Australia and New Zealand Bilateral CEPs/FTAs with the ASEAN countries and their Implication on the AANZFTA

REPSF Project No. 05/003

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Final Report
June 2006

ABSTRACT

This report presents a comparative analysis of CEPs/FTAs, mainly those completed or currently negotiated by Australia and New Zealand with ASEAN countries, aimed at drawing implications for the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA). An analysis of the provisions of the agreements is followed by a discussion of a detailed analysis of the preferences obtained and concessions granted by the members of the agreement, leading to consideration of the implications for the preferences likely to be obtainable by the ASEAN countries in an AANZFTA and the concessions that are likely to be demanded from them. The report concludes by analysing the so-called "spaghetti bowl" issue, the proliferation and overlapping of CEPs/FTAs that may lead to complications for traders and administrators, increasing the costs of trading, and prospects for successfully addressing this issue within the proposed AANZFTA.

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ABBREVIATIONS

AANZFTA	ASEAN Australia New Zealand Free Trade Agreement
ABAC	APEC Business Advisory Council
ACCI	Australian Chamber of Commerce and Industry
ACFTA	ASEAN China Free Trade Agreement
ACTU	Australian Council of Trade Unions
AD	Anti-dumping
AFTA	ASEAN Free Trade Agreement
AIG	Australian Industry Group
AMFTA	Australia-Malaysia Free Trade Agreement
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AUSFTA	Australia United States Free Trade Agreement
BCA	Business Council of Australia
BOP	Balance of Payments
CEP	Closer Economic Partnership
CEPT	Common Effective Preferential Tariff
CER	Closer Economic Relations
CLMV	Cambodia Laos Myanmar Vietnam
CTC	Change of Customs Classification
CTH	Change in Customs Heading
CTSH	Change in Customs Sub-heading
CU	Customs Union
DS	Dispute settlement'
DFAT	(Australian) Department of Foreign Affairs and Trade
EFTA	European Free Trade Association
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI	Geographical indicator
GP	Government procurement
GSP	Generalised System of Preferences
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
IP	Intellectual Property
IPP	Intellectual property Protection
MALIAT	Multilateral Agreement on Liberalisation of International Air Transportation
MFN	Most Favoured Nation
MR	Mandatory requirements
NT	National treatment
NTMs	Non-Tariff Measures
NAFTA	North America Free Trade Agreement
NZACERTA	New Zealand Australia Closer Economic Relations Trade Agreement
NZSCEP	New Zealand Singapore Closer Economic Partnership
NZTCEP	New Zealand Thailand Closer Economic Partnership
ODA	Overseas Development Aid
QR	Quantitative restrictions
RCA	Revealed Comparative Advantage
REPSF	Regional Economic Policy Support Facility
RVC	Regional Value Content

ROO	Rules of Origin
SAT	Substantially all trade
SAFTA	Singapore Australia Free Trade Agreement
SCM	Subsidies and countervailing measures
SEP	Strategic Economic Partnership
SPS	Sanitary and Phyto-Sanitary
STEs	State Trading Enterprises
SWOT	Strengths Weaknesses Opportunities Threats
TAFTA	Thailand Australia Free Trade Agreement
TBT	Technical Barriers to Trade
TOR	Terms of Reference
TPSEP	Trans Pacific Strategic Economic Partnership
TRQs	Tariff Rate Quotas
TRIPs	Trade Related aspects of Intellectual Property
UNICITRAL	UN Convention on International Trade Law
UR	Uruguay Round
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

EXECUTIVE SUMMARY

This report presents a comparative analysis of CEPs/FTAs mainly those completed or currently being negotiated by Australia and New Zealand with ASEAN countries, aimed at drawing implications for the AANZFTA.

An analysis of existing CEPs/FTAs between Australia and New Zealand and ASEAN countries indicates significant differences as well as similarities in the provisions of the agreements. Differences are found in both the content of provisions of specific issues, such as market access for trade in goods and services, and in the inclusion or non-inclusions of provisions covering particular issues, for example chapters on trade in services and investment, or understandings on labour and environment issues. Many of these differences can be put down to differences in the socio-economic environment or the political economy or the time of agreement. Similarities tend to reflect common WTO consistent positions.

The report involves a comparative analysis of the provisions of the existing FTAs, classifying them according to whether they indicate a standard approach that may be applicable to the proposed AANZFTA or whether they reflect country specific priorities or sensitivities. Particular emphasis is on rules of origin, given their potential importance in so-called “spaghetti bowl” effects.

The principal substantive obligations in the existing agreements of Australia and New Zealand with ASEAN countries are found in the chapters of each agreement relating to trade in goods, trade in services, investment, and dispute settlement. In the treatment of trade in goods the existing agreements exhibit a preference for comprehensive product coverage, with allowance for sensitive products being made through extended implementation periods and availability of additional measures such as tariff rate quotas and special safeguards rather than excluding the sensitive products from the agreement entirely. In services trade the classification of sectors and subsectors, as well as modes of supply, follow the GATS model. Provisions on temporary entry or movement of persons (GATS Mode 4) are however kept separate from the provisions on the other three modes of supply. An important difference among the existing agreements is between the “positive list” and “negative list” approaches to sectoral coverage. In the investment chapters the provisions on pre-establishment do not generally require any liberalisation beyond that occurring under the services provisions on Mode 3 (commercial presence), but there are substantive obligations on investor protection. The latter are generally similar in nature although there are possibly significant differences in the sections dealing with investor-state disputes.

The emergence of a divergence between ASEAN and the CER countries in the approaches taken to rules of origin is an important development that will have to be addressed. ASEAN continues to promote an regional value content (RVC) rule of origin, based on a 40% RVC requirement, whereas Australia and New Zealand appear to have taken the policy decision that change in customs classification (CTC) rules are preferable to RVC rules. CTC rules are said to have the advantage of providing greater certainty and giving rise to lower transaction costs. These advantages tend to be nullified however if the CTC rule is combined with an RVC requirement that must be satisfied simultaneously, as both Australia and New Zealand have done for textiles and clothing in their agreement with Thailand, and as Australia has also done with a range of other manufactured products in the same agreement. The choice of rules of origin for AANZFTA has important implications for the overall consistency of rules governing trade between the ASEAN and CER countries. For ASEAN this is part of the wider question of whether it will be possible to overcome potential “spaghetti bowl” problems by rationalising the rules of origin across all the FTAs of ASEAN and its members with external partners. As an input to the decisions that must be taken research is urgently needed on the advantages and disadvantages of the competing approaches to rules of origin.

The existing agreements contain chapters on government procurement, intellectual property, and competition policy, but these generally impose few if any substantial obligations beyond the parties' existing multilateral commitments. They thus represent an intermediate approach between complete omission of these issues and their inclusion with substantial new obligations.

Interviews with government and business representatives in Australia and New Zealand, and other information such as publications and presentations, were used in assessing the likely attitudes in these countries to issues such as the "spaghetti bowl" effect. Business representatives interviewed in the CER countries also tended to favour a comprehensive approach to product and issue coverage, although some special interest organisations predictably argued for special treatment of their constituents. On rules of origin there was a clear division between those seeking liberal rules and those seeking more restrictive rules. Business is concerned that negotiation of AANZFTA could be held up by the sensitivities of some individual ASEAN members.

The report notes that several dimensions need to be taken into account in the analysis of preferences, including the margins of preference, product coverage, and the length of the transition period over which the preferences are introduced. It is also important to consider the relationship of the preferences to the trade competitiveness of the countries receiving the preferences. As well as the relationship to MFN tariffs, the relationship to preferences available under other preferential arrangements needs to be considered. The somewhat haphazard spread of bilateral FTAs threatens to create complex patterns of preference and exclusion, and one important impact of AANZFTA will be in the nature of "levelling the playing field" in the Australian and New Zealand markets, both among ASEAN members and between ASEAN and other existing and future FTA partners of those two countries. It is also necessary to consider the special position of the CLMV countries (Cambodia, Laos, Myanmar and Vietnam). The report also notes that the value of preferences can be partially or even wholly nullified by restrictive rules of origin

Preferences in services trade are measured in principle by comparing each member's FTA commitments with its GATS commitments for the sectors in which GATS commitments have been made, or with its existing practice in sectors for which no GATS commitments have been made. The results of a study reported here indicate that Singapore has made commitments in its bilateral agreements that go significantly beyond its GATS commitments, and New Zealand has also been willing to make some commitments beyond its GATS commitments. Assessment of this issue is handicapped by not knowing how commitments in either the GATS or the FTAs relate to existing practice.

The question of difficulties that may be encountered by ASEAN as a group if it were to provide the same concessions as in the existing FTAs/CEPs could be answered in relation to the concessions offered by either Singapore or Thailand, or both. It is likely that the Thailand case, which is more representative and recent, is more relevant for other ASEAN members. There are two possibilities to be considered: the offering of the same concessions on the same products, or the offering of equivalent concessions on the sensitive products of the other ASEAN members, which are different from the sensitive products of Thailand. The latter possibility would appear to be more relevant. This requires an identification of the sensitive products of each ASEAN member, and an assessment of whether the treatment provided to Thailand's sensitive products in its FTAs with Australia and New Zealand would be adequate for those sensitive products of other ASEAN members. This assessment was based on information obtained from a range of sources, including the ASEAN Secretariat. Analysis shows that there is great diversity in the sensitive sectors nominated by individual ASEAN economies, and there is not always a strong correlation between sensitivity and existing protection levels. Thus there are likely to be difficulties in reaching a common position within ASEAN on this matter. Rationalisation of the situation within ASEAN itself would facilitate progress here.

In principle the proposed AANZFTA could either reduce or intensify "spaghetti bowl" effects, the proliferation and overlapping of CEPs/FTAs that may lead to complications for traders and administrators, increasing the cost of trading. Moving toward a consistent approach to rules of origin is likely to be crucial to minimising "spaghetti bowl" effects. Prospects for this are complicated because of the differences in the rules of origin in existing agreements, and because ASEAN and the CER countries now have divergent preferences, with ASEAN preferring a 40% RVC rule and the CER countries preferring a CTC approach. At least initially it may be necessary to consider the implications of allowing two rules to operate simultaneously, with exporters able to choose whichever rule they prefer, as appears to be envisaged with the simultaneous operation of the NZSCEP and TPSEP agreements involving New Zealand and Singapore.

The report concludes by highlighting the features of the existing agreements with significant implications for AANZFTA as well as other implications from the study and issues for future research. Key issues to be highlighted are:

- The existing agreements exhibit a preference for comprehensiveness in both product and issue coverage;
- Comprehensive product coverage in the existing agreements is facilitated by the use of extended time periods, TRQs and special safeguards;
- Flexibility can be provided to cater for the sensitivities of individual members while maintaining overall WTO-consistence of the agreement;
- Preferences will diminish over time as the level of tariffs continues to decline with liberalisation, unilaterally, bilaterally and multilaterally. Ultimately the preferential impact is likely to be largely in the nature of "levelling the playing field" in the Australian and New Zealand markets, both among ASEAN members and between ASEAN and other existing and future partners of those two groups. One implication is that other provisions in the FTA such as investment will grow in importance supporting a comprehensive approach at the outset;
- The existing agreements suggest the generosity of concessions offered by Australia and New Zealand may be related to the degree of openness in partner's markets;
- In the existing agreements, Australia and New Zealand have offered the longest implementation periods, with corresponding lessening of the value of preferences, for their most sensitive products, notably textiles and clothing, which are also subject to the most restrictive rules of origin;
- Consolidation of liberalisation commitments with ASEAN would facilitate the development of a coherent ASEAN approach to sensitive products and make AANZFTA more attractive, as well as facilitate intra-ASEAN trade with its associated benefits;
- There is an important choice to be made between a "positive" or "negative" list approach in services;
- The relation between investment provisions and services provisions on Mode 3 (commercial presence) is an important issue to address, with implications for liberalisation of pre-establishment, investor protection provisions and investor-state dispute settlement;
- Provisions on government procurement, Intellectual property and competition policy are included in the existing agreements, but inclusion of these issues does not necessarily imply a need to undertake substantial obligations. An important issue is whether such provisions should be subject to dispute settlement. This is not generally the case in the existing agreements;
- Consistency of rules of origin across ASEAN FTAs could be an important contribution to untangling the "spaghetti bowl" effect with its high costs; and

- It would be desirable for ASEAN to seek a definite assessment of the relative advantages and disadvantages of RVC versus CTC in facilitating trade and converge to the most appropriate approach.

1. INTRODUCTION

A. BACKGROUND

ASEAN, Australia and New Zealand started Free Trade Agreement (FTA) negotiations in 2005 that are expected to be completed in two years with the ASEAN Australia New Zealand FTA (AANZFTA) fully implemented within 10 years.

The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) entered into force on 1 January 1983 and has evolved to cover substantially all goods and services. In August 1999, the Prime Ministers of both countries outlined their policy on regional agreements in a joint Prime Ministerial Statement: "New Zealand and Australia are willing to consider free trade agreements with significant individual economies or regional groupings, where they would deliver faster and deeper liberalisation than the multilateral process, with the objective of gaining better market access for our exporters, faster economic growth and stronger employment growth. Such arrangements would need to reflect the principles underpinning the Closer Economic Relations Agreement (CER), including World Trade Organisation (WTO) consistency."

Australia and New Zealand have a number of FTAs with ASEAN member countries that could have implications on the AANZFTA. For example, Lloyd (2005) suggests in relation to investment negotiations that those for AANZFTA should follow relevant bilateral approaches such as investor protection, dispute settlement mechanisms, and national treatment to deepen the agreement, as well as attempt to outlaw investment incentives. It is envisaged that AANZFTA will cover in a consistent and compatible way bilateral trade between Australia and New Zealand on the one hand and each individual ASEAN member on the other, but not the bilateral trade between Australia and New Zealand themselves, or the trade among the ASEAN members themselves. The Singapore-Australia Free Trade Agreement (SAFTA) entered into force in July 2003 and the Thailand-Australia Free Trade Agreement (TAFTA) was signed in July 2004. FTA negotiations between Australia and Malaysia, the Australia-Malaysia Free Trade Agreement (AMFTA) are currently underway.

