearly each nation must strive to ensure its interests are protected and enhanced by a FTA we would strongly urge the Australian Government to consider & recognise the results achieved by the PRC Government in reforming its economy and be sympathetic and realistic in any demands to be placed upon the PRC Government on entering into a FTA.

In the balancing process required in any negotiations not only is it important to strive for a positive outcome in terms of a FTA for both PRC and Australia but also to recognise how Australia approaches the task can have tremendous spin off benefits not only with PRC but also in terms of wider relationships in the region which can produce additional benefits for Australia and our neighbours in Asia.

We would offer the following for consideration:

Avoid unrealistic economic criteria of a FME

Hunt & Hunt would recommend that in making any decisions regarding future free trade negotiations with PRC, the Australian Government should not confine itself to any test or economic model which requires the PRC to have achieved a perfect FME as a prerequisite to a FTA.

No economy in any “developed” nation has a “perfect” FME, all have different levels of conditions, restraints and national interests. Similarly, FTA’s do not require or guarantee totally free trade between contracting nations.

In all cases there are reservations associated with accepted national and international interests. Many FTA’s acknowledge that there will be improvements in various sectors over time.

To this end, the Australian Government should recognise that any “imperfections” in the PRC economy should not preclude a FTA and should allow PRC to address those specific issues over time rather than by way of immediate and revolutionary reform.

Acknowledge PRC’s efforts in economic transformation

PRC has already demonstrated a capacity and commitment to economic reform and a willingness to take some risks by moving quickly as was clearly evident in the 1990’s.

The PRC Government has effected significant economic and structural reform and Australian Government should acknowledge the efforts of the PRC Government to reform its economy and legal systems to satisfy the requirements of the WTO and its subsequent further move towards a FME and this would warrant some accommodation in expectations on the PRC.

Need to Maintain Stability in PRC

The challenges faced by PRC having regard to its population, regional and cultural diversity are unique and must be understood. PRC demonstrated a high level of economic resilience, stability and responsibility during the Asian financial crisis.

Clearly it is important for the region and globally that PRC remains stable during periods of change and one must be cautious not to force changes for the sake of meeting economic models which create instability and thereby losing the benefits of a FTA in the longer term.

We have observed already the challenges created by the pace of economic reform, they have not been without cost and have created tensions between those within PRC who have significantly improved their position and those who have lost their jobs.

PRC is making considerable efforts to maintain broad support in particular addressing the disparity between the rapidly developing economy in East China compared with the West and we have been directly involved in several projects to develop the West.

It would create significant disadvantage (and possibly significant social unrest) if Australia were to demand too many radical reforms or acceleration of reforms to the potential detriment of social structure.

Future expectations based on PRC's current state

Any efforts by Australia to extract additional concessions or demands in the acceleration of further reform by the PRC Government should be tempered by the realities of the PRC economy.

The PRC is in many respects a collection of a variety of economies in different geographical regions governed by different local products and levels of development.

The PRC has a massive population including a significant social strata which has yet to be directly involved in economic reform. For example, there are still many people operating on older socialist models of land use and exploitation particularly in western provinces.

The Accession Protocol of PRC

The PRC joined the WTO by entering into the Accession Protocol on 23 November 2001. The PRC should not be obliged to act in a way inconsistent to that Accession Protocol.

For the reasons set out above, Hunt & Hunt endorses an approach to the FTA which recognises and accepts the current and specific position of the PRC as sufficient basis for a FTA and then permits a phased reform process of increasing liberalisation in a manner sympathetic to the status of the PRC society.

Any expectations should also be consistent to PRC's Accession Protocol and should not be more onerous than provided for in the Accession Protocol.

Consistent to other FTA's, a FTA with PRC should incorporate committees and working groups to assist with the further liberalisation of the PRC economy.

We believe that there is precedent for this approach in other FTA's (including, for example, the way in which quotas and tariff rates are only to be reduced over time in the FTA with Thailand).

The International Context

Hunt & Hunt is aware that the negotiations regarding the proposed FTA with the PRC are being conducted in an international context where many countries are moving to commence negotiations for regional or bilateral FTA's.

Many other western, developed nations (in particular the US) are paying careful attention to the negotiations between Australia and the PRC one must be mindful that in negotiating a FTA with the PRC, the concessions it seeks or secures will be demanded in other negotiations.

Considerations of Specific Areas

Without limiting the generality of our endorsement of a FTA, Hunt & Hunt sets out below some commentary on specific issues which would need to be addressed in negotiations for a FTA with the PRC.

