

4. What would an FTA between Australia and the US cover?

What subjects would a free trade agreement between Australia and the US cover? What type of measures would be included? What about the contentious issues? Can anything be achieved on agriculture? To consider these questions, other free trade agreements will be reviewed to see what precedents exist and some of the more contentious issues will be discussed.

What makes an FTA?

The essential feature of a free trade agreement is that it discriminates in favour of the interests of the members of the agreement. Under a free trade agreement, barriers to trade, generally tariffs and quotas, are removed on trade between members, usually after a period of phase out. The result is that businesses in the member countries secure preferred access to the markets of other members over companies from non-members.

The nature of free trade agreements has evolved over the last few decades. Once free trade agreements were relatively straightforward. They set out commitments to remove tariff and non-tariff barriers to trade in goods among the parties to the agreement. Often they did not achieve ‘free trade’ but were agreements to reduce barriers to agreed levels. Today they cover much more than trade in goods. They cover services and investment and increasingly other areas to promote closer economic relations between countries. Some are even, and more appropriately, called agreements on “Closer Economic Relations” rather than “Free Trade Agreements”.

The widening ambit of international trade agreements

In the mid-1980s, the traditional ambit of all international trade agreements widened. The European Community led the way by substantially deepening the ambit of its Single Market to cover such areas as investment, competition policy, opening services markets, advancing and protecting intellectual property rights, standards and trade facilitation. These were enshrined in the Single Market Act and extended to other European nations through the European Economic Area. The European Union and the establishment of the common currency have also led to the adoption of measures constraining economic policy.

In the NAFTA Agreements, the three North American governments similarly expanded the ambit of regional agreements. NAFTA encompassed rules to open services markets, created legal rights for foreign investors, adopted competition policies for government monopolies, and set rules for technical standards and recognition of qualifications. To demonstrate how comprehensive the process of closer economic relations could be, in parallel to NAFTA agreements were negotiated on standards the three countries would apply on labour and environment issues.

Before NAFTA was completed, the process of forming a free trade area between Australia and New Zealand accelerated, resulting in the Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). As well as eliminating all barriers to trade in goods, it committed both countries to remove all barriers to trade in services, except in certain exempted sectors, and provided for harmonisation of standards. It committed to eliminate anti-dumping actions and harmonise competition policy and to prevent subsidisation of traded products. ANZCERTA also established the ANZ Food Authority, a joint institution that develops food standards for Australia and New Zealand.

By the time the Uruguay Round was completed in 1994, the ambit of multilateral rules of the GATT had also been extended in the new WTO to cover services and intellectual property.

Thus, in trade agreements involving fewer countries, such as regional or bilateral free trade agreements, it is possible to reach agreement on issues to strengthen the economic relationship that is not otherwise possible in wider fora. Accordingly, the ambit of ANZCERTA, EU and NAFTA agreements is wider than that of WTO agreements.

What an Australia–US FTA might cover

In order to assess the likely impact of an AUSFTA, it is necessary to have some sort of idea about what an FTA might include. There will be some issues that will be difficult to resolve given the traditional differences between Australia and the USA. Issues most commonly mentioned in this context are agriculture, investment and cultural policy.

It is not necessary to try to anticipate the outcome of negotiations in order to form a picture of what an FTA might look like. There are three approaches that will be employed. The first is to examine other trade agreements to see what they contain and what precedents they may set. The second is to identify the issues where either barriers are in place or where there has been a dispute. Since the point of a trade agreement is to remove barriers, it is logical that if they exist on one side the other side will seek their removal. The third is to identify interests common to the economies which provisions in an FTA can advance to their mutual benefit.

Precedents from other agreements

It is instructive to review the provisions of NAFTA and ANZCERTA and to compare them with the WTO Agreements. Since the US, Canadian, Australian and New Zealand economies are all at similar states of development, it would be reasonable to assume that many of the provisions in these agreements would also figure in a US–Australian FTA and that the structure would be similar. In the same vein, since the WTO agreements set the rules for the multilateral trading system, most provisions in its agreements are found in regional and bilateral agreements. Table 4.1 summarizes the key provisions of NAFTA and ANZCERTA and the WTO agreements. It draws on a more detailed comparative analysis of the basic provisions of the WTO Agreements, NAFTA and ANZCERTA, which is contained in Annex 7.