New Zealand has a FTA with Singapore that was completed before the SAFTA. Negotiations on a Closer Economic Partnership (CEP) Agreement between New Zealand and Thailand were concluded in November 2004 and entered into force from 1 July 2005. In parallel with this CEP, arrangements on labour, environment and customs cooperation were negotiated. Arrangements on these first two aspects have not been part of Australian negotiations which reflects differences in the socio-economic environment and the political economy of the two countries. Negotiations for a Trans-Pacific Strategic Economic partnership Agreement (TPSEP) involving Brunei Darussalam, Chile, New Zealand and Singapore were recently concluded. The Trans-Pacific SEP (together with the parallel agreement on labour and environment) is expected to enter into force early in 2006. New Zealand and Malaysia have also started formal rounds of negotiations.

The remainder of this introductory section sets out the specific objectives of the study, the general methodological approach and sources of data. This is followed by a section in which existing agreements are analysed for similarities and differences across all provisions. A section on preferences and concessions also includes analysis of what preferences might be able to be secured and concessions required to be given in the AANZFTA. Analysis is also included in the section on the "spaghetti bowl" effect risks from the proliferation and overlapping of CEPs/FTAs that may lead to complications for traders and administrators, increasing the costs of trading, and how these might be addressed. The final concluding section summarises the report along with identifying the implications for ASEAN in CER FTA negotiations and future research needs.

B. OBJECTIVES

The main task of the study is to conduct a comparative analysis of the CEPs/FTAs completed or currently negotiated by Australia and New Zealand with ASEAN countries and draw implications for the AANZFTA. Key issues that will be examined and possible implications, and negotiation strategies in the case of "spaghetti bowl" effects, include:

1. What are the main elements and/or salient features of each of the CEPs/FTAs? Are these common to all of Australia's and New Zealand's agreements, and with the Australia-New Zealand CER in particular, and therefore could be expected to form part of the AANZFTA or are these country specific? What could explain the differences?

2. What were the benefits (i.e. preferences) secured by both parties? Can ASEAN as a group expect to enjoy the same preferences?

3. What concessions were extended by each party? What difficulties would ASEAN as a group encounter if it were to provide the same concessions?

4. A critique of the proliferation and overlapping of RTAs is the "spaghetti bowl" effect that may lead to complications for traders and administrators, and increases the cost of trading. Are there possible risks, difficulties and/or increased transactions costs with the AANZFTA? How can these be addressed in the negotiations stage?

Discussions of the implications will highlight issues that will come up in the negotiations and draw attention to the points that ASEAN members will need to consider when addressing these issues in developing their negotiating positions. Broader objectives such as developing negotiating strategies within this study would require consultations with ASEAN officials and business people, at a minimum in a workshop for such a purpose.

C. METHODOLOGY

The methodology is based around analysis of the text of the relevant agreements, provision by provision, and other publicly available secondary data. The analysis of the texts allows both common features and differences between the agreements in the treatment of each provision to be identified. Other forms of analysis include estimating preferences from a comparison of the tariff elimination schedules in FTAs with the MFN base tariff rates, qualified by the existence of special safeguard measures, tariff rate quotas and other restrictive provisions. Analysis of the "spaghetti bowl" effect includes diagrammatic representation of the (potential) spread in the Asia-Pacific region.

Some primary data was collected from interviews with government officials and business representatives to follow up on issues identified from the first phase analysis. For example, explanations of differences in the agreements were sought through interviews with officials involved in negotiating the agreements if possible, and with other relevant respondents, as well as from available documents and literature. Interviews with appropriate officials and business representatives was also used to seek views on other relevant aspects such as the extension of preferences in existing ASEAN country FTAs to all ASEAN countries and the risks of the "spaghetti bowl" effect and how to address these.

D. DATA SOURCES

The key data sources have been

- Texts and schedules (including all annexes and protocols) of the FTAs listed in the Terms of Reference (TOR).
- Tariff schedules of the ASEAN and CER countries.

- ASEAN Schedules of concession for the ASEAN-China FTA (ACFTA).

It has been established that trade data at the tariff line level is unlikely to be available for all ASEAN and CER countries at reasonable cost. Trade data was therefore obtained from the Comtrade database. Comtrade provides data at the 6-digit level, the aggregation level at which tariff classifications are internationally comparable. Since FTA commitments and tariff schedules are disaggregated at the tariff line level it has not been possible in all cases to match these with the Comtrade data, since a significant proportion of tariff lines are differentiated at the 8-digit or even in some cases 10-digit level. Adjustments have been made as appropriately and transparently as possible.

2. ANALYSIS OF EXISTING AGREEMENTS

The trade agreements currently existing between ASEAN and CER members are as follows:

Singapore-Australia Free Trade Agreement (SAFTA)
Thailand-Australia Free Trade Agreement (TAFTA)
New Zealand-Singapore Closer Economic Partnership (NZSCEP)
New Zealand-Thailand Closer Economic Partnership (NZTCEP)
Trans-Pacific Strategic Economic Partnership (TPSEP)
(Members: Singapore, Brunei, New Zealand, Chile)

In addition, Australia and New Zealand are linked through the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), and the ASEAN countries are all members of the ASEAN Free Trade Agreement (AFTA)

ASEAN has concluded the ASEAN-China FTA (ACFTA) with China. Singapore has concluded bilateral agreements with Japan, the United States, Korea, EFTA, Jordan and India. Australia also has a free trade agreement concluded with the United States, the Australia United States Free Trade Agreement (AUSFTA).

The five existing agreements between ASEAN and CER members are all modern FTAs whose coverage extends far beyond the traditional concern with liberalising trade in goods. All but the NZTCEP contain provisions on trade in services, and all but the TPSEP contain chapters on investment. In addition these agreements typically contain provisions on a wide range of other economic issues, such as government procurement, intellectual property, competition policy, trade remedies, technical barriers to trade, sanitary and phyto-sanitary measures, and of course dispute settlement. There are some differences between the agreements in the range of issues covered, and differences also, sometimes significant, in the way and extent to which particular issues are covered. This can be seen from the table in Appendix 1 which summarises the coverage of the five agreements.

The comprehensive coverage of issues in the five existing agreements parallels the approach taken in ANZCERTA, although there are no provisions on investment or intellectual property in ANZCERTA and ANZCERTA also lacks a formal dispute settlement mechanism. The approach to issue coverage in AFTA has been more gradualist, and this approach is also mirrored in the ACFTA, which has begun as an agreement on trade in goods. It is envisaged that ACFTA will be progressively extended to include provisions on services, investment and dispute settlement, but there are no plans at the present time to extend the issue coverage beyond this.

The following summarises and discusses the provisions of the five agreements currently existing between ASEAN and CER members, making reference also where appropriate to the corresponding provisions in AFTA, ANZCERTA, ACFTA, and other agreements involving the ASEAN and CER members. From this account a strong sense can be gained of the approach being taken by the countries concerned toward the design of FTAs, and in some cases of how their approach has been changing over time. This is followed by an analysis of the issues that an examination of the existing agreements highlights as likely to be important for the AANZFTA negotiations.

In addition to the existing agreements, guidance can also be drawn from recent efforts to establish guidelines for “high-quality” FTAs. Examples include the APEC guidelines on “Best Practice in RTAs/FTAs” (APEC 2006) and the PECC proposals for a “Common Understanding” on RTAs (PECC 2006). More recently in Australia, RIRDC has produced a report on “Free Trade Agreements – Making Them Better” (RIRDC 2006), which includes a “ten point check-list for better FTAs”. None of these guidelines (see Appendix 2) are of course binding, and they refer to general design features rather than the content of specific provisions. APEC has now embarked on a project to develop “model provisions” for FTAs, to

be presented as examples of best practice. These "model provisions" will also be non-binding. While economies will sometimes have good reasons for deviating from the standards embodied in these guidelines and models, they do provide useful benchmarks for discussion, and reference will be made to them at times in the analysis of the provisions of the five existing agreements.

A. TRADE IN GOODS

Singapore's agreements with Australia and New Zealand provide for immediate removal of all remaining tariffs on trade between the partners. This has very little effect on Singapore, which already had applied zero tariffs on most imports, while requiring Australia and New Zealand to remove a substantial number of tariffs on imports from Singapore. The NZSCEP and SAFTA did however require Singapore to bind its zero tariffs on imports from Australia and New Zealand, whereas its MFN tariffs are in many cases not bound at zero, even if the applied rate is zero. Changes requiring a greater response from Singapore occur in other areas such as services, highlighting the negotiating advantages of comprehensive negotiations.

In Thailand's agreements with Australia and New Zealand, tariffs in the latter two countries are set at zero on entry into force of the agreement on approximately 80% of tariff lines, with the remaining tariffs phased out over periods of 2,3,4,5 or 10 years. The slower pace of liberalisation compared to the Singapore agreements may reflect Thailand possessing a comparative advantage in some sectors where tariffs remain in place in Australia and New Zealand.

In Thailand's case, the percentage of tariff lines with tariffs set at zero on entry into force of the agreement is just under 50% for TAFTA and just over 50% for NZTCEP. As with Australia and New Zealand there are tariffs scheduled to be phased out over 2,3,4,5 or 10 years, and there is a further category of tariffs on some (mainly agricultural) sensitive products scheduled to be phased out over 20 years. Further flexibility is given by provisions for the use during the transitional period of tariff rate quotas (TRQs) and special safeguard measures for certain sensitive products. For goods subject to the special safeguard measures, duties may be increased up to the MFN level on imports in excess of specified quantities set out in the agreement. The products covered by special safeguards are meat, dairy and horticultural products, with transitional periods of 10 or 15 years. The volume of imports required to trigger the special safeguards rises year by year through the transitional period. The TRQ provisions apply to dairy and some horticultural products, and in the case of TAFTA also to coffee, tea and cane sugar. The TRQs specify gradually increasing volumes to be subject to the preferential tariffs as they are phased down during the transitional period. Import volumes in excess of the TRQ levels are subject to an out-of-quota tariff 10% below the MFN rate. Imports become duty-free and quota-free at the end of the transitional period. The transitional period is 15 years for most TRQ products, but 20 years for some dairy products. The products subject to TRQs in TAFTA and NZTCEP are among products for which Thailand has also scheduled TRQs in its commitments under the WTO Agreement in Agriculture. The TAFTA and NZTCEP specify that the TRQs in those agreements are separate from, and do not in any way modify, Thailand's TRQs under the Agreement on Agriculture.

Rules of Origin

The rules of origin in existing FTAs of the ASEAN and CER countries exhibit a significant evolution of thinking in both groups on the way that rules of origin should be designed, which will undoubtedly influence the positions they are likely to take on this issue in the AANZFTA negotiations.

Both AFTA and CER utilise a regional value content (RVC) rule for rules of origin. In CER the requirement is 50% RVC, whereas in AFTA the requirement is 40% RVC, with full cumulation allowed among the AFTA members.

The NZSCEP and SAFTA rules of origin also follow the RVC approach. The NZSCEP follows AFTA in requiring 40% RVC, whereas SAFTA holds to the CER requirement of 50% as its basic rule. In SAFTA however some additional flexibility is built in to the RVC rule, both by reducing the RVC requirement to 30% for certain specified products, and also by allowing derogations from 50% and 30% respectively to 48% and 28% RVC for shipments which were expected to meet the standard requirement but failed to do so because of unforeseen circumstances. SAFTA also allows some relaxation of the requirement that the last process of manufacture must be performed in the territory of a party. The latter requirement applies to specified products, but for other products this requirement is softened to requirements that (a) one or more processes of manufacture must have been performed in the territory of the exporting party, (b) one or more processes must have been performed in the territory of the exporting party immediately prior to export and (c) the "principal manufacture" must have paid all the cost of any processes performed in a non-party.

TAFTA and NZTCEP mark a decisive change in the approach taken to rules of origin by the three countries concerned. The basic approach used in these agreements is the Change in Customs Classification. All products in the HS tariff classification are listed in the agreement either at the 6-digit level or aggregated to the 4-digit level, and the applicable rule is specified in every case. For the vast majority of items the basic rule is a CTC rule, either a change in customs heading or CTH (change at the 4-digit level) or change in customs sub-heading or CTSH (change at the 6-digit level). Very occasionally a particular heading or subheading is excluded from the changes that are deemed to confer origin. For a small number of products a specific process or processes must be performed in order to confer origin. For example in the case of processed frozen fish, three of more processes listed in the agreement must have been performed in the territory of a party. Iron and steel products are also subject to a "specific process" rule. For a small number of products there is a requirement that they must have been "wholly obtained" in the territory of a party, as in the case of tobacco products and some minerals, or produced from natural plants found in the territory of a party, as in the case of natural rubber products. For chemical and plastic products in HS Chapters 27-40 additional flexibility is introduced by a provision that products are deemed originating if they were produced in the territory of a party by a "chemical reaction" as defined in the agreement, regardless of the applicable CTH or CTSH rule.

In both TAFTA and NZTCEP additional restrictiveness is introduced for some products by combining a CTH or CTSH rule with an RVC rule that must be satisfied as well as the applicable CTC rule. In both agreements this is the case for all yarn, fabrics and garments. In TAFTA these products must satisfy a 55% RVC rule as well as the applicable CTC rule, while in NZTCEP the corresponding RVC requirement is 50%. Thus the rules in both agreements for textiles and clothing are considerably more restrictive than in other agreements by Australia and New Zealand with each other or with other ASEAN countries, especially in the case of TAFTA.

