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Abstract
This paper analyses the intersection between international trade and competition policy, using the proposed free trade agreement between Australia and the United States as a basis for examining key issues. The paper discusses rules of the international trading system relating to competition policy and market distortion, before considering the limitations of the multilateral system. The paper then considers free trade agreements as a means to overcome some of these limitations, before turning to the proposed Australian-American free trade agreement specifically, whereupon selected issues relating to competition policy and market distortion are closely examined.

Keywords
free trade agreements, international trade, competition policy, AUSFTA, Australia-United States Free Trade Agreement, Australia, United States

THE INTERSECTION BETWEEN INTERNATIONAL TRADE AND COMPETITION POLICY: AS ILLUSTRATED BY AN AUSTRALIAN / AMERICAN FREE TRADE AGREEMENT

Alexandra Merrett[*]

This paper analyses the intersection between international trade and competition policy, using the proposed free trade agreement between Australia and the United States as a basis for examining key issues. The paper discusses rules of the international trading system relating to competition policy and market distortion, before considering the limitations of the multilateral system. The paper then considers free trade agreements as a means to overcome some of these limitations, before turning to the proposed Australian-American free trade agreement specifically, whereupon selected issues relating to competition policy and market distortion are closely examined.

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Glossary of terms

ACCC	Australian Competition and Consumer Commission
AFTA	ASEAN Free Trade Area
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement (often known simply as the "CER")
APEC	Asia Pacific Economic Cooperation
APT	ASEAN Plus Three
ASEAN	Association of South East Asian Nations
AUSFTA	Australia-United States Free Trade Agreement
AWB	AWB Limited (formerly the Australian Wheat Board)
AWBI	AWB International Limited
CER	Closer Economic Relations (can also mean ANZCERTA specifically)
DFAT	Department of Foreign Affairs and Trade (Australia)
EIA	Economic Integration Agreement
EU	European Union
FTA	Free Trade Agreement (sometimes also known as a "Regional Trade Agreement")
FTAA	Free Trade Agreement of the Americas
FTC	Federal Trade Commission (United States)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IP	Intellectual property
IPRs	Intellectual property rights
NAFTA	North American Free Trade Agreement (less commonly, the original New Zealand-Australia Free Trade Agreement)
mfn	"most favoured nation"
OECD	Organisation for Economic Co-operation and Development
PBS	Pharmaceutical Benefits Scheme
RTA	Regional Trade Agreement (sometimes also known as a Free Trade Agreement)
SAFTA	Singapore-Australia Free Trade Agreement
STE	State Trading Enterprise
TPA	Trade Promotion Authority (United States)
TP Act	*Trade Practices Act 1974 (Cth)*
TRIPS	Trade-related Aspects of Intellectual Property Rights
TRQs	Tariff rate quotas
USTRA	United States Trade Representative
WEA	Wheat Export Authority
WHO	World Health Organization
WTO	World Trade Organization

THIS PAPER ANALYSES the intersection between international trade and competition policy in the context of the proposed free trade agreement between Australia and the United States (**AUSFTA**). While for the most of the last fifty years, focus has been upon reducing and eliminating protection to create a free trade system, lately attention has shifted to the role of competition policy in trade liberalisation. In part, this is due to the realisation that "the international firm is now the basic organiser of economic activity with a global rather than a national interest".[1] Accordingly, it has been recognised that policies in support of trade liberalisation will be ineffective if individual firms cannot compete fairly in a market due to non-existent, or inadequate, competition laws.

Professor Allan Fels, immediate past Chair of the Australian Competition and Consumer Commission (the **ACCC**) has summarised the debate concerning the interaction between trade and competition policy as follows:

> First, trade policy liberalisation can be frustrated by failures in the enforcement of competition policy…. The benefits to consumers of… liberalisation can be defeated by restrictive practices in the liberalising market…
>
> Second, it is important to note the reverse relationship. Trade policy can be highly anticompetitive. For example, nearly all forms of import protection, whether they be quotas, tariffs, anti dumping laws and so on can reduce competition and damage consumer interests….
>
> Third, it is important to note that there is another extremely important variable which may be at work – regulation. Very often it is Government regulation, rather than failures in the enforcement of competition law, that are the true obstacles to imports, to trade liberalisation working and to competition working. What is needed is a three-way debate about the relationship between trade, competition policy and regulation…[2]

This paper will examine the AUSFTA currently under negotiation in light of these three paradigms and applicable international trade obligations. It will detail existing co-operative measures between Australia and the United States in relation to competition policy, and consider the approach which may be adopted in

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1 Donald MacLaren and Tim Josling, 'Competition policy and international agricultural trade' (Working Paper No. 99-7, International Agricultural Trade Research Consortium, 1999), at 2.

2 Allan Fels, 'Competition and globalisation' (paper presented at the *Trade and cooperation with the EU in the new millennium* conference, Melbourne, 14-16 December 2000).

the AUSFTA. In addition, it will examine certain contentious trade policies of the negotiating parties, in light of their potential anti-competitive and market distortionary effects. Particular consideration will be paid to the structure of AWB Limited (**AWB**: formerly the Australian Wheat Board) and another aspect of Australian government regulation, the Pharmaceutical Benefits Scheme.

Before considering likely issues for an AUSFTA, however, this paper will provide the context for free trade agreements within the international trade system. Accordingly, this paper begins with a brief examination of the World Trade Organization (**WTO**), its constituent documents and the role of free trade agreements within the WTO.

I. Free Trade, The WTO and International Competition Policy

The very structure of the WTO is premised on the view that free trade leads to economic growth, while its antithesis, protection, results in costs to consumers and society as a whole. According to the WTO, 'data show a definite statistical link between freer trade and economic growth'.[3] Similarly, there appears to be a direct correlation between high levels of protection and slow growth.[4] Although the WTO has achieved a much freer international trade system, extensive protection remains. Thus the Australian Productivity Commission estimates that further liberalisation of international agricultural trade would provide a US$50 billion boost to global welfare.[5]

The WTO

The WTO is the only international body that governs the rules of trade between nations. At its heart are the WTO agreements, providing the legal framework for international trade. These agreements are essentially contracts between nations, binding governments to maintain their trade policies within agreed limits.[6] While the WTO only commenced on 1 January 1995, the General Agreement on Tariffs and Trade (**GATT**) dates back to 1948. Although an agreement, GATT gave rise to a 'de facto' international organisation,[7] also known as GATT. The 'Uruguay Round' of GATT negotiations – which took almost eight years, ultimately involving

3 World Trade Organization, *Trading Into The Future* (2nd edition, March 2001), at 8.
4 Note the Australian and New Zealand experience in this regard, as discussed in Kym Anderson, 'Measuring effects of trade policy distortions: how far have we come?' (Discussion Paper No. 0209, Centre for International Economic Studies, 2002), at 14.
5 Gary Banks, 'Getting the most out of the WTO and the Doha Round' (paper presented at the Parliamentary Trade Sub-Committee's one day public hearing on the WTO Doha Round, Canberra, 23 August 2002), at 4.
6 WTO, *Trading Into The Future*, above n3, at 4.
7 *Ibid*.

123 countries[8] - culminated in the creation of the WTO.[9] While GATT fundamentally addressed trade in goods, the WTO's scope is significantly broader, encompassing trade in services and intellectual property. There are more than 140 members of the WTO, over three-quarters of whom are developing countries and countries transitioning to market economies.[10]

Upon inception, the WTO adopted two keys elements of GATT as its founding principles: the first is 'most favoured nation' (**MFN**), whereby countries cannot discriminate between their trading partners (subject to certain exceptions).[11] Secondly, under the principle of national treatment (**NT**), imported and locally produced goods, services and intellectual property (**IP**) must be treated equally once they have entered the market.[12] These principles, and the related goal of predictability, form 'the foundation of the multilateral trading system',[13] assisting the WTO to promote its objectives of freer trade, fair competition, development and economic reform.

The WTO agreements

GATT 1994,[14] along with the General Agreement on Trade in Services (**GATS**) and the agreement on Trade-related Aspects of Intellectual Property Rights (**TRIPS**) are the basic documents governing the international trading system. These agreements are incredibly complicated, with numerous related agreements and "market access commitments".[15] Nonetheless, the basic structure of the WTO agreements is quite simple (see Table 1).

Table 1: WTO agreements

	Goods	**Services**	**IP**	**Disputes**
Basic principles	GATT	GATS	TRIPS	Dispute settlement*
Additional details	Other goods agreements and annexes	Services annexes		

8 *Ibid*, at 12.

9 As part of this process, GATT (the agreement) was updated – consequently there are now two versions: GATT 1947 and GATT 1994.

10 WTO, *Trading Into The Future*, above n3, at 7.

11 GATT, Article I. Thus, a WTO member must afford every other member 'most favoured nation' status in their trading relationship.

12 GATT, Article III; GATS, Article XVII and TRIPS, Article 3. While charging customs duty on imports is permitted, once through customs, the relevant goods, services or IP must be treated no differently from their local equivalents.

13 WTO, *Trading Into The Future*, above n3, at 5.

14 See above n9.

15 Whereby individual countries outline the particular obligations they have agreed to undertake under the umbrella of the head agreement.

Market access commitments	Countries' schedules of commitments	Countries' schedules of commitments (and mfn exceptions)

* The Understanding on Rules and Procedures Governing the Settlement of Disputes.

Source: WTO, Trading Into The Future *(see at footnote 3), at 15.*

Outside this structure there also exists a number of plurilateral agreements between some, but not all, WTO members, such as the Agreement on Government Procurement. Furthermore, there are several working groups addressing additional ways by which to enhance the multilateral trading system. Three working groups were set up following the 1996 Singapore ministerial conference, dealing with trade and investment; competition policy and transparency in government procurement.

Given its more extensive history, unsurprisingly GATT is the most developed of the WTO agreements. It adopts a 'negative list' approach, whereby countries agree to apply national treatment to all products, except those specifically excepted. A key component of this system is 'binding', by which countries commit to the maximum tariffs they will apply in relation to various product lines. A country is free to impose tariffs below the bound commitment, but if it wishes to exceed the binding, it must first negotiate with its trading partners (which may result in the payment of compensation). Under GATT, once a product has crossed a border and cleared customs, it must be given national treatment even if the importing country has made no commitment to bind the relevant tariff rate.

GATS mean while has a positive list, whereby members must apply national treatment only for those sectors where they have made specific commitments. Nonetheless, MFN applies to all services (subject to some temporary exceptions). As with GATT, individual countries have made commitments to open markets in specific sectors and these commitments are bound.

TRIPS represents an attempt to narrow the gaps in the manner in which intellectual property rights (**IPRs**) are treated around the world through the application of common international rules. NT and MFN are again key features. TRIPS also means that international disputes concerning IPRs can be determined by the WTO's dispute settlement system.

The interaction between trade and competition policy

During the development of these various agreements, the 'natural link'[16] between trade and competition policy has become increasingly apparent. Thus it has been recognised that "a government's choice of competition policy can be used to alter the conditions of access to that country's markets in much the same way that tariffs can affect market access".[17] This complementarity is due to the common objective of both policies: the 'elimination or reduction of barriers to, and distortions of, markets'.[18] Thus '[t]he reduction or elimination of tariff and non-tariff barriers to trade is perhaps the most natural complementarity between trade and competition policy'.[19] As the Organisation for Economic Co-operation and Developments (**OECD**) states:

> In the absence of an effective competition policy, the gains of trade liberalisation may be compromised as a result of restraints on trade by private or public undertakings. Conversely, in the absence of a sustained process of trade liberalisation, the impact of competition policy in promoting the contestability of markets is limited.[20]

Similarly, Brian Cassidy, Chief Executive Office of the ACCC, notes that '[a]ny movement towards trade policy liberalization can be restricted by deficiencies in the enforcement of competition policy.'[21]

Hence, a nation's competition policy can be a matter of legitimate international interest, in the same manner as, for example, that nation's tariff policy. With approximately 80 WTO members now adopting competition laws,[22] the WTO clearly has a role regulating competition as well as trade policy.[23]

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16 Kyle Bagwell and Robert W. Staiger, 'Competition policy and the WTO' (preliminary and incomplete paper) (2001), The Global Trade Negotiations website at http://www.iies.su.se/seminars/competition.policy.817.pdf, at 1.

17 *Ibid*.

18 Organisation for Economic Co-operation and Development, *Complementarities Between Trade and Competition Policies*, COM/TD/DAFFE/CLP(98)98/FINAL (28 January 1999), at 11.

19 *Ibid*, at 4.

20 *Ibid*, at 12.

21 Brian Cassidy, 'Can Australian and US competition policy be harmonized?' (paper presented at *An Australian United States Free Trade Agreement - Opportunities And Challenges* Conference, Canberra, 21 June 2001), at 3.

22 World Trade Organization, 'Working Group Set Up By Singapore Ministerial' (2003), The World Trade Organization website at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/16comp_e.htm.

23 Bagwell and Staiger, above n16, at 2.

The WTO and competition policy

Consequently, several provisions of the WTO agreements impact upon competition policy and/or market distortion issues, sometimes creating obligations for the implementation of competition policy, but often providing members with loopholes. A table setting out the major provisions is contained in Annexure A.

GATT

The most significant provisions of GATT concerning competition policy are Articles VI and XVII (although Articles XX and XXIII are also notable: see Annexure A). Considering these articles in turn, Article VI regulates the application of anti-dumping measures. The Article's broad nature has raised concerns given the 'widely-held view that anti-dumping activities by governments are, by [their] very nature, anti-competitive'.[24] Nonetheless, the Article is now complemented by the more detailed Agreement on the Implementation of Article VI of GATT 1994, which restricts the grounds upon which anti-dumping measures may be applied. Consequently, this agreement is seen to have 'strengthened the pro-competitive thrust of the Article… there is now less discretion available to national authorities…'.[25]

Article XVII (State Trading Enterprises) is particularly significant, addressing the role of state trading enterprises (**STEs**) and other enterprises that benefit from exclusive or special privileges. The Article recognises that such enterprises may create serious obstacles to trade, and imposes certain obligations on their conduct. Finally, Article II, which outlines the fundamental obligation to ensure national treatment (further explained in Article III), may also be significant. As the OECD notes, this article is 'fundamentally about the maintenance of competitive conditions, independent of actual trade effects…'.[26] Article II:2 regulates the operation of importation monopolies, and provides that such monopolies must not (except as specified in a schedule) operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule.

