# Australia's bilateral trade treaties—developments 1972-1975

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Eleven trade treaties concluded by Australia between the period May 1972 and June 1975 provide a new dimension to the network of Australia's trading relations.

Between 17 May 1972—when the Trade Agreement between Australia and Czechoslovakia was signed—and 1975,[1] Australia has concluded trade agreements with Czechoslovakia,[2] the USSR,[3] the People's Republic of China (PRC),[4] Indonesia,[5] the German Democratic Republic (GDR),[6] Iran,[7] Hungary,[8] the Democratic Republic of Vietnam,[9] Bulgaria,[10] Korea[11] and Romania.[12]

Australia had previously concluded similar trade treaties with the USSR, Hungary, Romania and Bulgaria[13] so that the eleven trade agreements mentioned are not without precedent. It was possible, however, for the Australian trade lawyer to regard these earlier agreements as an anomaly. The renegotiation of these earlier agreements and conclusion of similar agreements with such a range of other states demands more serious attention. It is well known that the majority of the countries in question conduct their international trade along very different lines from that of Australia and its major trading partners. The lawyer must first look to the trade agreements for the perimeters within which Australia will conduct commercial relations with these countries.

The provisions of the 1972-75 bilateral trade agreements may be summarised as follows:

1. Parties agree, subject to laws and regulations in force, to facilitate as

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1. In addition to the trade agreements noted below, Australia concluded an amendment to the rates and margins of preference under NAFTA, Aust TS 1973 No 14, which has not been included in this study.
2. Aust TS 1972 No 19.
3. Aust TS 1973 No 23.
4. Aust TS 1974 No 21.
5. Aust TS 1973 No 23.
6. Aust TS 1974 No 7.
7. Aust TS 1974 No 22.
8. Aust TS 1974 No 25.
9. Aust TS 1974 No 29.
10. Aust TS 1974 No 32.
11. Aust TS 1975 No 22.
12. Aust TS 1975 No 27.
13. Aust TS 1965 No 19; Aust TS 1967 No 28; Aust TS 1967 No 13; Aust TS 1966 No 9.

far as possible imports and exports to the territory of the other, particularly of the goods enumerated in schedules to the agreement.[14]

2. Parties agree to extend most-favoured nation (mfn) treatment in respect of customs duties and the like limited in scope of application.[15]
3. Parties support the principle of international commodity agreements designed to improve the conditions of international trade in products of interest to them.[16]
4. Parties agree to support negotiation of commercial contracts between relevant commercial enterprises and organisations; declare support in principle for conclusion of long-term commercial contracts relating to the supply and purchase of goods.[17]
5. Australian legal and natural persons on the one hand and state owned corporations/legal persons on the other may carry out/conclude contracts and agreements under the trade agreement.[18]
6. Parties agree to payments in convertible currency.[19]
7. Parties shall as appropriate, in accordance with existing laws and regulations, encourage economic, industrial and technical co-operation between relevant commercial enterprises and organisations, including interchange of technical representatives, holding of and participation in other promotional activities in the field of trade and technology.[20]

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14. Australia-USSR Trade Agreement 1973, Articles 1 and 2; Australia-PRC Trade Agreement 1973, Article 1; Australia-Indonesia Trade Agreement 1973, Article 1; Australia-GDR Trade Agreement 1974, Article 6; Australia-Bulgaria Trade Agreement 1974, Articles 1 & 4; Australia-Iran Trade Agreement 1974, Article 1; Australia-DR Vietnam Trade Agreement 1974, Article 1. The trade agreements by Australia with Czechoslovakia, Indonesia, Korea, Hungary and Romania do not contain a list of goods, nor, except in the case of Indonesia (Article 2), a reference to *mfn* treatment because all these countries are members of GATT.
15. See fn 14 above. Australia-PRC Trade Agreement 1973, Articles 4 & 5; Australia-Indonesia Trade Agreement 1973, Article 1; Australia-GDR Trade Agreement 1974, Articles 2, 3 & 4; Australia-Bulgaria Trade Agreement 1974, Articles 2 & 3; Australia-DR Vietnam 1974 Articles 4 & 5.
16. Australia-Czech Trade Agreement 1972, Article 3; Australia-USSR Trade Agreement 1973, Article 5; Australia-PRC Trade Agreement 1973, Article 2; Australia-Indonesia Trade Agreement 1973, Article 4; Australia-GDR Trade Agreement 1974, Article 13; Australia-Bulgaria Trade Agreement 1974, Article 1.
17. Australia-USSR Trade Agreement 1973, Article 3; Australia-GDR Trade Agreement 1974, Article 7; Australia-DR Vietnam 1974, Article 2; Australia-Iran Trade Agreement 1974, Article 2; Australia-Hungary Trade Agreement 1974, Article 3(b); Australia-Bulgaria Trade Agreement 1974, Article 5; Australia-Romania Trade Agreement 1975, Article 3.
18. Australia-Czech Trade Agreement 1972, Article 4; Australia-PRC Trade Agreement 1973, Article 3; Australia-DR Vietnam 1974, Article 3; Australia-GDR Trade Agreement 1974, Article 10.
19. Australia-Czech Trade Agreement 1972, Article 5; Australia-PRC Trade Agreement 1973, Article 6; Australia-GDR Trade Agreement 1974, Article 2; Australia-DR Vietnam Trade Agreement 1974, Article 7; Australia-Iran Agreement 1974, Article 6; Australia-Hungary Trade Agreement 1974, Article 7; Australia-Romania Trade Agreement 1975, Article 7.
20. Australia-USSR Trade Agreement 1973, Article 3; Australia-PRC Trade Agreement 1973, Article 7; Australia-GDR Trade Agreement 1974, Articles 8 and 9; Australia-Iran Trade Agreement 1974, Article 5; Australia-Hungary Trade Agreement 1974, Articles 4 & 6; Australia-Romania Trade Agreement 1975, Articles 4 & 8.

