

## **THE AUSTRALIA-US FREE TRADE AGREEMENT: DOES IT HINDER OR HELP HIGH-TECH SMES?**

Most foreign governments, particularly those based on market economies, regulate foreign direct investment (FDI) as little as possible in order to facilitate an open investment environment and to foster long-term economic development. As part of this process, the Australian government has entered into a number of bi-lateral Free Trade Agreements (FTA) to promote cross border trade. The largest, and arguably the most influential, is the Australia-US FTA which came into force in 2005. This article looks at the FTA from the perspective of Australia's high-tech manufacturing sector and reviews the benefits (or otherwise) that this agreement has delivered over the last six years.

### **Overview of Australia-US FTA**

Australia and the USA established a FTA in 2005 to improve trade and investment opportunities between the two countries. This means that Australian exporters should benefit in trade related areas including: reduced tariffs; stricter enforcement of intellectual property rights; better access to government procurement; fostering a more liberal investment environment; the more uniform application of customs and duties; and the availability of non-discriminatory dispute settlement procedures.

### **Establishment**

The main advantage of the FTA to most Australian exporters is the reduction in, and eventual total elimination of, tariffs. The FTA requires that any Australian export products be substantially transformed in either Australia or the US. Both countries have retained the right to regulate the import and export of certain items, including some specialist pharmaceuticals.

The FTA reinforces both countries commitment to intellectual property protection of most elaborately transformed manufactures (ETM). One special case is that of pharmaceuticals due to the role that they play in delivering high quality health care; the need for ongoing support and funding for research and development; and the more timely and affordable access to efficacious drugs. The countries established a Medicines Working Group to

address pharmaceutical supply issues, particularly those impacting the PBS (Pharmaceutical Benefits Scheme). The easing of certain restrictions on the PBS affords opportunities to manufacture and import generic drugs from the US.

### **Key Provisions**

The FTA affords non-discriminatory (national) treatment in key areas including dispute resolution and anticompetitive business conduct, and promotes compliance through consultation and trade-enhancing remedies. These policies may impact some US investment, but the degree to which is presently unclear. The FTA has also opened US Government procurement contracts to foreign firms.

The US does not screen FDI, but relevant legislation applies to all firms regardless of nationality. The economic freedom of foreign investors is largely protected by the US Constitution and Congress has the “power to...regulate commerce with foreign nations and among several states” (APEC, 2007, p 510). To that end, the US maintains federal, state and local laws which regulate investment and commerce. Legislation impacting FDI encompasses: anti-competitive behaviour; mergers and acquisitions (M&A); pay and social security; export controls; taxation; environmental protection; and health and safety. Foreign investors may also be required to submit to different investment reporting requirements than domestic firms and some firms may also need approval from statutory agencies such as the US Food and Drug Administration (FDA).

### **Commercial Impacts**

The US operates its foreign exchange regime within the regulatory framework of the International Monetary Fund (IMF) and generally imposes no restrictions on the repatriation of funds. The US permits inward and outward transfers relating to investments with no overriding performance requirements. The US “restricts certain transactions involving countries, entities or persons subject to sanctions imposed for national security or foreign policy reasons” (APEC, 2007, p 523).

However, generally, US government agencies encourage inward FDI and investors may be able to attract commercial incentives. These include loans and development bonds;

preferential tax treatment; defraying business establishment costs; and other non-financial assistance including business consulting. This means that high tech Australian firms looking to establish a business in the US may be able to offset some of the costs of establishing the new investment via these incentive schemes.

The FTA guarantees free movement of investment funds by virtue of a secure, predictable legal and investment framework. However, both countries have retained the right to review significant FDI proposals in order to protect respective national interests. Whilst the FTA provides excellent overall protection, Australia and the US have agreed not to adopt procedures that permit investors to arbitrate disputes with governments. Investment dispute settlement mechanisms available to foreign investors are generally the same as for domestic firms, although international arbitration may be applied in certain circumstances.

### **Entry and Sojourn**

The FTA prescribes clear processes for foreign nationals undertaking business in the US. Under the FTA, Australia and the US have reaffirmed their obligations to enforce respective labour laws so as not to affect bilateral trade. As previously mentioned, this enshrines rights to select key staff to establish and manage the new investment. The FTA declares that it is “inappropriate to weaken or reduce domestic labour protection to encourage trade or investment and includes procedural guarantees to ensure that workers and employers have fair, equitable and transparent access in the enforcement of labour laws” (USTR, 2009). Foreign investors are treated in accordance with the relevant FCN (Friendship, Navigation and Commerce) treaty or FTA. The treaty investor category permits entry of foreign nationals for the purpose of “developing and directing the operation of a substantial and active investment in a commercial enterprise” (APEC, 2007, p 525). Foreign employees are restricted to supervisory or executive roles or those requiring special skills. Australian firms are generally not be restricted in their appointment of managers or board members in the US meaning that they are free to choose a senior team to oversee any new investment.

## **Conclusions**

The FTA allows many Australian firms to take advantage of a more liberal investment regime between the US and Australia by guaranteeing an open investment environment based on the principle of national treatment. The US upholds the right to freely transfer the capital and profits resulting from FDI activities, and has enacted legislation to protect foreign investors, including against uncompensated expropriation, affording them similar rights to domestic firms. US legislation offers certainty, protection and stability across: investment policy; foreign exchange and funds repatriation; taxation, tariffs, excises and duties; intellectual property; the movement of personnel; government procurement; anti-competitive behaviour; and dispute settlement. The US economy is also supported by sophisticated physical and financial infrastructure. The FTA and other relevant US laws pertaining to FDI make the establishment of new ventures in the US more straightforward than previously and has opened the way for a new era in bilateral trade.

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