Table 4.1 Provisions in relevant trade agreements

Issue	WTO	NAFTA	ANZCERTA
Structure	WTO administers several agreements.	System comprises bilateral agreements among US, Canada and Mexico. Some side agreements and understandings.	One central agreement. Some related understandings and side agreements.
General Principles	Non-discrimination National Treatment	Non-discrimination National Treatment.	National Treatment.
Exceptions	General exceptions for security, health and safety, quarantine and moral issues.	Follows WTO.	Follows WTO.
Rules of Origin	Loose guidelines.	Complicated rules, particularly for clothing and textiles and automotive products.	Simple rules.
Tariff reductions	As determined in negotiating rounds.	General goal of phase out – immediate, or in 5, 10 or 15 year programs. Mostly 10 years. Some exceptions.	All tariffs eliminated over 5 and 7 year periods.

Table 4.1 continued

Issue	WTO	NAFTA	ANZCERTA
Non-tariff measures	Quotas prohibited except in some specified circumstances.	Quotas prohibited, except in some specified circumstances.	All quotas and export restrictions phased out over 7 years.
Duty drawbacks, remissions on duty	No specific rules.	Gradual elimination of duty drawback.	No specific provisions.
Agriculture	Export subsidies permitted within limits, high domestic subsidies permitted, quotas apply for limited access in some products.	New reductions to be negotiated. Secured free access to the US market, some products (corn, sugar, orange juice, vegetables) have longer transition periods (of up to 15 years). Canada will apply WTO rules in trade with Mexico and the US.	No special rules for agriculture. Special transition arrangements applied to phase out controls on dairy products (now expired).
Automotive	No special rules	Progressive removal of restrictions on trade and investment controls between Canada and US with Mexico for periods up to 25 years.	No specific provisions
Clothing and textiles	Quotas to be eliminated by 2008. Special safeguards rules apply.	Commitment to remove barriers over a 10 year period. Exceptions permitted. Special safeguards rules apply	No specific provisions.
Energy and petrochemicals	No specific provisions.	Specific rules to secure trade rights and to govern actions of regulatory bodies.	No specific provisions.

Table 4.1 continued

Issue	WTO	NAFTA	ANZCERTA
Subsidies	On industrial products, export subsidies are banned, certain domestic subsidies are actionable, all subsidies are subject to countervailing action. Looser rules apply to agriculture subsidies	Export subsidies are banned in agricultural trade between Canada and the USA and circumscribed in agricultural trade with Mexico.	Subsidies were banned on all products traded between the countries. Subsidies which distort trade in services are prohibited.
Anti-dumping and countervailing	Duties can be imposed if damage by subsidised or dumped imports can be demonstrated.	Rights to challenge and review countervailing and anti-dumping actions are provided.	Anti-dumping action is prohibited. Each country recognises the other's competition policy law instead.
Safeguards	Rules stipulate when members may restrict imports causing damage.	Rights are provided to take safeguard action. NAFTA members have rights to be exempted from safeguard actions applied against countries outside NAFTA.	No specific provisions.
Government Procurement	Government procurement excluded from GATT rules, but a plurilateral agreement limits this exclusion.	Rules restrict favouritism for national suppliers and require national treatment.	No specific provisions. A separate Agreement provides national treatment.
Sanitary and Phytosanitary Measures	The right in the GATT to restrict imports on quarantine and health grounds is restricted to justifications based on sound science and risk assessments.	Provision reflect WTO rules.	Provisions reflect WTO rules and commit to harmonisation of quarantine standards and processes.

Table 4.1 continued

Issue	WTO	NAFTA	ANZCERTA
Standard and technical barriers	Mandatory standards must be non-discriminatory and provide national treatment and be based on sound science.	Rules are similar to WTO, but more permissive in some respects when consumer and environment issues are in play.	WTO provisions apply. Additional agreements commit to harmonisation of standards and conformance and mutual recognition. Food standards are to be common.
Customs Administration	Rules govern customs valuation.	Rules govern administration of rules of origin.	Rules govern administration of rules of origin. Customs procedures are to be harmonised.
Competition Policy	No specific provisions. Voluntary guidelines are available for telecommunications services.	Provisions govern anti-competitive behaviour of state enterprises and monopolies.	No provision in CER. An understanding commits to harmonisation of business law.
Temporary Entry	No specific provisions. Scope for liberalisation of temporary entry in the GATS.	Provisions lay down rules for temporary entry for business purposes.	No provision in CER. The Trans-Tasman Travel Agreement gives rights of residence to citizens of both countries.
Services	GATS requires non-discrimination when services markets are opened and negotiations for progressive, global liberalisation. Special rules apply to financial services, telecommunications, labour and air and sea transport. Australia and Canada exempted cultural industries. US exempted maritime transport.	Non-discrimination is to be progressively introduced and national treatment is required. No residency restrictions are permitted on licensed services providers. Canada excluded cultural services, the US excluded maritime transport and government services, including health and social services.	National treatment is required. All barriers to services removed, except where stated. Australian exemptions are air services, coastal shipping, broadcasting and television, third party insurance, postal services. NZ exempted aviation and coastal shipping.