8. Parties agree to exempt commercial and advertising samples from customs duties and taxes and to permit their re-exportation.[21]
9. Parties agree to establishment of a mixed committee or commission to examine the state of trade, explore measures of expansion of mutual trade and of economic, industrial and technical co-operation between relevant commercial enterprises and organisations, and will seek solutions to problems which may arise in the course of the development of trading relations between the two countries.[22]

The substantive clauses of the 1972-75 bilateral trade agreements naturally reflect whether the parties are both members of the GATT, but irrespective of the answer to that question, they represent a marked departure from the specific and detailed provisions which have been a feature of earlier trade agreements negotiated with Australia's major trading partners—the United Kingdom, Japan and New Zealand and the bilateral commodity agreements such as those dealing with the supply of beef to the United States.[23]

Such agreements are notable for the degree of detail included, both as to the goods traded, scope of preferential treatment and quantitative arrangements. Full provision is made for governmental consultation on all relevant issues. Of these, the now defunct 1957 trade agreement with Britain was typical. In Articles 2, 3 and 7 of the 1957 Australia-United Kingdom Trade Agreement[24] there were carefully drafted provisions dealing with rates of duty. Article 5 dealt with access for Australian meat, Article 6 contained provisions for quantitative arrangements for Australian wheat sales to the United Kingdom; Article 9 dealt with protective tariffs and machinery for protesting against them; Article 12 established rights of protest and action to be taken in the event of dumping of products by third countries. In addition, it should be noted that Articles 4; 6.2; 7.3; 8.2; 9.1(d); 12; 13; 14, and 15.2 dealt with consultation between governments on points of difficulty or as required from time to time and as well covered rights of access by private traders of both governments to government bodies of either party. A similar approach was taken in the Australia-Japan Agreement on Commerce 1957[25] which in related exchanges of notes embodied detailed preferential and quantitative provisions dealing with access of specified products as well as protective provisions. The Free Trade Area Agreement between Australia and New Zealand 1966,[26] also falls into this class.

It is doubtful whether these trade agreements fall into the traditional

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21. Australia-USSR Trade Agreement 1973, Article 4; Australia-GDR Trade Agreement 1974, Article 5; Australia-Hungary Trade Agreement 1974, Article 5; Australia-Romania Trade Agreement 1975, Article 5.
22. Australia-Czech Trade Agreement 1972, Article 6; Australia-USSR Trade Agreement 1973, Article 6; Australia-GDR Trade Agreement 1974, Article 12; Australia-Iran Trade Agreement 1974, Article 7; Australia-PRC Trade Agreement 1973, Article 8; Australia-Hungary Trade Agreement 1974, Article 8; Australia-Romania Trade Agreement, Article 10.
23. 511 UNTS 17; Aust TS 1964 No 8; Aust TS 1970 No 3; Aust TS 1971 No 8.
24. 265 UNTS 197; Aust TS 1957 No 2.
25. 318 UNTS 381; Aust TS 1957 No 15, amended. 517 UNTS 318; Aust TS 1964 No 11.
26. 554 UNTS 169; Aust TS 1966 No 1.

pattern of the 'umbrella' treaty, as the treaty of friendship, commerce and navigation (FCN) is commonly called. The 'umbrella' or FCN treaty is well known as a treaty of establishment; it is commercial in the broadest sense, concerned with the protection of persons natural and juridical and of the property and interests of such persons.[27] It defines in general terms the treatment which each country owes to the other's nationals, commercial activities and the respect due to them, their property and their enterprises. In essence then, although the FCN treaty covers a wide range of matters, it does not particularise in the way that the Australia-United Kingdom trade agreement 1957 did. It is rather concerned to secure general non-discrimination and equality of treatment or in other words to provide an umbrella under which the nationals of each side can carry on their legitimate commercial and trading activities in the territory of the other party.

Australia has not been enthusiastic about concluding this type of treaty, although it inherited a number of them from the United Kingdom as a result of British nineteenth century negotiations in which Britain generally had the dominant trading interest, and in which colonial interests were seldom a relevant consideration for the British government. Australian officials rebuffed the interest in such an arrangement expressed by the Japanese in 1971. This position was modified in 1973 when the Australian and Japanese Prime Ministers announced their approval in principle to the negotiation of a treaty along these lines with Japan, and the 'NARA' treaty finally entered into force on 21 August 1977. Nevertheless, it falls a long way short of the traditional friendship treaty. It can probably best be regarded as an ad hoc response to the political decision to negotiate a bilateral charter of good will, although it has been viewed as a realistic response to modern day needs.[28]

Other countries have been willing to negotiate a more limited type of umbrella agreement designed to offer the potential trader and investor some degree of general protection as well as some concessions on individual items. The agreement on Commerce and Economic Co-operation between the United Kingdom and Cameroon in 1963[29] provides an example. That type of treaty is both more general in its wording and more limited in content than the traditional 'umbrella' treaty, but it does embody an expression of approval for trade between the two countries and provides a basis for one country to complain to the other of failure to implement its terms and to complain of difficulties experienced. On the other hand, general obligations are qualified by the magic phrase 'within the framework of its laws and regulations'.[30] This is designed to enable a state to expand or modify its treaty concessions by changing its municipal law and administrative practices as its developing or changing economic

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27. Cf Treaty of Commerce, Establishment & Navigation between the United Kingdom and Japan 1962, 86 (English text).
28. See Herron, L. W., 'Most favoured North-South treatment. The *mfn* clause & Australia's First Friendship Treaty'; paper presented to Seminar for Australian International Lawyers, 1977.
29. 478 UNTS 150.
30. Cf Articles V 1; and VII 1.

and financial needs may require. Australia was careful to adopt this approach in its negotiations with the Japanese on matters such as the ownership, control and development of Australia's natural resources, and having adopted this stance, could not oppose Papua New Guinea taking the same approach in the clauses dealing with investment in the Australia-PNG Agreement on Trade and Commercial Relations (PATCRA).

Leaving aside the trade agreement with Indonesia, the other Australian trade agreements under study seem at first reading to have an affinity with agreements like the United Kingdom-Cameroon agreement. They are very general in terms favouring two-way trade and investment. In addition, they contain sprinklings of the phrase 'subject to laws and regulations in force' throughout the various substantive provisions. For example, in the agreements with the People's Republic of China and with the Democratic Republic of Vietnam, the phrase appears both in Article I, which embodies the general undertaking to facilitate trade, and in Article II which states that:—

> 'The exchange of goods and technical agreements entered into between the two countries shall, subject to laws and regulations in force in each country, be at reasonable market prices and shall be carried out by Australian legal and physical persons and state-owned import and export corporations of the People's Republic of China.'