In the NZTCEP, textiles and clothing are the only products subject to an additional RVC rule. In TAFTA however a large number of manufactured products are subject to an RVC requirement of 45% or 40% in addition to the applicable CTH or CTSH requirement, including the following:

- Additional 45 % RVC requirement: cooking appliances, some non-ferrous metals, some locks, many machinery parts, railway rolling stock, helicopters, boats, printing machinery, machine tools, ball bearings, gears, revolution counters, spectacles, microscopes, some cameras and projectors, some musical instruments, watches, clocks, pulley blocks, motor vehicle lights, toasters, headphones, amplifiers, optical fibre cables, lighters, combs, lighting sets, dolls, buttons, fasteners, pens
- Additional 40% RVC requirement: trailers and semi-trailers, motor vehicles and components, some locks, wiring sets, coaxial cable, loudspeakers, valves.

The rules of origin in the TPSEP closely follow the NZTCEP rules. The basic rule applicable to the vast majority of products is a CTH or CTSH rule. Once again yarn, fabrics

and garments are subject to an additional RVC requirement of 50% which must be satisfied as well as the relevant CTH or CTSH rule. No other products are subject to additional RVC requirements. As in TAFTA and NZTCEP chemical and plastic products in HS chapters 27-40 qualify as originating products if they are produced by a chemical reaction as defined in the agreement. For present purposes the most interesting feature is that the provisions of NZSCEP will continue to operate in parallel with TPSEP. Since Singapore and New Zealand are members of both agreements this means that Singaporean and New Zealand exporters to each other's country will have the option of exporting under either the NZSCEP or TPSEP rules. Since the TPSEP has not yet entered into force it is too early to assess how well this arrangement will work.

ASEAN has also begun to introduce CTC and specific process rules into AFTA as alternatives to the 40% RVC rule, meaning that for the products concerned exporters have a choice as to which ROO to use. CTH rules have been agreed for most iron and steel and aluminium products. For a range of textile products "substantial transformation" rules have been introduced, specifying the manufacturing process that is deemed to confer origin, such as producing yarn by spinning, twisting, texturizing or braiding; producing fabrics from yarns; producing garments and other products from fabric through the processes of cutting and assembly of parts into a complete article. Specific process rules are now available for a wide range of yarns, fabrics, garments and other fabric products. Specific process rules have also been introduced for wheat, wheat flour and wood products.

The rules of the ACFTA closely follow the AFTA rules. As in AFTA the basic requirement is a 40% RVC rule, but specific process rules that closely follow the corresponding AFTA rules have been introduced for a wide range of fibres, fabrics, garments and other fabric products. CTC rules have also been introduced for a limited range of products: salmon and herrings (CTSH rule), and a range of products from HS Chapters 42 and 43, such as travel bags, other bags and some leather products (CTH rule). There are also rules for some types of wool that require the wool to have been produced from "sheep, lambs or other animals raised in the ACFTA".

Further analysis of trade in goods issues is included in later sections on preferences and concessions, and the "spaghetti bowl" effect.

B. TRADE IN SERVICES

Scollay (2003) included a comparative analysis of services in the AFTA, CER, NZSCEP and SAFTA. This is expanded in this report to cover all the trade agreements relevant to this report, in a table in Appendix 1 and in the following discussion.

There is no services chapter in the NZTCEP, though there is an agreement to future negotiations on commitments on trade in services, and correspondingly no chapter on mobility of natural persons, while each of the other four agreements between ASEAN and CER countries contains a services chapter together with provisions on movement of natural persons. These provisions vary in their format. The services chapter in the TAFTA follows a positive list approach, with sector specific commitments along the lines of the GATS. The TPSEP on the other hand follows a negative list approach with a schedule of non-conforming measures, more along the lines of FTAs recently concluded by the United States. SAFTA has separate chapters on telecommunications services and financial services. In the NZTCEP case, negotiations on services trade are scheduled to commence within three years.

Similarities to GATS framework

SAFTA, NZSCEP, TAFTA and the TPSEP all follow the GATS framework in a number of respects:

1 Service sectors and sub-sectors follow the GATS classification
2 Services trade is defined to cover all four modes of supply as defined in the GATS

3 Nevertheless there are provisions stipulating that the provisions of the services chapters do not restrict the rights of the parties to regulate entry or temporary entry of persons. There are separate chapters on temporary entry or movement of persons in SAFTA, TAFTA and the TPSEP, and a separate article on movement of natural persons in the General Provisions chapter of the NZSCEP.
4 There is provision for commitments on market access, national treatment and additional commitments. The commitments on market access and national treatment follow the GATS model.
5 The scope of the agreement is defined to exclude subsidies, services supplied in the exercise of government authority, application to employment market, and citizenship or residency issues.
6 Government procurement of services is either excluded from the scope of the agreement or deemed to be covered by the provisions of the chapter on Government Procurement.
7 Air transport services are generally not covered (except for the reference in the TPSEP to inclusion of the Multilateral Agreement on Liberalisation of International Air Transportation – MALIAT), although ancillary services such as computer reservation systems and aircraft repair and maintenance services may be covered.
8 There are articles setting out principles to be followed in domestic regulation of service sectors. The provisions of these articles are more extensive in some agreements than in others.
9 There are provisions relating to monopoly suppliers of services; these provisions differ between agreements.

Modification of Commitments

There are provisions for modification of commitments in each agreement. Commitments may be modified, usually on 3 months' notice, subject to negotiations on consequential changes in other commitments that might be needed to preserve the overall balance of commitments, with provision for arbitration in the event that agreement cannot be reached.

Positive List versus Negative List Approaches

A very important difference between NZSCEP and TAFTA on the one hand, and SAFTA, and the TPSEP on the other hand, is that the sectors or sub-sectors in which commitments are made are defined on a positive list basis in the NZSCEP and TAFTA, but on a negative list basis in the SAFTA and the TPSEP. The scheduling of commitments in the sectors committed in the NZSCEP closely follows the GATS scheduling practice. In SAFTA and the TPSEP on the other hand there are lists both of non-conforming measures and the sectors or sub-sectors to which the provisions on market access, national treatment and additional commitments do not apply.

Relation to APEC Commitments

In the NZSCEP there is a commitment to work toward full liberalisation of services trade by 2010, in accordance with APEC's free trade targets, and for negotiations in 2008 on those sectors in which full liberalisation by 2010 proves impracticable.

Professional Services

There is an emphasis on professional services in the agreements. TAFTA provides for possible recognition of qualifications and licenses. The NZSCEP provides for identification of priority areas for mutual recognition of professional qualifications and registration. The TPSEP provides for early outcomes in specified professional services.

Financial Services

The special requirement for prudential regulation in financial services is recognised. In SAFTA this is done within a separate chapter on financial services, while in NZSCEP the relevant provision is contained within the services chapter and there is no separate financial

services chapter. In the TPSEP, financial services are excluded from the provisions of the services chapter.

Telecommunication Services

In the SAFTA there is a separate chapter on telecommunications, setting out an extensive set of rights and obligations regarding the access of facilities-based suppliers to network elements owned by major suppliers, as well as related provisions directed to ensuring a competitive environment and regulator independence. There are no separate chapters on telecommunications services in the other agreements.

Temporary Entry

The temporary entry provisions of SAFTA and TAFTA contain provisions on short-term temporary entry for business visitors, and longer-term temporary entry for intra-corporate transferees. Significant advances in SAFTA are the provisions for employment of spouses and dependants of intra-corporate transferees, and the prohibition of labour market tests in assessing temporary entry applications. Dispute settlement provisions can apply only in cases involving a "pattern of practice", and where all other avenues of resolving the issue have been exhausted.

Relation to GATS Commitments

Further analysis is needed to assess the extent to which the commitments of the parties in these agreements represent advances over their GATS commitments in addition to those mentioned above.

C. INVESTMENT

There is no investment chapter in the TPSEP, while each of the other four agreements contains an investment chapter, again with some variation, from a NAFTA-style chapter in TAFTA to more limited provisions in other agreements. The CER does not include investment.

Admission of Investments and Relation to Existing Policies

In all four agreements there are provisions that effectively allow the parties to maintain their existing policies toward admission of foreign investment. In the NZSCEP and SAFTA this is achieved by providing for limitations on national treatment and most-favoured nation treatment to be listed in an annex setting out limitations (NZSCEP) or non-conforming measures (SAFTA). In the TAFTA and NZTCEP the mechanism is a definition of "covered investment" that refers to an investment that has been admitted by a party in accordance with its laws regulations and policies. In the NZTCEP the application of the investment provisions is further restricted to sectors listed in an annex, and subject to any conditions, limitations or qualifications set out in that annex.

In the case of Australia and New Zealand, the national policies toward admission of foreign investment are relatively liberal. In Australia the Foreign Investment Review Board screens most investment proposals, and a national interest test is applied. There are some sensitive sectors like media, telecommunications, shipping, aviation and residential real estate. As a general rule, foreign firms establishing in Australia are accorded national treatment.

In New Zealand one hundred percent overseas ownership is allowed in most industry sectors. Approval from the Overseas Investment Commission (OIC) is required for non-land investment by an overseas person seeking to acquire more than 25% of an asset worth more than $50 million. The approval criteria in such cases are transparent and of a prudential nature. Ministerial approval is required for certain land investments and for the acquisition of fishing quotas, and in these cases there is also a national interest criterion to be satisfied.

In a small number of industry sectors there are specific limitations on foreign investment. In telecommunications, for example no single investor can acquire more than 49.9% equity in Telecom NZ Ltd without ministerial approval. In air transport, foreign ownership of international airlines designated by the government is limited to 49%, with no more than 35% to be held by foreign airlines and no more than 25% by any single foreign airline. In maritime transport, New Zealand registration of vessels is limited to New Zealand nationals or enterprises incorporated in New Zealand. In fishing, vessels not registered in New Zealand cannot be used for commercial fishing within the territorial waters (12 mile limit). The Casino Control Authority is required to consider the extent of beneficial ownership to be vested to New Zealand citizens or residents when considering applications for the establishment of casinos.

Standard of Treatment

All four agreements provide for national treatment. In the TAFTA and the NZTCEP it is specified that this treatment applied to "covered investments". The NZSCEP and the TAFTA also provide for most favoured nation treatment. In the NZSCEP it is stipulated that investors should receive the more favourable of national treatment and most favoured nation treatment.

The TAFTA and NZTCEP stipulate that national treatment must apply to the promotion and protection of "covered investments". In both cases provision is made for the listing of exceptions. The NZTCEP contains the further detail that this provision of national treatment applies to the "requirements (if any) that need to be satisfied for investors and investments to receive the benefit of an agreement relating to investments", and the requirement that "appropriate protection" be accorded to "covered investments which, if so required, have been specifically approved in writing by the competent authorities concerned of the other Party as being entitled to the benefits of an agreement relating to investments".

The TAFTA requires that "each Party shall ensure fair and equitable treatment in its own territory of investments" and that "each Party shall accord within its territory protection and security to investments". The other three agreements do not contain such language.

Repatriation of Profits and Other Proceeds

The provisions relating to repatriation are similar in all four agreements. They each provide for funds to be transferred freely and without undue delay, in a "freely usable currency at the market rate of exchange prevailing on the date of transfer" (the NZSCEP further provides that the rate referred to is the "spot" rate). In the NZSCEP this provision relates to "investments and proceeds from investment" while in the other three agreements the term used is "funds….related to an investment". In the latter three agreements illustrative lists are provided of the types of "funds" covered by the provision. In the NZSCEP, SAFTA and NZTCEP it is specifically mentioned that repatriation must be permitted on a non-discriminatory basis.

In each case provision is explicitly made to allow transfers to be prevented through application of laws relating to specific circumstances. In all four agreements these circumstances include bankruptcy, insolvency or the protection of the rights of creditors, and ensuring the satisfaction of judgements in adjudicatory proceedings. The NZSCEP, SAFTA and NZTCEP also mention criminal or penal offences and the recovery of the proceeds of crime, while the NZSCEP and SAFTA provisions also cover laws relating to the issuing, trading or dealing in securities. The SAFTA provision mentions laws relating to social security, public retirement or compulsory saving schemes, and the NZSCEP mentions laws relating to "reports of transfers of currency or other monetary instruments".

The SAFTA also provides an exception for Restrictions to Safeguard the Balance of Payments, and refers specifically to upholding the rights and obligations of members of the IMF under the Articles of the Fund.

Expropriation

The SAFTA, TAFTA and NZTCEP contain provisions forbidding expropriation or measures "equivalent to expropriation" (without any definition of "equivalence"), unless the expropriation is for a public purpose, is taken on a non-discriminatory basis, in accordance with the due process of law, and accompanied by prompt, adequate and effective compensation based on market value of the expropriated investment.

The SAFTA contains a further provision relating to the expropriation of land as defined in the existing domestic legislation. The SAFTA provisions on expropriation do not apply in the case of compulsory licenses issued in relation to intellectual property rights, or to the "revocation, limitation or creation" of intellectual property rights, provided such actions are taken in compliance with the relevant provisions of the WTO's TRIPs Agreement.

The NZSCEP does not contain provisions on expropriation.

Performance Requirements

None of the four agreements contain provisions relating to performance requirements.

Dispute Resolution

The provisions on dispute resolution in the four agreements are relatively complex, with several variations observed between the agreements.

All four agreements have provisions on investor-state disputes. In each case provision is made for initial efforts to resolve disputes by consultation or negotiation. If these efforts are not successful, provision is made for recourse to further procedures, as follows:

1 In NZSCEP, at the request of either party to the dispute, to ICSID
2 In the SAFTA, at the request of either party to the dispute, to the court of the Party concerned, to ICSID, or to UNCITRAL
3 In the TAFTA, at the request of the investor, to the court of the Party concerned or to UNCITRAL (with the further provision that if a Party makes additional avenues of dispute resolution available to a non-Party, those avenues must also be made available to its TAFTA partner)
4 In the NZTCEP, by agreement of the parties, to the court of the Party concerned, to ICSID, or to UNCITRAL

Provisions on arbitration are found in the SAFTA, TAFTA and NZTCEP, but not the NZSCEP. In the SAFTA the Parties explicitly consent to submission of a dispute to conciliation or arbitration. The TAFTA and NZTCEP contain provisions applicable to any arbitral tribunal that may be set up, but arbitration does not appear to be mandatory.