Table 4.1 continued

Issue	WTO	NAFTA	ANZCERTA
Telecommunications	An Annex to GATS requires rights of access to publicly owned networks. The Information Technology Agreement requires elimination of tariffs on most IT products.	Tariffs on Telecoms equipment removed over 10 years. Access must be provided to public networks, with exemptions on public interest grounds.	No special provisions.
Financial Services	An Annex to GATS details rules elaborated for nominated services, following GATS principles. Controls for prudential purposes are permitted.	Rights are provided for suppliers and consumers to supply and purchase services in all members. National treatment is qualified by a right for reciprocal treatment.	No special provisions.
Investment	Generally not covered by WTO. Some trade related investments are limited. GATS allows non-discrimination to apply to a right to establish.	Foreign investors get national treatment and a right of non-discrimination in relation to establishment, conduct, acquisition, expansion and management of investments. Conditions on investment are generally not permitted. Exemptions apply. Investors have a right to establish. A tribunal can settle disputes between investors and Governments.	No rules on foreign investment.

Table 4.1 continued

Issue	WTO	NAFTA	ANZCERTA
Intellectual property	TRIPs Agreements sets new standards for copyright, industrial property, trademarks and integrated circuits and rules on geographical indicators and applies WTO disputes procedures.	NAFTA rules are similar to WTO rules.	No provisions.
Sub-national government	WTO obligations fall on national governments which are responsible for compliance by sub-national governments.	Central governments are obliged to ensure sub-national entities: <ul style="list-style-type: none"> ■ apply national treatment on services and investment issues; ■ apply NAFTA rules on regulation of financial services ■ treat foreign investors without discrimination. 	
Dispute settlement	WTO disputes procedures amount to compulsory arbitration.	Legally binding dispute mechanism established.	No binding disputes procedures
Labour and Environment	The exemptions provisions of GATT permit most environmental restrictions. The GATS Protocol on Movement of Natural Persons provides a framework for rights of movement of labour.	No explicit environment or labour provisions. NAFTA obliges members to give priority to environment agreements where provisions clash with other agreements. Separate side agreements on labour and environment deal with non-trade issues among NAFTA members.	No specific provisions

From the foregoing it can be reasonably deduced that many of the issues covered by NAFTA and ANZCERTA will be included in an Australian US Free Trade Agreement. Some, such as energy and petrochemicals, which related solely to US-Mexican bilateral economic interests, are unlikely to be included.

Trade barriers and investment issues

A second guide to what an FTA could cover would be areas of trade where barriers exist in each country and/or issues over which there have been trade disputes or contention. It is not necessarily the case that because there has been dispute over an issue it will be addressed or solved in an FTA. It may be decided that the issue is better dealt with elsewhere or that it does not have a place in an FTA.

Following in Table 4.2 is an overview of issues where either barriers to trade exist or where there has been contention. Contention may take the form of a dispute, such as the current one over US controls of imports of lamb; through indication of concern, such as by the United States in its annual “National Trade Estimates” report on foreign trade barriers¹ or Australia’s TradeWatch publication;² or where each country has an established position on access. A more complete list of trade barriers applied by both countries is set out in Annex 3.

Table 4.2 Australian and US interests in the bilateral trade relationship

Issue	US interest in Australian positions	Australian interest in US positions
Tariffs	Lower remaining Australian tariffs.	Lower high US tariffs, particularly in agriculture.
Agriculture	Remove AWB's single desk export monopoly. Expedite review of quarantine bans on imports of chicken, pork, Florida citrus, stone fruits, corn, apples, Californian table grapes.	Remove non-tariff restrictions, usually tariff quotas, on imports of sugar, dairy, cotton and beef. Secure US compliance with WTO directive to remove safeguards controls on lamb. Secure removal of domestic and export subsidies on grains, sugar, dairy products.
Subsidies	Ensure consistency of subsidies for automobile and clothing and textiles with WTO requirements.	See above.