The agreement with Iran includes the protective reference to domestic laws and regulations in four of its seven substantive articles, including the general undertaking to facilitate trade. Provisions in the 1973 agreement with the USSR and the agreement with the GDR also contain the phrase. The result is that very general provisions dealing with long-term commercial contracts, visits by trade delegations and experts, commercial arrangements relating to patents, licences and services, exchange of industrial and technical expertise, and relief from duty on commercial samples are reduced to legally ineffective undertakings. In summary, it is tempting simply to regard these treaties as political gestures reflecting the policies of rapprochement toward the countries in question. A more positive approach leads to the conclusion that like the more limited type of 'umbrella' treaty, the real value of this group of trade agreements is that they provide a peg for governmental discussion and development of commercial relations between Australia and the nations in question.

If this viewpoint is accepted then the agreements can be seen in proper perspective. Although neither Korea nor Iran nor Indonesia can be put in the same political group as the other countries, all these agreements fall into the general pattern of agreements concluded by state trading nations with non-state trading nations. The formula can be justified in the case of Korea, Indonesia and Iran as appropriate when dealing with developing countries. In other words, Australia accepted that this sort of treaty was both desirable politically and was legally the most that could be expected. It would have been quite unrealistic to have used precedents, drawn from trade agreements between 'capitalist' countries. This conclusion is reinforced in the case of the state trading countries by following a brief description of the way in which they do business, and on an analysis against that background, of the substance of Australia's agreements with

the state trading countries. Special features in the agreements with Iran and Indonesia are also noted.

**The Structure of the Foreign Trade Organs of State Trading Countries**

In countries like the USSR, Czechoslovakia, the German Democratic Republic and the People's Republic of China, external trade is nationalised. Generally speaking, the conduct of foreign trade is entrusted to the Foreign Trade Minister in each country and under him to three types of organisation:—

A. Foreign Trade Organisation/Corporation
B. Trade Delegation
C. Council for Foreign Trade

*A. Foreign Trade Organisation*

The Trade Agreement with Czechoslovakia refers to 'Czechoslovak legal bodies authorised under Czechoslovak law to carry on foreign trade'. In Article III of the Australia-PRC Trade Agreement, there is a reference to the state-owned import and export corporations. The USSR and the German Democratic Republic are more specific. It is clear from Article 2 and Article 6 respectively of those agreements that the relevant bodies in both these countries are Foreign Trade Organisations.[31]

It would seem that all these bodies have very much the same structure and authority. Trade in these countries being state-regulated, its control is in the hands of the relevant Ministry of Trade or Foreign Trade. The powers of this Ministry include negotiation of foreign trade agreements, regulation and issue of licences for foreign trade and the control of customs. The Foreign Trade Organisations, as they are usually referred to, are directly under the control of this Ministry which determines their objects and approves their charters. These are the organisations which in China, for example, negotiate with foreign merchants at the annual spring and autumn fairs at Canton.[32] The important point about these organisations is that they are neither the producer nor the consumer of the products with which they deal. However, while they are 'middlemen' they are not agents but principals. Without special government permission the domestic consumer or supplier does not qualify as a party to a particular contract with a foreign firm.[33]

Writing about the Eastern European foreign trade organisations, Pisar says that these operating business organisations are

> 'subject to their government approved charters of incorporation, the civil codes of their countries of origin and the regulations which are

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31. Winter in 'The Licensing of Know-How of the Soviet Union', (1967) 1 JWTL 162 at 164, states that in the USSR the correct title is the 'All Union Export-Import Association'.
32. Similar fairs are held in Eastern European countries.
33. This statement may need qualification; Pisar, *Coexistence and Commerce* (1970) pp 149-150 claims that leaving aside the USSR, other socialist states have moved away from the notion that export/import organisations have the monopoly in foreign commercial dealings. He cites (inter alia) the illustrations of Karl Zeiss and Chemianlagan operations in the GDR and the Skoda complex in Czechoslovakia.

sporadically prescribed for the state trading apparatus as a whole. Transactions concluded in violation of these provisions are tainted with illegality and are precarious from the standpoint of foreign parties. This is just as true under the more traditional approach of the East Germans' legal system as under recent Soviet legislation'.[34]

The Chinese Foreign Trade Organisations seem to be essentially the same as their Eastern European counterparts.[35] They too are middlemen in a planned economy.[36] They possess few fixed assets. The exact legal position of these entities under PRC law is far from clear due to the traditional Chinese distaste of seeking legal solutions to disputes, but Hsiao suggests that it follows the Eastern approach in so far as its civil liability is limited to the working capital appropriated to it by the State.[37]

*B. Trade Missions*

The work of the foreign trade organisations in the USSR, the German Democratic Republic and the People's Republic of China is supplemented by trade delegations. Thus Article 7 of the agreement with the PRC and Article 9 of the agreement with the GDR, in which each country undertakes to promote the interchange of trade representatives, groups and delegations and to facilitate the holding of trade exhibitions and other trade promotional activities by organisations of the other, is an important provision so far as the state trading nations are concerned. In the USSR, Trade Missions are authorised to operate abroad as agencies of the Soviet Government.[38] Triska and Slusser[39] state that a 1930 Soviet Decree provided that all Soviet foreign trade contracts concluded abroad under the authority of Soviet trade treaties and agreements must be signed by a member of a Soviet trade delegation. Those concluded in the USSR must be signed by a representative of the respective organisation. Observers have noted that direct commercial activities of trade delegations have been substantially reduced in favour of the foreign trade organisation. Whatever the extent of authority, there is no doubt that the USSR Trade Mission is an organ of state. The width of responsibilities may differ in other Eastern European states and it appears that while the delegations are part of the state, the status of these entities as a separate organ of the state is not necessarily the same.[40]