GATS

The key GATS provisions affecting competition and market distortion are Articles VII, VIII and IX. Article VIII requires members to ensure that monopoly suppliers do not abuse their monopoly position when competing in the supply of

24 MacLaren and Josling, above n1, at 10.

25 *Ibid*.

26 Organisation for Economic Co-operation and Development, *Competition Elements In International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements*, COM/TD/DAFFE/CLP(98)26/FINAL (28 January 1999), at 7.

services outside their monopoly rights. Article IX(1), meanwhile, states that 'Members recognise that certain business practices of services providers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services'. Article IX obliges members to accede to others' requests for consultation, with a view to eliminating such practices. Article VII meanwhile permits recognition of a member's licensing or certification arrangements on a bilateral or plurilateral basis, subject to certain conditions. Given these provisions, the OECD concludes '[t]he notion that international liberalisation of services needs to be complemented by provisions to protect the openness of a market from potential anti-competitive practices has been most explicitly recognised in [GATS]…'.[27]

Other WTO agreements

TRIPS also contains key provisions. For example, the ability to impose compulsory patent licences under Article 31 explicitly contemplates "anti-competitive" practices as grounds for compulsory licensing. Meanwhile, Article 40 allows members to specify licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs and have an adverse effect on competition in the relevant market. Under this Article, members are permitted to adopt appropriate measures to prevent or control such practices.

Finally, there are several ancillary agreements containing references to competition policy, whether explicitly or by way of limiting distortionary measures. These agreements include the GATS Agreement on Basic Telecommunication Services as well as the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture.

Recent WTO initiatives

At the 1996 WTO Ministerial Conference in Singapore, a Working Group on the Interaction between Trade and Competition Policy was established.[28] Spier notes this is "the first time that a multilateral body has been charged with examining the links between trade and competition policy".[29] The Working Group has been very active and recent topics it has examined include the relevance of the fundamental WTO principles of national treatment, transparency and MFNn treatment to competition policy and vice versa; approaches to promoting co-operating and communication among members; and the contribution of

27 OECD, *Complementarities Between Trade And Competition Policies*, above n18, at 9.

28 See WTO, 'Working Group Set Up By Singapore Ministerial', above n22.

29 Hank Spier, 'The Interaction Between Trade and Competition Policy: The Perspective of the Australian Competition and Consumer Commission' (paper presented at the Board of Foreign Trade Seminar on *International trade policies after the WTO Singapore ministerial conference*, Taipei, 2 May 1997).

competition policy to achieving the objectives of the WTO, including the promotion of international trade.

Doha Declaration

In November 2001, the Working Group's efforts helped shape the Doha Declaration.[30] The Declaration provides that negotiations were to take place after the Fifth Session of the Ministerial (held September 2003) 'on the basis of a decision to be taken… at that session on modalities of negotiations' for a multinational framework 'to enhance the contribution of competition policy to international trade and development'.[31] (Those negotiations, of course, were a monumental failure.) The Declaration also addresses more general issues of market distortion, with members committing themselves to comprehensive negotiations aimed at market access; reductions to (with a view of phasing out) all forms of export subsidies; and substantial reductions to domestic supports that distort trade.[32]

Other international initiatives

The WTO may be the most significant, but it is not the only international organisation addressing competition policy issues. The United Nations' Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (1980) was followed by an OECD recommendation on co-operation between members in relation to anticompetitive practices affecting international trade.[33] Fundamentally, the trigger for action under the OECD recommendation (and subsequent bilateral arrangements enacted pursuant to it) is when 'antitrust enforcement activity by one jurisdiction may affect 'important interests' in another jurisdiction'.[34]

The Asia Pacific Economic Cooperation (**APEC**) forum, to which both Australia and the United States belong, also acknowledges the significance of competition policy. APEC's Principles to Enhance Competition and Regulatory Reform include non discrimination, comprehensiveness, transparency and accountability. APEC proposed to implement these principles – assisted by its Competition Policy and

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30 *Ministerial declaration*, adopted 14 November 2001, World Trade Organisation WT/MIN(01)DEC/1 (the **Doha Declaration**).

31 *Ibid*, at ¶23.

32 *Ibid*, at ¶¶13-14.

33 Organisation for Economic Co-operation and Development, Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/FINAL (21 September 1995).

34 John J. Parisi, 'Enforcement Cooperation Among Antitrust Authorities' (paper presented at the IBC UK Conferences *Sixth Annual London Conference on EC competition law*, London, 19 May 1999 (updated October 2000)), at 5.

Deregulation Group - through promoting the consistent application of policies and rules, eliminating unnecessary rules and regulatory procedures and improving the transparency of policy objectives and the administration of rules.[35] Given their common focus, it is not unsurprising that the OECD and APEC have launched a co-operative initiative on regulatory reform.[36]

Future developments

Notwithstanding these advances, there is a view that there should be greater multilateral recognition of competition policy. Indeed, it has been queried whether national competition laws can adequately handle the antitrust aspects of 'our increasingly global economy'.[37] MacLaren and Josling state that 'many are asking whether there needs to be some sort of agreement at the multilateral level to maintain or enhance competition in national and international markets'.[38] Robert Pitofsky, Chair of America's Federal Trade Commission explains the range of likely outcomes:

> A minimal response to the challenge would seek procedural cooperation (mostly bilateral) among countries with antitrust codes, according due respect to the preservation of confidential information and for differences in approach from country to country.
>
> A maximum response would be a world competition code, enforced by mandatory dispute resolution in some international tribunal. Perhaps the world community would not and could not agree on every detail of competition policy but, according to this ambitious agenda, it would agree on many essential principles.[39]

While harmonisation seems unlikely, even in the long term,[40] convergence may be achievable.[41] More immediately, increased co-operation will be critical. Varney

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35 Asian Pacific Economic Cooperation Secretariat, 'Leaders' Declaration – New Zealand' (declaration made at the APEC Economic Leaders' meeting, Auckland, 13 September 1999).

36 See World Trade Organization, 'Trade And Competition Policy: Working Group Set Up By Singapore Ministerial' (2003), The World Trade Organization website at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/16comp_e.htm.

37 Christine A. Varney, 'Cooperation Between Enforcement Agencies: Building Upon The Past' (paper presented at the APEC Committee on Trade and Investment Conference on *Competition policy and law*, Auckland, 25 July 1995).

38 MacLaren and Josling, above n1, at 5.

39 Robert Pitofsky, 'Competition Policy in a Global Economy – Today and Tomorrow' (paper presented at the European Institute's Eighth Annual Transatlantic Seminar on *Trade and investment*, Washington D.C, 4 November 1998).

40 Pitofsky, *ibid*, states:

states 'movement in the direction of convergence is important, but I think that cooperation – not drafting a code – is the best way to move in the direction of meaningful convergence'.[42] Pitofsky also points out that the 'real internationalization of antitrust enforcement is found in the day-in-day-out collaboration of enforcement officials in so many parts of the world'.[43] Given the extent of globalised activity by firms, he continues, 'this is a cooperation born not of ideology but of necessity'.[44]

Common exceptions from competition policy

Finally, it should be noted that countries frequently exempt certain industries from the operation of their competition laws. This is notwithstanding the admonition that "[b]est practice' advice recommends that competition… law should be a *general law of general application*; that is, the law should apply to *all sectors* and to *all economic agents* in an economy engaged in the *commercial* production and supply of goods and services'.[45] Nonetheless '[i]n many societies, agricultural firms and cooperatives are exempt from the normal antitrust laws'.[46] While '[e]xemptions from the application of competition law in one sector may perpetuate or induce distortions that can affect the efficiency of economic activity

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I doubt very much that a consensus on international antitrust principles, even one subscribed to only by relatively more developed countries, is likely to be achieved outside the area of an anti-hard core cartel commitment. The present state of antitrust law with respect to monopoly power, mergers, vertical distribution practices and the whole range of competition issues varies too much country to country to expect a wide range of countries to find common ground…

41 Although it has been noted (Bernard Hoekman, 'Competition Policy and the Global Trading System' (Working Paper No. 1735, The World Bank, 1997), at 2) that:
[F]rom a developing country perspective a [trade-related antitrust principles] agreement should be limited to a ban on horizontal restraints (price fixing, market sharing, etc) – including a ban on export cartels – and embody a set of procedural disciplines to ensure transparency; initiate a process of replacing antidumping actions with domestic competition law enforcement; and strengthen the competition-advocacy and dispute settlement dimensions of the WTO. Developing countries potentially have much to gain from such agreement. Achieving it may be difficult, however.

42 Varney, above n37.

43 Pitofsky, above n39.

44 *Ibid*, noting that one third of recent cartel investigations conducted by the United States Department of Justice have involved suspected international cartel activity. Note, for example, the animal vitamins cartel, where a number of manufacturers were found to have reached a global market sharing and price fixing arrangement (for the Australian proceedings, see: *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* [2001] FCA 150).

45 R. Shyam Khemani, 'Application of Competition Law: Exemptions and Exceptions'; (2002) UNCTAD/DITC/CLP/Misc.25), at 5 (emphasis in the original).

46 MacLaren and Josling, above n1, at 6. Note the list of exempted sectors in the United States discussed in Khemani, *ibid*, at 12, as well the Australian exemptions noted in the same paper (at 21).

conducted in other sectors',[47] such exemptions are a reality that, at this stage, are best dealt with by way of bilateral agreements between individual countries rather than by multilateral consensus.

II. Free Trade Agreements

Notwithstanding the international trading system governed by the WTO, nearly all WTO members have notified of their participation in at least one free trade agreement (**FTA** – also known as a regional trade agreement or **RTA**). Indeed, some WTO members are party to twenty or more FTAs.[48] This proliferation of FTAs is frequently attributed to perceived failures with the WTO system, which were further highlighted by the failure of the Cancun negotiations in September 2003.

These failures relate to the systemic unwieldiness of a multilateral decision making process that relies upon consensus[49] but also reflect the propensity of members (particularly developed countries) to exploit loopholes and to replace 'new types of protection [with] old'.[50] Such loopholes have been particularly apparent in relation to agriculture, with the Uruguay 'achievement' described as 'ephemeral'.[51] Australia's Department of Foreign Affairs and Trade (**DFAT**), in a recent submission to the Senate, noted particular difficulties in achieving market

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47 Khemani, *ibid*, at 5.

48 *Singapore Ministerial Declaration*, adopted 13 December 1996, World Trade Organisation WT/MIN(96)DEC.

49 See for example ACIL Consulting, *A Bridge Too Far? An Australian Agricultural Perspective on the Australia / United States Free Trade Area idea* (2003), at 7, where it is noted that the Doha commitments were to be established by March this year, and implemented by January 2005:
The chance that the January 2005 date will be met seems slim – historically, most GATT/WTO deadlines have slipped and this time the scope for resistance from protected sectors and for disagreement among member nations seems as great as ever.

50 *Ibid*, at 4. The report notes at 5:
Agricultural support in OECD countries is now back to where it was prior to the Uruguay round at appropriately 40-50% in producer subsidy equivalent terms and 35% in consumer tax equivalent terms. The recent US Farm Security and Rural Investment Act 2002 [Farm Bill], however, seems likely to increase average protection above this level by raising subsidies.

51 *Ibid*, at 5. The report also notes:
The US replaced measures such as deficiency payments and price support loans with contract payments and market loss assistance. The EU has frequently pursued the strategy of setting unrealistic base rates and broadly defined average reductions, allowing retention of protection on sensitive production… Other countries have circumvented their commitments on export subsidies through the use of protectionist state trade enterprises, new levels of food aid and subsidised export credits.

access through the WTO in relation to agriculture.[52] These problems have been seen as part of a larger issue, viz 'the unwillingness of major players – the United States and European Union, in particular – to take account of the wishes of developing countries' particularly in relation to market access, concentrating instead of issues such as labour and environmental standards.[53] Consequently, Access Economics concludes:

> The reason for the proliferation of regional trade and bilateral economic integration agreements is not hard to find, and resides in large part with frustration at the slow pace of and difficulties inherent in multilateral trade liberalisation...[54]

Regardless of the underlying reasons for these difficulties,[55] there is no question that FTAs now play a significant role in the international trading system.

What are FTAs?

Although a key principle underlying the WTO system is non-discrimination, free trade agreements and custom unions[56] are specific exceptions to the MFN rule:

> One characteristic in each [FTA] is the requirement that the parties eliminate duties and other restrictive regulations of commerce… with respect to substantially all the trade between the constituent territories in products originating in such territories.[57]

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52 Department of Foreign Affairs and Trade, Submission to the Senate Foreign Affairs, Defence and Trade Committee Inquiry into the General Agreement on Trade in Services and Australia/US Free Trade Agreement (2003), at 40.

53 Australian Trade Minister, Mark Vaile, 'A Free Trade Agreement with the United States' (speech given to the St George Bank 'Trends' luncheon, Canberra, 23 May 2003).

54 Access Economics, The Costs and Benefits of a Free Trade Agreement with Singapore (2001), at 10.

55 For a brief discussion, see Lucian Cernat, 'Assessing Regional Trade Arrangements: Are South-South RTAs More Trade Diverting?', *Policy issues in international trade and commodities*, Study Series No. 16 (2001) (UNCTAD/ITCD/TAB/17, E.01.II.D.32, 12/12/01); also Vaile, above n53.

56 As outlined by DFAT, custom unions differ slightly from FTA:
Under a customs union, parties to the agreement eliminate tariffs and other trade barriers between themselves and also maintain a common external tariff against non-parties… Customs unions are more complex to negotiate than free trade areas, because all countries in the union must agree on joint external trade policies…
(Department of Foreign Affairs and Trade, 'Free trade agreements: WTO and free trade agreements' (2003), The Department of Foreign Affairs and Trade website at http://www.dfat.gov.au/trade/negotiations/wto_agreements.html).

57 World Trade Organization, *Submission on Regional Trade Agreements* (submission made by Australia), TN/RL/W/15 02-3820 (9 July 2002), at ¶2.

Accordingly, by their very nature, FTAs are discriminatory. Article XXIV of GATT allows individual countries to afford preferential treatment to 'partners', subject to certain conditions, while its GATS equivalent, Article V, permits economic integration agreements (**EIAs**) in services. Most modern 'FTAs' are in fact a combined FTA and EIA (as an AUSFTA would most likely be).

'WTO-plus' FTAs

As FTAs tend to involve few countries (often only two), the negotiation process is considerably more wieldy than for the WTO.[58] Thus it has been noted that, in contrast to GATS, many FTAs adopt a "'top down' or negative list" approach in relation to services, whereby the FTA party stipulates the *exceptions* to market access, not the inclusions.[59] In addition, countries can negotiate on any number of issues which are not currently addressed (or only inadequately addressed) by the multinational system. These include investment protection and promotion, government procurement, harmonisation, customs standards and protection of IPRs. Furthermore, many FTAs address the complementarity between trade and competition policy, often with express obligations relating to co-operation, as well as indirect mechanisms, such as rules governing anti-dumping measures.