¹ See www.ustr.gov

² <http://tradewatch.dfat.gov.au>

Table 4.2 continued

Issue	US interest in Australian positions	Australian interest in US positions
Anti-dumping		Address potential punitive effects of anti-dumping procedures.
Countervailing		Address punitive effects of imposition of countervailing duties on subsidized imports.
Investment	Remove discretion to deny foreign investment on grounds of "national interest".	
Government procurement	Secure Australian membership of the WTO Government Procurement Agreement limiting preferment to national supplies.	
Maritime Transport		Secure removal of ban on use of foreign built and owned ships for seaborne commerce between points in the US.
Air services	Secure "open skies" for air services.	
Telecommunications	Remove restrictions on broadcasting on broadband.	Ensure Australian carriers are charged fair accounting rates and Internet access rates.
Business services	Secure recognition of US professional qualifications.	Remove restrictions, such as skill and residency testing procedures, on Australian professionals, such as engineers, accountants and architects.
Intellectual Property	Restrict parallel importing of recorded music and branded goods. Concern about laws permitting de-compilation of software. Concern about adequacy of protection for test data for pharmaceuticals. Concern that civil rather than criminal remedies are favoured for abuse of copyright or music	
Cultural industries	Secure removal of measures to protect domestic cultural industries such as local content rules for broadcasting.	

From the foregoing, a general idea of what is likely to inform the approach of each side to negotiation of an FTA can be drawn. It is stressed that this is a picture painted from existing positions, not a prediction of how each side will prepare its negotiating brief. There are a number of important issues that are not covered in the above table. For example, how can an FTA be used to advance common interests between the economies, such as in the area of e-commerce? Could an FTA be used to enhance public confidence in the health and safety of food products traded between the countries?

Issues in the FTA

In early comments about a possible FTA, both governments have indicated that an agreement would have to be comprehensive. A comprehensive agreement, rather than a more narrowly focused one, is the best way of promoting a closer relationship between the two economies. Such an approach also offers scope for mutually beneficial trade-offs and provides an opportunity for trade irritants to be addressed in a constructive way before they evolve into disputes.

A comprehensive approach does not mean, however, that all barriers will be removed in the context of the agreement itself. It simply means that all broad themes will be addressed and no particular issue will, *a priori*, be excluded. If individual barriers are to be retained, it will be through a negotiated outcome, which may in turn allow the party to retain one of its own barriers.

It is not the aim of this report to canvass in detail every issue to be covered in an FTA. Some issues have already attracted attention, in particular, investment, agriculture and cultural policies. These and other issues likely to be a focus of interest are reviewed. This report argues that these are the areas in which the most significant impacts of an FTA are likely to be felt. An overview of other matters likely to be covered in an FTA is then provided, including discussion of some of the areas that are likely to be sensitive for Australia.

Investment

In the NAFTA agreement, each country guarantees national treatment to foreign investors from the other two parties. The aim is to encourage foreign investment because it guarantees foreign investors they will not be singled out for special treatment. NAFTA went further and created rights under Chapter 11 of NAFTA for foreign investors to challenge governments if their rights to national treatment were not respected. Special legal tribunals were established for that purpose.

It is likely that the United States and Australia will pursue a similar objective of granting investors from the other country national treatment. As discussed in greater length in Chapter 5, one of the most important benefits for Australia from an FTA would be to encourage greater foreign investment from the United States by drawing the attention of US investors to the Australian market. Provisions in the FTA that provide certainty to US investors in Australia would encourage US investors to take a stake in the Australian economy and thereby generate a very important continuing benefit from the agreement.

The same provisions would work in the interest of Australian investors in the United States. They would benefit from the same guarantee that they would not be discriminated against in the US, which has become the leading destination for Australian investment abroad. It needs to be recalled in this context that the US is a federal system and the rules and regulations of state and local authorities usually have a bigger impact on foreign investors than federal laws. This explains why in NAFTA sub-national authorities are specifically bound by the national treatment rule. All three members of NAFTA have federal systems.

On the other hand, the right to challenge legally the compliance of governments with the provisions of Article 11 of NAFTA, has been a major point of criticism of NAFTA since it was negotiated. In particular, there is criticism that the application of Chapter 11 has gone well beyond the original intention of providing safeguards against expropriation: arbitration panels and the courts have extended the meaning of expropriation by allowing private companies to successfully challenge domestic laws on matters such as the environment. However, there is no reason why a flawed mechanism should be adopted in an Australian US FTA. It is up to our negotiators to get it right. NAFTA member Governments have themselves been discussing ways to address the problems that have arisen in application of Chapter 11.

An FTA might cover other issues relevant to the interests of investors in both countries. Previous agreements negotiated by both countries have included, for example, special visa provisions for foreign investors and provided for equal treatment in government procurement decisions. However, it is not clear how an FTA might deal with one of the more important issues affecting the bilateral investment regime, namely taxation of foreign investments. Profits from investments in the US repatriated to Australia face a withholding tax of 15 per cent while the corresponding figure for US investments in Australia is 10 per cent. A separate double taxation treaty, currently the subject of review and renegotiation, covers these arrangements, but there may be scope for them to be brought under the framework of a comprehensive FTA.