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34. Pisar, op cit p 263, fn 1, 'RSFSR Civil Code Sec 50, invalidates transactions beyond an enterprise's corporate purpose'. And see examples cited at 263-4.
35. Cf Hsiao, 'Communist China's Foreign Trade Organisation' (1967) 20 Vand L Rev 303 at 310.
36. One Australian company which has been trading with the PRC for a lengthy period before recognition explained that it regularly sent representatives to the Canton trade fair. At that stage matters such as the price of the product was settled. The contract was then finalised by the relevant PRC Overseas Trade Organisation trading through Hong Kong.
37. Op cit at 311.
38. USSR Decree on Trade Delegations, 13 September 1933.
39. *Theory, Law and Policy of Soviet Treaties* (1962) p 493 fn 25.
40. See discussion in Szászy 'State Trading Activities in Hungary' (1967) 20 Vand L Rev 393 which suggests that until the mid-1960s Hungarian trade representation was part of the Ministry of Foreign Affairs, and Quigly 'Soviet Foreign Trade Agencies Abroad' p 73 at 77 in *East West Trade* (ed Grizybowski) states that Soviet Trade Delegations, unlike the Foreign Trade Orgnization, are not independent legal entities.

*C. Chambers of Commerce*

Another organ common to both Eastern European states and the PRC owes its existence to the 1952 International Economic Conference in Moscow. The Chamber of Commerce is a separate entity from the Foreign Trade Organisation although it works under the supervision of the central Ministry of Foreign Trade. In some respects these Chambers of Commerce are like the free enterprise trade associations; for example, they sponsor trade fairs at home and abroad, provide marketing information, issue certificates of origin and quality, promote joint ventures and are responsible for the arbitration machinery for settlement of commercial disputes. Called the Chamber of Foreign Trade in the GDR, and the China Council for Promotion of International Trade (CCPIT) in the PRC, the role of these organisations in particular has, because of the particular political difficulties, been regarded by commentators as providing the PRC and the GDR with a front organisation whereby trade arrangements can be concluded between these state trading states and countries which do not recognise them.[41] Thus in 1965 the CCPIT concluded an agreement with the Italian Institute of Foreign Trade which facilitated the exchange of economic missions.[42] Sino-Japanese trade has been conducted under the umbrella of agreements signed by the CCPIT for the PRC.[43]

In Australia's case no such 'trade agreement' was concluded with either the GDR or the PRC before recognition. In spite of this it would appear from the experiences of Australian businessmen both before and after recognition that the CCPIT had and has a valuable function as a facilitator or a go-between. It is able to take up specific interests expressed by western traders and to ascertain which state organisation handles the product. This is a most vital aspect for a businessman in dealing with state monopolies. At this level it supplements the foreign trade organisations and trade delegations.[44]

Both the Chinese CCPIT and the East European Chambers have responsibility for the machinery provided in these countries for arbitration of commercial disputes between domestic and foreign traders.[45] The

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41. Cf Hsiao 20 Vand L Rev at 373; Drobnig and Waehler, 'Legal Aspects of Foreign Trade in East Germany', (1968) 2 JWTL 28 at 33. Similar 'western' organisations such as the Confederation of British Industry operated in this way before the United Kingdom recognised the German Democratic Republic.
42. Reghizzi, 'Legal Aspects of Trade with China' (1968) 9 Harv ILJ 85 at 92.
43. Cf Hsiao 20 Vand L Rev at 313 and cf Hsiao 'The Fourth Sino-Japanese Trade Agreement' in Cohen (ed) *China's Practice of International Law*, from which it becomes clear that while the Chinese included these and other agreements in their treaty series, the Japanese were careful to avoid giving them the status of treaties.
44. On the other hand, many businessmen have never used the good offices of the CCPIT. Sometimes contracts between Australian traders before recognition of the PRC by Australia were concluded with the China Resources Company of Hong Kong. In other instances firms having long standing trading relations with Chinese enterprises have for many years visited enterprises in the PRC to discuss purchases of goods from China, negotiating the contracts later through the Hong Kong entity.
45. Pisar, op cit, p 527 fn 1, gives references to the arbitration organs in state trading countries and cf Book 2, Part II, 'The settlement of Disputes'; see also Hsiao, 20 Vand L Rev at 314 and Szászy, 'State Trading Activities in Hungary', (1967) 20 Vand L Rev at 424.

Russian Chamber and the CCPIT also have responsibility for registration of foreign trade marks.

The legal status of these organisations is unclear. Hsiao suggests that the CCPIT is neither a state agency nor legal entity and emphasises that a 'trade agreement it has concluded with a foreign partner becomes binding only when a specific contract has been signed.'[46] This statement would seem to mean that the CCPIT is simply an agent of the corporation on an ad hoc basis. So far as the East European States are concerned, Pisar notes that the All-Union Chamber of Commerce of the USSR is a legally independent corporate person designated in its Charter as a 'social' rather than a 'state' organisation. He points out that in spite of this designation the organisation, like the Chamber functioning in other East European states, is subject to government control.[47] From his description it would seem that notwithstanding their constitutions these Chambers would be regarded as governmental entities by an Australian court.[48]

**Substance of Bilateral Trade Agreements 1972-75**

The first area requiring comment is illustrated by some provisions dealing with what has traditionally been the most important general concession in a trade agreement—the extension of *mfn* treatment on a reciprocal basis. In other words, the trade of each contracting party with the other is to be treated no less favourably than that of the most favourably treated third country.