In light of this broader scope, the APEC Study Centre concludes:

> 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…[60]

Particularly where it is WTO-plus, an FTA may therefore offer considerable advantages over pursuing trade liberalisation exclusively through the multilateral trading system. Indeed, DFAT states:

> in circumstances where the pace of the Doha Round is slowing as it works through very difficult issues, and in particular the difficulty of securing commitments from WTO members to significant agriculture reform, governments will wish to take the opportunity to secure WTO-consistent market opening elsewhere.[61]

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58 Of course, the world's most significant customs union, the European Union, is an noticeable exception to this tendency.

59 Organisation for Economic Co-operation and Development, *Regional Trade Agreements and the Multilateral Trading System*, TD/TC(2002)8/FINAL (2002), at ¶12.

60 Australian APEC Study Centre, An Australian Free Trade Agreement: Issues and Implications (2001), at 26.

61 DFAT, Submission to the Senate Foreign Affairs, Defence and Trade Committee, above n52, at 40.

The increasing prominence of FTAs

In light of the apparent benefits of FTAs and the perceived difficulties of the WTO process, FTAs are becoming an increasingly prominent feature of the international trading system. The percentage of world trade occurring under the auspices of FTAs was reported to be 43% as of November 2002, a figure which is expected to grow to 55% if all FTAS currently under consideration come to fruition.[62] The number of FTAs currently in force is reported by the WTO to be approximately 160, with some estimating that it may be as high as 200.[63] Meanwhile, DFAT notes that all but one member of the OECD (being the Republic of Korea) is party to at least one FTA.[64]

The popularity of FTAs has been particularly apparent in our own region, with most East Asian countries already party to FTAs and/or currently undertaking discussions.[65] Although the Asian economic crisis of the late 1990s has somewhat slowed momentum, the role of FTAs in the Asian region is set to soar, with discussions underway for closer economic relations between ASEAN, China, South Korea and Japan (together known as **APT** – ASEAN Plus Three).

WTO rules relating to FTAs

As noted above, WTO agreements specifically contemplate FTAs and customs unions. The rationale for their exception from the MFN principle is said to be 'the desirability of increasing freedom of trade by development of closer integration between members'.[66] Nonetheless, the exception is subject to the requirement that the FTA or customs union eliminate all tariffs and other restrictions on 'substantially all the trade' in goods between the parties. What 'substantially all trade' means has yet to be tested[67] and is a contentious issue.

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62 OECD, Regional trade agreements, above n59, at ¶2.

63 Greg Wood, 'Balancing of Regional and Multilateral Interests' (paper presented at An Australia-US Free Trade Agreement conference, Canberra, 29-30 September 2002), at 2.

64 DFAT, Submission to the Senate Foreign Affairs, Defence and Trade Committee, above n52, at 46.

65 Ibid at 39. DFAT also notes (at 46):
Of the four major economies in the Asian region which are not members of FTAs (Korea, China, Hong Kong and Taiwan), only Taiwan is not currently engaged in negotiations (but is actively seeking FTA partners).

66 Department of Foreign Affairs and Trade, 'Free Trade Agreements: What Are Free Trade Agreements?' (2003), The Department of Foreign Affairs and Trade website at http://www.dfat.gov.au/trade/ftas_what_are_they.html.

67 Access Economics, above n54, at 42. While there has been some work on interpreting this exception (e.g. *The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*), as yet there has been no formal criteria established by which compliance may be assessed.

Australia, in a submission to the WTO, has argued that 'substantially all the trade' should be defined in terms of a defined percentage of the WTO tariff lines.[68] Such a percentage criterion 'should be established at a sufficiently high level to prevent the carving-out of any major sector, in terms of its near-complete exclusion of coverage'.[69]

Conclusion

Notwithstanding their increasingly significant, and somewhat controversial role, in international trade, it is generally agreed that 'regional trade agreements can complement but cannot substitute for coherent multilateral rules and progressive multilateral liberalisation'.[70] For so long as the multilateral system is considered too slow, unwieldy and easily circumvented, however, it is clear that FTAs will remain an attractive proposition for countries which wish to increase their access to other markets. This will be particularly the case for countries, such as Australia, for whom agriculture is a significant sector.

Australian and American FTAs

Until recently, neither Australia nor the United States pursued FTAs with the enthusiasm of other countries. Notwithstanding their general propensity to seek liberalisation through the WTO, however, each country is party to a groundbreaking FTA – the Closer Economic Relations Trade Agreement between Australia and New Zealand (**ANZCERTA**)[71] and the North American Free Trade Agreement between the United States, Canada and Mexico (**NAFTA**). Both these agreements provide valuable guidance as to the form each country may expect the AUSFTA to take. Further assistance is provided by the FTAs that each country has separately concluded with Singapore recently.

Australia

Traditionally, Australia has not pursued bilateral or plurilateral agreements, preferring instead to engage in the multilateral process through the WTO. Lately, this approach has changed, perhaps in part due to the proliferation of FTAs amongst its trading partners. For example, if APT were to proceed, a region accounting for 47% of Australia's current merchandise trade would fall under a preferential arrangement to which Australia was not party.[72] Australia has thus been described as 'desperate and dateless',[73] looking for FTA partners.

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68 WTO, Australia's *Submission On Regional Trade Agreements*, above n57, at ¶8.
69 *Ibid*, at ¶9.
70 OECD, *Regional Trade Agreements*, above n59, at ¶36.
71 Sometimes also known only as the "CER".
72 Reportedly research shows that an APT FTA would have 'a negative economic effect on Australian welfare to the amount of 0.11 per cent of initial GDP': cited in Jeffrey

ANZCERTA

Nonetheless, Australia was party to one of the first FTAs to be notified to the WTO. ANZCERTA was built on a series of preferential trade agreements between Australia and New Zealand (including the 'original' NAFTA – the 1966 NZ-Australia Free Trade Area agreement – which came into effect in 1966). Notwithstanding bilateral liberalisation between Australia and New Zealand,[74] the two countries had the most protected industrial sectors among OECD countries until the 1980s.[75] With ANZCERTA in 1983, however, both countries 'took the plunge', agreeing to extensively reduce protection applying to trade between themselves, and simultaneously reducing protection applying to trade with other countries.

Notwithstanding that Australia and New Zealand are minnows in global trade terms, the WTO has recognised ANZCERTA as the 'world's most comprehensive, effective and multilaterally compatible free-trade agreement'.[76] Architecturally ANZCERTA is very significant – for example it is the first bilateral trade agreement to include free trade in services.[77] In light of its groundbreaking nature, '[m]any of the concepts it pioneered were picked up and replicated in other FTA agreements'.[78] A complicated agreement comprising several different documents,[79] ANZCERTA is of broad application[80] and fully complies with GATT requirements.[81]

Market distortion/ competition aspects of ANZCERTA

Robertson, *ASEAN Plus Three: Towards The World's Largest Free Trade Agreement?*, Department of the Parliamentary Library: Research Note 19 2002/03 (2002).

73 Ann Capling, 'An Australia-United States Trade Agreement?' (2001) 20(1) *Policy, Organisation & Society*, 11, at 25.

74 Department of Foreign Affairs and Trade, Closer Economic Relations: Background Guide to the Australia New Zealand Economic Relationship (February 1997), at 6.

75 Anderson, above n4, at 14.

76 Cited in Department of Foreign Affairs and Trade, 'Free Trade Agreements: Australia New Zealand Closer Economic Relations' (2003), The Department of Foreign Affairs and Trade website at http://www.dfat.gov.au/trade/negotiations/anzcer.html.

77 DFAT, *Background Guide To The Australia New Zealand Economic Relationship*, above n74, at 6.

78 Wood, above n63, at 5.

79 For a general explanation of ANCERTA, see DFAT, *Background Guide To The Australia New Zealand Economic Relationship*, above n74.

80 There are some permitted exceptions, for example, where required for the protection of essential security interests, public morals and IPRs – so long as such exceptions are not used "as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade" (ANZCERTA, cited in DFAT, *ibid*, at 9).

81 *Ibid*, at 6.

Many of ANZCERTA's novel concepts specifically relate to issues of market distortion and competition policy, with the agreement demonstrating the explicit link between the two. Its provisions relating to subsidies, anti-dumping measures and business harmonisation are particularly notable. For example, all export subsidies affecting trade between New Zealand and Australia were eliminated by 1987. The first general review of ANZCERTA in 1988, however, saw the most significance steps towards trade liberalisation. This review resulted in several key agreements, including the Protocol on Acceleration of Free Trade in Goods. At the same time, the parties executed a Memorandum of Understanding on the Harmonisation of Business Law.

Under Articles 4 and 5 of ANZCERTA and Articles 1 and 2 of the 1988 Protocol on Acceleration, the parties prohibited all tariffs and quantitative import and export restrictions on trade in goods in the free trade area governed by ANZCERTA. The parties are still permitted to apply countervailing duties in accordance with GATT,[82] but the application of anti-dumping measures as between the two countries has been abolished. As the OECD notes, FTAs which prohibit anti-dumping remedies are generally implemented in conjunction with co-operative measures on competition, which 'has traditionally occurred where there has been deep integration on competition".[83] This has certainly been the case in ANZCERTA.

Thus, in 1990, both Australia's *Trade Practices Act 1974* (the **TP Act**) and New Zealand's *Commerce Act 1986* (which was largely modelled on the TP Act) were amended such that the virtually identical misuse of market provisions contained in sections 46 and 36 respectively were extended to market power in a 'trans-Tasman' market for goods or services (new sections 46A and 36A). These amendments took effect 'as anti-dumping controls on trade between Australia and New Zealand were removed'.[84] It was considered these new provisions, in protecting against predatory pricing, were sufficient to ensure that anticompetitive effects arising from the sale of underpriced products from one country into the other were avoided.

Economic effects of trade liberalisation under ANZCERTA

Total trade in goods between Australia and New Zealand increased by more than 564% in the years 1983-1999, while two-way investment has increased from AUD1.5 billion to AUD25 billion in 1998 – almost twice the global rate for the same period.[85] Importantly, the liberalisation achieved by way of ANZCERTA has

82 OECD, *Regional Trade Agreements*, above n59, at ¶379 (although neither has done so since ANZCERTA's implementation).

83 *Ibid*, at ¶167.

84 Cassidy, above n21, at 9.

85 DFAT, 'Free Trade Agreements: Australia and New Zealand CER', above n76.

generally been extended to third parties, meaning the two countries now have extremely low protection levels by international standards.[86]

Australia's more recent trade agenda

Although the ANZCERTA is considered highly successful, until this year it remained Australia's only FTA. This was partly due to the extensive unilateral trade liberalisation programme that the Australian government undertook while implementing ANZCERTA. The current government, however, now claims to be pursuing 'a wider-ranging and more ambitious trade policy agenda than at any previous stage in Australia's history, taking in both the multilateral and bilateral channels'.[87]

In February this year, the Singapore-Australia Free Trade Agreement (**SAFTA**)[88] was signed. A 'wide-ranging and comprehensive agreement',[89] SAFTA requires the parties to eliminate tariffs on all goods trade between the two countries from the date the agreement comes into effect. Unsurprisingly, the agreement is WTO-plus, with the parties agreeing not to use export subsidies, nor to apply safeguard measures against each other. Interestingly, the two governments have committed themselves to addressing anti-competitive business practices and to ensure government-owned bodies comply with the principle of 'competitive neutrality'.[90] furthermore, SAFTA is open to accession or association by any States or separate customs territory.

Aside from SAFTA, Australia has recently concluded negotiations for a CER-FTA with Thailand, and signed a Trade and Economic Framework Agreement with Japan. Similarly the members of the Pacific Forum (including Fiji, Samoa and Tonga) have reached agreement with Australia and New Zealand for closer economic relations. Australia and New Zealand are also pursuing closer relations with the members of ASEAN,[91] with the AFTA-CER Closer Economic Partnership

86 *Ibid*.

87 Department of Foreign Affairs and Trade, *Advancing The National Interest* (White Paper, 2003) at xiii. See also Vaile, above n53.

88 *Singapore-Australia Free Trade Agreement*, 17 February 2003, Australia and Singapore (entered into force 28 July 2003) (**SAFTA**).

89 Department of Foreign Affairs and Trade, 'Free Trade Agreements: Singapore-Australia Free Trade Agreement (SAFTA)' (2003), The Department of Foreign Affairs and Trade website at http://www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html.

90 Under the principle of competitive neutrality a government owned entity is required to price its services as though it were subject to the same cost structures as its private competitors – e.g. factoring in taxes to which it may not be subject.

91 The Association of South East Asian Nations (**ASEAN**) now has ten members (Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam). The ASEAN Free Trade Area (**AFTA**) was established in 1993. Part of

officially launched in September 2002.[92] Thus, although the government is anxious to affirm that the WTO remains its highest priority,[93] Australia clearly sees FTAs as forming a key platform of its trading policy.

United States

The United States' approach to free trade agreements has followed a similar trajectory to Australia's, being party to a significant FTA in the form of NAFTA but, until recent times, not really pursuing other bilateral or plurilateral opportunities. And, as for Australia, amongst the United States' growing portfolio of FTAs is a recently concluded agreement with Singapore. A quick examination of some of the FTAs to which the United States is party, however, reveals a different approach to FTAs.

NAFTA

NAFTA came into effect in January 1994, and might also be considered 'WTO-plus' although generally in different respects to ANZCERTA. For example, the treatment of IPRs is the subject of significant attention, with NAFTA requiring national treatment for the protection and enjoyment of IPRs.[94] While several provisions of TRIPS are reiterated in the agreement, in many areas, the protection required by NAFTA is stronger than that imposed by the multilateral system.

The approach to protection of agricultural products under NAFTA is also significantly different to ANZCERTA. Thus, ACIL Consulting states that 'NAFTA is riddled with agricultural exceptions intended to slow down the liberalisation process'.[95] Restrictions on products such as sugar, dairy and poultry have not been addressed in NAFTA, although licensing requirements in relation to trade

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AFTA is the Common Effective Preferential Tariff scheme, which establishes a schedule for phased tariff reductions within ASEAN (with members remaining free to set their own tariffs against non-members).

