



June 2006 FTA Update

Focus on Intellectual Property (IP)

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Australia/UAE FTA

These negotiations have now officially ceased

For some months these negotiations have been more or less “on life support” pending confirmation as to whether the UAE would be able to bring an agreement into effect, given the recent Gulf Cooperation Council (GCC) decision that no bilateral FTAs were to be negotiated by member states apart from those underway with the United States (US).

On 21 June, Mr Vaile announced that FTA negotiations with the UAE had ceased, due to GCC

considerations constraining the UAE’s negotiating authority. Mr Vaile noted that Australia had put a considerable investment into these negotiations and the Government would now be considering whether perhaps they could be rolled into a new mandate for GCC wide negotiations.

In industry consultations on 22 June, Stephen Deady, Australia’s chief negotiator with the UAE, observed that the negotiating text had been very largely completed. He drew attention to the fact that the GCC had been negotiating over a long period with the EU and was currently negotiating with China and about to commence with Japan, New Zealand and others. If Australia is to go ahead with a new negotiating mandate, it would seem this would have to happen relatively quickly if Australia is not to lose its place in the queue.

Australia/China FTA

These negotiations are the most difficult and risky of those underway

The latest round of negotiations was held in Beijing from 22 to

25 May 2006. Australia’s negotiators are reporting to industry representatives in the aftermath of this latest round that these negotiations are clearly going to be long and hard.

Agreement has been reached to some elements of a basic structure for the FTA. Negotiating impetus was provided on the Chinese side by the visit to Australia in early April of Chinese Premier Wen, who has proposed that the FTA seek to achieve major breakthroughs in 1 to 2 years. The Australian Government has said publicly it is happy to work to that timeframe, on the conditions that the FTA delivers substantial, positive outcomes, and that the sensitivities of both sides are addressed.

At the recent negotiating round, Australia tabled texts for draft provisions of the FTA covering goods, agriculture, services, financial services (including provisions on the right to freely transfer funds and payments for fees), telecommunications, education (including provisions dealing with accreditation of courses), movement of natural



persons, intellectual property and e-commerce. China reserved its position on the need for separate chapters on telecommunications, financial and education services. China also continued to reserve its position on adopting a negative list approach on **Services**.

Australia did not table a text on **Investment** or a text on **Government Procurement** due to sensitivities on the Chinese side. Australia has secured agreement that it can table text on investment at the next meeting in September. Chinese negotiators are beginning also to show some willingness to include a Chapter on Government Procurement (reportedly because they are now considering joining the WTO Government Procurement Agreement).

China and Australia will exchange market access offers on goods (including agriculture) at the next round in September. Services and investment issues, however, remain very sensitive for the Chinese and they have said that Australia's level of ambition is too high.

Australia's negotiators have stressed that Australian

industry will not accept a gap of more than one meeting between market access negotiations on goods and agriculture, and market access negotiations on services. Market access negotiations on services and investment are expected to commence at the November negotiating round.

In the margins of this most recent round of talks, a high-level policy dialogue on **telecommunications** took place. The Australian delegation, including industry participants from Telstra, Macquarie Telecoms and ATUG, met with senior Chinese officials responsible for telecommunications reform and regulation from the Ministry of Information Industries, the State Council and the National Development Reform Commission (NDRC); as well as the Ministry of Commerce (MOFCOM) and Chinese telecoms providers. A number of telecoms officials have been invited to Australia to continue to dialogue. These talks are reported to have been very constructive with some senior interlocutors reportedly taking a somewhat more open approach

than MOFCOM to the possibility of China taking further steps in telecoms liberalization than it has to date in its WTO accession Agreement.

A number of intersessional meetings will take place in August, including a workshop on Australia's proposed structure for the FTA and its capacity for flexibility to meet China's various concerns. In July, a Conference on the Australia/China FTA will be held in Shenzhen, with the Australian Prime Minister in attendance. The next negotiating round takes place again in Beijing 4-7 September and in Canberra in November. This is to accommodate the Chinese side which is keen to bring the timing/venue of these negotiations into better logistical sync with their negotiations with New Zealand.

Intellectual Property (IP)

At the last negotiating session, Australia tabled an "Elements Paper" based on industry submissions which reflected Australia's offensive interests in IP. The Chinese team described the Elements Paper as



“comprehensive” and “ambitious”.

Australia also tabled a first version of a draft IP Chapter, indicating roughly how Australia wanted to deal with these various issues. This text was reported by DFAT’s China IP negotiator David Livingstone as having a “sobering” influence and having set the Chinese side back a bit. The text had been handed over in advance and after the process of translation, the Chinese negotiators had probably had about a week to look at the text - China was very engaged – about 31 agencies had looked at the text and a substantive discussion therefore took place with the Australian negotiating team.