Finally, the US has consistently raised concerns over the application of Australia's foreign investment screening process and, specifically, the "national interest" criteria. Australian governments have argued just as consistently for the retention of screening but the history of ANZCERTA might provide an indication of how the issue could be

constructively addressed. Australia and New Zealand have agreed to take the agreement into consideration when applying the national interest criteria and to avoid to the fullest the imposition of restrictions on investors. Furthermore, the two governments agreed in 1999 to raise the threshold level for investment screening to \$NZ50 million and \$A50 million respectively.

New Economy issues

This report argues in Chapter 6 that one of the most important long-term impacts of an Australia-US FTA will be felt in the area of the new economy. As this is a new area in both economies there are few impediments to business, although some exist. There are restrictions in Australia on the use of the Internet for broadcasting. Australian telecommunications providers face high costs for access to US telecommunications and ISP systems. Both countries have developed laws to facilitate e-commerce transactions. There may be scope to harmonise these laws.

Important impacts on this sector are likely to be primarily derived from agreements covering other areas. For example, any agreement that delivers an improved bilateral investment environment is likely to promote US investment in this area. Similarly, guarantees of continued effective protection of intellectual property rights would encourage US firms to undertake research in Australia by drawing on the skilled workforce available here. Mutual recognition of skills could also play a role.

Agriculture

Extensive protection of certain agricultural sectors in the United States, particularly sugar and dairy, has long been regarded as the principal stumbling block to a bilateral agreement. It has been argued that it would be too difficult for a US Administration to give preferential access to its market to importers as competitive as Australian farmers.³ Some still argue in Australia today that unless access to US agricultural markets could be secured in an FTA, there is little point pursuing an agreement and, since the same commentators tend to rate prospects for that as low, there is no point proceeding.⁴

3 A study by Professor Richard Snape commissioned in 1986 about the prospects of a free trade agreement between Australia and the US concluded that the principal barriers to Australian exports were agricultural and since there was little prospect of the US agreeing to remove those barriers in a bilateral negotiation, there was no real point in negotiating an agreement. In a broader study completed in 1994 on regional Free Trade Agreements, Snape arrived at the traditional neo-classical economic position that free trade agreements are second best instruments for trade liberalisation and again concluded that prospects for access to US agricultural markets were weak. An agreement with the US should only be considered if the multilateral processes failed. See Snape, Morgan and Adams, "Regional Trade Agreements, Implications and Options for Australia", 1993.

4 Professor Peter Drysdale makes a closely related point that efforts to secure access to US agricultural markets through an FTA will damage Australia's global farm trade interests – See Opinion, *Australian Financial Review*, 1 August 2001.

There is no question that securing liberalisation of agricultural markets is one of the toughest tasks in world trade. Not only has it been the bane of the multilateral trading system for decades, it has been a stumbling block in bilateral agreements negotiated by the US. It was effectively exempted from its agreement with Israel, and in the bilateral agreement with Canada the issue was basically set aside. The parties agreed to leave agricultural trade to the WTO.

With regard to this general view about the significance of the prospects for negotiating agriculture in an Australia–US FTA there are three points to make:

1. It is not the case that seeking concessions over agriculture from the US is a fruitless endeavour.
2. There are significant long term pressures on the US agricultural sector which suggest that it should not be presumed that high levels of protection of agriculture are an immutable feature of US public policy over the long term.
3. It is no longer the case that agriculture is the only issue of economic significance in Australia-US economic relations.

The third point has already been demonstrated in Chapter 2. Trade with the US in non-agricultural issues has become significant, as has investment. We will now consider points one and two.

The North American Free Trade Area was an innovation in many respects. Important in this context is that Mexico secured rights to almost full access to US agricultural markets, although a phase out period of up to 10 to 15 years was allowed for the most sensitive products. In a free trade agreement negotiated by the Clinton Administration with Jordan, but not yet approved by Congress, Jordan also secured access to the US agricultural markets, again with longer implementation periods in some cases.

It is important not to overstate the value of what Mexico secured. Implementation periods of up to 15 years were agreed for some of Mexico's key exports. Gallagher has explained how subsequent to the negotiation of NAFTA, the United States clawed back the value of the concessions made over access to the sugar market.⁵ Nevertheless, while concessions granted over a fifteen year period may at first sight not appear to be of great relevance, it is important to bear in mind Australia's long-term interests in the US market and the long-term perspective of Australian exporters. Particularly in the event of a stalling of multilateral negotiations on agriculture and with major agriculture exporting nations likely to secure improved access to the US market under the Free Trade Area of the Americas, the value of access achieved under an FTA could become very significant.