92 Initially rejected by the members of ASEAN, the parties have now signed a memorandum of understanding to harmonise standards (see *Memorandum of Understanding Concerning Cooperation On Standards and Conformance*, 13 September 1996, Member States of ASEAN and the Governments of Australia and New Zealand), and established a Business Council to assess impediments to closer economic relations between the two free trade regions (see further Department of Foreign Affairs and Trade, "AFTA-CER" (2003), The Department of Foreign Affairs and Trade website at http://www.dfat.gov.au/cer_afta/index.html).

93 See for example DFAT, *Submission to the Senate Foreign Affairs, Defence and Trade Committee*, above n52, at xiii: 'Negotiations in the World Trade Organization… remain Australia's best hope for better access for Australian goods and services to global markets, and for rules that allow Australians to trade on equal terms with others'.

94 C.f. OECD, *Regional trade agreements*, above n59, at ¶¶315-317.

95 ACIL Consulting, above n49, at 23.

between the United States and Mexico in a number of products (such as wheat, tobacco and cheese) were converted to tariffs to be phased out over ten years. Other restrictions have been converted to tariff rate quotas (**TRQs**), with each country required to gradually expand quotas and phase out associated tariffs for over-quota goods during the transition period.

Market distortion/ competition aspects of NAFTA

NAFTA explicitly addresses competition policy, with Chapter 15 requiring the parties to adopt or maintain competition laws, and to consult and co-operate with each other in enforcement (Article 1501). Under Article 1504, a working group was established with the mandate of reporting on issues affecting competition law and policy and trade law in the free trade area. Chapter 15 also contains express provisions relating to monopolies and state enterprises, which ensure that monopolies do not infringe NAFTA in the exercise of any regulatory, administrative or other governmental authority delegated to them. Under Article 1502, members can designate both privately-owned and public monopolies, but such monopolies are subject to certain constraints such as not using their monopoly position to engage in anti-competitive behaviour in a non-monopolised market.

State enterprises are subject to similar (although less far reaching) constraints; they must act in a manner consistent with NAFTA obligations on investment and financial services and must maintain non-discriminatory treatment in their sales to NAFTA investors or investments (Article 1503).[96] Under the dispute settlement mechanisms set out in Chapters 11 and 20, these rights may be enforced by the other states or investors in other states.

Measures relating to subsidies correspond to those of the WTO, excepting export subsidies in the agricultural sector. Canada and the United States prohibit export subsidies for agricultural products (as a result of their original FTA, now incorporated in Annex 702.1 of NAFTA). Furthermore, Article 705 states that it is 'inappropriate' for a party to provide an export subsidy for goods exported to another country where there are no other subsidised imports of the goods. Members are permitted to adopt or maintain export subsidies for agricultural products exported to another country with the express agreement of that country.
In terms of competition laws, there are no detailed procedures for co-operation contained in NAFTA, and certainly nothing approaching the comprehensiveness of ANZCERTA. Instead, the parties are subject to general obligations to consult on the effectiveness of their national competition laws and to co-operate on the enforcement of those laws by way of mutual legal assistance, notification,

96 See generally OECD, *Complementarities Between Trade And Competition Policies*, above n18, at 11 and OECD, *Regional Trade Agreements*, above n59, at ¶196.

consultation and the exchange of information.[97] More detailed obligations are subject to bilateral co-operation agreements between the parties, and fall outside the scope of NAFTA (which means, for example, they are not subject to the dispute settlement mechanism arising under Chapter 11, discussed below).

Chapter 11: investor/ state disputes

Under NAFTA not only do the parties have the ability to seek enforcement of obligations, but so too do investors.[98] Based upon previous United States bilateral treaties and domestic legal principles applying to investment,[99] Chapter 11 of NAFTA was included at the insistence of the United States.[100] It has been used on a number of occasions by private parties against all three governments; as of July 2001, 13 claims had been filed under Chapter 11.[101]

The potentially broad scope of the provisions was shown in a preliminary decision in the Loewen Group case. Following a jury award of USD500 million in compensatory and punitive damages in a civil suit against Loewen, the company appealed, triggering a requirement under Mississippi law and the Mississippi Supreme Court rules for the payment of a "bond" totalling 125% of the award under appeal. Loewen claimed that the jury award and the requirement for the bond amounted to a denial of justice, and violated the national treatment and expropriation provisions of Chapter 11. It sought more than USD66 million in damages. In a hearing on jurisdiction the disputes tribunal constituted under Chapter 11 found that a NAFTA party can be held liable for decisions of its state courts, even in relation to litigation solely between private parties.[102]

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97 See generally OECD, *Regional Trade Agreements*, *ibid*, at ¶202.

98 Article 1101(1) provides:

> No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment ("expropriation"), except:
>
> for a public purpose;
>
> on a non-discriminatory basis;
>
> in accordance with due process of law and Article 1105(1); and
>
> on payment of compensation…

99 United States General Accounting Office, North American Free Trade Agreement: U.S. Experience With Environment, Labor, And Investment Dispute Settlement Cases (2001), at 5.

100 Kim Richard Nossal, 'Bilateral Free Trade With The United States: Lessons From Canada' (2001) 20(1) *Policy, Organisation & Society*, 47, at 59.

101 United States General Accounting Office, above n99, at 5 - four against the United States, five against Mexico and four against Canada. For a précis of these cases, see Appendix IV of that paper. See also at 5 and 37 for a description of the dispute resolution process.

102 United States General Account office, *ibid*, at 63. Nonetheless, when determining the case on the merits (late June 2003), the NAFTA panel held that Loewen was the victim of a 'local error', and not an international wrong. Consequently, its claim for

Although it has been claimed that, when placed in a broader context, Chapter 11 'is not an onerous provision relative to the benefits of increased economic activity that tend to come with [agreements such as NAFTA]',[103] the rights afforded to investors under Chapter 11 have certainly provoked unease. It has been stated, for example, that the provisions have 'caused a great deal of anxiety for the Canadian government',[104] and a number of submissions to DFAT expressed concern that similar provisions might be enacted in an AUSFTA.[105] Indeed, it has been claimed that:

> the most serious challenge to the power of a government to regulate in the public interest, be it in the area of public health, environment or labour, is the ability of an investor to bypass host country courts and have the law of a NAFTA-type Agreement applied to the claim.[106]

Economic effects of trade liberalisation under ANZCERTA

Notwithstanding these concerns, NAFTA is generally considered a success. Taking the case of Canada (being, of the three NAFTA members, the most analogous to Australia), Nossal reports that, although Canada was initially reluctant to pursue an FTA with the United States,

> the free trade agreements [first with the US, and then NAFTA] were followed by huge increases in economic activity in Canada – so huge in fact, that even those who originally argued in favour of the free trade agreement in the mid-1980s seemed surprised by the statistics.[107]

Thus, by 2000, Canada had reversed a persistent current account deficit, returning an overall and improving surplus.[108]

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damages was rejected: see Barrie McKenna, 'Panel Absolves US of Loewen Damages', *Globe Investor*, 27 June 2003 at http://www.globeinvestor.com/Servlet/ArticleNews/story/GAM/20030627/RLOEW viewed 6 July 2003.

103 Nossal, above n100, at 60.

104 Capling, above n73, at 24.

105 See for example Trade Watch, 'Public Submission to the Department of Foreign Affairs and Trade on Issues Relevant to the Negotiations for a Free Trade Agreement (FTA) between Australia and the United States' - submission to the US FTA Task Force (2003) and Law Institute of Victoria, 'US Australia Free Trade Agreement - Submission by Law Institute of Victoria' - submission to the Department of Foreign Affairs and Trade (2003). These concerns are averted to in Australian APEC Study Centre, above n60, at 36.

106 Samrat Ganguly, cited in Law Institute of Victoria, above n105, at 21.

107 Nossal, above n100, at 47.

108 *Ibid*, at 48.

The United States' more recent trade agenda

After a long hiatus, during which time legal constraints limited the United States' ability to negotiate free trade agreements,[109] in early 2002 an FTA with Singapore was concluded.[110] Although many key outcomes were similar to those achieved by Australia in SAFTA, stark differences are apparent - even in the length of the two agreements: whereas SAFTA is about 120 pages, the United States equivalent is approximately 1,400. The agreement provides for the 'broadest possible trade liberalization' in relation to services,[111] while Singapore has guaranteed zero tariffs on all American goods immediately that the agreement comes into force. Meanwhile the United States has agreed to phase out duties on Singaporean products entering the United States market over a period of ten years. The agreement provides significant protection for American investors, guaranteeing them equal treatment when compared to other foreign investors or Singaporean investors.[112] As with SAFTA, a negative list approach has been adopted, with all forms of investment protected unless they are specifically exempted.

Also reflecting SAFTA's terms, the FTA between the United States and Singapore commits Singapore to enacting laws regulating anti-competitive business conduct, and to creating a competition commission by January 2005. The Office of the United States Trade Representative (**USTR**) also reports that:

> Specific conduct guarantees are imposed to ensure that commercial enterprises in which the Singapore government has effective influence will operate on the basis of commercial considerations, and such enterprises will not discriminate in their treatment of US firms.[113]

Closer examination of the US-Singapore FTA, however, reveals points at which Australia's and the United States' priorities diverge. Thus, for example, the American agreement protects against parallel importation of pharmaceutical products without the patent-holder's consent. Interestingly, the United States has

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109 To be discussed below in Section IV.

110 For general descriptions of this FTA, see Office of the United States Trade Representative, 'Quick facts: U.S. - Singapore Free Trade Agreement' (2003), The USTR website at http://www.ustr.gov/new/fta/Singapore/final/factsheet.pdf and Office of the United States Trade Representative, *Trade facts: free trade with Singapore* (2002) viewed 12 May 2003.

111 Office of the USTR, "Quick Facts", above n110.

112 Similarly, under 08-Article 4 of SAFTA, Australian investors are to be accorded 'treatment that is no less favourable than that which [Singapore] accords in like circumstances to its own investors', and vice versa. There are, however, a number of reservations to this Article (see 08-Article 5).

113 Office of the USTR, *Trade Facts*, above n110, at 7.

repeatedly expressed concerns at Australia's laws permitting parallel importation,[114] and this is said to be one issue on the AUSFTA negotiating table. The United States has also recently concluded an FTA with Chile and another with Jordan. Its most ambitious project, however, is the Free Trade Agreement of the Americas (**FTAA**). Described as a 'sort of Monroe Doctrine for the 21st century',[115] the FTAA is proposed to eliminate trade and investment barriers on virtually all goods and services traded between all countries in South, Central and North America excepting Cuba. Negotiations are well under way, with the parties hoping to complete negotiations by 2005 and entry to force to occur no later than December 2005.[116] Of the nine negotiating groups established by the parties, specific groups are dedicated to issues relating to market access, IPRs, subsidies, anti-dumping and countervailing duties as well as competition policy.[117]

Finally, the United States Trade Representative, Robert Zoellick, has recently notified Congress of the United States' intention to negotiate an FTA with five central African countries. Also on the boil is a trade pact with Vietnam, arrangements with the Balkan nations and an Andean Trade Preferences Act.[118] Thus it can be seen that:

> From the US point of view, discussions on free trade with Australia form only a very small part of a much wider agenda and perspective. The free trade push is in fact worldwide in scope. It stems from both a sense that there is an opportunity to move quickly in respect of free trade and a fear that if the opportunity of the moment is not grasped quickly by the United States, it will be lost, and lost to others.[119]

AUSFTA

AUSFTA can therefore be seen as the intersection of both countries' renewed appreciation of FTAs and their combined experience at FTA negotiation. That is not to say, however, that the idea of an AUSFTA is recent. It was first floated in 1987, but stalled in light of American intransigence on agricultural reform. In

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114 See, for example, Office of the United States Trade Representative, *2000 National Trade Estimate Report on Foreign Trade Barriers* (2000) at 11 and Australia Council for the Arts, *Cultural Trade: Background Report* (2003), at 9.

115 Capling, above n73, at 18.

116 Tripartite Committee, 'Overview of the FTAA Process' (2003), The official home page of the Free Trade Area of the Americans process at http://www.ftaa-alca.org/View_e.asp.

117 For more details concerning the FTAA, see Office of NAFTA and Inter-American Affairs, 'Free Trade Area of the Americas' (2003), The Office of NAFTA and Inter-American Affairs website at http://www.mac.doc.gov/ftaa2005/.

118 Donald A. DeBats, 'Road Block on the Fast Track: The Struggle For Trade Promotion Authority' (2001) 20(1) *Policy, Organisation & Society*, 63, at 66.

119 *Ibid*, at 64.

1992, the first President Bush again suggested an FTA which Australia rejected.[120] The most recent attempt was initiated by Prime Minister John Howard in 2000. Trade and foreign policy intersected in 2001 when John Howard's visit to Washington to lobby for an FTA coincided with the September 11 attacks. Oxley reports that "when the Prime Minister returned to complete the visit in June 2002, the President gave his blessing to an FTA".[121]

The overt link between American willingness to negotiate an FTA and Australia's support for the United States in the wars against terror and Iraq has been made on several occasions, including by the United States Trade Ambassador Robert Zoellick.[122] More to the point, however, both countries share a (relatively) co-operative trade relationship and similar objectives for the development of the multinational trading system. For example, there exists already a Trade and Investment Framework Agreement, which provides a solid foundation for a more extensive and broad-reaching FTA. And, as DFAT says, "both sides share the aim of a comprehensive and liberalising agreement that sets a high standard both for other FTAs and for the Doha Round of WTO negotiations".[123]

The parties' objectives

The parties' general objectives have been clearly articulated, and emphasise that they have a 'bigger picture' in mind. Thus, DFAT states, '[t]he free trade agreement that the Government is seeking with the United States could bring gains more quickly and more extensively than those available through the multilateral channels of the WTO'.[124] Mark Vaile has also claimed that:

> An FTA with the United States offers us not just direct economic and commercial benefits, it also is *the single greatest strategic opportunity*, in foreign and trade policy, presented to Australia for many decades.[125]

120 Paul Keating reportedly rejected the idea on two grounds: '1. the proposed agreement was one of a number proposed by the US which appeared to be directed at isolating Japan within the Pacific trading community; 2. America proposed to have separate agreements with Pacific trade partners, in all of which the US was the dominant partner' (John Edwards, 'An American-Australian Free Trade Agreement?' (2001) 20(1) *Policy, Organisation & Society*, 29, at 35).

121 Alan Oxley (ed.), 6 *FTA Analyst* (March 2003).

122 Robert Zoellick, 'Remarks' (speech given to the American-Australian Free Trade Agreement Coalition, Washington, 19 March 2003).