The five trade agreements concluded during this period with countries which are members of GATT deal with the matter simply by noting that GATT relations exist between the two parties. GATT is of course based on the concept of *mfn* treatment, and given the obligations under GATT no further statement in the bilateral treaty is necessary. By contrast the 1974 Trade Agreement between Australia and Iran does not embody *mfn* obligations. Iran has turned against incorporating the *mfn* principle in her trade agreements and has in fact terminated *mfn* treaties such as the 1969 Convention on Establishment and Navigation between Iran and France. This approach is of course consistent with that taken by developing countries who, quite correctly, argue that the *mfn* clause can hardly be a non-discriminating tool where the economic strengths of the partners are disparate.[49] In the case of the Australia-Iran Trade Agreement, the Agreement itself only records a loose understanding to take all appropriate measures to facilitate trade between the two countries particularly in respect of the goods listed in Schedules A and B to the Agreement. This contrasts sharply with the way in which the *mfn* principle is traditionally reflected in bilateral trade agreements, that is by according the other party to the treaty rights to export goods into the other country at *mfn* rates of duty. So far as Iran is concerned it would seem that Iranian goods of

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46. Op cit p 314.
47. Pisar, op cit pp 145-7.
48. *Grain Elevators Board v Dunmunkle Corporation* (1946) 73 CLR 70.
49. Cf YbILC 1976 Vol 1 pp 142-8.

export interest to Australia already enjoy better than *mfn* treatment in that they qualify for Australia's special preferences for less-developed countries. The Australian schedule to the agreement was heavily weighted in favour of primary products for which Iran has a demand. The potential value of the agreement to Australia is demonstrated by the joint enterprise 'Austiran' in which governments and private enterprise on both sides participate. The Austiran operation has been concerned initially with the production, slaughter and shipment of animals in Australia and the sale and distribution of the carcasses in Iran (or other markets). None of this is specifically dealt with in the Agreement, but the existence of the inter-governmental trade agreement is a useful backup to the joint venture.

The 1973 Trade Agreement between Australia and Indonesia also requires special mention.[50] This Agreement was negotiated under an Australian conservative government and ratified by the Labor Government which came to power in late 1973. It is similar to the other agreements under study in that it provides business enterprises on both sides with governmental assurances of good will in respect of trade, particular attention being paid to agricultural commodities of importance to both sides. As such it represents an advance over the previous unsatisfactory situation in which the 1959 trade agreement between the two countries had been renewed each year, but apart from the undertaking to consult on shipping matters,[51] its *mfn* undertakings in respect of customs duties, rules, import and export charges and the like, do not seem to take either party beyond its commitments as a member of GATT in respect of trade between them.

In one important respect, however, the 1973 Agreement with Indonesia is more extensive than the other agreements discussed. It contains in Articles 8 and 9 provisions whereby Australia undertakes to facilitate the flow of Australian investment in Indonesia, to use 'best endeavours' to encourage joint enterprises in that country and to encourage Australian subsidiaries to make use of parts and components of Indonesian origin. For its part, Indonesia undertakes to use 'best endeavours' to ensure that Australian professional consultants and construction contractors are favoured, and to extend *mfn* treatment to Australian investments and joint ventures in accordance with its investment laws and regulations.

A stronger agreement from the point of view of the Australian investor would have contained express provisions dealing with expropriation by Indonesia, if only a general undertaking that expropriation must be equitable and in the public interest and not contrary to a specific undertaking in state contracts with Australian enterprises. Nonetheless, the 'best endeavours' provisions will provide a useful peg for either side to raise governmental breaches during the ad hoc consultations provided for in Article 10.

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50. Cf Exchange of Notes between Australia and Indonesia amending the Trade Agreement of 17 December 1959, Aust TS 1970 No 2, and cf comments of Sir John Crawford, *Australian Trade Policy 1942-1966*, pp 416-7.
51. Article 7.

The other agreements under study in this paper, which are not based on a GATT relationship, schedule lists of goods in respect of which there is a loose undertaking to facilitate trade, subject to laws and regulations in force. All these agreements contain an *mfn* clause,[52] in relation to customs duties and the like, but exclude existing preferential systems like free trade areas or Eastern European trade blocs from the *mfn* undertaking.

In the case of agreements with the People's Republic of China (PRC), the Democratic Republic of Vietnam and the German Democratic Republic (GDR) the clause granting *mfn* treatment is in substance the same as that contained in the earlier trade agreement with the USSR. It might be argued that when these two agreements were concluded there was little practical advantage for the PRC and GDR in obtaining a concession in these terms from Australia. In the Australian tariff, the old distinction between general and *mfn* treatment had disappeared when these treaties were concluded so that although not members of GATT both countries enjoyed *mfn* treatment in respect of customs tariffs, and in both treaties the limited *mfn* obligation does not extend to special preferences. Since that time, however, economic pressures in Australia have forced the reintroduction of specific measures such as quota requirements to control imports in addition to the 'voluntary restraints', which had earlier been considered an adequate control. In this economic climate, it would seem that while the *mfn* obligation can be evaded by devices like quotas, a state enjoying general *mfn* status may be in a better bargaining position than a state which has no such claim. On the Australian side, for the reasons noted below, it is questionable whether the *mfn* obligation is an important concession to secure when negotiating with non-members of GATT.

The other related explanation for the inclusion of the *mfn* clause in these trade agreements probably derives from the acceptance by non-GATT members of the argument that this key provision of the GATT does not represent an accepted rule of international law to which they can claim the benefit without either adhering to the GATT or entering into bilateral agreements dealing specifically with the issue. In other words, negotiation of an *mfn* clause is still in the nature of a contract consisting of mutual exchange of concessions and privileges. Hyder[53] notes that there is not a single instance where a state has successfully claimed *mfn* rights in absence of a treaty. On this basis, whatever the current position so far as Australia's tariff and related taxes may be, neither the PRC nor the GDR could claim as of right the benefit of any *mfn* treatment in the absence of a specific treaty undertaking by Australia.

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52. The Trade Agreement between Australia and the USSR, Aust TS 1973 No 23, constitutes a supplement to an earlier agreement of 1965, whereby *mfn* treatment was granted in respect of customs and other duties and related formalities, quotas, export, import licences and the like. The customary exceptions necessary on both sides in respect of 'essential security interests', health and traditional trading blocs were covered. Accordingly it was unnecessary to include an express *mfn* provision in the supplementary agreement.

53. *Equality of Treatment and Trade Discrimination in International Law* (1968) p 30.