Both the Elements paper and the draft text remain confidential. But Australian negotiators have discussed some aspects of the content with industry representatives. Implementation and Enforcement issues figure prominently throughout the proposed text. In particular, the text proposes criminalization of IP offences – this is being actively resisted by the Chinese side. Australia is

also seeking commitments with respect to the right of presumptive validity for industrial property rights, to apply to all Australian industrial property rights once registered in China.

China has laid down some markers of its own. In particular, China objects to anything in the proposed text which is TRIPS plus – and Australia’s text is clearly heavily TRIPS plus in its substance. In addition, China is currently reviewing aspects of its own IP regulatory regime. China has just released (in the Chinese language only at this stage) its new Internet Regulations and is conducting trade mark and patent law reforms. The FTA negotiations are providing opportunities to feed Australian perspectives into this domestic review process. Equally, however, the review process may potentially limit the negotiating room for manoeuvre. For example criminalization appears to have been rejected to date in the domestic review process.

The Australian side is arguing that it is in China’s own national interest to go beyond

the WTO, pointing out the merits for example of the WIPO internet treaties which have promoted the development of the internet in developing countries. Australia is arguing for example that an inclusive approach to the registration of trade marks (which would include non-visual trade marks) is something which would be in China’s own interests. The Australian negotiators are facing, however, in this chapter, and in other difficult chapters of the text, a general Chinese reluctance to sign on to specific written wording.

The Australian team is very focused on how to give the FTA sufficient teeth to deal effectively with enforcement issues, including how best to link an IP Chapter to the dispute settlement Chapter of the Agreement. Consideration is also being given to a prior “Consultation Mechanism” of some kind, which might perhaps include industry involvement. Australia is also considering a suite of “Cooperation Mechanisms”, including specific provisions which link to assisting with enforcement.



Immediately after the recent negotiating round, a two day IP Seminar was held in Beijing with a focus on “experience sharing”. The seminar was very well attended, including by key decision makers. Chinese officials have shown interest in IP Australia’s approach to Human Resources issues and also to its cost recovery model for running an IP office. IP Australia has funding to assist Australian industry understand the Chinese IP system and is producing fact sheets etc which will be put up on their website shortly. An domestic industry seminar will be held on July on Industrial Property. An inter-sessional negotiating meeting on IP will take place in Canberra in August.

Australia/Singapore Ministerial review in August

SAFTA has been in effect now for 3 years, the first review taking place in July 2004. Preparations are in full swing for the second Ministerial level review which will take place in August or September this year. The focus is on the services sector and on Intellectual Property.

Services

Education: Australia is looking for a deal for the University of New South Wales which wants to establish a campus in Singapore

Legal Services: Australia is seeking recognition of an additional number of Australian Law degrees.

Engineering services: The Institute of Engineers is seeking assistance in negotiating mutual recognition of qualifications

Telecommunications: There have been and remain a number of irritants with respect to telecoms, in which sector Australian service providers do not enjoy the same open access in the Singaporean market as SingTel enjoys in Australia. From an industry perspective, the time has clearly come for the Australian Government to take a very robust line in favour of improved access for Australian telecoms providers.

The Australian Government is reported to have made clear at officials level talks that Australia will not agree to any changes Singapore is seeking to the Telecoms Chapter unless Singapore moves to enhance

access for competitive Australian providers. Singapore is also reported to be seeking some specific regulatory outcomes in Australia in relation to the sale of Telstra). **Air transport,** Singapore is seeking “open skies” with Australia, specifically Singapore Airlines wants access to Trans Pacific routes from Australia to the US. Australia is insisting that the Australian cabinet decision of February this year, which rules this out, will hold for the immediate future and that air traffic rights must be negotiated separately and not be handled within the FTA framework. Singapore is insisting that there be some text on air services /open skies in the Joint Ministerial Declaration at the time of the review. There seems to be a suggestion that while the Cabinet decision will hold for at least three years, if in future years there is to be any change, access for Singapore Airlines would only come gradually over a period of time.

Intellectual Property

Australia is seeking to update the IP Chapter of SAFTA to reflect changes in legislation in both countries since the



agreement was completed. In principle Singapore has accepted this, but the two countries are still debating the precise terms of reference for the update. Australia is still hoping it will be possible to agree this in the next couple of weeks so that the review can be completed in time for adoption at Ministerial level. If not, the objective is to agree on terms of reference in time for endorsement by Ministers with a view to completing the review by the end of the year.

Specifically Australia is seeking to update the IP Chapter to change the term of copyright protection, update the section on rights management and ISP liability, and to refer to ratification of the 2006 Singapore Trade Marks Law.