SAFTA, TAFTA and NZTCEP all have provisions restraining the Parties from pursuing disputes through diplomatic channels unless the relevant dispute settlement body has decided that it has no jurisdiction, or unless the other Party has failed to comply with rulings of the relevant dispute settlement body.

The TAFTA and NZTCEP specifically exclude access by investors to dispute settlement in relation to decisions by the foreign investment authority of a Party in relation to establishment, acquisition or expansion of an investment by the investor, including any conditions that may be placed upon such investment.

In addition to provisions on investor-state disputes, the TAFTA and NZTCEP also have provisions requiring investors to have full access to competent judicial or administrative bodies within the other Party, for the purpose of pursuing or defending their rights as investors. The TAFTA provisions on this point go a little further than NZTCEP, requiring the investors to be allowed to choose their preferred means of settling disputes, and also requiring that the enforceability of judgements or awards be assured.

Exceptions, Safeguards and Transition Periods

Non-application of the provisions of the investment chapter to services is a very important exclusion. In the TAFTA and NZTCEP it is stipulated that the provisions of the investment chapter do not apply to services (and the NZTCEP currently does not include commitments on services liberalisation). The NZSCEP excludes supply of services through "commercial presence" (i.e. GATS Mode 3) from the scope of the investment chapter.

The SAFTA, TAFTA and NZTCEP all have provisions excluding application of the provisions of the investment chapter to subsidies, grants and government procurement. These mirror corresponding provisions in the services chapters. There are also the standard general exceptions relating to issues such as public order and morals, national security, and plant, animal and human health.

The SAFTA has a provision stating that nothing in the investment chapter shall constitute an obligation to privatise.

The NZTCEP has a provision stipulating that the investment chapter does not apply to disputes arising before entry into force of the Agreement.

The SAFTA has transitional provisions excluding investment measures maintained at the regional level.

D. GOVERNMENT PROCUREMENT

The most substantive commitments are found in the three agreements involving Singapore: SAFTA, NZSCEP and TPSEP, particularly SAFTA and the TPSEP. The two agreements involving Thailand are largely limited to commitments to principles of open government procurement policies (in the case of the NZTCEP including commitment to apply as far as possible the APEC non-binding principles on government procurement and the APEC transparency standard), and to exchange of information. The NZTCEP provides for establishment of a working group that could eventually lead to further negotiations on government procurement. Neither Australia nor New Zealand have joined the WTO Agreement on Government Procurement.

Scope

The SAFTA, NZSCEP and TPSEP all contain carefully-drawn provisions setting out the coverage of the provisions on government procurement. Certain types of transactions are excluded, and the NZSCEP and TPSEP contain monetary thresholds defining the value of transactions above which the provisions are to apply. SAFTA and the TPSEP contain lists of government entities whose procurements are covered by the provisions. In SAFTA there is a limitation on the applicability of the provisions to state and local governments.

National Treatment

National treatment is a central obligation in SAFTA, NZSCEP and TPSEP. There is also an emphasis on proscribing discrimination in favour of companies in which the government is a shareholder.

Process

SAFTA, NZSCEP and TPSEP each contain detail provisions on aspects of tendering procedures and related matters. The provisions of SAFTA and TPSEP are particularly detailed. Matters covered include tender announcements, use of open or limited tenders, registration and qualification of suppliers, valuation of tender bids, prohibition of offsets, protection of confidential information, provision of information on tender results, and access to competent bodies for reviews of tender procedures in case of complaints.

The three agreements also require that the normal rules of origin set out in the agreement should apply to government purchases, and that technical specifications should not be used in a way designed to disadvantage suppliers from the partner country.

Dispute Settlement

Both SAFTA and NZSCEP provide for access to the dispute settlement provisions of the agreement to resolve disputes on government procurement matters, but only after all other avenues for resolving the dispute have been exhausted. SAFTA further limits the applicability of dispute settlement to cases involving a "pattern of practice".

Other Provisions

The provisions of SAFTA may not apply when governments decide to use government procurement to support development of small and medium enterprises (SMEs) or when the Australian government uses government procurement to assist indigenous peoples.

SAFTA and the TPSEP both contain commitments to promote the use of e-procurement.

E. INTELLECTUAL PROPERTY

The intellectual property chapters of the five agreements impose relatively few obligations on the parties that extend beyond their existing international obligations, say through WIPO. This is especially the case with the NZSCEP and the NZTCEP. TAFTA also is almost devoid of additional "hard" obligations. The additional obligations under SAFTA and the TPSEP are slightly more extensive but still relatively light.

Commitment to TRIPS and Other International Treaties

The common features of all five agreements are a reaffirmation of TRIPs commitments. The simplest statement of this is in the NZSCEP, which simply states as its sole provision on intellectual property that the TRIPs defines the obligations of the parties in relation to intellectual property. Respect for TRIPs obligations is also stipulated in the other four agreements.

SAFTA also contains requirements for accession to the WIPO Copyright Treaty (1996) and the WIPO Performance and Phonograms Treaty (1996), and compliance with the Geneva Act of the Hague Agreement concerning international registration of Industrial Designs. The TPCEP also requires consistency with the two WIPO treaties mentioned above.

Cooperation

SAFTA, TAFTA and the TPSEP all contain "soft" obligations of a general nature for cooperation on enforcement of intellectual property rules, and for the promotion of effective intellectual property regimes. SAFTA also calls for cooperation in eliminating trade in goods that offend against intellectual property rules.

Prevention of Export of Goods that Infringe Copyright or Trademarks

SAFTA and TAFTA contain obligations on the parties to prevent the export of goods that infringe against copyright or trademark rules.

Additional Provisions in SAFTA and the TPSEP

SAFTA contains provisions relating to storage of intellectual property on electronic media. There is also a requirement to support international efforts to develop guidelines for dispute settlement procedures in disputes relating to domain names and trademarks.

The TPSEP has additional provisions affirming the right of IP owners to take steps against abuse of the intellectual property rights, supporting the development of intellectual property

rules suitable for the protection of traditional knowledge, and providing a role for interested parties in the processing of trademark applications.

The TPSEP also contains a list of geographic indications for Chilean wines and spirits that are to be protected under the agreement.

F. COMPETITION POLICY

The competition policy chapters of the five agreements are characterised by an absence of "hard" obligations. The provisions generally relate to the application of agreed principles of competition policy on a "best endeavours" basis, effective application of domestic competition law, and cooperation and consultation between parties on competition policy matters.

Competition Policy Principles

Principles typically mentioned in the competition policy chapters of the agreement are transparency, timeliness, non-discrimination, and procedural fairness. Competitive neutrality is also emphasised. There are general obligations to promote competition through effective competition policy, and to ensure that competition law is applicable to all businesses. The TPSEP emphasises certain types of anti-competitive behaviour that should be given particular attention. The NZSCEP and NZTCEP contain commitments to implement the APEC Principles on Competition and Regulatory Reform on a "best endeavours" basis.

The TPSEP goes a little further than the other agreements, by stipulating national treatment in the application of competition law.

Consultation and Cooperation

Requirements for consultation, information and cooperation are typically found in the agreements.
TAFTA, NZTCEP and TPSEP all contain provisions for consultations regarding particular anti-competitive practices in a partner country that are of concern to another partner.

Dispute Settlement

SAFTA, TAFTA, NZTCEP and TPSEP all explicitly state that the provisions of their competition policy chapters are not subject to dispute settlement, and SAFTA also explicitly states that the agreement does not provide any basis for challenging decisions of the partners' competition authorities. The lack of recourse to dispute settlement emphasises the "soft" nature of the obligations in the competition policy chapters.

G. TRADE REMEDIES

The agreements have very few provisions relating to trade remedies. If trade remedies (anti-dumping, safeguards or countervailing duties) are mentioned it is generally to state simply that these actions are to be governed by the relevant WTO article and agreement. The TPSEP specifically states that the agreement creates no additional rights or obligations in relation to trade remedies.

Safeguards in TAFTA and NZTCEP

TAFTA and NZTCEP do provide for safeguards and special safeguards on a bilateral basis. The trade remedies chapter of the agreements sets out the conditions and processes applicable to these bilateral measures. The NZTCEP also explicitly notes that global safeguard actions by the parties continue to be governed by the relevant WTO rules.

H. DISPUTE SETTLEMENT

Each of the five agreements contains a dispute settlement chapter. The process to be followed in dispute settlement is similar in each case.

The process begins with a stipulated period allowed for resolving the dispute by consultation. If this is not successful the next step is the establishment of an arbitral tribunal. The procedure for appointing the arbitral tribunal is set out, as are the procedures to be followed by the arbitral tribunal itself. Non-compliance with the findings of the arbitral tribunal may be followed by compensation and/or suspension of benefits under the agreement. If there is disagreement over whether compliance with the tribunal's decision has occurred, recourse is generally possible to a further dispute settlement process, preferably before the original arbitral tribunal.

I. OTHER PROVISIONS

Typically agreements such as those above also contain chapters on customs, rules of origin (ROO), technical barriers to trade (TBT), sanitary and phyto-sanitary (SPS), transparency, and electronic commerce. There is however considerable variation across agreements in the content of some of these chapters, and in some cases a chapter is "missing", for example electronic commerce in the NZSCEP. The NZTCEP and the TPSEP include understandings on labour and environment issues, but these are not found in the other three agreements

J. OTHER AGREEMENTS

A useful step would be to compare the provisions of the agreements listed in the TOR with provisions of FTAs that the parties have concluded with other parties, to establish whether the provisions of the former are typical of the approach followed by the parties in their bilateral FTAs, or whether the provisions of the latter indicate any preferences for different approaches to specific provisions.

The CER belongs to an older generation of agreements than the five agreements discussed above. In some respects it is very advanced, for example it now provides for free trade in all goods and most services, and contains a very extensive array of market integration measures, going beyond cooperation in customs, SPS, TBT and government procurement to include mutual recognition of product and occupational standards, joint food standards and a joint quality accreditation system. A particularly advanced feature is the use of harmonised competition law provisions to take the place of anti-dumping actions on trade between the two countries. On the other hand, CER does not contain an agreement on investment. There is free flow of labour between the two countries under the Trans-Tasman Travel Arrangements, which are not formally part of CER. Analysis of CER will be useful in providing an indication of some aspects of the thinking of Australia and New Zealand on the design of FTAs. One development of particular note is that Australia and New Zealand are in the process of changing the basis of the CER rules of origin from purely regional value content (RVC) to change in customs classification (CTC). This may have implications for the AANZFTA negotiations.

Similarly, analysis of the current state of AFTA will also be useful, along with comparative analysis of FTAs between ASEAN and CER countries and outside countries, particularly Singapore's FTAs with Japan, the United States and Korea, and Australia's agreement with the United States.

K. ANALYSIS

The comparative analysis outlined above of provisions of the existing FTAs allows some inferences to be drawn as to how far they indicate a standard approach that the parties may seek to apply to the proposed AANZFTA, or alternatively as to the options that may be considered when negotiating the design of the AANZFTA. The following section analyses some issues that emerge for ASEAN in developing its position on the design of the AANZFTA.

The structure of AANZFTA will be unusual if, as is envisaged, it is to cover bilateral trade between Australia and New Zealand on the one hand and each individual ASEAN member on the other, but not the bilateral trade between Australia and New Zealand themselves, or the trade among the ASEAN members themselves. This will add complexity to the agreement, but in principle should not be unmanageable. The US-Central America-Dominican Republic FTA and EFTA agreements with third countries provide examples of agreement architectures that can accommodate such situations.

A further issue is that the membership of AANZFTA will obviously encompass some CER and ASEAN countries that already have bilateral FTAs with each other. It appears that the AANZFTA is envisaged as co-existing with these bilaterals, although little indication has been given as to how this is expected to work out in practice. Among the existing agreements the TPSEP overlaps with the NZSCEP, and experience with this situation may provide useful lessons as to how such overlaps may be handled. However the TPSEP has not yet entered into force, and so it is premature to discuss how the overlap may work out in practice, as noted earlier.

Trade in Goods

The existing agreements provide examples of an approach to liberalisation of trade in goods that aims at full product coverage. TAFTA and NZTCEP provide examples of how sensitive products can be accommodated within this approach. Rather than being placed on exclusion lists, sensitive products are handled by provision of extended transitional periods of 15-20 years and by use of TRQs and special safeguards. This approach involves a very lengthy implementation period, but the agreements provide that at the end of the implementation period trade between the partners will be duty-free for all products.

This approach is consistent with the recommendation in the PECC “Common Understanding that all sectors should be included in FTAs, with “sensitive sectors being liberalised on a slower timetable with due regard to the sensitivities of member economies”. The APEC guidelines also call for the inclusion of all sectors, but also stipulate that phase-out periods in sensitive sectors be kept to a minimum. The RIRDC paper too emphasises the inclusion of sensitive sectors. The TAFTA and NZTCEP approach exceeds the requirement of GATT Article XXIV, which requires coverage of “substantially all trade” but not “all trade”. The Article XXIV requirement is echoed in the RIRDC checklist. On the other hand the 20 year phase-out period for tariffs on some products in TAFTA and NZTCEP greatly exceeds the 10 year guideline set out in the WTO’s 1994 Understanding on interpretation of Article XXIV.