Writers have noted that East European countries in particular look on equality in trade matters as a symbol of the general principle of the equality of states and of peaceful co-existence at that level. They suggest that the *mfn* clause has, for communist countries, thus come to be a symbol of this equality and is regarded by them as important, not because it is a means of expanding trade but because from it, friendly relations are expected to flow.[54]

It has also been noted[55] that during the Cold War of the 1950s, 'western block' states were reluctant to incorporate the clause in trade treaties with communist states. This policy was obviously based on political motivation but it is also argued by western governments that in centrally planned economies the private foreign trader does not have more than a theoretical assurance of reciprocal advantage which an *mfn* clause would normally provide.[56] This attitude is due in large part to the absence of any assurance that trade will be conducted purely on the bases of commercial considerations. If this view is still well-founded today, it may be that Australia would have been better off with a tighter agreement containing specific commitments in quantitative terms. However, given the accession to GATT of Poland, Yugoslavia, Romania and Bulgaria it would seem that this problem has been found capable of pragmatic solution.

The policy of the PRC in favour of an *mfn* clause probably reflects a view deriving from their experience of the unilateral *mfn* clause contained in the unequal treaties imposed on China by European powers during the nineteenth century.[57]

Chiu[58] states that an *mfn* clause is usually insisted on in Communist China's treaties of commerce and navigation and its trade agreements. He notes that generally the right is not applied by Communist China to favours granted in frontier trade between neighbouring states or to trade between members of a customs union or any preferential system. The primary example he cites is the Sino-Ceylonese Trade and Payment Agreement 1957[59] which contains a provision substantially the same as Articles 4 and 5 of the Australia-PRC Agreement 1974. Since Australia also insists that such preferential arrangements be regarded as exceptions to an *mfn* obligation, it is readily understandable that Australia could accept the Chinese draft on this point—presumably on the basis that only

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54. Cf Kock, *International Trade Policy and the GATT 1947-1967* (1969) Ch VIII.
55. Kock, op cit, p 187; Hyder op cit, p 11.
56. See for example discussion in Pisar, *Coexistence & Commerce* (1970) pp 194-8, and in Kock op cit, at 204 et seq.
57. Cf Tsung-Yu Sze, *China and the mfn Clause* (London 1925, reprinted Taipei 1971) and discussion in Chieu, *The People's Republic of China and the Law of Treaties* (Harvard 1972) pp 51-2, of the concept of inequality in relation to the unilateral *mfn* clause. Chiu later makes the point that the Chinese may claim that even a reciprocal *mfn* clause is unequal on the ground of uneven economic position of the two contracting parties pp 63-4—this is unlikely to worry Australia while political relations remain warm, for although there is a current imbalance of trade in Australia's favour, the PRC are concerned only with ensuring that their total imports balance with their total exports.
58. Op cit, p 52.
59. 337 UNTS 137, Article VIII.

experience will show what preferential treatment the Chinese Government is prepared to offer to foreign firms.

For the businessman what is important is the basis on which goods can be traded with his commercial counterpart. Given the generality of the terms of the these agreements, Australian firms and enterprises and their state trading counterparts get little assistance from the texts as distinct from the spirit of the trade agreements negotiated between 1972-4. This is borne out when the agreements are examined for guidance on questions of rights of establishment and sovereign immunity.

**Rights of Establishment**

These trade treaties do not contain any provision dealing with the rights of natural and juristic persons of either contracting state to enter and remain within the territories of the other, nor with matters such as protection of persons and property. On the Australian side, while there was provision in the 1957 Trade Agreement with the United Kingdom permitting private traders to have rights of access to relevant statutory authorities,[60] there has been official reluctance to write into agreements with other states 'establishment' provisions of the sort found in the nineteenth century FCN treaties. This reluctance was demonstrated by the initial Australian official rejection of the Japanese proposals for a treaty of friendship, commerce and navigation between the two countries which would have incorporated such provisions. The slow progress of negotiation of the NARA treaty, which was approved in principle by the Australian and Japanese Prime Ministers in 1973 as a compromise to a full FCN treaty undoubtedly reflects the difficulty which Australian officials experienced in exploring the implications of granting some degree of privileged status to Japanese nationals and enterprises. In this instance Australia's negotiating position as a country faced with Japan's economic might obliged it to insist on something less than full *mfn* clauses which would have allowed Japan to claim benefits granted in the past to British and American firms.

So far as the socialist states are concerned, while foreign traders are operating in their territories, including foreign airline representatives, this is the exception rather than the rule. Foreign investment is also treated with considerable reservation by Iran, by Socialist states, and more recently by Australia itself.[61] During the period in question all these governments favoured the negotiation of joint ventures whereby government controlled investment of foreign and domestic capital, and the exchange of knowhow were the vital indicators of mutual advantage.[62]

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60. Eg Australia-United Kingdom Trade Agreement 1957, Article 9.1 (d); compare this right of direct access with the Australia-Japan Agreement on Commerce 1957, Article V, which only provides government to government consultation in like circumstances.
61. The Australian Labor Government pledged to control foreign investment. Parl Deb HR 1920-5 (Sept 26 1972).
62. Australian missions went to Iran in May and June 1974 to examine possible areas of co-operation between the two countries. A joint venture in Australia has been one outcome.

Provisions in the trade agreements between Australia on the one hand and Czechoslovakia, the PRC and GDR on the other, which deal with negotiation of contracts, provide a further illustration of the reluctance of both sides to grant broad rights of establishment. These provisions represent the only reference in these treaties to the status of persons and enterprises of the other. They do not constitute rights of establishment. They are strictly limited to an indication of the entities authorised to conclude contracts under the terms of the agreement. They reflect the different political and economic systems. Thus Article III of the trade agreement with the PRC states:

> 'The exchange of goods and technical services under contracts and agreements entered into between the two countries shall, subject to the laws and regulations in force in each country, be at reasonable market prices and shall be carried out by Australian legal and physical persons and state-owned import and export corporations of the People's Republic of China.'

**Sovereign Immunity**

Article 10 of the Australia-GDR Trade Agreement provides:

> 'Legal and natural persons shall in every respect carry out their commercial transactions on their own responsibility.'