These issues reflect our practice areas, the interests of our clients and their experience from working in PRC over some 16 years.

The majority of these issues relate to the liberalisation of the means of access to the PRC economy and the way in which Australian entities are permitted to operate within that economy.

Access to legal markets

The PRC Government should continue to liberalise access for Australian lawyers.

This should include the following.

- Limit the restrictions on Australian lawyers who wish to work as lawyers in the PRC.
- Limit the restrictions on Australian law firms opening up satellite offices in the PRC.
- Limit the restrictions on Australian law firms working for Government in the PRC at any level.
- Allow greater access of Australian students to study law in the PRC.

Elimination of Customs duties

One of the basic requirements for a FTA is the elimination (or reduction) of Customs duties.

Hunt & Hunt appreciates that not all tariffs can be eliminated immediately and that the particular position of sections of the PRC economy may dictate that certain tariffs only be reduced over time. Similar considerations may dictate phased reduction in Australian tariffs.

However, the primary consideration is to reduce tariffs as early as is possible and our view is that slow reductions serve the interests of neither country. To support these reductions, both countries will presumably take some comfort from the fact that there will be protection in Anti-Dumping legislation and the availability of Safeguards for certain industries (described below)

In addition to the agreed tariff reduction rates, both countries should have the right to ask for faster reduction from the other country or to reduce their rates unilaterally.

Import and Export Permits and Quotas

The PRC Government has an extensive regime for import and export permits which is perceived to be more than the regime implemented by the Australian Government.

The PRC Government also maintains many quota restrictions which exceed Australian quota restrictions.

Permit and quota restrictions constitute significant non-tariff barriers and work will need to be undertaken to determine which of these restrictions represent legitimate national interest.

Quotas need to be reduced and phased out over a reasonable period. Both countries co-operate in developing agreed procedures for administration of quotas and to minimise the anti-competitive effect of quotas. Protections to specific industries can be found in “provisions for safeguards” set out below.

Future of Free Trade Zones and Special Economic Areas

The PRC Government has encouraged overseas investment and development through different treatment of entities operating in Free Trade Zones and Special Economic Areas.

However, the underlying concept of a FTA is that one contracting nation to the FTA will not afford treatment to the entities of other countries which is more advantageous than the treatment afforded to the other contracting nation.

The treatment afforded to entities in the Free Trade Zones and Special Economic Areas will need to be reviewed carefully to ensure that entities from countries other than Australia operating in those areas are not afforded treatment which is more advantageous than that provided to Australian entities.

The Australian Government will need to consider carefully how it will treat any requests to permit the continuation of Free Trade Zones and Special Economic Areas.

Rules of Origin

Although “Rules of Origin” (“ROO”) are technically part of the Customs administration, the ROO deserve separate consideration as they represent the criteria for favourable tariff treatment.

Of recent time, there are essentially 2 separate approaches to ROO, being the approach in the Australia and Singapore Free Trade Agreement (“SAFTA”) and the different approach in the Australia and US Free Trade Agreement (“AUSFTA”).

The approach in the AUSFTA appears to be very similar to the approach in the Thai and Australia Free Trade Agreement (“TAFTA”) subject to some different treatment in requirements for “regional value content” in the TCF and motor vehicle areas.

The AUSFTA affords protection to goods wholly obtained or produced in a contracting party using products of that country. Goods from “third countries” are allowed as inputs if those goods undergo a change in Tariff Classification.

In general, it is our view that the approach to ROO in the AUSFTA should be adopted as a means of determining the products of either nation which attracts preferential treatment.

However, specific consideration should be given to whether the specific ROO (and associated regional value content for TCF goods or motor vehicle components) should be adopted in their entirety in any FTA with PRC.

It is our view that the specific regional value content requirements for motor vehicle components may be warranted but the specific rules for TCF goods in the AUSFTA should not be adopted in the same form. They appear to be unnecessarily complex and contrary to the notion that all ROO need to be clear and easy to administer.

Foreign exchange and currency movement restrictions

One of the main concerns in conducting business in the PRC is the ability to repatriate moneys earned in the PRC. This constitutes another non-tariff barrier to trade and will need to be reviewed to enable the repatriation of earnings.

Recognition of Professional Qualifications and Trade in Services

Hunt & Hunt endorses the approach in other FTA's of the establishment of an expert working group to consider the basis on which educational and professional qualifications of the members of both nations can be recognised by other nations. This will assist in the cross-border trade in services which require certain professional standards or qualifications.