Australia/Malaysia Negotiating climate is changing

Australia's next round with Malaysia will take place from 3-7 July in Kuala Lumpur and the two Trade Ministers will meet for bilateral discussions in Adelaide on 3-4 August. There has been some recent domestic

opposition in Malaysia to the FTA negotiations, including from former Prime Minister Mahathir, though this opposition largely seems to relate to Bumiputra concerns. The Trade Minister Rafidah has also, however, been voicing a tougher stand on FTA issues.

There are risks that the negotiating dynamic, which has been very positive to date, may be altering significantly. Important new factors include completion of the Malaysia/Japan FTA, stalling of the Malaysia/NZ FTA which is now "on-hold" and the onset this month of the first round of negotiations between Malaysia and the US, the second round being scheduled already for July. There is some risk that the US will "crowd out" the Australian negotiations given Malaysia's limited negotiating resources. Nevertheless, given that US Trade Promotion authority expires 30 June 2007, and that domestic US processes can require up to three months, the expectation is that both sets of negotiations will finish no later than early next year. According to Michael Mugliston, Australia's lead negotiator, the Malaysian's also

tend to see the agreement just concluded with Japan as a "template". This "template" would be unlikely to accommodate Australian services industry interests. It would seem unlikely, also, at least in the non-goods areas, to achieve much traction with the US.

Australian and Malaysian telecoms negotiators met in Penang in May. Agreement was reached on a number of the regulatory provisions to be included in the Telecoms Chapter. A market access offers on Telecoms will be exchanged at the next session.

Intellectual Property

According to Jonathon Kenna, DFAT's IP negotiator for Malaysia, the fact that Malaysia has a pretty good IP regime doesn't necessarily translate into an easy negotiation. In general it appears that the Malaysian side is under-prepared and "passive" on the IP front. Formally, Malaysia has still not agreed to include an IP Chapter in the Agreement, though this position is not seen as sustainable by Australia especially since an IP



Chapter was included in the FTA with Japan. The US is also expected to have tabled, or to be about to table a draft text on IP.

Despite Malaysian reluctance, Australia will be tabling, at the next negotiating round in July, both an “Elements Paper” and a draft text for an IP chapter. The Australian text can be expected to be less prescriptive than the US text and this, it is hoped, will help put Australia’s text in perspective.

Anticipated contents of Australia’s draft text;

General Provision on National Treatment (with a more flexible definition than the TRIPS definition eg to take account of commitments in the Berne and Paris Conventions).

General Provisions to incorporate TRIPS (rather than merely reaffirm TRIPS); this is in order to be able to use the dispute settlement mechanisms (including consultation phase) of the FTA as well as/rather than the WTO.
Provisions on enhanced transparency.

Provisions to encourage harmonisation of industrial property provisions.

Reference to the Patents Cooperation Treaty (which Malaysia has acceded to)

Provisions seeking commitment by Malaysia to accession to the Madrid Treaty (this is something Australia wants from all ASEAN countries.)

Provisions locking in commitment to the Nice Agreement on Trade Marks and reaffirmation of the Singapore Treaty which was agreed in March this year(electronic filing procedures etc).

Provisions seeking commitment by Malaysia to the Patent Law treaty and accession to the WIPO Internet Treaties (Malaysia’s regime is reasonably convergent with these but DFAT considers Malaysia will need to look at the detail and perhaps adapt its copyright system.)

Provisions relating to other aspects of Copyright – including the width of exceptions to copyright.
Australia wants Malaysia to

restate the 3 step test, look at effective management of copyright systems, introduce laws on effective telecoms and ISPs, limit remedies for third party copyright infringement.

Provisions ensuring the Malaysian Government is a user of legitimate software (Malaysia is reported to be affronted by this - but Australia is motivated to send a signal on this to all ASEAN countries)

Provisions on registration of Geographic Indicators

Provisions on patentability of new uses of known products

Provisions on a grace period for patents. (Australia has 12 months)

Provisions on Enforcement, Malaysia being a major hub for pirated material

Provisions introducing a Consultative Mechanism (DFAT is still thinking this through and seeking ideas from industry – DFAT wants a mechanism with a “light touch” ie not a working party – but a concrete avenue to discuss



things when a problem is triggered)

Provisions to facilitate court proceedings by providing for presumptive rights.

Provisions on Deterrents, Scope of Provisions on Infringement

A suite of cooperative mechanisms

Australia/NZ/ASEAN **The negotiations are frustrating; ASEAN considers Australia too ambitious**

Australia and New Zealand clearly face considerable challenges in these negotiations, given the diversity and varying capacity of each of the ASEAN countries to negotiate.

According to Michael Mugliston, Australia's chief negotiator, there is a tendency for ASEAN to show little creativity in their approach and to promote lowest common denominator positions.

On the positive side, the ASEAN countries have accepted that the agreement must be a single undertaking.