This provision gives an indication of the legal position of foreign trade organisations under the law of East European States.[63] It is based on the notion that every juridical person including the foreign trade organisations is to operate on a basis of independent economic accountability. Each enterprise is a juristic person creating rights and obligations for itself alone. It is answerable for its own obligations only to the extent of the property it holds. Moreover, in the case of the foreign trade organisation, although the state trading government in fact conducts the greater part of its domestic and foreign activities through them, execution of a claim against such an organisation is on its own assets. For this purpose the organisation is not legally part of the state's exchequer. The PRC has adopted the same principle.[64]

For this reason, notwithstanding the admittedly slight risk of an eastern state trading enterprise being unable to discharge its obligations, the private trader would be well advised to seek a financial guarantee. In Australia the position may be covered by insurance under the Export Payments Insurance Corporation Act 1956 (Cth).

Aside from the possibility that the foreign trading corporation might not be able to discharge its debts, it does seem that the foreign private trader who wishes to sue on a contract with such an entity is in a better position than if he wished to sue the state trading government. A breach of

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63. Article 9 of the Australia/GDR Trade Agreement states that contracts may be concluded by legal persons of the GDR authorised to carry on trade. These general references in the two sections can only be understood by reference to division of responsibilities between the trading organs of the GDR. It then becomes clear that on the GDR side it is the Foreign Trade Organisations which are referred to in Articles 9 & 10 of the Trade Agreement.
64. Hsiao, 20 Vand L Rev at 311.

contract by such an instrumentality may be the subject of a proceeding before a permanent arbitration tribunal operating under the Chamber of Commerce of the state trading state or subject to arbitration by another body under the terms of the contract. The alternative is to bring a claim against the organisation in a foreign court, but this is potentially hazardous while the law on the question of state immunity is unsettled. However, this difficulty may be more apparent than real if Pisar is correct in asserting that state trading countries have adopted the policy of not claiming immunity in respect of their foreign trade organisations.[65]

The legal position of other state enterprises and entities such as trade delegations and Chambers of Commerce is confused.[66] Sometimes the problem has been dealt with by special provisions in intergovernmental agreements.[67] The whole question raises issues going beyond the limits of the present paper.[68] In this context it can only be stressed that both the East European states and the PRC favour the settlement of commercial disputes by negotiation or arbitration.

The issue of state immunity is not dealt with in any of the trade agreements concluded by Australia under examination in this paper, and there is in fact no machinery in these agreements for the settlement of disputes over commercial contracts. This is in line with other modern Australian trade treaties which tacitly leave this question for the contractual parties.

There may be some avenue for ventilating complaints by private traders in the mixed commissions set up under the trade agreements themselves. For example, the instruction in the agreement with the PRC to:

> . . . seek solutions to problems which may arise in the course of development of trade between the two countries (Article VIII)[69]

would seem to allow one government to raise problems which would then be the subject of discussion by the Commission, whose findings would presumably be submitted to each Government. But there is no assurance that the Commission's report would be acted on and in the event that one government is unwilling or unable to take effective action to deal with a complaint raised in this forum, the government from whom the complaint originated can only exert diplomatic pressure for settlement. Denunciation of a trade agreement is too serious a step to be entertained on the

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65. And cf *EJR Lovelock v Exportles* [1968] 1 Lloyd's Rep 163; *Agroexport State Enterprise for Foreign Trade v Compagnie Européenne de Céréales* [1974] 1 Lloyd's Rep 499.
66. In the USSR a Statute of 13 September 1933 defined Soviet Trade Mission abroad not as legal entities but as agencies of the Soviet Government, cf 2 Gzovski, *Soviet Civil Law* (1949) 347-52.
67. USSR-Denmark Trade & Navigation Agreement, 17 August 1946 Article 6.
68. Jenks, *International Immunities* (1961), p 151; Amerasinghe 'State Breaches of Contracts with Aliens and International Law' (1964) 58 AJIL 881; and authorities cited by Szàszy (1967) 20 Vand L Rev 393.
69. Similar provisions are found in Australia-USSR Trade Agreement 1973 Article 6, 3; Australia-Czechoslovakia Trade Agreement 1972, Article VI, Australia-GDR Trade Agreement, Article 12; Australia-Iran Trade Agreement 1974, Article 7(b); Australia-Hungary Trade Agreement 1974, Article 8.

basis of a government's concern about alleged breaches of commercial contracts unless these were on such a scale that the agreement became unworkable.

In any event the procedure outlined above would be quite unsatisfactory for the private trader since the Commission only meets annually. It is not necessarily effective and would seem better suited to complaints between governments about bureaucratic policies or administrative procedures than to complaints about the alleged breach of the terms of a particular contract. Even in the light of recent developments in the law relating to sovereign immunity[70] it is clearly desirable that commercial contracts concluded by Australian firms and enterprises with state trading entities contain an arbitration provision. Such a provision seems particularly appropriate in the case of contracts with the foreign trade organisations of East Europe and the PRC because these countries have established arbitration machinery.[71]

Two other aspects of these bilateral trade agreements deserve mention:—

**International Commodity Agreements**

As might be expected from a country which depends so heavily on sale of primary commodities, the need to ensure secure markets for these products is at the forefront of Australian trade policy.[72] Seasonal fluctuations and agricultural protection, technological changes and substitute products mean that commodities do not have a stable supply-demand base. The result has been that Australia has been preoccupied with price stability. Although market agreements and production policies are also important, Australia has handled the matter primarily through bilateral agreements, but successive Australian governments have been active in GATT and specialised commodity conferences. They have pressed for reduction of agricultural protectionism, for arrangements to deal with surplus commodities and have participated in supplier agreements dealing with commodities such as minerals. This Australian policy is reflected by the inclusion in the agreements under study of reciprocal assurances in favour of the conclusion of international commodity agreements.

**Joint Trade Committees**

With the exception of the Agreement with the Democratic Republic of Vietnam, each of the Trade Agreements under study envisages that a joint trade committee should meet on a regular basis. It is not easy to ascertain the importance which the trading partners attach to this body.

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70. Cf Johnson, 'The Puzzle of Sovereign Immunity in the English Courts', in this volume.
71. The writer found it difficult to obtain any information from private or government enterprises as to what provision is made for settlement of disputes. Contractors with the PRC were however prepared to say that no specific provisions are ever inserted and this situation is substantiated in the case of the PRC. The writer sighted five contracts concluded between a PRC Trade organisation and an Australian private trader before recognition. None of them made any provision for arbitration or other means of settlement of disputes under the contracts.
72. The present paper is not concerned with stabilisation schemes.