123 DFAT, *Submission to the Senate Foreign Affairs, Defence and Trade Committee*, above n52, at 42. Nonetheless, it has been suggested that it would be incorrect to trace the new found enthusiasm for an AUSFTA solely to perceived failures with the WTO process (see Capling, above n73, especially at 18).

124 DFAT, *Advancing the National Interest*, above n87, at xiv.

125 Vaile, above n53 (emphasis in the original).

Meanwhile, Robert Zoellick has stated:

> an FTA would fit well into the larger trade strategies articulated by both the United States and Australia: to press forward with regional and bilateral trade initiatives while simultaneously advancing trade globally through the WTO and the Doha Agenda. By moving on multiple fronts, we can create a competition in liberalization…[126]

Unsurprisingly, given the parties' FTA history, objectives extend beyond the strict terms of an FTA, with both seeking to address access for service providers as well as indirect trade issues, such as labour and environmental standards, investor protection and increasing co-operation in the enforcement of competition laws.

Australian objectives

While Australia's general objectives are also said to include promoting trade liberalisation and economic growth and stability in the Asia-Pacific region,[127] Foreign Minister, Alexander Downer, has said that Australia's goals for the AUSFTA negotiations are threefold:

- to obtain better market access, by removing or reducing barriers to Australian goods;
- to ensure current levels of Australian access to United States' markets are maintained and protected; and
- to prevent any deterioration in Australia's competitive position vis-à-vis other parties' trading relationships with the United States.[128]

These last two points both highlight the risk that Australia's current trading relationship with the United States may be undermined if the United States were to enter into other preferential trade agreements not involving Australia.

Australia's detailed objectives[129] focus more upon specific market access issues, particularly for agricultural products. As Australia's chief negotiator has stated:

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126 Robert B. Zoellick, 'A Pacific Partnership: Australia and America in a Globalizing World' (paper presented at the Australian American Leadership Dialogue, Washington D.C, 10 July 2002), at 8. See also Robert B. Zoellick, Letters to the United States Senate and House of Representatives notifying of the President's intent to initiate negotiations for a free trade agreement with Australia (13 November 2002).

127 DFAT, *Submission to the Senate Foreign Affairs, Defence and Trade Committee*, above n52, at 49.

128 Alexander Downer, 'The Strategic Importance of a Free Trade Agreement to Australia-United States Relations' (paper presented at the Australian APEC Study Centre conference on *The Impact of an Australian-United States Free Trade Agreement*, Canberra, 29 August 2002).

'[w]e are looking for a comprehensive market access package from the United States…'.[130] For example, Australia is seeking the removal of TRQs applying to Australian exports of beef, dairy products, sugar, peanuts and cotton, as well as agricultural subsidies. In relation to services, Australia will be seeking reduced barriers for professional service providers, as well as education, environmental, financial and transport services. Meanwhile, the Australian government also intends to pursue exemptions for Australian products from American safeguards legislation, and to try to minimise the impact of other American trade remedy laws affecting Australian exports. The objectives also specify that Australia will 'build upon existing bilateral treaty arrangements to foster co-operation on competition law and policy…'.[131] While state-to-state dispute resolution is listed in the statement of Australian objectives, the statement is silent upon the question of investor-to-state provisions.

American objectives

Under the American system, ambassador Zoellick was required to provide written notification to Congress advising of the United States' intention to negotiate an FTA with Australia, and this notification sets out the United States' formal objectives.[132] As a general indication, the notification suggests the United States is less focused upon specific market access issues, considering indirect restrictions upon market access to be more significant.

Australia's indirect trade barriers[133] are said to include its quarantine measures, as well as its export monopoly arrangements particularly in relation to wheat. The protection provided to IPR-holders and current restrictions upon foreign investment are also issues of concern. Again, state-to-state dispute resolution procedures are specifically raised, and while there is no explicit reference to investor-state disputes, the notification states that an objective is to 'secure for US investors in Australia important rights comparable to those that would be available under US legal principles and practices'. As may be recalled, these principles and practices contributed to the formation of NAFTA's Chapter 11. As with Australia, American objectives specifically state that the United States will seek provisions in the FTA to foster co-operation on competition law.

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129 As announced in March 2003. A copy of the objectives can be found at: http://www.dfat.gov.au/trade/negotiations/us_australias_objectives.html.

130 Stephen Deady and Ralph Ives, Transcript of media briefing on the second round of Free Trade Agreement negotiations between Australia and the United States (23 May 2003).

131 Australia's statement of objectives, see above n129.

132 See above n126. A copy of the notification as sent to the Senate can be found at: http://ustr.gov/releases/2002/11/2002-11-13-australia-byrd.PDF.

133 *Ibid*. See generally Office of the USTR, *2000 National Trade Estimate Report*, above n114, at 11ff.

Zoellick's notification expressly recognises that an AUSFTA 'is of particular interest and concern to the US agricultural community'. Thus, while the United States will seek to provide for bilateral safeguard mechanisms during any transition period, it intends to 'make no changes to US antidumping and countervailing laws'. The notification is silent upon the issue of American subsidies and TRQs.

Negotiation process

It is beyond the scope of this paper to describe in detail the process for negotiations. Nonetheless, it is useful to briefly discuss the general structure and to consider certain constraints that American negotiators in particular face.

United States' legal requirements

The United States' ability to even begin negotiations for an FTA was severely constrained until the passing of the *Trade Act 2002*, which provided the President with 'trade promotion authority' (**TPA**). (TPA had lapsed in 1994, and there were two failed attempts in the 1990s to renew it.)[134] In granting TPA, Congress accepts limits on its own power to amend an agreement negotiated by the executive branch. Once such an agreement is negotiated, then there is a simple 'up or down' vote, whereby Congress either accepts or rejects the agreement. Nonetheless, in granting TPA, Congress can stipulate that agreements must meet certain criteria – thus for example, under the current TPA, the impact of environmental and labour standards must be considered when negotiating FTAs.[135]

Even with TPA, however, the United States cannot negotiate on issues of market access until a review by the International Trade Commission (an American governmental agency) is completed.[136] Accordingly, for the first two rounds of negotiations, market access issues – which it will be remembered were the main focus of Australia's objectives – were 'out of bounds';[137] they were considered until the July round.

The Australian process

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134 See DeBats, above n118, for an explanation of the process of obtaining TPA.

135 For further explanation of this process, see DeBats, *ibid*, and Office of the United States Trade Representative, 'Trade Promotion Authority: Trade Promotion Authority is about…' (2001), USTR Resources at http://www.ustr.gov/new/2001-12-03-tpa-summary.htm.

136 This review was due in June, but does not appear to have been released publicly.

137 Stephen Deady, Transcript of media briefing by Australia's chief negotiator for the Australia United States Free Trade Agreement (AUSFTA) on forthcoming second round of negotiations (16 May 2003).

The Australian process, in accordance with the Constitutional requirements for the negotiation of treaties by the Commonwealth, is considerably less prescribed. There is no formal oversight of the negotiations analogous to the American system and concerns have been raised about the transparency of the Australian process.[138] Once signed, an AUSFTA would need to satisfy no further requirements to have force in Australia.

General outline of significant issues

The purported advantages and disadvantages of an AUSFTA have been extensively debated, particularly in Australia (where it would have a far greater impact on the economy).[139] While analysing these arguments is clearly beyond the scope of this paper, nonetheless it is appropriate to consider briefly the broader issues on the table, before turning to the three issues of particular interest for present purposes: increased co-operation in competition law matters; the status of the single desk for Australian wheat exports and the operation of the Pharmaceutical Benefits Scheme. A general outline of each party's significant issues, as stated by the APEC Study Centre, is set out in Appendix 2. These issues can be broken down into two basic categories – those relating directly to tariffs (which, by and large, are not of enormous import) and more significant issues relating to non-tariff barriers.

Tariffs

By world standards, Australian and American tariffs are low (with the former averaging 3.7% and the latter, 2.8%)[140] – and both countries, via the APEC forum, have committed to eliminate all trade barriers by 2010. More than 96% of Australian tariff lines are bound through the WTO system, and all but two American tariff lines are bound.[141] Major tariffs (being those over 5%) for each country, post-Uruguay, are as set out in Table 2.

138 See for example Australian Council of Trade Unions, 'Submission to the Department of Foreign Affairs and Trade United States Free Trade Agreement Taskforce' - submission to the Department of Foreign Affairs and Trade (2003) and Mark Davis, 'Time to count true cost of free trade', *The Australian Financial Review*, 26 May 2003, 6.

139 Centre for International Economics, *Economic impacts of an Australia-United States Free Trade Area* (2001), at viii.

140 Australian APEC Study Centre, above n60, at 40.

141 DFAT, *Submission to the Senate Foreign Affairs, Defence and Trade Committee*, above n52, at 59ff. The two American exceptions relate to crude petroleum.

Table 2: Post-Uruguay tariff rates

Sector	Australian tariff (%)	American tariff (%)
Peanuts	--	45.00
Sugar cane, beet sugar	0.00	80.00
Dairy products	3.20	23.90
Butter	--	84.60
Cheddar Cheese	--	15.50
Mozzarella Cheese	--	23.60
Sugar	0.00	80.00
Textiles and clothing	9.90	5.80
Wearing apparel	15.70	11.60
Leather products	8.40	7.30
Wood products	5.20	0.40
Metal products	1.50	5.50
Motor vehicles and parts	9.30	1.40
Passenger motor vehicles	15.00	--
Light commercial vehicles	--	25.00

Source: Centre for International Economics, Economic impacts of an Australia-United States Free Trade Area *(2001), at 17-18.*

Non tariff measures

Australia

Aside from the single desk and the Pharmaceutical Benefits Scheme, the major Australian non-tariff barrier to cause United States concern is that of quarantine. The USTR states that '[t]he Government of Australia limits agricultural imports through quarantine and health restrictions, in some cases apparently without the necessary risk assessment to provide the WTO-required scientific basis for such restrictions'.[142] Australia's quarantine regime in relation to salmon has been successfully challenged in the WTO by the United States,[143] and the United States remains disturbed by restrictions relating to poultry, feed grains, pork and certain fruits.[144] While Australia claims its quarantine restrictions are not arbitrary and are based upon scientific grounds, it is clear the United States will want some concrete obligations in this respect.

The United States

142 Office of the USTR, *2000 National Trade Estimate Report*, above n114, at 9.
143 *Ibid*.
144 *Ibid*, at 9-10.

Australia, meanwhile, will be looking to overcome the United States' system of TRQs. For example, up to 1.1m tonnes of sugar and sugar syrup are permitted to enter the United States at a base tariff of US1.5 cents/kg, of which Australia is allocated just 90,000 tonnes.[145] Any sugar above Australia's allocation is subject to a tariff of US34 cents/kg – while the world price for sugar is approximately US20 cents/kg.[146] ABARE has estimated that over the period 2001-2005, American sugar support will cost the Australian economy more than US$200 million a year.[147]

Similar arrangements apply to dairy products. Taking cheese as an example, 'in quota' exports are subject to tariffs ranging between 10 and 16%. Once Australian exports exceed 7,000 tonnes, however, tariffs range between 60-65%. While Australian access has been increased in recent years (e.g. butter has gone from 320 tonnes to 7,000), it remains set at pitifully low levels. In considering American restrictions on sugar and dairy imports, the OECD has stated that the TRQs violate "the spirit and intent of the liberalisation objectives".[148]

Cotton is also subject to a TRQ regime, although in cotton's case, the high level of subsidies paid to American farmers is the main distortionary effect limiting Australian access. The APEC Study Centre reports that American subsidy programs – which apply to almost every agricultural sector – "dwarf in economic impact the restrictions on imports created by tariffs and tariff quotas".[149]

Clearly, therefore, Australia will be seeking higher allocations (or lower tariff rates) in sectors where TRQs apply, as well as reductions in American subsidy programs. These reductions will be critical not merely because of the adverse impact that such programs have on Australian access to the American market, but also because of the impact they have in relation to third party markets where Australian and American farmers are direct competitors.

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145 Australian APEC Study Centre, above n60, at 117. To put this into context, Australia exports approximately 5 million tonnes of sugar annually.

146 ACIL Consulting, above n49, at 28-29.

147 *Ibid*, at 31.

148 Organisation for Economic Co-operation and Development, *Competition Policy and Agricultural Trade*, COM/AGR/CA/TD/TC/WS(98)106 (9 October 1998), at 7.

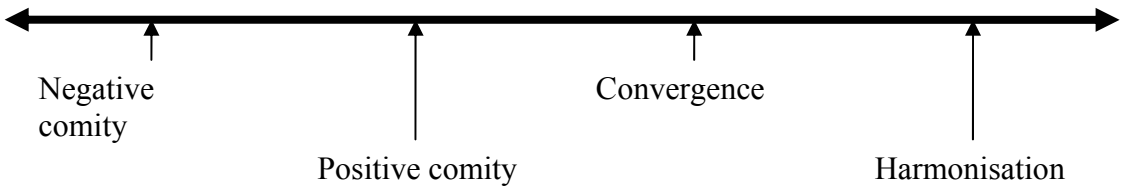
149 Australian APEC Study Centre, above n60, at 119. For a discussion of Australian concerns in relation to the *US Farm Security and Rural Investment Act 2002* (commonly known as the Farm Bill), see Downer, above n128; ACIL Consulting, above n49; AWB Limited, 'US - Australia Free Trade Agreement' - submission to the Senate Foreign Affairs and Trade Committee (2003); and DFAT, *Advancing the national interest*, above n87, at 89. For a brief outline of the American position, see Zoellick, "A Pacific partnership", above n126.

AUSFTA ISSUES CONCERNING COMPETITION POLICY AND MARKET DISTORTION

Competition policy

As already discussed, although competition policy in its nascence in the WTO, it is not uncommon for quite detailed measures to be included in an FTA. This is particularly the case where, as in the present scenario, there are only two parties to the FTA, both of whom have sophisticated competition laws already in force. The value of co-operation in the application of competition policy is well accepted: 'Cooperation can lower transaction costs and can speed up the process by eliminating duplication of effort…'.[150]
Once a general co-operative approach is assumed, the options available to the parties may be seen as part of a continuum:

Figure 1: Options for co-operative competition policy



Negative comity would require the enforcing nation to consider the interests of an affected nation when applying its domestic laws, generally by notifying the affected nation of relevant enforcement proceedings and considering ways in which the enforcing nation's needs may be met without harming the interests of the affected nation. Positive comity builds on this general approach but also would require a nation to consider express requests for enforcement action by another country where conduct in the first country is adversely affecting the interests of the second.