For the purposes of focus in relation to the trade in those services.

- Specific focus on improving trade in services

Certain areas should be identified for specific focus. Relevant areas could include.

- Research and Development
 - Education
 - Health Care
 - Tourism
 - Telecommunication Services
- General commitment to GATS process

Other than the specific areas, there should be a general commitment to liberalisation of the trade in services based on the provisions of the General Agreement of Trade in Services ("GATS").

Intellectual Property Rights

Consistent with other Australian FTAs, any FTA with the PRC should reflect the continued commitment of both nations to become parties to all International Conventions protecting Intellectual Property. This also includes the WTO Agreement on Trade-Related aspects of Intellectual Property Rights. This should require both nations to continue their accession to those Conventions and Agreements.

Of particular importance is the commitment of the PRC Government to protect the intellectual property of Australian entities including aggressive enforcement action. This should include jail terms for continuing breaches in a manner consistent to recent Australian legislation and practice.

Anti-Dumping and Countervailing measures

Both countries should reaffirm their commitment to the WTO Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures.

Particular interest will be whether Australia is prepared to formally (and finally) commit that PRC is not an "economy in transition" for the purposes of the WTO Agreements. This would be a significant concession as pursuant to the Accession Protocol, the PRC is treated as an "economy in transition" for the purposes of the WTO Agreements.

Safeguards

Hunt & Hunt endorses general safeguard provisions consistent to other WTO Agreements and other FTAs. This will specifically arise for Australia in relation to TCF imports from PRC.

There should be careful attention to the ability of a country to adopt transitional safeguards, requiring thorough investigation and consultation with the other country.

Further, there should be reservations against adopting extensive “special” safeguard measures such as under the TAFTA.

Customs administration

As a general proposition, Hunt & Hunt sees significant merit in the PRC and FTA containing provisions similar to those in the AUSFTA regarding Customs administration. Australia and the PRC have already worked together on these issues. Without limitation, this should include the following.

Administrative fees and formalities

Other than fees and charges permitted under Article III of the GATT (Customs duties and internal charges) and anti-dumping and countervailing duties, any fees and charges must be limited to the approximate cost of those services and not represent indirect protection.

Transparency

Both countries should commit to clear and transparent administration of Customs laws. These are vital in aiding trade. This should include the publication (in hard copy and electronic form) of relevant legislation and the issue of advisory opinions and binding rulings (both public and private). All commentary should be available in both languages.

Clearance of cargo

The significant amount of cargo between the two countries requires agreement that there should be minimal delays to the clearance of cargo. The specific criteria for normal and express cargo clearance in the AUSFTA should be adopted as a benchmark.

Exchange of information

It is in the interests of both nations that Customs authorities are able to exchange information on the arrival and departure of goods. This assists cargo management, border control, national statistics, identification of criminal activity and revenue collection.

Standards of information exchange and co-operation as set out in the AUSFTA are recommended. This can provide for more extensive disclosure in the context of perceived illegal activities.

Customs broking

The existence of a properly trained and licensed Customs broking industry assists in the timely and accurate reporting of the passage of cargo.

We would recommend the establishment of a national, licensed, customs broking regime similar to the Australian model.

Valuation

Valuation should adopt WTO practices and those dictated by the World Customs Organisation (“WCO”). As indicated above there should be provision for binding private and public rulings.

Classification

Classification should also reflect practices of the WTO and WCO together with the availability of rulings.

Use of Information Technology and Modernisation

Increased use of Information Technology in the reporting of the transport of goods aids trade and also aids the task of the Customs administrations.

For these purposes, both nations should continue to work to implement the provisions of the Revised Kyoto Convention. Work should also be undertaken to enable reporting parties in both countries to report electronically and directly into the systems operated by the Customs administrations of both countries.

For example, parties in Australia should be able to also report the import of those goods directly into the PRC Customs systems. For these purposes, it will require exporters and importers to hold Digital Certificates to verify identities which are to be recognised by both countries.

Registration of Exporters and Provision of Certificates of Origin

Hunt & Hunt appreciates that there are different approaches to whether it is an importer or exporter who must verify the qualifying (“originating”) status of goods.

Our view that the preferable approach is that set out in the TAFTA which obliges an exporter to be registered as producing “originating goods” and for Certificates of Origin to be provided with each shipment.

Such approach permits verification of status of exporters. Although this is more rigorous than in the AUSFTA, we believe that it assists certainty and compliance more than in the AUSFTA.