5 See Gallagher P., Inquit Pty Ltd, "Agriculture - the Strategic Issues", 27 June 2001, on www.apec.org.au

US participation in negotiations for a Free Trade Area of the Americas is also relevant to Australian interests in this sector. Key Latin American countries have made clear their strong interest in securing good outcomes in this sector. Just as in the case with Mexico, the US will likely be forced to make concessions in this sector if it is to secure its own market access interests in those countries. Thus, the US is gradually having to address the issue of its high levels of protection for certain agricultural products. An FTA with Australia would be seen in the US as part of this process. US negotiations with other regional partners are thus creating a dynamic which could lead to outcomes for Australia that might not have otherwise been possible.

The early positions of both the US and Australian governments was that the starting point of any negotiation would be that everything was covered⁶. While there is no denying that agriculture will be the focus of intense negotiations, it is very unlikely that the sector would be altogether excluded from an agreement. It is essential to bear in mind that on the global stage, the US and Australia (the latter through its membership of the Cairns Group of agriculture exporters) are both ardent proponents of liberalisation of world markets for agriculture. For strategic reasons, neither country would wish to give the impression that they considered agriculture to be too hard. Both would likely seek an agreement that dealt with agriculture in a comprehensive manner as a way of setting ambitious benchmarks for later multilateral action.

It is not just the initiation of negotiations, multilateral and regional, which creates a dynamic element in this environment. The impact of globalisation will create long-term pressures on the US farm sector over time to become more competitive. Hooke points out the impact that globalisation is having on the food processing sector, a major consumer of farm product.⁷ Food processors are globalising production and seeking competitive sources of supply. In the United States this will start to put pressure on producers to supply product at globally competitive prices. Government protection of producers will no longer be enough to tie processors to suppliers at whatever price the protection mandates. In globalised production systems, it is an increasingly viable option for producers to relocate to sites where better-priced supplies are available. This was a conclusion reached by Australian and US agriculture experts at the conference on an US–Australia Free Trade Agreement mounted by the Australian APEC Study Centre in Canberra in June 2001.

The US has its own interests in agriculture as shown in Table 4.2. It has become particularly critical of Australia's quarantine management. This issue is discussed below in the section on quarantine and biosafety issues.

6 Media reports in May 2001 claimed this principle had been accepted in exchanges between the US Administration and Canberra.

7 Hooke, M, Australian Food and Grocery Council, "Agricultural Negotiations and a New Comprehensive Round of Trade Negotiations in the WTO", June, 2001, www.afgc.org.au

Tariffs

Most free trade agreements carry commitments to reduce tariffs to zero. With Australian tariffs averaging 3.7 and US tariffs averaging 2.8 per cent, this would not be difficult in an FTA, except in the areas where both Governments have tariffs with high peaks, such as in agriculture in the case of the US, clothing and textiles in the case of both countries, and light trucks in the case of the US and automobiles in the case of Australia. This can be seen in the summary of the average tariffs of both countries, which was prepared by the Centre for International Economics, in Table 4.3.

Also relevant to the consideration of tariffs is the commitment both countries have made as members of APEC to eliminate all trade barriers by 2010, although neither to date has indicated how it intends to meet that goal.

Subsidies

The incidence of subsidisation of industry in both countries is low on average, again with the exception of agricultural industries in the US. Reduction of agriculture subsidies, particularly those provided by the EU and the US, is a key Australian trade priority, which is actively pursued through the WTO and through Australia's membership of the Cairns Group of agriculture exporting countries. For its part, the US in its National Trade Estimates has pointed to Australia's Export Market Development Grants and the import duty credits scheme as it applies to automobile producers.

While both countries would be likely to use the opportunity of FTA negotiations to push their interests on subsidies, it is not clear how this might be achieved in practice. Subsidies are not by their nature bilateral measures, and therefore may be difficult to remove on a bilateral basis.

However, bilateral negotiations have in the past succeeded in imposing some restraint on subsidy activity. For example, under the Andriessen assurance, the EU undertook not to export beef that has benefited from export subsidies to Asian markets of value to Australia. Under ANZCERTA, Australia and New Zealand agreed to eliminate subsidies affecting goods traded between them. Similarly, NAFTA commits its members not to subsidise exports to the other parties and also to take into account the interests of the other parties when subsidising exports to non-members. Also of interest is that the draft text of the Free Trade Agreement of the Americas (FTAA) deals quite comprehensively with subsidies. While this text is at a very early stage, it suggests there may be scope for constructive discussion of the issue.