As used in this paper, the term 'convergence' reflects the gradual standardisation of approaches, although not of the law itself. An example of convergence is the growing similarity in the approach of the United States and that of the European Union to issues of market definition:

> it is often and accurately said that market definition could be outcome determinative in competition cases; cooperation that increases the similarity of market definition principles can result in convergence that is far more meaningful than that which is

150 Parisi, above n34, at 14.

> likely to result from making the FTC and Sherman Acts read more like the Treaty of Rome, or vice versa.[151]

Harmonisation would be the extreme option, and the closest that either Australia or the United States has come to such harmonisation would be the restrictive trade practices provisions of Australia's TP Act and New Zealand's equivalent, the *Commerce Act*.[152] The *Commerce Act* provisions were modelled upon the TP Act, with differences between the two acts minimal (and often attributable to the countries' different constitutional structure).

Along the continuum, other options occur. Thus, Robert Pitofsky claims that '[v]ery limited convergence is not hopelessly impractical'[153] on a world wide scale, citing an OECD resolution whereby 29 countries collectively condemned hard core cartels. Nonetheless, it is fair to say that most FTAs focus upon co-operative measures towards the left of the continuum,[154] with progress towards convergence generally occurring by informal means (such as staff exchanges, which help to standardise the approach to seminal competition policy issues). As Caplin notes:

> Formal cooperation agreements are useful, and agreements permitting the sharing of confidential information will take cooperation to new levels, but most important is the development of close relationships, which are necessary both to negotiating formal agreements and to making them work.[155]

Before assessing the current degree of co-operation between Australia and the United States and considering how much more might be possible, it is necessary to first briefly consider each country's respective starting point: the basic principles underlying Australian and American competition laws.

Basic principles of US/ Australian competition law

As a starting point, the basic principles of Australian and American competition laws are very similar. This is no great surprise, given that the Australia approach was developed with an eye to America's considerable experience. Thus Cassidy states that 'there exists a fundamental similarity of objectives in dealing with anti-competitive situations';[156] he continues that 'there is a high degree of

151 Varney, above n37. See also Pitofksy, above n39, on this point.
152 Although it should be noted that Australian and New Zealand competition laws are by no means completely harmonised: see for example Cassidy, above n21, at 11.
153 Pitofsky, above n39.
154 For example, a 1991 co-operative agreement between the United States and the European Union is said by Parisi (above n34, at 4) to be the first bilateral agreement to incorporate positive comity.
155 Varney, above n37.
156 Cassidy, above n21, at 8.

consistency in the intent, purpose and even basic structure of US and Australian competition law'.[157] Indeed, both nations contain per se prohibitions against certain types of 'collusive conduct', they both regulate merger activity and both seek to restrain the conduct of monopolists.

Nonetheless, certain differences in approach exist – some due to the very structure of the law (such as certain Australian exceptions to the application of competition laws) and others due to developments in case law (such as American interpretations in relation to price discrimination). In addition, there are significant differences concerning the administration of the law, as exemplified in the two countries' approaches to pre-notification of mergers (mandatory in the United States, while an informal, involuntary process operates in Australia) and the availability in the United States of 'treble damages' for private litigants. While there can be no doubt that American jurisprudence has exerted considerable influence upon the development of Australian competition principles and continues to do so,[158] the laws of the two countries would be extremely difficult to harmonise and, given the role of the courts in developing competition policy (particularly in the United States), practically impossible to keep harmonised.

Current relationship

As will be seen, Australia and the United States already have well developed co-operative measures in place, and a likely outcome would be for these existing measures to be formalised in an AUSFTA. Before considering the extent of the current relationship, however, it is important to understand the purported reach of American antitrust laws. As explained in the Antitrust Enforcement Guidelines published by the American antitrust agencies, the Department of Justice and the FTC,[159] anti-competitive conduct which affects American domestic conduct can violate American law regardless of where it occurs.[160] Thus, the *Sherman Act* (as amended by the *Foreign Trade Antitrust Improvements Act 1982*) brings into American focus certain foreign conduct where there is a 'direct, substantial and reasonably foreseeable effect' on trade or commerce, and such

157 *Ibid*, at 11.

158 See, for example, recent discussion concerning the need for 'recoupment' in predatory pricing matters in the *Boral* decision at first instance (*Australian Competition and Consumer Commission v Boral Ltd* [1999] FCA 1318, per Heerey J, e.g. at ¶159ff), by the Full Federal Court ([2001] FCA 30, per Finkelstein J, e.g. at ¶202ff) and by the High Court (*Boral Besser Masonry Limited (now Boral Masonry Ltd) v ACCC* [2003] HCA 5, per Kirby J, e.g. at ¶400).

159 Department of Justice (**DOJ**) and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (1995).

160 *Ibid*, at ¶3.1

effect gives rise to a claim under the *Sherman Act*.[161] Nonetheless, the Guidelines provide that 'if the conduct is unlawful under the importing country's antitrust laws as well, the Agencies are also prepared to work with that country's authorities if they are better situated to remedy the conduct, and if they are prepared to take action that will address the US concerns, pursuant to their antitrust laws'.[162] Similarly, the guidelines specifically aver to concepts of negative comity.[163]

Nonetheless, the aggressive approach of enforcing American antitrust law abroad has led to tensions in its relationship with Australia. For example, private action against a number of alleged cartel conspirators, both American and foreign, resulted in judgment being entered against Australian defendants when those defendants had refused to recognise American jurisdiction.[164] The 'cartel', however, had been established with the imprimatur of the governments of a number of countries, in response to protectionist measures imposed by the United States. Notwithstanding Australian representations to the United States, the plaintiff continued to pursue the damages awarded. Finally, the Australian government enacted the *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Cth)*. Even then, however, there was a risk that enforcement action could be taken against the American assets of Australian firms. Consequently, 'claw back' legislation was enacted to permit Australian firms targeted in this manner to recover their losses against the Australia assets of the plaintiff. The blocking and claw back legislation were consolidated in Australia by the *Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth)* which remains in force.[165]

Notwithstanding more recent curbs on extra-territorial enforcement by the United States (as evidenced by the negative comity consideration outlined in the Guidelines, and the positive comity provisions of a number of bilateral agreements to which the United States is a party), these curbs are more in the form of American "considerations"[166] and could not be considered enforceable.

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161 See *ibid*, at ¶¶3.12-3.123. Specific enforcement powers also exist where 'the US Government is a purchaser or substantially funds the purchase, of goods or services for consumption or use abroad' (at ¶3.13).

162 *Ibid*, at ¶3.122.

163 *Ibid*, at ¶3.2.

164 *Re Westinghouse Electric Corporation Uranium Contracts Litigation* 405 F Supp 316 (JPMDL 1974). *Re Uranium Antitrust Litigation* 480 F Supp 1138 (ND III, 1979); 473 F Supp 393, 400-06 (1979); 617 F2d 1248 (7th Cir 1980). *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] 2 WLR 81.

165 See further Commonwealth of Australia, *Joint Committee on Foreign Affairs and Defence* – 'Australian-United States Relations: The Extraterritorial Application of United States Laws' (Australian Government, Canberra, 1993), at chapter 3.

166 See for example the wording in DOJ and FTC, above n159, at ¶3.2: 'In enforcing the antitrust laws, the Agencies *consider* international comity' (emphasis mine).

Co-operative agreements

Notwithstanding previous tensions in the relationship, the United States' co-operative arrangements with Australia have been amongst its earliest and most extensive moves to bilateral co-operation. Following the enactment of enabling legislation in both Australia and the United States,[167] the parties entered the Australia-United States Mutual Antitrust Enforcement Assistance Agreement.[168] In accordance with the requirements of the American enabling legislation, the agreement is based upon three basic principles: reciprocity; protection of confidential information; and case-by-case public interest determinations. Thus, under Article IV.A(4) for example, a Requested Party may deny assistance if 'execution of a request would be contrary to the public interest of the Requested Party'. Interestingly, however, the parties have undertaken to provide assistance 'whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the Requested Party'.[169]

Notwithstanding separate agreements between the countries' enforcement agencies,[170] responses to requests for assistance under the Assistance Agreement are decided by the executive arm of government (albeit in consultation with the relevant agency). The assistance agreement, however, imposes strict limits on the circumstances in which requests will be complied with, and the information which may be exchanged. Thus, the agreement (in accordance with Australian legislation) restricts the ability for information provided by Australia to be used for the purposes of criminal proceedings.[171] Similarly, subject to narrow exceptions, the information can only be used for competition enforcement

167 Mutual Assistance in Criminal Matters Act 1987 and the Mutual Assistance in Business Regulation Act 1992 (Cth); and the International Antitrust Assistance Act 1994 (US) respectively. See Peter Costello, Competition enforcement assistance agreement with United States, Media Release No. 022/1999 (28 April 1999) and Federal Trade Commission, United States and Australia sign bilateral antitrust agreement, Media Release (27 April 1999) for a brief explanation of the legislative requirements.

168 Agreement between the Government of Australia and the Government of the United States of America on mutual antitrust enforcement assistance, 27 April 1999, Australia and the United States of America, Australian Treaty Series 1999 No. 22 (entered into force 5 November 1999) (the Mutual Antitrust Enforcement Assistance Agreement).

169 Ibid, Article II.F.

170 See Fels, above n2, and Cassidy, above n21, at 8.

171 Mutual Assistance in Business Regulation Act 1992 (Cth), section 6(2). See the Mutual Antitrust Enforcement Assistance Agreement, above n168, Article III.B(2) and Article IV.A(3).

purposes.[172] There are tight confidentiality restrictions whereby statutory confidentiality restrictions are expressly recognised (see Article VI).[173]

Likely outcomes

Considering the content of an AUSFTA, it seems highly improbable that there would be any move towards harmonisation of the two countries' competition laws. As Cassidy notes, 'it can be extremely difficult to achieve total harmonisation of competition legislation between countries, even in the context of a Free Trade Agreement'.[174] The practicalities of *achieving* harmonisation (which would, for example, require consultation with Australia's States and Territories before Part IV of the TP Act could be modified) would be dwarfed by the practical issues posed by *maintaining* harmonisation. Furthermore, the vast differences in the two economies mean that certain policy objectives may differ – Australia's merger laws for example are triggered more easily than their American equivalent, reflecting special concerns arising due to Australia's significantly smaller economy. Considering that Australia and New Zealand, who are faced with a similar business environment, have failed to achieve total harmonisation, it is fair to say that the competition provisions of an AUSFTA would fall well short of this level of co-operation. (Consequently, it is unlikely that the FTA will provide for restrictions upon the applications on anti-dumping measures between the two countries commensurate with ANZCERTA.)

It is clear, however, that the existing level of co-operation between Australia and the United States provides a solid foundation for a competition chapter.[175] The existing commitments in relation to negative and positive comity obligations are likely to provide the starting point. It seems unlikely that there would be binding positive comity obligations (where Australia, for instance, was obliged to assist in an investigation), given the differences in approaches to competition laws in the two countries. In the same way that Australian law would not permit the extradition of a person facing criminal antitrust charges in the United States,[176] it is apparent that restrictions will also apply to the provision of assistance in relation to such charges. Nonetheless, the development of objective criteria by Australia clearly articulating the circumstances in which Australia will provide assistance may enable the United States to make concessions of its own in relation to the extraterritorial operation of its own laws. Thus, for example, before jurisdiction is accepted in an American court in relation to conduct occurring in

172 Mutual Antitrust Enforcement Assistance Agreement, *ibid*, Article II.H.

173 See discussion in Parisi, above n34, at 10ff. These restrictions extend to, for example, pre-merger notifications.

174 Cassidy, above n21, at 2.

175 The assistance provided by recent discussions of the Law Council of Australia (Trade Practices Committee) on this issue is gratefully acknowledged.

176 C.f. the principle of 'dual criminality', e.g. section 19(2) of the *Extradition Act 1988* (Cth).

Australia, regard may be had to whether a request for enforcement action to be undertaken by the ACCC has been made, and if such request was refused, the grounds upon which Australia declined to provide assistance. Nonetheless, it is likely that a provision similar to 12-Article 8 of SAFTA will limit the ability of one country to challenge the other's decisions in relation to the provision of assistance.

In light of the competition principles developed by APEC – to which both countries belong – it is likely that the principles of non-discrimination, transparency, comprehensiveness and procedural fairness will be incorporated. On the one hand, such principles may sound like 'motherhood' statements; on the other, allegations of political interference in the administration of competition law are not altogether uncommon in Australia (see for example recent pubic debate concerning the authorisation application by Qantas and Air New Zealand currently being considered by Australian and New Zealand regulators).[177] In addition, American negotiators may wish to address certain exceptions to the application of competition law which currently apply in Australia. One such example would be the single marketing desk for wheat, AWB.

The single desk

The United States has consistently objected to the operation of the 'single desk' structure for the export of wheat by Australia, conducted under the auspices of the AWB's subsidiary, AWB International Ltd (**AWBI**). AWBI is, in effect, a state trading enterprise (or **STE**) and while STEs are specifically regulated by the WTO (see above in Section I), it has been noted that '[i]n the agricultural negotiations the question of State Trading Enterprises will probably be the main 'competition' issue to be tackled'.[178] The fundamental objection to STEs is their ability to create or increase market power. As the OECD states:

> state traders are much like public utilities: while they may exercise market power and may violate restrictions on commercial practices competition policy seeks to impose, their role as public institutions and their mandate to implement domestic policy leads to both exemption from competition policy disciplines and a great reluctance to reform these institutions.[179]

This is indeed the situation with AWBI.

177 See authorisations no. 90862 and A90863 (now on appeal to the Australian Competition Tribunal). See also comments of John Anderson, Deputy Prime Minister and Minister for Transport, Transcript of doorstop interview (1 May 2003), Transcript No. APC8/2003.

178 MacLaren and Josling, above n1, at 22.

179 OECD, *Competition Policy and Agricultural Trade*, above n148, at 8.

Why have a single desk for the export of wheat?

The short explanation for the perceived need for a single desk is as follows:

> The international market for wheat is distorted by the interventionist policies of other grain producing countries such as the US and EU which use varying forms of domestic support and export subsidy programs. Aggressive use of these programs can substantially reduce international wheat prices.
>
> The export monopoly, therefore, provides a tool to conduct the export marketing of Australian wheat to maximise the net returns to growers. It is also considered that the export monopoly provides a net benefit to the wider Australian community.[180]

AWB states that, as a consequence of this distortion, neither AWB/ AWBI or its predecessor, the Australian Wheat Board, has ever exported wheat to the United States.[181] Fundamentally, this is because 'unsubsidised Australian export wheat [is] unable to directly compete with general Farm Bill concessions for US wheat products'.[182] This is contrasted with the position of Australian wheat farmers who receive no direct production assistance from the government, other than in the form of drought or disaster relief.[183] The cost differentials resulting from these different approaches to support are exacerbated by the cost of freight and the traditionally high levels of American production and reserves.