Rules of Origin

Rules of origin (ROOs) are now well-recognised as a crucial factor in determining the true degree of liberalisation of trade in goods provided by any FTA. The costs imposed on exporters by ROOs, for example in record-keeping and documentation, production down time, and switches to more expensive input mixes, count as an offset to the cost advantages provided by tariff preference. Rules of origin can often be more important than tariff preferences in determining the degree of market access provided by the FTA. One indication of this is the extent to which exporters choose not to use the tariff preferences available under FTAs, and prefer to continue to incur the MFN tariff when exporting to the partner country. This is usually interpreted as an indication that the costs of complying with the ROO exceed the tariff preferences, although there can also be other reasons for non-utilisation of tariff

preferences. Further problems for exporters may arise when their country enters into multiple FTAs, each with different ROOs. This issue is discussed further in the section on the "spaghetti bowl"

Rules of origin can vary enormously in the extent to which they restrict or facilitate trade. Some rules are deliberately restrictive, responding to pressures from import-competing producers demanding to be sheltered from the additional competition that would otherwise result from the tariff preferences under the FTA. A sufficiently restrictive ROO can completely nullify the effect of the tariff preferences. In other cases restrictive ROOs may simply reflect poor design. ROOs perceived by one partner in an FTA as unduly restrictive can be an ongoing source of friction between the partners. For example New Zealand's dissatisfaction with the ANZCERTA rules has been probably the most persistent source of friction between the ANZCERTA partners.

There is widespread consensus on the desirable features of ROOs that are intended to facilitate trade. These rules should be "should be as straightforward as possible, and should be transparent, clear and consistent, and should not impose unnecessary compliance costs" (PECC Common Understanding 2006), "easy to understand and to comply with" (APEC "Best Practice" guidelines 2006), and "simple, consistent and flexible" (RIRDC 2006).

As noted above, both ANZCERTA and AFTA adopted RVC rules, attracted by the apparent simplicity of this type of rule. It has become apparent however that the simplicity of RVC rules is largely illusory. Exporters facing RVC rules often experience continual uncertainty over whether their ability to satisfy the ROOs may be compromised by relative price changes, exchange rate changes, and even by improvements in production efficiency that reduce the domestic value content. Complexities and disagreements in the definition of the regional value content can be a further source of uncertainty and vulnerability, especially when disputes arise. There has been widespread comment about the degree of preference utilisation within AFTA, and the possible connection of this with the costs and uncertainties involved in complying with the apparently simple AFTA ROOs, although this comment is largely based on anecdotal evidence, as no systematic empirical evidence has yet been produced.

ASEAN has sought to establish its 40% RVC-based rule as the basis for ROOs in its FTAs with other parties. China has accepted the AFTA rule as the basic rule in ACFTA, and it is understood that Japan is also willing to use the AFTA rule as the basis for ROOs in an ASEAN-Japan FTA, although it has insisted on much more stringent rules in its bilateral FTAs with individual ASEAN economies, where 60% RVC is typically required. Australia and New Zealand followed the AANZCERTA precedent of RVC-based rules in NZSCEP and SAFTA, although the RVC requirement in NZSCEP was dropped to the AFTA level of 40% rather than the ANZCERTA level of 50%. Subsequently Australia and New Zealand have revised their approach, as explained below.

Efforts have been made to improve the ROOs in both ANZCERTA and AFTA. The CER partners have decided to change the basis of the ANZCERTA rules from RVC to CTC. This change responds both to the perceived disadvantages of RVC, which have now been recognised in both countries, and to New Zealand's longstanding dissatisfaction with the existing ANZCERTA ROOs. This change within ANZCERTA has in turn been reflected by the adoption of CTC as the basic ROO in TAFTA and the NZTCEP. ASEAN has taken a somewhat different approach within AFTA, making available CTC and "specific process" rules for some products as an alternative to the RVC rules, and ACFTA has also followed this approach.

The advantage of a CTC rule is that it provides greater certainty to exporters than an RVC rule. Exporters know the tariff classification of their inputs and their final products, and this knowledge is all that is required for complete certainty as to whether their products will satisfy the ROOs. Unfortunately the Harmonised System (HS) of tariff classification was not designed with ROOs in mind, with the result that a single CTC rule will not be suitable for every product.

As a consequence comprehensive application of the CTC approach typically requires that the ROO for each tariff category be specified. This results in extremely lengthy ROO schedules. The complexity of these schedules is however more apparent than real. Exporters are generally interested only in a small number of products and so will be interested in the small sections of the schedules that deal with those products, which provide them with precise guidance as to the requirements for meeting the ROOs on the products they wish to export..

On the other hand it is also the case that the effect of CTC rules for particular products will be understood only by the firms involved in the production and export of those products. The limited extent of understanding of the effect of a particular ROO can assist special interests in taking advantage of this non-transparency to press for ROOs that will severely restrict the ability of competitors in the partner country to export under the preferences. The resulting ROOs may be both restrictive and complex. The success of auto and textile interests in securing restrictive ROOs for their sectors in NAFTA has given CTC rules a bad name in some quarters. Vigilance on the part of exporters and their supporting officials is needed to counter attempts to introduce restrictive CTC ROOs.

Unfortunately the CTC rules in TAFTA in particular have been made considerably more restrictive by the imposition of onerous RVC rules that must be satisfied simultaneously with the CTC rule. The 55% RVC applied to textile and clothing products is especially restrictive, and the 50% RVC rule for the same products in NZTCEP and TPSEP is not much better. As noted above TAFTA has combined CTC and RVC ROOs for a large number of other products as well.

If ASEAN seeks trade-facilitating ROOs for AANZFTA, the CTC rules in NZTCEP and TPSEP could well serve as a useful model, provided Australia and New Zealand can be persuaded to abandon the practice of imposing simultaneous RVC requirements for some products, especially products sensitive to themselves. It would however be advisable to check the ROO for each tariff category to ascertain whether problems would be created for ASEAN exporters by that rule. This is a demanding and time-consuming task best undertaken in consultation with industry.

Adoption of CTC-based rules in AAZNZFTA would run counter to ASEAN's current strategy of seeking to establish its 40% RVC AFTA rule as the basis for ROOs in other FTAs. The crucial importance of ROOs in determining the liberalising effect of FTAs makes this a vital issue. It is really important to know which ROO is most effective in facilitating trade. If the anecdotal evidence of low preference utilisation within AFTA is in fact correct, and if problems with the RVC-based rule are a significant factor in this low utilisation, standardisation on the AFTA rule could have unfortunate consequences, seriously limiting the potential trade-creating effects of FTAs based on these rules. A rigorous study to assess the effect on trade of each type of ROO is urgently needed to assist in resolving this issue.

Provision for cumulation in rules of origin is an issue that would be very important in AANZFTA, but that does not generally arise in bilateral FTAs. Because of the growing integration of production networks across ASEAN it would be important for ASEAN to ensure that the AANZFTA rules of origin provide for cumulation to the maximum possible extent. This is especially important if an RVC-based rule is to be used, but it could be important at least for some industries even if a CTC-based rule is adopted.

Trade in Services

The existing agreements highlight a key choice in the design of the services provisions of an FTA, between a "positive list" approach and a "negative list" approach. The positive list approach is followed in TAFTA and the NZSCEP, while SAFTA and the TPSEP follow the negative list approach. Under the positive list approach the sectors, sub-sectors and modes of supply in which commitments are made are specifically identified, along with the limitations on the commitments in each case. Under the negative list approach the sectors, subsectors and modes of supply that will not be covered are specifically listed. The services provisions of the

agreement apply to all sectors, subsectors or modes of supply not included in the negative list, with the exception that existing regulations in partner countries that do not comply with the provisions may be listed in a Schedule of Non-Complying Measures, which then constitute the limitations on the parties' commitments in the covered sectors. In principle it would be possible to achieve any given outcome by either the negative or positive list approach, but in practice there will be significant differences in the negotiating dynamics generated by the two approaches. A positive list is usually associated with a more cautious approach and this is usually reflected in more limited outcomes. Progress in extending the coverage of agreements at subsequent reviews also tends to be much more difficult in positive list agreements.

The issue inevitably arises as to the relation between the provisions on Mode 3 in the services chapter and the provisions of the investment chapter, since Mode 3 supply necessarily involves investment in most if not all cases. In the existing agreements it is expressly stated that the investment provisions do not apply to services. There is some advantage in this as far as pre-establishment provisions (i.e. provisions on approving/admitting FDI) are concerned, because the investment provisions of the agreements generally involve little or no liberalisation of existing pre-establishment provisions, as noted above. Application of these provisions to services could limit the extent to which market access commitments could be made on services mode 3. As the agreements stand the parties were left free to make market access commitments for mode 3, even though the investment provisions of the agreement involve little or no liberalisation of pre-establishment measures. As regards post-establishment (i.e. treatment of investors and investments after they have been admitted), some aspects are covered by the national treatment provisions of the services chapters. There are other post-establishment matters however, such as repatriation of profits and capital, and protection against uncompensated expropriation, that are not covered in a typical services chapter. It would be desirable for Mode 3 investors to have these protections as well as other investors.

There is an important trade-off involved in determining the extent of the commitments that countries should make in the services provisions of an FTA. On the one hand a key benefit of services trade liberalisation is the potential to improve the efficiency of the liberalised sectors, through the increased competition and technology transfer resulting from the entry of foreign suppliers into the market. This is a vital consideration because of the importance of service sectors for the efficient operation of an economy, especially the key "infrastructure" services such as telecommunications, transport and financial services. Binding commitments on liberalisation that are made within an international agreement provide investors with greater certainty than could be provided by a purely domestic policy that the policy environment for their investments should remain stable. It would be expected that increased FDI would be attracted into the sectors where commitments are made. On the other hand, because services trade liberalisation generally involves making commitments on the operation of services regulations, an important part of the preparation for a services trade negotiation involves conducting an inventory of existing regulations and an assessment of the adequacy of the regulations, so that limitations that need to be made on commitments can be identified.

The standard advice on formulating services trade commitments is to give priority to making commitments in sectors that are vital for economic efficiency and into which government is anxious to attract FDI, and to avoid liberalisation in sectors where the regulatory framework is inadequate or has not been fully assessed. Difficult choices arise for sectors where both sets of considerations apply simultaneously. In a group such as ASEAN it is inevitable that there will be differences between members in their degree of preparedness for services trade liberalisation and in the priorities they attach to different sectors, and this is likely to be reflected in differences in the commitments that members are willing to make. This adds complexity to the negotiations but in principle presents no insurmountable difficulty. The EU GATS schedule provides an example of how differences between members in their commitments can be reflected in a services schedule.

Investment

If the existing agreements are taken as precedents, it would suggest that the AANZFTA may not include any liberalisation of pre-establishment treatment, but rather commit members to maintain their existing policies and avoid introducing new restrictions. Individual ASEAN members may nevertheless wish to consider whether it would be in their interests to consider taking advantage of the AANZFTA negotiations by revising their existing policies toward approval and admission of foreign investment. If they decide to do so, the provisions on investment in AANZFTA could be drafted so that the conditions relating to retention of existing policies relate to the revised policies.

One area in which there is significant variation between the existing agreements is in the choice of independent tribunal to which investor-state disputes may be referred. This choice is of some importance, as each tribunal has its own characteristics and its own track record in relation to the outcome of disputes. Specialised expert advice on this matter may be desirable.

Government Procurement, Intellectual Property and Competition Policy

These three issues are considered together because it is known that the inclusion or non-inclusion of each of them, and the content of the provisions if they are to be included, is likely to be controversial in the negotiations.

Broadly speaking there are three approaches to the treatment of these issues in AANZFTA:

(i) Inclusion of substantive obligations: In the existing agreements substantive obligations are found on government procurement in SAFTA, NZSCEP and TPSEP. Only minor obligations on intellectual property are found in the existing agreements, and there are no “hard” obligations on competition policy in any of the existing agreements. The question of whether to include substantive obligations in these areas can be evaluated as to whether it is in ASEAN’s interest to do so. The arguments in favour of liberalisation of government procurement are analogous to the arguments for removing or reducing trade barriers on non-government imports, and in addition there will be a favourable fiscal impact. Transparency in government procurement is also a significant contribution to good governance. Commitments on intellectual property may enhance the investment environment and thus help to increase the attractiveness of ASEAN economies as destinations for FDI.

(ii) Inclusion of “soft” obligations that in particular are not subject to dispute settlement. This is the approach taken to competition policy in all of the existing agreements, and also the approach taken to government procurement in TAFTA and NZTCEP. The provisions on intellectual property in the existing agreements are also mainly of the “soft” variety. “Soft” obligations, such as reaffirmations of WTO TRIPs commitments, are not onerous for the parties, but they do create a framework within which regular consultations can be held between the parties on the relevant issues. The possibility of introducing more substantive obligations can potentially be a subject for discussion in these consultations. These consultations can be useful for ASEAN economies if they envisage that their policy frameworks for these issues will eventually have to be improved, in their own interest. As noted above, liberalisation of government procurement is likely to be beneficial for ASEAN economies, and it is also likely that the costs of inadequate or non-existent competition policy regimes will increase in the future as the influence of multinational enterprises in the global economy continues to grow.

(iii) Complete omission of these issues from the agreement: This approach is not followed in any of the existing agreements.

It can be expected that Australia and New Zealand will strongly favour the inclusion of provisions on these issues in AANZFTA, although the RIRDC in its “checklist” argued that

domestic policies such as competition policy are best addressed separately of trade policy such as FTAs which are best focused on trade issues. The existing agreements provide precedents for a variety of approaches toward the inclusion of these issues. ASEAN will need to consider which approach best suits its interests for each issue.

Dispute Settlement

Dispute settlement procedures are, or should be, an essential element in an FTA. There are well-understood approaches to dispute settlement in FTAs, and the provisions in the existing agreements all follow a similar pattern. Guidance should also be available soon from an APEC "model provision" on dispute settlement. Experience in ANZCERTA suggests that it is generally the smaller partner in the agreement that is disadvantaged by the absence of an effective dispute settlement process.