Administrative penalties and prosecutions

There should be consistency in the application of administrative penalties and types of prosecutions. Traders in both countries should have some comfort that they are subject to similar legislation and trading requirements in both countries.

Quarantine

Hunt & Hunt endorses continued work on quarantine regulation as set out in the Framework and which is also consistent with the WTO Agreement on Sanitary and Phytosanitary Measures. Both nations will require high levels of legitimate quarantine protection.

Investment

Hunt & Hunt endorses the approach set out in the Framework to encourage investment.

In addition, the following matters warrant additional consideration.

FIRB Restrictions

There should be a review of the FIRB restrictions in Australia to consider whether those restrictions constitute an unfair restraint on PRC investment. There does not appear to be significant evidence of investment being withheld by FIRB and as a result the existing FIRB restrictions appear to be adequate and not requiring review as in the AUSFTA.

Levels of Domestic Regulation in the PRC

Hunt & Hunt perceives that many problems exist for Australian entities wishing to invest in PRC from the multiple levels of regulation of investment by different levels of PRC Government and the fact that this regulation changes so regularly.

It is often difficult for Australian investors to manage the variety of different entities existing in the PRC and the different levels of permitted activity.

We would encourage the reform of the different types of regulation affecting establishment of operating companies to enable more direct investment. Any regulation should be transparent and not subject to unilateral change.

Investment would be assisted by one set of Government regulations and more liberal means of direct investment, removing the current complex structure.

Mandatory Use of Local Labour Service Companies

This represents one of the more significant restrictions on direct investment. The need to use these companies represents a cost to business. Direct employment should be liberalised to parties beyond those currently able to do so. The current restrictions based on the type of approved entity should be revised.

Dispute Resolution – Investor/State Resolution Provisions

Consistent with other FTAs we believe that the FTA with PRC should include a general mechanism for the countries to resolve disputes as to the application of the FTA by way of diplomatic negotiations, and, ultimately, Arbitral Tribunal.

However, there are some concerns that PRC regulations may not yet afford adequate protection to individual investors who believe that they are being disadvantaged by inadequate implementation of the FTA.

Consistent with the TAFTA we believe that there should be an Investor/State dispute resolution provision to protect individual investors.

Shipping restrictions

There appear to be real concerns that “Conference” arrangements for shipping between PRC and Australia increases costs and limits services although they are permitted by the ACCC. This is creating a very real limitation on trade. The FTA should incorporate an independent, specific review of these shipping practices and provision to allow new entrants.

Migration and Visa Restrictions

Hunt & Hunt recognises the sovereign right of nations to control immigration. However, there will need to be some relaxation to the current visa restrictions to accommodate increased business investment and international provision of services.

There should be better accommodation in the provision of the visas. Applicants for business visas should not be obliged to wait in person for many hours in lines at Chinese Consulate for their visas.

Capital Market Reform

We believe that PRC should continue their commitment in reforming capital markets, especially in liberalising the access of Australian Companies and in adopting regulation consistent with international standards.

Australian investors should be able to invest directly in PRC Capital markets, feel confident that their investments are protected and that the markets are being conducted in a transparent and fair manner. Hunt & Hunt would encourage the PRC Government to continue their efforts to eliminate unfair practices such as market manipulation and insider trading. Australian entities should have better access to list and raise money in PRC markets.

Establishment of Advisory Committees

In a manner consistent to other Australian FTAs, we believe that the FTA with the PRC would benefit from the establishment of bilateral Advisory Committees to work together to facilitate the FTA and achieve the aims of the FTA.

Conclusion

Hunt & Hunt strongly endorses a FTA between Australia and the PRC.

The final wording of a FTA is very important but the real strength & substance of any FTA with PRC will be found in the process to achieve this outcome. In Asia mutual obligations rely on “guanxi” (relationships) to give real substance to written agreements.

No FTA will ever be perfect nor will it satisfy every interest group and the task of government is to strike a balance which is “politically” acceptable and still moves to meeting the economic and structural concepts of free trade.

Whilst the primary objective of the negotiation process is a signed FTA it is just as important that we use the process to strengthen our bi-lateral relationship the sometimes over used “win win” concept is very important in this FTA round.

We believe that a FTA represents a significant opportunity for Australia to entrench its relationship with the PRC as a major trading partner. and enables Australia to enhance its position as an international leader in the advancement of free trade.

We confirm our previous offer to assist and contribute to this exciting and important initiative.



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