The structure of the single desk

Originally established in 1939, the Australian Wheat Board was a statutory authority granted extensive regulatory powers in relation to both the domestic and international trade of Australian wheat. In 1989, the domestic wheat market was deregulated through the introduction of the *Wheat Marketing Act 1989* (Cth), but restrictions in relation to the export of wheat remained. Consequently, AWBI has an exclusively statutory right to export bulk wheat. While individuals may apply to the Wheat Export Authority (**WEA**) for a permit to export wheat in small quantities, AWBI must be consulted before such a permit is granted. A recent Senate Committee reports that AWBI exports approximately 98% of all exported Australian wheat.[184]

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180 Explanatory Memorandum to the Wheat Marketing Legislation Amendment Bill 1998, at ¶¶19-20.

181 AWB, above n150, at 2.

182 *Ibid*.

183 *Ibid*, at 4.

184 Commonwealth of Australia: Senate, *Rural and Regional Affairs and Transport Legislation Committee* - "Provisions of the Wheat Marketing Amendment Bill 2002" (2003), at ¶3.54.

Under section 57(6) of the *Wheat Marketing Act*, the export of wheat by AWBI is specifically exempted from the operation of Part IV of the TP Act. This section interacts with section 51(1)(a) of the TP Act, which provides that, when considering whether a person has contravened Part IV, anything specifically authorised by an act of the Commonwealth must be disregarded. Consequently, AWBI is not subject to the same restrictions as other (near) monopolists, such as Qantas or Telstra. For example, a claim against the AWBI, alleging misuse of market power in contravention of section 46 of the TP Act, was dismissed on the grounds of the application of this exemption.[185]

US complaints about the single desk

American complaints relating to the operation of the single desk reflect more general concerns with the creation or entrenchment of any degree of monopoly power. By being the channel for virtually all Australian exports of wheat, the AWBI is in a stronger bargaining position than would otherwise be the case (say, if individual farmers were seeking to export); consequently, it is in a better position to seek higher prices – and returning to the extract of the explanatory memorandum for the 1999 amendments – that was indeed the intention. In addition, it is able to 'out compete' other suppliers attempting to land contracts. Consequently, the United States claims that AWBI gives Australia 'an unfair advantage in the international commodity market'.[186] Put more precisely, there are concerns according to Ralph Ives that having a single desk 'distorts trade'.[187]

Likely outcomes

The Australian government has consistently asserted that the single desk arrangement does not distort trade, and is transparent in its operation.[188] As AWB has pointed out, any change to the operation of the single desk as part of the bargaining process in AUSFTA has multilateral consequences.[189] Thus, Australian concessions on this issue should be made only in light of the issues which prompted the establishment of the single desk – concerns that international trade conditions were too distorted to permit Australian wheat farmers to compete on the merits. If American subsidies were to be reduced or even eliminated, that would go some way to 'levelling the playing field', but it would not assist Australian wheat farmers to compete against other subsidised producers.

185 *Neat Domestic Trading Pty Limited v AWB Limited & Anor* [2001] FCA 1178.

186 Peter Cook, "An Australia-America Free Trade Agreement?" (2001) 20(1) *Policy, Organisation & Society*, 39, at 42-43.

187 Stephen Deady and Ralph Ives, Transcript of media briefing on the start of Free Trade Agreement negotiations between Australia and the United States (18 March 2003).

188 DFAT, *Submission to the Senate Foreign Affairs, Defence and Trade Committee*, above n52, at 42; and Stephen Deady, Transcript of media briefing by Australia's chief negotiator for the AUSFTA (14 March 2003).

189 AWB, above n150, at 6.

Nonetheless, there are suggestions that, even aside from the concerns of Australia's trading partners, the single desk is not appropriately serving Australia's *own* interests. While the WEA is required to review AWBI's use of its export rights,[190] this review is to concentrate upon ABWI's performance, rather than the single desk system per se.[191] The next scheduled review of the single desk arrangement itself is set for 2010,[192] which some consider is too far away.[193] A Senate Committee has recently reported that there is a general view that the WEA is 'unduly influenced' by AWBI in making decisions concerning the issue of permits.[194] Consequently, it has recommended that the WEA be allowed to approve exports without reference to AWBI.[195]

In light of concerns relating to the general operation of the single desk, it may be the case that Australia does make trade concession in relation to the AWB. While it seems unlikely that the single desk would be abolished immediately, an AUSFTA may provide for the phase out of the single desk over, say, a ten year period (or, at a minimum, it may accelerate the review process). This would also mean the current exemption for the single desk from the application of the TP Act would most likely be removed. As there is uncertainty over the utility of the desk from an Australian point of view anyway, this may not seem such a significant concession;[196] furthermore, if it is tied to concessions on subsidies from the United States, it may even seem a good bargain. In light of recent developments in relation to EU subsidies, perhaps such concessions by the United States do not appear as unattainable as may once have been the case.[197] Consequently, it is

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190 *Wheat Marketing Act*, section 57(7) – the minister has requested this report by 30 June 2004.

191 Explanatory Memorandum to the Wheat Marketing Amendment Bill 2002, at 9.

192 Being a National Competition Policy review in accordance with the Competition Principles Agreement between the Commonwealth and the States.

193 Senate Rural and Regional Affairs and Transport Legislation Committee, above n184, at 34 (Additional comments by Labor senators).

194 *Ibid*, at ¶3.7.

195 *Ibid*, Recommendation iv.

196 Notwithstanding AWB's submission that the potential income loss to Australia of the abolition of the single desk 'is of the magnitude of A$400m pa…' (AWB, above n150, at 3).

197 The European Union has recently announced an overhaul of the 'common agricultural policy', whereby subsidies will no longer be linked to production levels. Nonetheless, individual countries will be able to continue paying subsidies if there are concerns that the land will otherwise be abandoned: see Michael Brissenden, 'EU to cut agricultural subsidies' (transcript of story from 'AM' on ABC radio), 27 June 2003 and Michael Vincent, 'Australian farmers welcome cuts to Euro farm subsidies' (transcript of story from 'AM' on ABC radio), 27 June 2003. This is particularly significant given that it has been noted, in the context of the WTO, that 'Washington will only agree to agricultural entry in a trade-off to gain similar entry to the European Union and Japan, the world's two most protected agricultural markets' (Fred Brenchley, 'Doable deals', *The Bulletin*, 4 July 2001, http://www.bulletin.ninemsn.com.au).

unsurprising that at least one commentator suspects that Australia will agree to abolish the single desk as part of the AUSFTA negotiations.[198]

The Pharmaceutical Benefits Scheme (the PBS)

Another area of Australian regulation to fall for consideration is the PBS, the scheme whereby specified drugs are subject to price controls. Effectively, the PBS is the intersection between health and competition policies and the protection of IPRs. As Professor Fels notes, '[i]ntellectual property laws are an interesting example of potentially anticompetitive regulation…'.[199] Similarly, Maskus notes that 'weak IPRs can operate as a non-tariff barrier to trade by reducing domestic demand for goods imports under patent or trademark protection'.[200] For American pharmaceutical manufacturers, the PBS undermines their IPRs, distorting the market for drugs such that manufacturers are not able to extract the value for their products that they would otherwise be able to in a "free" market.

How does the PBS work?

The PBS is considered a 'key component of Australia's health system',[201] and dates back more than 50 years. Initially regulating the supply of a small number of 'life saving and disease preventing' drugs, the PBS as at May 2002 provided subsidised access to over 590 generic drugs, in more than 1,460 forms, by way of more than 2,500 different brands.[202] The cost of such subsidisation was in excess of $4 billion in 2001-02.[203] Ultimately, the PBS is a 'safety net', enabling the government to 'provide medication to the Australian community at affordable prices'.[204]

The current provisions governing the operations of the PBS are set out in Part VII of the *National Health Act 1953* and the *National Health (Pharmaceutical Benefits) Regulations 1960* made under that act. The key is the reference price

198 Michael Pascoe, 'Singing for our free trade supper', *Investor*, 17 March 2003 at http://www.investor.ninemsn.com.au/investor/news/pascoe/story_389.asp.

199 Fels, above n2.

200 Keith E. Maskus, 'Regulatory standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection and Core Labor Standards' (2000), The Global Trade Negotiations website at http://www2.cid.harvard.edu/cidtrade/Issues/maskus3.pdf).

201 Amanda Biggs, 'The Pharmaceutical Benefits Scheme', *E-Brief* 16 September 2002 (most recent update 2 January 2003), The Parliament of Australia website at http://www.aph.gov.au/library/intguide/SP/pbs.htm.

202 *Ibid*.

203 Productivity Commission, Evaluation of the Pharmaceutical Industry Investment Program (2003), at ¶3.3

204 Australian Doctors' Fund, 'Submission to the Department of Foreign Affairs and Trade on Australia-United States Free Trade Agreement' - submission to the Department of Foreign Affairs and Trade (2003).

system, whereby '[t]he maximum price that the Government is willing to pay for some classes of pharmaceuticals in Australia is determined by reference pricing'.[205] Once listed on the PBS, a drug is effectively subject to this price cap. If a drug is not listed, then it is less likely to be prescribed, as patients will not be subsidised by the government in their purchase of the drug (and the unlisted drug will be more expensive). The Productivity Commission reports:

> Failure to achieve a listing would significantly damage sales and overall revenues of pharmaceutical manufacturers. It is estimated that around 90 per cent of prescriptions are for pharmaceuticals that are listed on the PBS… and only 10% per cent are for drugs not listed (their purchase being directly funded by individuals)…[206]

Where a generic drug is available in a certain 'class', it is this drug that is most likely to set the reference price, meaning that the original patented drug, for example, will only be able to be listed if its manufacturer agrees to sell it at the lower price.

Effect of PBS

It has been reported that prices for Australia's top-selling pharmaceuticals are at least 162% higher in the United States (84% higher once standards discounts are taken into account), and at least 48-51% higher in the United Kingdom, Canada and Sweden.[207] Nonetheless, it is the case that lower prices mean that more drugs are actually sold. Thus, 'the effect of price suppression on pharmaceutical firm profits is partly offset by higher volumes of sales…'.[208] The position of drug companies selling pharmaceutical products in Australia can therefore be summarised as follows:

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205 Productivity Commission, *Evaluation of the PIIP*, above n203, at ¶3.5

206 *Ibid*, at ¶¶3.3-3.4.

207 Biggs, above n201. Note that the Productivity Commission's estimates are slightly lower: above n203, at ¶3.10:
The Productivity Commission (2001) compared pharmaceutical prices in Australia and seven other countries for the 150 top listed pharmaceuticals for mid-2000 (these account for about 80 per cent of spending under the PBS). Using the lower estimates as the benchmark… Australian prices were around 60 per cent lower than the US, still significantly cheaper than Canada, the UK and Sweden and roughly similar to those in France, Spain and New Zealand. The price discount achieved was lower for new innovative products (which account for around 10 per cent of PBS sales).
See also the table at ¶3.11.

208 Productivity Commission, *Evaluation of the PIIP*, ibid, at xvii.

> Bargaining power [for the Government] arising from Australia's PBS arrangements almost certainly leads to lower prices, but the exact price effect is unknown given other influences.[209]
> While volume effects partly counteract the effects of price suppression, it is still likely that the overall impact of price suppression on net revenue remains negative.[210]

Similar schemes overseas

The Doha Declaration states that TRIPS should be implemented and interpreted 'in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines'.[211] Thus, given the essential nature of pharmaceuticals, it is unsurprising that the PBS is not the only scheme of its type around the world. Balasubramaniam reports that '[a]ccording to the WHO nearly 90 countries have national drug policies in place or in preparation. Three out of four countries – over 140 in total, have adopted national essential drug lists'.[212] Nonetheless, for many, the PBS sets the benchmark:

> Australia… is the one country which seems to have got it right, that what you want to do in controlling costs is to pay what the drugs are therapeutically worth. And the Pharmaceutical Benefits Scheme does that…[213]

Consequently, any derogation from the PBS as part of AUSFTA negotiations may set a significant precedent.

US complaints

For some considerable time, American pharmaceutical manufacturers have mounted a concerted campaign against the PBS. It has been reported, for instance, that since at least 1998, the American pharmaceutical industry has been objecting to the PBS, with PhRMA (the Pharmaceutical Research and Manufacturers Association) asking that Australia be placed on the 'Special 301' watch list (referring to the power under Section 301 of the *Trade Act*, which

209 *Ibid*, at ¶3.13: Finding 3.1.
210 *Ibid*, at ¶3.18: Finding 3.2.
211 The Doha Declaration, above n30, at ¶17.
212 K. Balasubramaniam, 'Access to medicines and public policy safeguards under TRIPS' (paper presented at the Multi-stakeholder dialogue on *Trade, Intellectual Property and Biological Resources in Asia*, Bangladesh, 19-20 April 2002), at 12.
213 K. Lokuge and Richard Denniss, 'Trading in our Health System? The Impact of the Australia-US Free Trade Agreement on the Pharmaceutical Benefits Scheme'. (Discussion Paper No. 55, The Australia Institute, 2003), at vii, citing Professor Richard Laing of Boston University School of Public Health.

permits economic sanctions to be imposed against unfair trade practices).[214] Although the request wasn't pursued, PhRMA campaign against the PBS continues, with Pfizer claiming that the PBS 'distorts the market for drugs', reducing the returns it would otherwise receive for drugs such as Viagra.[215] PBS has been described as an involuntary subsidy extracted from the drug industry, which devalues the value of pharmaceutical manufacturers' patents.[216] Issues have also been raised as to the transparency of the listing process.[217]

Reportedly 15 drug companies have formed a group to advise American trade negotiators on the pharmaceutical aspects of an AUSFTA.[218] The increasing effectiveness of the campaign is perhaps reflected in the fact that while the USTR's annual report on trade barriers made no reference to the PBS in 2000, the report for 2003 states:

> Research-based US pharmaceutical firms are disadvantaged by several Australian Government policies. These include a reference pricing system that ties the price of innovative US medicine to the lowest price medicine in the same therapeutical or chemical group, regardless of patent status of the medicines.[219]

It is not surprising therefore that the Productivity Commission reports:

> Almost all pharmaceutical firms visited by the Commission were of the strong view that price suppression, price-volume agreements and other features of the PBS made Australia a 'hostile' location for new investment in pharmaceutical production or R&D.[220]

Such open hostility has not, however, been the approach of the negotiators. After reviewing briefing material provided by Australia on the PBS, Ralph Ives stated that the American negotiating group:

> became very aware of the importance of the PBS to Australia. What we are stressing is that we are in no way going after the PBS. We are genuinely seeking: how does it operate; could it be perhaps a bit more transparent in its operation; what are the procedures? We understand the strong feelings by Australia

214 Eva Cheng, 'Pharmaceutical benefits threatened by 'free trade' agreement', *Green Left Weekly*, 29 January 2003, http://www.greenleft.org.au.