Results of Consultations.

Selective interviews with government officials and business have been undertaken and these respondents have been identified in what follows (see Appendix 3 for copies of the questionnaires that will be used as a basis for free-flowing interviews). There is also a large body of published material and presentations that can be drawn on along with these interviews to present the views of government and business on the various issues raised above, especially investment which has been the focus of a number of associated reports involving the same researchers. For example, on the Australian DFAT website there are a number of submissions made by governments, business and other groups to the AMFTA Scoping Study which covers broader territory such as on other relevant FTA's including the AANZFTA. Specific industries are covered in this discussion but analysis of impacts on ASEAN industries is more general. Industry submissions generally reflected when something specific concerned particular industries but State government submissions captured more general industry positions which tended to be more passive.

Most industry groups that made submissions on the AMFTA, including the peak Business Council of Australia (BCA), saw Malaysia as already an important trading and investment partner but one where there was scope to build on current trends, especially in investment. Some smaller industries like the Winemakers Federation of Australia saw it as a market offering greater diversification and higher growth even though from a low base. The same sentiments would apply in respect of ASEAN as a whole which is seen as having a lot of potential though current Australian industry interest is more in individual members, a number of which are involved in bilateral FTA negotiations. ASEAN needs to offer more than the sum of its individual members, addressing difficult intra-ASEAN integration issues that often mean ASEAN offers a lowest common denominator in negotiations. ASEAN was often not thought of as a single cohesive unit but one stretched by the number of FTAs under consideration. The issue of whether ASEAN could legally enter into a treaty on aspects such as Rules of Origin was raised by one peak industry group.

The BCA favours multi-lateral liberalisation through the WTO but also supports opportunities for additional liberalisation through appropriate bilateral or pluri-lateral agreements that did not threaten the multi-lateral approach. Rules-based economies were seen as easier to trade with. But changing the rules in a FTA may not change the responses of businesses unless they are encouraging to more open trade and investment, including multi-laterally. The APEC Business Advisory Council (ABAC) followed this approach but went further in saying there should be some similarity in the model provisions which would provide consistency, though at the cost of flexibility which may be important in the negotiating process. Other industry groups such as the Australian Council of Trade Unions (ACTU) and some of its associates like the Textiles and Fashion Industry Australia also favoured a multilateral approach. The Australian Plantation Products and Paper Industry Council stated that the AMFTA could offer benefits for some of their industry interests but also risks to its manufacturing interests, and pointed to the need for some balance. A few industries, such as those represented by the ACTU in respect of public services, and other service industries

such as the Music Council of Australia and the Nursing Federation of Australia, wanted their interests excluded from any FTA.

The BCA highlighted how trade and investment liberalisation had brought significant benefits to Australia as well as to developing countries through stronger growth and economic activity. The Australian Industry Group (AIG) expressed narrower sentiments in relation to a focus on Australian industry benefits. In contrast, Raby and McCarter (2005) put forward a broad range of social, political and security benefits that Australia could achieve from FTAs.

The BCA also raised a number of negotiating issues of more general relevance, namely comprehensiveness (broader than trade, covering aspects such as investment and the movement of people), WTO consistent, WTO plus, international law coverage subject to compulsory dispute settlement, and regular reviews. Comprehensiveness was a common issue with a number of industries such as the Federal Chamber of Automotive Industries and Ford Australia representing the multinational automotive sector. The BCA felt the impacts of such trade agreements would be improved by aspects such as an alignment of Australian tariffs with those that apply within AFTA. Current applied lower or zero tariffs should be formally locked-in and not offset by the adoption of alternative duties, charges or processes. Meaningful gains in market access on both sides were called for by groups representing multinational industries benefiting from components trade like in the case of the Federal Chamber of Automotive Industries and Ford Australia. Dairy Australia, who supply for local Malaysian consumption as well as processing for export, agreed and added that tariffs and licensing arrangements mainly benefited multi-national processors, not local industry. Some industry groups feeling more threatened by FTAs, such as the Australian Plantation Products and Paper Industry Council, pushed for strong positions on anti-dumping and standards. Overly complex and unnecessarily costly customs procedures were another identified negotiating issue along with import licensing requirements, and quarantine, standards and certification. Quarantine was raised by a number of food industry groups and some governments, such as the Australian Chicken Meat Federation and the Northern Territory and Western Australian governments, but in these cases from the perspective of not liberalising trade given the risk to the health of Australian industries. Standards were also raised by a range of industries such as the ACTU on labour, the Winemakers Federation of Australia, the Federal Chamber of Automotive Industries, the Carpet Institute of Australia, Monash University and the Australian Nursing Federation. Business felt liberalising government procurement that was restrictive and discriminatory would have capacity building and efficiency gains, and broader social and developmental objectives could be better met more directly. Still the AMWU submitted that government procurement should be excluded from the AMFTA though some business groups such as the AIG wanted the agreement to include the issue and to ensure equitable access. The AIG also saw the FTA offering the potential for improved cooperation in areas such as competition policy and practices, such as is in the TPSEP and CER countries agreements with Thailand. The BCA treated services and investment as a group and there is a link through the GATS mode of commercial presence though in many agreements investment is treated as a separate chapter and differs from the GATS, for example through having lists that are “negative” (applies to all except those listed) rather than “positive” (applies to those listed). National treatment that addressed restrictions on foreign ownership, or the form of foreign ownership in some sectors, was seen as important. Concerns were also raised about intellectual property rights infringements and their enforcement which act as a deterrent to investment and the provision of the latest designs etc which has productivity implications. This issue’s profile was raised substantially during the AUSFTA.

Rules of origin (ROO) were a focus in both questionnaires and were raised by various groups including the AIG and the ACTU. DFAT has prepared a background paper on issues related to ROO for consideration by business and other interest (see http://www.dfat.gov.au/trade/050921_roos_background.html). The main points in this paper are captured in the following. Firstly, there is a balance between facilitating trade and ensuring

only products of the parties to the agreement benefit from tariff commitments. This has been interpreted to mean when some material inputs are imported they should undergo a substantial process of transformation prior to export. A key question then is what is a simple, objective and readily applied basis for measuring this substantial process of transformation? There are three basic approaches that may be combined in some degree, namely value-added tests, change in tariff classification (CTC), and a specified manufacturing or processing operation prior to export. Traditionally the first has been applied in Australia but most recent FTAs have applied the CTC approach, supplemented with requirements on value-added, Regional Value Content (RVC). Support for the value-added approach was based on simplicity, neutrality and fairness but over time some of these benefits have been diminished due to aspects like the cost calculations becoming more time consuming and administratively burdensome. More importantly, shifts in prices, exchange rates etc can lead to uncertainty on whether the ROO will be met or not. The CTC approach came out of negotiations aimed at harmonising non-preferential ROOs initiated in 1995 by the WTO. The CTC overcomes the uncertainty factor mentioned above but in some cases a substantial transformation cannot be demonstrated through a CTC and there is a need for support from RVC tests which diminishes some of the other advantages like objectivity and certainty. The importance of when origin should be retained in transhipment as an issue is identified in the paper.

Industry groups differed in their views on the appropriate ROO and in the process put forward the trade-offs between a number of factors that would favour either a value-added or CTC approach from their perspective. The Australian Chamber of Commerce and Industry (ACCI) made the point that the two models are not mutually exclusive but that CTC is not as subjective over time. However, CTC can have a different basis in different agreements and be more complicated overall. Proponents of the products approach based on CTC that was used in the TAFTA and the USAFTA included the AIG. Proponents of the traditional approach based on physical transformation in the last manufacturing process and a RVC threshold used in the SAFTA, and currently in the CER, included the ACTU and the Carpet Institute of Australia. The ACTU preference was based on what approach was well-established, including in ASEAN, but they did raise the testable claim that the CTC approach is “widely considered to involve lower transaction costs for business and greater transparency”. They also raised a concern that a CTC could occur in one of the FTA parties but represent less than 50 percent of the total cost unless supplemented with RVC requirements. The Carpet Institute of Australia requested that if a CTC approach is followed then there should be a regional threshold equivalent to the current value-added approach. One consistent view of business was that there would be benefits of harmonisation in having the one approach.

The views of New Zealand officials on comprehensive issue coverage in FTAs broadly correspond to those of their Australian counterparts. They do attach importance to the inclusion of issues such as government procurement, intellectual property and competition policy, as well as investment and services. They have been strong advocates of the APEC principles on competition and regulatory reform. At the same time they have shown in existing agreements that they are willing to take a patient approach in cases where difficulties have arisen in pursuing the comprehensive approach in relation to specific issues.. For examples services in the NZTCEP and investment in the TPSEP were held over for subsequent negotiations. While New Zealand officials were disappointed that agreement could not be reached immediately in these cases, they considered it preferable to aim for higher-quality outcomes in later negotiations rather than rush through unsatisfactory sets of provisions. In the areas of government procurement, intellectual property and competition policy New Zealand has not insisted on the inclusion of substantive obligations in the NZTCEP but nevertheless considered that it was important to include chapters on these issues to provide a framework for discussion in subsequent reviews of the agreement, as well as in possible future negotiations. One area in which the New Zealand approach differs somewhat from that of Australia is in relation to labour and environmental issues. In order to maintain political consensus behind the “open economy” approach to trade policy the current New Zealand government has found it necessary adopt a policy requiring inclusion of provisions on these

matters in trade agreements that it negotiates. The approach taken on these matters is non-binding and does not involve recourse to sanctions or dispute settlement, but rather establishes these issues as potential subjects for discussion in regular reviews of the agreement. In some cases the relevant provisions are covered in memoranda or side letters rather than in provisions of the agreement itself.

New Zealand officials are very enthusiastic about the TPSEP, which they see as providing a desirable model for future FTAs. They acknowledge that the absence of an investment chapter in the TPSEP is a major gap, but expect this to be remedied in following negotiations.

New Zealand officials tend to attach considerable importance to regulatory issues in relation to market access within FTAs. Officials from the Ministry of Economic Development in particular are firmly of the view that standards and other TBT issues must be addressed in FTAs, in parallel to tariff issues, if market access is to become truly effective. They believe that consultation between the relevant regulatory authorities in the partner countries is very important in resolving problems in this area.

New Zealand Customs has become a strong advocate of the CTC approach to rules of origin. Customs officials have indicated that analysis of their revenue collection data shows that preference utilisation tends to be very low or non-existent when RVC rules are used, even when substantial preferences are available. They are firmly of the view that CTC rules are more effective in facilitating trade, as well as offering significant administrative advantage, for example because their greater transparency facilitates monitoring and efficient investigation of complaints. New Zealand Customs has been conducting workshops in ASEAN countries promoting the advantages of CTC rules.

New Zealand business is principally interested in the market access provisions of the proposed AANZFTA. The main focus of interest is on how AANZFTA could expand the market access already available through the NZSCEP, NZTCEP, TPSEP and the proposed agreement with Malaysia, to include other important ASEAN markets. The Philippines is New Zealand's largest export market in ASEAN and Indonesia ranks third after Malaysia. Viet Nam accounts for a smaller share of exports but is seen as a market with great future potential. Cambodia, Laos and Myanmar are of less interest as markets, but New Zealand exporters are concerned that the sensitivities of these economies might prevent ASEAN from offering meaningful additional market access under AANZFTA. It could be inferred that New Zealand exporters would not object strongly to an arrangement that allowed these three economies to opt out of market access commitments to a considerable extent, provided there is comprehensive coverage in the commitments of other ASEAN economies.

There is a significant difference between the attitude of larger companies like Fonterra, who are interested in the effect of FTAs on their international supply chain management, and smaller exporters who tend to be most concerned with direct market access for their finished products. New Zealand services exporters view ASEAN as an important market and can be expected to take an active interest in the negotiations.

In terms of defensive interests, the New Zealand firms that see themselves as most threatened by tariff elimination are in the textile and clothing sector. However these firms are much more concerned about the proposed FTA with China than about AANZFTA.

New Zealand places a very high priority on biosecurity controls at the border, because of the serious consequences of a major pest incursion or disease outbreak for New Zealand's vital agriculture and forestry industries. The adequacy or otherwise of biosecurity controls is a frequent subject of public controversy. Since however New Zealand does not produce tropical fruits and vegetables, local horticultural producers are unlikely to look to biosecurity controls as an instrument of protection. Poultry products and pork are the main industries that do in practice derive significant protection from biosecurity measures in New Zealand.. As in Australia, industry opposition can be expected to proposals to relax quarantine controls for these products.

3. PREFERENCES AND CONCESSIONS

The market access and related commitments on goods and services by members of an FTA establish preferences in favour of their partner(s) in the FTA. These preferences are an important determinant of the trade effects of the FTA. The commitments can also be viewed as concessions by the members making the commitments, providing an indication of the degree of adjustment that the FTA is likely to impose on them. The study uses analysis of commitments by Australia and New Zealand in existing CEPs/FTAs as the basis for an assessment of the extent and level of preferences that the ASEAN countries may be able to secure within AANZFTA. Issues facing ASEAN countries in negotiating the concessions that they will make within AANZFTA are also analysed.

A. PREFERENCES

Several dimensions of preferences in an FTA are important. Two key dimensions are the range of products over which the preferences are established, and the extent of the margins of preference that are created, which in the case of trade in goods reflects in principle the gap between the preferential and MFN tariffs. Preferential elimination of relatively high tariffs over a wide range of products establishes much more significant preferences than elimination of high tariffs over a smaller range of products, or the preferential elimination of lower tariffs over the same range of products. Potential for creating preferences is negligible if most MFN tariffs are already zero, as is the case with Singapore. In general, the lower the average tariff and the smaller the range of products remaining subject to tariffs, the smaller the potential for creating margins of preference. Thus the potential for preference creation is smaller for Australia and New Zealand than for the ASEAN countries other than Singapore. This would suggest that ASEAN's interest should be more in other provisions such as investment, economic cooperation, and harmonisation of standards.