And ASEAN is committed politically to completing the negotiations within two years, ie by March 2007. Australia perceives, however, a "ramping up of the politics" oriented to encouraging Australia and New Zealand to take a less ambitious approach in the interests of finishing on time. The Singaporean Prime Minister visited Australia in June and commented publically to the effect that Australia and New Zealand should take a pragmatic approach and take what can be achieved now and then build on the Agreement subsequently to cover additional issues.

Against that background, Australia's negotiator's are very focused on getting the structure of the Agreement right at the outset plus achieving some credible market access gains.

The parties are fully engaged in substantive discussions on Goods and Rules of Origin, with the ASEAN countries reportedly now seeming comfortable with these aspects. Discussions have started on Services and Investment. But the ASEAN countries are still very hesitant to contemplate chapters or even significant

provisions on Intellectual Property, Government Procurement or Competition Policy. ASEAN reportedly wants these issues handled in a Chapter on Economic Cooperation

The next meeting is in Brunei at the end of July. This meeting, at which market access issues will be discussed, will likely be very difficult. The ASEAN/CER Trade Ministers Meeting takes place at the end of August. The subsequent negotiating session will be held in November/December.

Intellectual Property

A workshop on Intellectual Property was held in the margins of the recent round of negotiations in New Zealand. Mugliston reports that the Workshop seemed to go very well, but it was unclear how this might translate into the negotiations themselves. Australia and New Zealand recognize it will be difficult to get the ASEANs on board with substantive IP provisions and are working together on an "Elements Paper". The "Elements Paper" will not be as comprehensive as the



paper which will shortly be tabled with Malaysia and it will not be supported yet by any draft text of a chapter on IP. Australia and New Zealand accept that the diversity within ASEAN needs to be accommodated in the FTA text. One idea is to include a Transition Period for implementation of commitments. Another is to build in a Review Mechanism. Where new commitments are made, ways will be sought of supporting them with cooperative arrangements. This will have resource implications for Australia and New Zealand.

AUSFTA

Focus on domestic implementation

Following the Ministerial Review at the end of last year, workshops on Professional Services were to take place in Australia in May. Most disappointingly for a business perspective, these workshops did not take place. The Australian Government has found it very difficult to engage the US side. An Australian legal services delegation visited the US last month, and the engineers are planning a similar independent visit to the US

later this year. There is a general sense in industry that the AUSFTA Working Group Chapter on Professions Services is not delivering commercial outcomes.

Intellectual Property

AUSFTA required Australia to extend its copyright term and implement some additional new commitments. First, a couple of technical amendments were needed to bring Australia's copyright law into agreement with the WIPO PPP Treaty. Second, Australia had a two year transition period to implement a technological extension liability scheme ie by 1 January 2007. The matter was looked at by the House of Representatives Legal Committee which tabled its report three months ago and the government is considering its response.

Study with Japan Prospects for an FTA may be improving

Since the decision by both Prime Ministers to go ahead with a joint study into an FTA, three meetings have been held, the latest in March. The next

meeting takes place 18-21 July and both sides are hoping to finalise the study early next year.

Australia, for its part, is hoping to move to FTA negotiations during the year of Australia's chairmanship of APEC. The Australian Government is hopeful that an FTA with Japan could set an aspirational standard for the APEC region.

The Australian government senses that support inside Japan for an FTA with Australia is increasing; a less negative attitude seems to be emerging on bilateral agricultural concerns.

Next cab off the rank?

The Government is reviewing its priorities for bilateral FTA negotiation

The negotiations with China are top priority, along necessarily with implementation and review of the existing agreements with the US, Singapore and Thailand. Negotiations with Malaysia on track and are expected to be complete by early next year.



There has been a lot of speculation as to which bilateral partner might be the “next cab off the rank”.

Mexico has seemed to be at the head of queue for some time, though immediate commercial pressures to proceed in this direction are relatively narrow and largely limited to the energy sector.

There is rapidly growing industry interest in an FTA with India. The Federal Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade is currently conducting an inquiry into relations with India, which is attracting submissions from a number of industry groups.

Despite their frustrations, the negotiations with ASEAN are of high priority, given the critical importance to Australian foreign and trade policy of relations with East Asia. Similarly the pursuit of the current study on an FTA with Japan and potentially the idea of an FTA with Korea (despite Korean hesitation) attract priority support. Australia does not want to be left out of

any emerging ASEAN plus 3 free trade arrangement. Partly for that reason, Australia may also be reconsidering whether it should adopt a more positive attitude to a proposed FTA with Indonesia.

Consideration is also now being given to the idea of negotiations with the GCC. Consideration is also reported to be being given to possible negotiations with the EU.

And finally, it seems there is growing support, at least officials level, for possible bilateral negotiations with a Latin American trading partner, for example, Chile.

The SERVICES sector is mobilising

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