Table 4.3 Post Uruguay Round Levels of Protection

Sector	US %	Australia %	Sector	US %	Australia %
Paddy rice	0.30	1.00	Processed rice	0.30	0.00
Wheat	1.80	0.00	Sugar	80.00	0.00
Cereal grains n.e.c.	0.00	0.00	Food products n.e.c.	1.60	2.40
Vegetables, fruit, nuts	1.00	0.80	Beverages and tobacco products	1.40	4.80
Oil seeds	3.80	0.00	Textiles and clothing	5.80	9.90
Peanuts	45.00		Wearing apparel	11.60	15.70
Sugar cane, sugar beet	80.00	0.00	Leather products	7.30	8.40
Plant-based fibres	0.10	0.00	Wood products	0.40	5.20
Crops n.e.c.	0.90	0.00	Paper products, publishing	0.30	4.60
Bovine cattle, sheep and goats, horses	0.00	0.00	Petroleum, coal products	0.70	0.10
Animal products n.e.c.	0.30	0.00	Chemical, rubber, plastic products	2.00	2.70
Raw milk	0.00	0.00	Mineral products n.e.c.	3.50	4.40
Wool, silk worm cocoons	0.00	0.00	Ferrous metals	2.50	4.40
Forestry	3.00	0.00	Metals n.e.c.	0.50	2.70
Fishing	0.20	0.00	Metal products	1.50	5.50
Coal	0.00	0.00	Motor vehicles and parts	1.40	9.30
Oil	0.20	0.00	Passenger motor vehicles		15.00
Gas	0.00	0.00	Light commercial vehicles	25.00	
Minerals n.e.c.	0.10	0.40	Transport equipment n.e.c.	1.4	1.30
Bovine cattle, sheep and goat, horse meat products	2.20	0.00	Electronic and equipment n.e.c.	1.10	0.20
Meat products n.e.c.	1.80	0.30	Machinery and equipment n.e.c.	0.80	2.90
Vegetable oils and fats	0.00	0.00	Manufactures n.e.c.	2.00	3.90
Dairy products	23.90	3.20			
Butter	84.60				
Cheddar Cheese	15.50				
Mozzarella Cheese	23.60				

Services and cultural issues

Both countries have among the most open services sectors in the world. Domestic laws in the US at both the federal and state levels somewhat constrain domestic and overseas service providers alike, including in the financial services and telecommunications sectors. Skills recognition and residency requirements also affect Australian architects, engineers and accountants. Australia will no doubt look for these restrictions to be removed in the context of an FTA but past US experience does not give a good indication of how it might be dealt with. The US has tended to negotiate separate mutual recognition agreements.

The US has been a strong advocate of deregulation of international air services through bilateral agreements. Australia regulates who fly on international routes to and from Australia. Under the umbrella of ANZCERTA, Australia and New Zealand negotiated a Single Aviation Market. However, given the different characteristics of the US air services sector, this model may not be directly relevant.

Coastal shipping is one of the more contentious issues in the bilateral trade relationship. Under the US Jones Act, commercial shipping between points in the US is restricted to US built and owned vessels. This has restricted the capacity of Australian manufacturers to supply this potentially lucrative market and in some cases has forced them to enter joint ventures with US-based partners and set up their manufacturing facilities there.

The US has also consistently pressed for removal of restrictions on broadcasting of film and television in international agreements on services. In Australia's case, the US points to local content rules for broadcasting as restricting US product. This has led to concerns expressed by Australian cultural industries – film and television production in particular – that an FTA will lead to removal of the preferences granted to Australian cultural industries. These concerns have been intensified by the successful campaign by New Zealand to have its audiovisual products given national treatment for the purposes of filling local content quotas in Australia. However, in the wake of this case, the Government made a commitment to protect the Australian audiovisual industry in future trade agreements.

Experience of other FTAs is enlightening in this respect. Under NAFTA, Canada exempted its cultural industries from the scope of the provisions on services. This has also been the experience under the GATS negotiations where most countries, including Australia, exempted audiovisual services from the application of the agreement.

Competition policy

There are philosophical aspects of national competition policy in common in Australia and the US. Their previous agreements address competition policy to some degree. ANZCERTA sought harmonisation of business competition policy although action to

implement has stopped short of that. NAFTA requires Government owned monopolies to respect competition policy principles. The similarities between the Australian and US economies suggest there is very fruitful ground for cooperation over competition policy. However harmonisation is an ambitious and difficult goal and, as Cassidy observes, may not be necessary to promote closer economic relations in this case.⁸

Both countries have active anti-dumping procedures. Australia and other countries have challenged US practice in this regard, specifically the practice of passing anti-dumping duties to the affected industry. Under ANZCERTA, Australia and New Zealand surrendered the right to levy anti-dumping duties against each other in return for cross recognition by each party of the other's competition policy laws. In NAFTA the US accepted provisions which created special panels to provide for review of anti-dumping and countervailing actions.