How the establishment of preferences is scheduled over time is also important. A preference established immediately has a greater economic value than the same preference scheduled to be established in 20 years' time, both because of the immediacy of the effect and because a preference which does not come into effect over many years may well be eroded over the intervening report by MFN liberalisation or by the establishment of FTAs and other preferential arrangements with other countries in which preferences are given for the same products.

Conventional economic analysis holds that the economic effects of preferences may not be unambiguously positive, since preferential access can result in trade diversion as well as trade creation. As well as being welfare-reducing, trade diversion in FTAs with large partners can encourage the expansion of industries in which a country does not have comparative advantage, and which will later come under threat if the partner liberalises multilaterally or enters into FTAs with other partners where those industries are more competitive. Australia and New Zealand may not however be large enough markets for such effects to be potentially significant. In general, larger margins of preference are likely to be associated with a greater incidence of trade diversion. The degree of correlation between margins of preference and the partner's trade competitiveness is also important. Other things being equal, a stronger correlation should indicate a smaller risk of trade diversion and a greater potential trade creation impact.

Preferences under AANZFTA will not be granted in a vacuum however. While margins of preference are appropriately measured in the first instance with respect to MFN tariffs, the effect of preferences already granted to existing partners, as well as the preferences that may be granted to other partners in future must also be taken into account. Non-ASEAN countries with which preferences obtained under AANZFTA would be shared include the least-developed countries and the independent Pacific island states, and also the United States in

the case of Australia. Tariff preferences under the Generalised System of Preferences (GSP) also reduce the margins of preference that can be enjoyed over other developing countries.

Six ASEAN members already have arrangements conferring duty-free access to the Australian and New Zealand markets. Singapore has duty-free access under SAFTA and NZSCEP, and duty-free access is to be phased in for Thailand under TAFTA and NZTCEP. Brunei has access to New Zealand under TPSEP but does not have duty-free access to Australia. The least-developed members of ASEAN – Cambodia, Laos, Myanmar and Vietnam – already enjoy duty free access to Australia and New Zealand under the special arrangements established for access by least developed countries to those two countries' markets. Thus the proposed AANZFTA will not provide these six ASEAN members with any additional preferences in the Australian and New Zealand markets, but will rather potentially eliminate the preferences they currently enjoy over some other ASEAN countries. The same situation will apply for Malaysia if it concludes bilateral FTAs with Australia and New Zealand in advance of the conclusion of AANZFTA.

More generally, the preferences granted by Australia and New Zealand to existing FTA partners (including ASEAN FTA partners) and to least developed countries are also a measure of the extent of discrimination against exports of the rest of the ASEAN membership in the Australian and New Zealand markets. AANZFTA will potentially overcome this discrimination and place the remaining ASEAN members on an equal footing with other countries enjoying duty-free access to the Australian and New Zealand markets. The ASEAN members concerned are Indonesia and the Philippines, and also Brunei in relation to the Australian market. AANZFTA will also provide greater security of market access for Cambodia, Laos, Myanmar, and Viet Nam, since the existing provisions for least-developed countries were granted unilaterally and could therefore in principle also be withdrawn unilaterally.

Looking to the future, Australia and New Zealand are both in the process of negotiating FTAs with China, and both countries have been holding preliminary discussions with Mexico. Australia has also been discussing a possible FTA with Japan. Conclusion of these agreements would dilute the preferences for ASEAN members under AANZFTA and the existing agreements with Australia and New Zealand. On the other hand, in the absence of AANZFTA, conclusion of FTAs with these other non-ASEAN partners will mean that the ASEAN members currently without duty-free access to the Australian and New Zealand markets will be further discriminated against in the markets of those two countries.

Thus the preferential impact of AANZFTA will be largely in the nature of "levelling the playing field" in the Australian and New Zealand markets, both among ASEAN members and between ASEAN and other existing and future FTA partners of those two countries. It is likely to have a greater effect in reversing existing trade diversion than in giving rise to fresh trade diversion.

The foregoing discussion indicates that the analysis of preferences in goods trade should address the following:

- Product coverage
- Margins of preference measured in relation to MFN tariff rates but also considered in relation to preferences extended under other preferential trading arrangements
- Period over which preferences are phased in
- Degree of correlation between the extent of preferences and indicators of trade competitiveness of countries enjoying the preferences.

As a first step in this analysis, the preferences provided by Australian concessions in the TAFTA were considered (see Appendix 4). Of the tariff lines for which duties were eliminated on entry into force of the agreement, the vast majority (1915 lines) were subject to MFN tariffs of 5% or less, with a very few products subject to MFN tariffs of 10% (48 lines) or 15% (11

lines). The latter however, though small in number, are of considerable significance, since nine of the eleven tariff lines relate to automobiles. Over the period 2007-2009 (2-4 years after entry into force) tariff elimination is completed on a further 257 tariff lines with MFN tariffs of 5% or less.

Elimination of tariffs on products with MFN rates of over 5% is generally not completed until 2010 (5 years after entry into force) or 2015 (10 years after entry into force). Of the 549 tariff lines for which tariff elimination is completed in 2015, 301 tariff lines are subject to MFN tariff rates of 15%, the majority of these being from HS Chapters 51-63 (textiles and garments). A further 230 tariff lines are subject to an MFN rate of 10%, the largest number (117 lines) again coming from the textile and garment chapters, with a further 61 lines referring to automotive and other machinery parts and 40 lines referring to plastic and rubber products. Finally, the 239 tariff lines for which tariff elimination is not completed until 2015 are all subject to an MFN rate of 25%, and almost all of them (234 lines) are from the textiles and garments chapter. Thus a clear pattern is observed whereby higher MFN tariff rates are subject to longer phase out periods, with tariff elimination being completed last for the most highly protected items. Garments and textile feature very prominently among the products for which the longest periods for completion of tariff elimination are provided. As already noted, the value of the preferences granted for these products is further diluted by the application of onerous rules of origin, with a restrictive RVC of 55% being applied in addition to the CTC rules that form the basis of the TAFTA rules of origin provisions.

Australia approach to granting of preferences in TAFTA is thus much less generous than in SAFTA, where tariffs on all products were eliminated on entry into force of the agreement. One likely reason for this is that Thailand is seen as more competitive than Singapore in the products of particular sensitivity to Australia. Another possibility is that the less generous treatment in TAFTA is a response to Thailand's requirement for extended phase-out periods on many products, in contrast to the case of Singapore where all products were duty free from entry into force of SAFTA (and of course most were already duty-free). The extent to which the generosity of preferences offered by Australia may vary according to severity of the partner demands for special treatment of sensitive products is something that could be tested in the AANZFTA negotiations.

In the case of services, the extent of preferences established by an FTA is in principle determined by comparing each member's FTA commitments with its GATS commitments for the sectors in which GATS commitments have been made, or with its existing practice in sectors for which no GATS commitments have been made. The latter information is difficult to compile on a systematic basis although GATS commitments are of course publicly available. It is also the case that GATS commitments do not necessarily reflect the actual practice of WTO members. Just as applied tariff rates can be lower than bound rates, so services sectors can in practice be liberalised to a greater extent than indicated by GATS commitments. In such cases comparisons of GATS commitments with FTA commitments will overstate the extent to the preferences being provided in the FTA. The extent of this over-statement is very difficult to measure, unlike the case with goods where comparisons between applied and bound tariff rates can readily be made.

Comprehensive analysis of the services commitments in the existing agreements would be a very large undertaking beyond the scope of this report, given the large number of sectors, subsectors and modes of supply in which commitments could be made. Pilot study of liberalisation commitments in three sectors by Stephenson (2005) contains information on the GATS commitments of Australia, New Zealand, Singapore and Thailand, and on the liberalisation commitments in ANZCERTA, NZSCEP and TPSEP. Her findings are summarised here as an example of a potentially useful analytical approach.

The sectors chosen by Stephenson were telecommunications, construction/engineering and distribution. Telecommunications and distribution are key "infrastructure sectors", while construction/engineering is a sector of export interest to developing countries. Restrictions were analysed according to the following GATS-related categories:

- Market Access
  - Restrictions on foreign ownership
  - Restrictions on entrance (licenses, quantitative restrictions)
  - Restrictions on competition (monopoly controls)
  - Restrictions on type of legal entity
- National Treatment
  - Restrictions on nationality/residence
  - Any other type of national treatment restriction

Sectors were classified in relation to these restrictions according to whether they are liberalised (no restriction in place), partially liberalised (meaning that some type of restriction remains in place, without any judgement as to the degree of restrictiveness) and not listed or no commitment (meaning that the agreements in question contain no commitments or no information on that sector). The study covers mode 3 (commercial presence) and cross-border trade (defined as a combination of modes 1 and 2). Mode 4 was omitted because of insufficient availability of comparable information. A summary of the results of Stephenson's study that are relevant for this report are contained in Appendix 5.

The summary shows that both Singapore and New Zealand made commitments in NZSCEP and TPSEP that extended beyond their GATS commitments in these sectors. In Singapore's case substantial additional commitments were made in telecommunications, beyond the commitments in GATS. In distribution services and construction/engineering Singapore had no commitments in GATS, but made substantial commitments in NZSCEP and TPSEP, to the extent that its commitments in NZCEP on cross-border supply of construction/engineering services exceeded those of New Zealand, although New Zealand subsequently improved its commitments in TPSEP so that they now match those of Singapore.

New Zealand retained in NZSCEP and TPSEP the limitation on commercial presence (mode 3) contained in its GATS commitments on telecommunication. It progressively improved its commitments in distribution services so that this sector is fully liberalised in the TPSEP, whereas wholesale distribution was only partly liberalised in its GATS commitments and no commitments had been made in franchising. In construction/engineering services New Zealand improved on its GATS commitments by fully liberalising cross-border supply, compared with the partial liberalisation committed in the GATS.

Three points can be made about the results of the comparisons reported here. First, no information is available on how far the commitments in the FTAs represent new liberalisation commitments and how far they represent bindings of existing practice. It can be noted that binding of existing practice can itself be valuable. Second, the fact that Singapore already had zero tariffs on almost all goods and is thus unable to offer any significant concessions on goods tariffs may have caused its partners to focus more attention on securing concession on services trade. Thus the observed tendency of Singapore to go further on services trade may in part reflect a concern to achieve overall balance in the negotiated package. Other ASEAN members that still have substantial tariffs on many goods have a wider range of concessions that they can offer. Third, in addition to the FTAs with New Zealand covered in Stephenson's study, Singapore has also concluded FTAs with the US (covered in Stephenson's study) and with Japan and Australia (not covered by Stephenson). There will thus be an element of "levelling the playing field" in the preferences offered by Singapore to its various FTA partners. FTA partners are likely to focus as much on the extent to which commitments by Singapore to them exceed or fall short of commitments to other FTA partners as on the extent to which the FTA commitments go beyond GATS commitments. Likewise ASEAN members will want to compare the commitments offered to them by Australia and New Zealand with the

commitments they have offered to other FTA partners, as well as with the GATS commitments of those countries.

Stephenson's analysis shows that in the three sectors covered by her study Singapore's commitments to the US and New Zealand were largely equivalent, the only exception being that Singapore went slightly further in its commitments to New Zealand on distribution services, by fully liberalising franchising, which is only partly liberalised in its commitments to the US.

B. CONCESSIONS

Viewing FTA market access and related commitments as concessions focuses attention on the adjustments likely to be faced by the member making the commitments. In addition to the dimensions already considered above in relation to preferences, a further dimension that will be significant will be the potential competitive threat likely to be faced by that country's producers. Competition for domestic producers is of course not necessarily undesirable, since it promotes increased efficiency and reallocation of resources in line with comparative advantage, but it will be a source of domestic political sensitivity, especially if it results in substantial (short-term) adjustment costs.

The question of difficulties that may be encountered by ASEAN as a group if it were to provide the same concessions as in the existing FTAs/CEPs could be answered in relation to the concessions offered by either Singapore or Thailand, or both. It is likely that the Thailand case is more relevant for other ASEAN members given that it is more representative and recent. There are two possibilities to be considered: the offering of the same concessions on the same products, or the offering of equivalent concessions on the sensitive products of the other ASEAN members, which are different from the sensitive products of Thailand. The latter possibility would appear to be more relevant. This requires an identification of the sensitive products of each ASEAN member, and an assessment of whether the treatment provided to Thailand's sensitive products in its FTAs with Australia and New Zealand would be adequate for those sensitive products of other ASEAN members.

In Thailand's case, as already noted, the most sensitive products were handled by providing very lengthy periods of 20 years for the phasing out of tariffs, and also providing for the use of special safeguards and TRQs during the phase-out period. The products treated in this way were dairy and beef products, some pork products, some fruits vegetables and crops, coffee, tea and cane sugar. Other sensitive products are subject to a 10 year phase-out period. Products in this category include a wide range of clothing and other textile products, iron and steel products, wine, and some fish products.

In negotiating AANZFTA, ASEAN will need to decide how sensitive products should be handled, and which products should be designated as sensitive. The TAFTA and NZTCEP offers one approach to the handling of sensitive products. The choice of products to be designated as sensitive is likely to be more complex. One issue is whether there is any common ground among ASEAN economies in the sectors they each consider sensitive.

Given it is relatively early on in the AANZFTA negotiations, what might be defined as sensitive, or highly sensitive, sectors for ASEAN countries is not clear. For this reason, the list of (highly) sensitive sectors determined in the ASEAN-China FTA is taken as a proxy for such sectors in an analysis relevant to the AANZFTA. Such an assumption would appear reasonable given the view of some ASEAN officials that some (highly) sensitive sectors which surprisingly have no tariff protection (see later) are defined as such because of tradition.