215 Caroline Overington, 'American in no rush for free trade deal', *The Age* (Melbourne), 11 June 2002, http://www.theage.com.au.

216 Cheng, above n214.

217 Morgan Mellish, 'US drug firms push for changes to PBS', *Australian Financial Review*, 3 March 2003.

218 *Ibid*.

219 Cited in Lokuge and Denniss, above n213, at vii.

220 Productivity Commission, *Evaluation of PIIC*, above n203, at ¶3.18.

> towards the PBS. That [abolishing the PBS] is not part of the agenda.[221]

Likely outcomes

In contrast to the single desk marketing arrangement, DFAT and Australian trade officials have been quick to assure the Australian public that the PBS will not be 'traded away'. Thus DFAT has declared that '[t]he Australian Government remains committed to providing Australians with access to quality and affordable medicines through a sustainable Pharmaceutical Benefits Scheme'.[222] Similarly, Australia's chief negotiator was strident in attacking a recent report[223] examining the costs to Australia if the PBS were abolished:

> there is no basis whatsoever for the claims that the FTA negotiations will limit the Government's ability to provide affordable medicines for all Australians or that the FTA will change the fundamental framework of the PBS. Therefore, the speculation based on the report by the Australian Institute has no foundation. Its claims are baseless. I can say that we have had a further information exchange on the PBS… but no proposals have been made to Australia by the United States on this issue as yet.[224]

Alive to the sensitivity of the issue, his American counterpart added:

> Let me stress… that the FTA will in no way affect the basic framework of the PBS or the way medicines are delivered to Australians. What we're interested in is receiving information on how the system values innovative medicines and whether the system is transparent…[225]

And it is little wonder the negotiating parties are defensive on this point. A recent research survey published in the *Australian Financial Review* showed that 90% of Australians would reject a trade deal that changed the PBS.[226]

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221 Stephen Deady and Ralph Ives, Transcript of media briefing on the first round (17-21 March) of Free Trade Agreement negotiations between Australia and the United States (21 March 2003).

222 DFAT, *Submission to the Senate Foreign Affairs, Defence and Trade Committee*, above n52, at 41.

223 Being Lokuge and Denniss, above n213.

224 Deady and Ives, Transcript of 23 May 2003, above n130.

225 *Ibid*.

226 A survey by UMR Research, published in the *Australian Financial Review*, 21 March 2003 (cited in Australian Fair Trade and Investment Network, *Trading Australia Away?* (2003)).

In light of public concerns about changes to the PBS, *Realpolitik* suggests that the Australian government would be unlikely to offer much ground on this point. As the Australian Doctors' Fund notes:

> An AUS-US FTA that would foster the dismantling of such a system, or provide for equivalent compensation/ subsidy, would be difficult to justify, particularly to those Australians who rely of the $4 billion subsidies for their medications.[227]

While there may be some concessions relating to the transparency of the listing process, it ultimately seems unlikely that Australia will make significant structural changes to the PBS.

Conclusions

Regardless of the outcomes in relation to the issues discussed in Section V, and various other issues on the negotiating table, consideration will need to be paid to the broader implications of an AUSFTA. A number of the issues in which the United States will be seeking Australian concessions may be multilateral in their impact – if the single desk were abolished, for example, its effect will not be limited to Australian-American relations. In addition, consideration needs to be paid to any investor rights granted under the agreement, and the broader implications that may flow from promises of "national treatment".

For example, if Australia were to retain the PBS in its current form, but an investor-state resolution process, similar to Chapter 11 of NAFTA, were also included, that may provide a 'back door' method by which American pharmaceutical manufacturers could challenge the operation of the PBS. The impact of Chapter 11 on public health policy has been an issue of concern; for example, cigarette manufacturer Philip Morris has threatened to challenge Canadian restrictions on the use of the words 'light' and 'mild' for cigarette packaging by way of a Chapter 11 suit.[228] Interestingly, the United States is currently challenging the legality of the Canadian Wheat Board, which also operates a single desk marketing system for grain exports.[229]

While it may be an exaggeration to say that investor-state provisions along the lines of NAFTA's Chapter 11 would 'endanger the basis of Australian

227 Australian Doctors' Fund, above n204. See also Australian Medical Association, 'Submission to the Australia - US Free Trade Agreement' - submission to the Department of Foreign Affairs and Trade (2003).

228 Public Citizen, 'Philip Morris warns Canadian public health proposal violates NAFTA', 2(9) *Harmonization Alert* (March/ April 2002). See also Australian Doctors' Fund, above n204.

229 See further Senate Rural and Regional Affairs and Transport Legislation Committee, above n184.

democracy',[230] any investor-state dispute process would need careful consideration. The Law Institute of Victoria, for example, has pointed out limitations imposed by the Australian Constitution:

> Section 51(xxxi) of the Australian Constitution provides that there needs to be a reasonable and sufficient basis for the determination by courts of claims for compensation for any expropriation by Government. There should be no provisions in the FTA based on chapter 11 of NAFTA, especially Article 1110(1). Bona fide regulation should not be treated as expropriation…[231]

Consequently, the Law Institute suggests that any claims for compensation should be determined in the courts in accordance with section 51(xxxi) of the Constitution. If such an approach were adopted it may alleviate concerns that investor-state provisions 'effectively [put] foreign investors on a level above not only local investors [who are not able to challenge domestic legislation pursuant to an FTA], but sovereign governments themselves'.[232] DFAT has said, in relation to Chapter 11 of NAFTA, that 'there is no reason why a flawed mechanism should be adopted in Australian US FTA'.[233] Nonetheless it would be appropriate for an AUSFTA to explicitly recognise each government's ability to legislate in its national interest.

Similarly, regard will need to be paid to the interconnection of an AUSFTA with each party's other bilateral and plurilateral obligations. 'In conceptual terms, if Australia has an FTA with, say, the United States, and they have one with Canada and Mexico (i.e. NAFTA), what does it mean about our relationship with Canada and Mexico…'.[234] For example, under the Treaty of Nara between Japan and Australia, Australia would be required to pass on the benefits of any preferential treatment granted to American investors under an AUSFTA.[235] This is a lesson that the Australian government will have learnt, however, following the *Project Blue Sky* decision.[236] In this case, it was argued that New Zealand television programmes should be treated as favourably as Australian programmes for the purpose of Australian local content requirements. It was held by the High Court that the content standards applied pursuant to the *Broadcasting Services Act 1992* were unlawful as they were not consistent with Australia's obligations

230 Trade Watch, above n105.
231 Law Institute of Victoria, above n105, at 18.
232 Trade Watch, above n105.
233 Australian APEC Study Centre, above n60, at 36.
234 Australian Chamber of Commerce and Industry, 'Australia's free trade agreement agenda' (2001).
235 See further Edwards, above n120, at 33.
236 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335.

under ANZCERTA (the Australian Broadcasting Authority has subsequently modified the standards accordingly).[237]

Finally, as Wood points out, an AUSFTA will, to a certain extent, become a benchmark by which other trading partners of Australia assess Australia's commitment to their relationship.[238] As FTAs are, by their nature, preferential trading agreements, inevitably they can be perceived to create a hierarchy of relationships. With approximately 10% of Australia's export trade with the United States,[239] it would be unfortunate if the countries responsible for the remaining 90% were – in fact, or in appearance – designated as of lesser priority by the entry into force of an AUSFTA.

These are doubtless all considerations that the Australian government will take into account when negotiating the AUSFTA. Notwithstanding the varied concerns that have been voiced in relation to the agreement, both Australia and the United States are in many respects FTA pioneers; as they both have sophisticated competition laws, it is clear therefore that any FTA between the two will address in considerable detail the intersection of trade policy and competition laws. It is hoped that this paper has illustrated particular ways in which this intersection is manifested in the Australia-American relationship, and provides some guidance as to the likely outcome of the AUSFTA negotiations.

237 See Australia Council for the Arts, above n114, at 10ff; Australian Coalition for Cultural Diversity, 'Negotiation for a Free Trade Agreement between Australia and the United States of America' - submission to the Department of Foreign Affairs and Trade (2003), at ¶3.9; and Australian Broadcasting Authority, 'Australia's approach to Australia-United States free trade negotiations' - submission to the Department of Foreign Affairs and Trade (2003).

238 Wood, above n63.

239 Australian APEC Study Centre, above n60, at 10.

APPENDIX 1

Provisions of various WTO agreements addressing market distortion or competition policy

GATT 1994	
Article II	If a member establishes a monopoly for the importation of any products, that monopoly must not (except as otherwise set out in a schedule) operate so as to afford protection in excess of the protection provided for in the schedule
Article III	National treatment (e.g. Article III:4: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use"). The OECD notes "this provision is fundamentally about the maintenance of competitive conditions, independent of actual trade effects"[240]
Article VI	Permits a member to impose anti-dumping duties in cases against imports whose export prices is below its 'normal value' and causes (or threatens to cause) material injury to a domestic injury. See also the Agreement on the Implementation of Article VI of GATT 1994
Article XI	Prohibits governmental use of most quantitative import and export restrictions and prohibitions
Article XVII	Recognises that State Trading Enterprises (and other enterprises enjoying exclusive or special privileges) may be operated in a manner that creates serious obstacles to trade and notes the importance of negotiations, on a reciprocal and mutually advantageous basis, to reduce such obstacles. Requires that purchase and sales, including exports and imports, be made "in accordance with commercial consideration", and that other Contracting Parties [i.e. members] be afforded "adequate opportunity to compete for participation in such purchases and sales"
Article XX(d)	Provides that – for so long as they are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restraint of international trade – members may adopt or enforce governmental measures where "necessary to secure compliance with laws or regulations which are not

240 OECD, *Competition Elements in International Trade Agreements*, above n26, at 7.

	inconsistent" with GATT, including the enforcement of monopolies operated under Articles II and XVII
Article XXIII	Sets out concepts of non-violation nullification and impairments and may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. The OECD has argued that restrictive business practices could be a factor for consideration under this article[241]
GATS	
Article VII	Permits recognition of another member's licensing or certification arrangements on a bilateral or plurilateral basis provided that "adequate opportunity" is afforded to other members to negotiate their accession, and that the arrangements are not used as a means of discrimination between countries
Article VIII	Requires members to ensure that public and private monopolies do not act in a manner which is inconsistent with members' obligations under Article II (mfn treatment) and specific scheduled commitments
Article IX	Recognises that anti-competitive business practices of services suppliers "may restrain competition and thereby trade in services". Obliges members to accede to any request for consultation with other members concerning such practices "with a view to eliminating them"
TRIPS	
Article 8	Allows members to take appropriate measures in order to prevent the abuse of IPRs by rightsholders or practices which unreasonably restrain trade or adversely affect the transfer of technology, provided that they are consistent with the other provisions of TRIPS
Article 31	Recognises anti-competitive practices as one of the grounds for compulsory licensing
Article 40	Allows members to specify in legislation licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs having an adverse effect on competition in the relevant market and to adopt appropriate measures to prevent or control such practices
Other	
Agreement on Trade-Related Investment Measures	Requires the Council for Trade in Goods to consider whether the WTO Agreement "should be complemented with provisions on investment policy and competition policy"

241 OECD, *Regional Trade Agreements*, above n59, at 66.

Agreement on Safeguards	Article 11.3 obliges members not to encourage or support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements or other governmental arrangements prohibited under Article 11.1 See also Articles 1(3) 3, 7, 8 and 9
Reference Paper on Regulatory Principles	Contains a commitment by members to adopt appropriate measures to prevent anti-competitive practices by major suppliers
Reference Paper on Basic Telecommunications	Contains a general commitment by members to maintain adequate measures to prevent anti-competitive practices of major suppliers. Lists specific examples of anti-competitive practices: anti-competitive cross subsidisation, use of information obtained from competitors and withholding technical and commercial information
Other	See also Agreement on Technical Barriers to Trade; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Preshipment Inspection; Agreement on Government Procurement; Agreement on Trade in Civil Aircraft; Agreement on Agriculture; Understanding on Commitments in Financial Services; Annex on telecommunications; Agreement on Subsidies and Countervailing Measures

Source: adapted from OECD, Regional Trade Agreements *(see at footnote 59), at 65-66; WTO,* Trading Into The Future *(see at footnote 3), at 15; and OECD,* Competition Elements in International Trade Agreements *(see at footnote 26).*

APPENDIX 2

Australian and United States interests in the bilateral trade relationship

Issue	US interest in Australian position	Australian interest in US position
Tariffs	Lower remaining Australian tariffs	Lower high US tariffs, particularly in agriculture
Agriculture	Remove single desk export monopoly for wheat Expedite review of quarantine bans on imports of chicken, pork, Florida citrus, stone fruits, corn, apples, Californian table grapes	Remove non-tariff restrictions, e.g. TRQs, on imports of sugar, dairy, cotton and beef Secure US compliance with WTO direction to remove safeguards controls on lamb Secure removal of domestic and export subsidies on grains, sugar, dairy
Subsidies	Ensure consistency of subsidies for automotive and clothing and textiles with WTO requirements	As for agriculture
Anti-dumping		Address potential punitive effects of anti-dumping procedures
Countervailing		Address punitive effects of imposition of countervailing duties on subsidised 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 suppliers	
Maritime transport		Secure removal of ban on use of foreign built and owned ships for seaborne commerce between points

Issue	US interest in Australian position	Australian interest in US position
		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, including 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/ "undermining" of IPRs by PBS Concern that civil rather than criminal remedies are favoured for abuse of copyright	
Cultural industries	Secure removal of measures to protect domestic cultural industries such as local content rules for broadcasting	

Source: Australian APEC Study Centre, An Australian Free Trade Agreement *(see at footnote 60), Table 4.2 (with slight adaptations)*