Technical Standards

Harmonisation of technical standards could be an important outcome of an FTA. These standards, although seemingly innocuous, can act as barriers having a major impact on the viability of products in another market. For this reason, most FTAs devote considerable effort to harmonising standards. Under the umbrella of ANZCERTA, Australia and New Zealand have negotiated a number of agreements on such issues as quality assurance testing and mutual recognition of certification and accreditation systems. Similarly, there were provisions in NAFTA to ensure technical standards were based on science and did not create unwarranted trade restrictions. Both countries have similar traditions on the philosophy of regulation and standards setting.

Quarantine and Biosafety issues

The tradition of strict quarantine controls to provide high standards of protection of human, animal and plant health and of basing such controls on sound science and risk assessment, is strong and similar in both countries. Both countries strongly support the WTO provisions governing sanitary and phytosanitary controls on trade. Philosophies towards administration of biosafety regulations are also similar. As major food producers and exporters, there is strong common interest in effective international rules providing for safety and public confidence in food standards. However, the US contends in its trade barriers report that Australia's conduct of its import risk assessments has not complied with its obligations under the WTO Agreement on Sanitary and Phytosanitary Measures and that in some cases imports have been prohibited without the due completion of an import risk assessment.

Australia, for its part, has staunchly defended its strict quarantine controls. It argues that they are strictly based on scientific considerations, comply with international

⁸ See Cassidy, Brian "Can Australian and US competition policy be harmonized", June 2001, paper delivered at the APEC Study Center conference on US/Australia FTA (www.apec.org.au) for an illuminating discussion.

agreements on sanitary and phytosanitary controls and are justified given that Australia's historic geographic isolation has left it free of many of the plant and animal diseases found in other countries. It is hard to see Australia retreating from these positions in the context of an FTA. Again, however, previous agreements negotiated by both countries offer an indication of how the issue might be treated in a constructive way. Both NAFTA and ANZCERTA create institutions that seek to harmonise quarantine practices including inspection standards, and to examine technical differences to ensure they do not lead to disputes.

Intellectual Property

The US and Australia have very similar approaches to intellectual property law as it relates to trade issues. The US has very actively pursued strict enforcement of IP laws in the context of the FTAs it has negotiated with other countries. Both countries strongly enforce IP law. However, in its report on trade barriers, the US criticises Australia's decision to remove restrictions on parallel importing of sound recordings as well as legislation permitting limited software decompilation. Australia's approach to protection of test data submitted to regulatory authorities has also attracted criticism.

There is concern on the US side that application of intellectual property law in some areas is not as rigorous as the US would prefer. A summary of US interests can be found in the 2001 National Trade Estimates report. Whereas Australia has negotiated agreements with the EU on use of geographical indicators on wine, in the process eschewing use of European geographical indicators, the US has not.

Labour and environment issues

Previous US administrations have accepted labour and environment issues as relevant to trade agreements. Side-agreements on labour and environment were negotiated alongside NAFTA. The US-Jordan FTA contains provisions on these issues within the text of the Agreement itself and these are subject to the same dispute resolution mechanism as other provisions. However, the Bush Administration is opposed to these measures. It is not clear what will happen to this agreement.

Australia's position has been that trade agreements should focus on issues directly related to trade and that other issues should be addressed in multilateral agreements specifically addressed to those issues. Despite this difference of approach, Australian and US labour and environmental standards are similar and therefore this issue is unlikely to be an issue of contention in an FTA.

Trade facilitation

In APEC and in the WTO both Australia and the US have supported measures to facilitate trade, such as harmonisation and streamlining of customs administration and issuance of business visas.

Other issues

When governments negotiate free trade agreements, the process is regarded as an opportunity to settle other, related matters. A review of NAFTA shows economic issues that were the subject of dispute between the US and Mexico at the time, in particular energy and petrochemicals, were included in the agreement. It is common for there to be side-agreements on issues. There are several side-agreements in ANZCERTA. One was an agreement to work to harmonise business law and competition policy. There was a side letter setting out an understanding between the two governments that the pace of removal of barriers in dairy trade between the two countries would be slower than that set out in the agreement.

Business groups in both countries will regard the negotiation as an opportunity to push long-standing issues and will try to enlist government officials in their cause. US business groups are particularly effective in lobbying their government and given the US' recent experience in FTA negotiation, they will be well prepared to do so. Until the decision this year to negotiate an FTA with Singapore, Australian business groups had had no such experience since the conclusion of ANZCERTA. Therefore, if negotiations with the US should eventuate, it will be particularly important that businesses and other relevant stakeholders work very closely with the Government to ensure that Australian interests are pursued effectively.