On the side of the state trading country its representatives will obviously be state controlled and it would seem that the Australian side is also heavily official. To that extent these bodies would not seem very different from the groups of officials from each side involved in consultations under the agreements between Australia and the United Kingdom, New Zealand, Japan[73] and Papua New Guinea.

The establishment of the sort of joint bilateral commission which meets annually and alternately in each country has become a common feature of trade and cultural agreements, especially those with state trading countries. Commissions were not set up by the earlier Australian trade agreement with USSR and Hungary[74] but have been established by the 1973 and 1974 trade agreements with these countries.

The possible development of such committees as a venue for Australia to air complaints by private traders has been discussed.[75] It might also be possible to use the committees as arbitrators of disputes between private traders and foreign trade corporations but this seems unlikely to find favour with those countries which have established systems for arbitrating commercial disputes.

It is not possible without practical knowledge of the composition and operation of these bodies to assess whether they are more or less effective than the 'consultation' required under GATT and under Australia's trade treaty commitments with other governments. One benefit for Australia may be that there is a requirement that the Commissions meet annually and this may be a more satisfactory arrangement than the ad hoc consultation provided for under earlier trade agreements with the USSR and Hungary.

**Conclusion**

At the outset it was suggested that an analysis of the provisions of the latest trade agreements concluded by Australia during the 1970s shows that they do not find a precedent in either her major bilateral trade agreements with the United Kingdom, Japan and New Zealand or the FCN treaties of the nineteenth century. The subsequent portions of the paper described those organs of state trading nations engaged in foreign trade and suggested how certain key provisions of trade agreements with these nations should be interpreted in the light of status and practice of their foreign trade organs. This analysis demonstrates the unreality of attempting to square this group of trade agreements with bilateral trade

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73. Cf Australia-Japan Agreement on Commerce 1956, Article VI, 1. 'Each Government shall accord sympathetic consideration to representations made by the other on matters arising out of the operation of this Agreement and shall afford to the other Government adequate opportunity for consultation. 2. Consultation shall be in any event held annually on the operation of this agreement', and refer to page 155 above.
74. A random search of the United Nations Treaty series suggests that at that time the East European states had not adopted this practice but in 1967, when the Australia-Romania Trade Agreement was concluded, (no commission) Romania concluded an agreement on technical and economic co-operation with the FDR which provided for a mixed commission. 642 UNTS 47.
75. Cf p 167 above.

agreements negotiated by Australia with countries having a free enterprise economy.

In this connection it is interesting to note that from the viewpoint of the state trading government it is equally difficult to push agreements between state traders and free market economy countries into the same box as agreements between state trading countries. Schmithoff[76] argues that compared with the private law detail contained in trade agreements between state traders, the free market economy countries provide in their trade agreements only for a public law framework within which privately owned enterprises trade. While this may be generally true, Schmithoff's reliance on two FCN treaties[77] to demonstrate trading relationships between free enterprise economies seriously detracts from his argument for he ignores the range and depth of other types of bilateral trade agreements, especially those between states which, because of their participation in special economic groupings, can be said to have something akin to the economic links between the states of East Europe. Thus an examination of Schmithoff's only example of state trading trade agreements—the Trade Agreement between USSR and Yugoslavia 1955[78] which is based on agreement to export and import defined quotas of specific goods—reveals that it has quite a close parallel with the detailed commitments in NAFTA, in the trade agreement between Australia and the United Kingdom and in the trade agreement between Australia and Japan. Obviously the parallel cannot be exact, given trading monopolies in state trading countries. But his emphasis that agreements between state traders contain a deal of private law is not borne out by the agreement between USSR and Yugoslavia.[79]

The better view is that detailed trading commitments of the sort found in treaties such as the Australia-United Kingdom Trade Agreement 1957 and NAFTA 1965 on the one hand and the USSR-Yugoslavia Trade Agreement 1955 on the other are based not just on mutual advantage but on a mutual understanding of the way in which similar economies operate. If not also based on trust, then they are based on respect flowing from a history of close trading relationships both at government and private trader levels; and finally they rest on an underlying political empathy. When these features are present then it may be both useful and possible to express government commitments with considerable particularity. When they are absent, then the governmental agreement may become reduced in specific content to the level of the 1974 trade agreement between Australia and Iran, an agreement which was, however, well suited to that stage of Australia's political and economic relations with that country, yet is sufficiently elastic to cover more intensive trading relations should these develop.

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76. 'Commercial Treaties and International Trade Transactions in East West Trade' (1967) 20 Van L Rev 355.
77. Op cit pp 356-8.
78. 240 UNTS 216.
79. The only private law content is in Article 6 which provides for reciprocal deliveries of goods for prescribed places. But this obligation is subject to contrary arrangements between foreign trade organisations of the two countries.

This group of Australian bilateral trade agreements of the 1970s should therefore be considered to constitute a special category—agreements with state trading or developing countries. As such, and as Australian state practice in the operation of such agreements develops, it may become possible to make a further study of this group of agreements with the aim of suggesting modifications which would assist Australian private and government traders working under them. In such a comparison the longer experience of Western European states would be valuable, for example in the field of settlement of disputes, but at this point, especially when Australian private and government traders are unwilling to discuss either the general scope of contracts concluded with state trading countries or any difficulties in their implementation, it is not possible to obtain material on which such a study could be based.

In conclusion it can be said that given the realities of Australia's political and economic links with the state trading countries it would be unfair simply to dismiss the trade agreements concluded during the period under reference as useless pieces of paper. Obviously for the lawyer or the trader they are so general as to be unuseable in terms of enforcing a specific contract, and the cynic could point to the existence of trading relations between Australia and China prior to the conclusion of the trade agreement with that country as evidence of the slight weight which should be accorded these agreements.

Such criticisms should, however, be balanced against the need to see the negotiation of such agreements as indicia of official willingness on both sides to see an expansion of trading relations. But if they are no more than this they are no less a useful starting point for the Australian traders seeking new markets. Such a development will not be achieved easily nor in the short term, but as suggested above, given the different political and economic institutions in the countries involved, it would be unrealistic to expect more.