The first component of the analysis of the (highly) sensitive sectors relates to the associated tariffs. The following table provides the frequency distribution of the tariff levels for (highly) sensitive sectors for each of eight ASEAN countries that apply tariffs. Singapore which

does not apply tariffs and Vietnam, which is undergoing WTO accession and tariff determinations, are not included in the table.

Table 3.1: Frequency distribution of tariff levels for (highly) sensitive sectors for ASEAN countries

	BRN	IDN	KHM	LAO	MYN	MYS	PHL	THA
0		4	299	2	4	9	5	29
0-10	52	118	49	17	170	83	95	167
10-20	14	223	3	4	76	91	150	23
20-30		3		37	13	69	13	28
30-40				28	7	17	1	21
40-50						4		
50+		1						8
Total	66	349	351	88	270	273	264	276

Some key points from this Table are:

- Only the more developed ASEAN countries apply associated tariffs of 40% plus (Thailand 8, Malaysia 4, and Indonesia 1 of the 1341 potential tariff lines that one or more ASEAN countries have deemed (highly) sensitive – this should not be discouraging given that Australia and Thailand with such high tariffs have been able to negotiate a comprehensive FTA with agreement on the treatment of (highly) sensitive sectors in the longer-term which is accepting that sectors cannot be sensitive forever);
- More developed Brunei plus Cambodia, with its recent accession to the WTO, had the narrowest range of associated tariffs (0-20%) – Vietnam's tariff structure may be similar to Cambodia's following its accession process;
- But Cambodia also had the largest number of (highly) sensitive sectors at 351, followed closely by Indonesia with 349, then the remaining countries had between 264 and 276 apart from Laos at 88 and Brunei 66;
- Cambodia also had the largest number of (highly) sensitive sectors with associated applied zero tariffs (299) followed by Thailand (29) and the remaining ASEAN countries had between 2 to 9;
- Brunei was the only country with no associated zero tariffs (the implications of zero tariffs for so-called (highly) sensitive sectors are discussed later).

The next table sets out the frequency distribution of the number of ASEAN countries with the same (highly) sensitive sectors. There were no (highly) sensitive sectors that applied to more than 5 of the countries.

Table 3.2: Frequency distribution of the number of ASEAN countries with the same (highly) sensitive sectors

No. of countries with same sector as (highly) sensitive:	1	2	3	4	5
Frequency (%):	69.6	20.0	7.1	2.7	0.6

There are a number of points that can be made from this table, and the more detailed information underlying it:

- The high 69.6 percent in only a single country having the sector as (highly) sensitive is somewhat surprising given the similarities between the ASEAN countries in some aspects (e.g. there is evidence that ASEAN countries have been forming networks of components in some industries like electrical products).

.. This would suggest a key approach to improving ASEAN's trade and investment situation would be to free up these aspects internally;
- Sectors with a large number of ASEAN countries defining them as (highly) sensitive related to goods such as plastics, footwear, motor vehicles, and colour TVs – some of the individual country tariffs were large (20-60%) but others in the same sensitive sector were low (0-4%).
.. This raises the question of what is meant by sensitive if the sector is not associated with high (applied) tariffs, and the implications for FTAs given sensitive sectors often have different treatments in terms of the degree of tariff cuts or the period for implementing such cuts (if tariffs are already low such treatment has little meaning apart from locking in low applied rates by lowering bound rates);
.. In addition to lengthy phase-out period and use of TRQs and special safeguards, as in TAFTA and NZTCEO, such sectors could obtain non-tariff forms of protection, such as through anti-dumping actions, but would not need to be deemed (highly) sensitive for such action to be applicable. It may be that (highly) sensitive reflects a situation where the sector is deemed to be possibly requiring flexibility to raise tariffs or implement Emergency Safeguard Measures. And this last aspect may make more sense in that applying high tariffs on sectors where countries have a comparative advantage could impede the development of downstream industries with high value adding (e.g. as in the case of India and Sri Lanka with tea – lucrative blending being undertaken in a neighbouring country with more open trade policies). The majority of the high tariff sectors were associated with low Revealed Comparative Advantage (RCA, often measured by a product's share in a country's export in relation to its share in world trade) and low exports (the correlation was a significant -0.16 in both cases) but around a dozen data points had positive RCA's. Colour TVs in ASEAN might be an example of a components sector with strong comparative advantage also having high tariffs. Other sectors with high tariffs and a strong RCA were beans, ginger, glutamates, pigments, woven fabrics, and air-conditioners. In the Australian case the correlation between Australian tariffs and exports was -0.018. There were a small number of sectors with high tariffs and low exports but their contribution to the correlation estimate was swamped by a large number of sectors with low tariffs and high or low RCA's (reflecting a view that it was not worth protecting sectors where you had no comparative advantage and that there was no need to protect sectors where you did have a comparative advantage).
- The discussion in the last point applies also to the situation where nearly 100 sectors were deemed (highly) sensitive for one country but had zero applied tariffs (and in 2 sectors where 2 countries both had zero applied tariffs).

Some further analysis of the ASEAN (highly) sensitive sectors was undertaken involving Australian exports and imports. In the majority of cases (737 out of 1415) Australian exports were less than imports, suggesting that Australia would not be a threat to these (highly) sensitive sectors. In a further 379 cases there were no associated Australian exports or imports. In only 299 of the 1415 cases, or around 20 percent of the ASEAN (highly) sensitive sectors, did it appear Australia had a possible comparative advantage. But as already noted,, competition for domestic producers is not necessarily undesirable as it promotes efficiency as has been shown in the case of the CER in which tariffs between the partners' trade are very low.

Another issue to be taken into account is that because Australia and New Zealand are classified as developed countries in the WTO, AANZFTA will have to be notified to the WTO under GATT Article XXIV rather than under the Enabling Clause. This means that it will have to comply with the requirements of Article XXIV, in particular the requirement for coverage of "substantially all trade" (SAT).

Most ASEAN members are already familiar with the demands of negotiating Article XXIV-compatible FTAs. Singapore and Thailand have concluded several such agreements, and

have others under negotiation, while Brunei is a member of the TPSEP. The Philippines and Malaysia are each in the advanced stages of negotiating an FTA with Japan, and are in the earlier stages of negotiation of FTAs with other developed country partners. Indonesia has begun to negotiate an FTA with Japan, and it is understood that Viet Nam and Japan may be planning to begin negotiating an FTA shortly. However the remaining three ASEAN members – Cambodia, Laos and Myanmar, have no previous experience of negotiating Article XXIV-compatible agreements with developed country partners, so that the AANZFTA negotiations will be breaking new ground for them. The gap in development status between the so-called CLMV countries and the other ASEAN members also has the potential to give rise to problems in arriving at a common approach to negotiating concessions.

The potential difficulties of the lesser-developed ASEAN members in entering into an Article XXIV-compatible FTA are recognised in Australia and New Zealand. As noted earlier there is apprehension, especially among business, that these difficulties could become an obstacle to successful conclusion of AANZFTA. Based on trade interests it could be expected that Australia and New Zealand would take a constructive approach to finding a solution to the difficulties of Cambodia, Laos and Myanmar, given their much greater trade interests in the markets of the other ASEAN economies.

There are various devices that could be considered for addressing the sensitivities of Cambodia, Laos and Myanmar, while preserving an overall structure of AANZFTA capable of being defended as Article XXIV-compatible. Most obviously, the SAT requirement of Article XXIV does not preclude the exclusion of some products from the tariff elimination provisions of an FTA. Compliance with SAT can be measured asymmetrically, allowing the least-developed countries to exclude a larger proportion of their imports than other parties to the agreement. As in the TAFTA and NZTCEP, lengthy phase-out periods of up to 20 years could be provided, invoking the “special circumstances” exception to the 10 year standard for phase-out periods established in the 1994 Understanding on the Interpretation of Article XXIV. Furthermore the tariff reductions could be heavily “backloaded”, so that the largest share of the reductions occur in the latter years of the phase-out period, perhaps also with a “grace period” of some years before the reductions commence. The three countries would need to consider this option in relation to their adjustment needs and capacities, bearing in mind that concentration of adjustment in the latter stages of an implementation programme can present its own problems. Recourse to TRQs and special safeguards could also be provided during the phase-out period, as has also been done in TAFTA and NZTCEP. A further device that has been discussed in connection with some other FTAs is the inclusion of a review provision, that would allow the possibility for these countries to modify or suspend their commitments, if necessary indefinitely, if implementation of the commitments becomes excessively burdensome. The reviews might be provided at specified intervals, or might be “events-based”, triggered by adverse circumstances that affect the ability of the countries to safely continue implementing their commitments. Some discussion on the Article XXIV-compatibility of such review provisions could be expected, but as a practical matter it might be unlikely that other WTO members would challenge such arrangements. The extent to which these flexibilities would also be available to Viet Nam would be a matter of negotiation between the parties. Since Australia and New Zealand view Viet Nam as a potentially important market they can be expected to be more insistent on substantive commitments from Viet Nam than from the other three countries.

C. BUSINESS VIEWS

Preferences and concessions, especially in respect of tariffs, did not elicit many specific responses to the questionnaire or in the submissions. The fact that these aspects represent half the numbered components of the terms of reference suggests this, if it relates mainly to tariffs, could be an over representation of their importance in FTAs that have moved on to broader issues than goods tariffs. What comments were made came in the main from

government interviews. One set of comments were that preferences and concessions, even for less developed countries, tend to be time related – sectors cannot remain sensitive forever. But even some of these comments were of the form that the main interests were in non-tariff barriers, which became more obvious after tariffs were lowered, and people issues. Some non-tariff issues raised included investment, economic cooperation and harmonisation of standards. FTAs were seen as setting up a framework in which such issues could be developed further. However, this is a different agenda to traditional trade negotiations that focused on tariffs that were more measurable in their application and impacts.

As mentioned above, preferences were not specifically raised by many of the business groups. The Carpet Institute of Australia requested no additional margin of preference for Malaysia and certainly no special allowance for non-indigenous developing content preference, as was granted under TAFTA.

One point worth noting is that in some submissions a somewhat different view of concessions to that portrayed above was given. For example, the Music Council of Australia in their submission on the AMFTA viewed concessions as rights to regulate for aspects like culture under a FTA. So instead of being something Australia might give up for gaining some preferences, concessions in this context are something Australia imposes within the FTA to protect some aspect, in this case an approach thought to maintain culture.

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4. RISKS OF THE "SPAGHETTI BOWL" AND WAYS TO ADDRESS THEM

The term "spaghetti bowl" describes the outcome of the fragmentation of the world and regional trading systems into complex patterns of overlapping and intersecting PTAs, each with their own distinctive terms and conditions. As economies become involved in multiple RTAs the situation facing importers and exporters will become complex. For importers, the same product may be subject to several different tariff rates depending on its claimed origin. Exporters face the challenge of varying rules of origin in the markets of their preferential partners, with the result that manufacturing processes may have to be varied to suit the rules of origin applicable in each export market, and more complicated accounting and production management records may have to be maintained to ensure that claims of origin can be substantiated. Importers and exporters may also face inconsistencies between agreements in other areas as well such as standards and conformance, customs procedures and quarantine procedures. The outcome may be significant increases in transaction costs for businesses.

Some evidence on this issue is found in Brown et al (2004). They showed that the welfare effects of FTAs on the United States and Japan are small and that the "spaghetti bowl" effects can overwhelm these, potentially considerably more than what they measured in their analysis.

A good visual of the "spaghetti bowl" effect has been developed by the Integration and Regional Programs Department of the Inter-American Development Bank (see Appendix 6). The increasing proliferation and overlapping of CEPs/FTAs that may lead to complications for traders and administrators, increasing the costs of trading, is clearly evident. What is also evident is that the "spaghetti bowl" is less dense in the top left hand corner where the ASEAN countries sit. Moreover, if some of the strands of "spaghetti" representing individual CEPs/FTAs were more or less the same, having the same provisions etc, then they could be combined into one and lessen the density of the "bowl". This is what Australian businesses were wanting when they requested a consistent approach on aspects such as ROOs.

In principle the proposed AANZFTA could either reduce or intensify "spaghetti bowl" effects. The scope to reduce "spaghetti bowl" effects will depend on factors such as:

- Existence of common provisions in existing FTAs that could be adopted within the AANZFTA.
- Ability to agree on harmonised provisions in the AANZFTA.
- Possibility that AANZFTA provisions could operate in parallel with provisions in the existing FTAs (as apparently will be the case with the TPSEP and the New Zealand - Singapore Closer Economic Partnership Agreement).

Rules of origin are the most important factor in the "spaghetti bowl" effect. ASEAN members face the possibility of confronting different rules of origin in each of their FTAs. Already the existing FTAs between ASEAN and CER members are contributing to this "spaghetti bowl" effect. For Singapore exporters the rules of origin in SAFTA are different from those in NZSCEP, TPSEP, AFTA and ACFTA. Even though NZSCEP , AFTA and ACFTA all employ a 40% RVC rule, there can be differences in the way that the RVC is calculated that would effectively mean that exporters need to consider the NZSCEP rule as distinct from the rules in AFTA and ACFTA. The rules in TAFTA and NZTCEP are very different from the rules in AFTA and ACFTA. They differ also from each other, even though they both use CTC as their basic criterion, in that there is an additional RVC requirement for many products under TAFTA that does not apply to the corresponding products under NZTCEP.

As a first step to rationalizing ASEAN members' "spaghetti bowl" it would be obviously be desirable to harmonise the rules in the bilateral FTAs between ASEAN and CER members with the rules in AANZFTA. Essentially this would have to mean that the AANZFTA rules would have to replace the rules in all the bilaterals, or alternatively to allow the rules in the

bilaterals to continue to operate in parallel with the rules in AANZFTA, just as the rules in NZSCEP are apparently going to operate in parallel with the rules in TPSEP.

A key question then would be the choice of rules for AANZFTA. If the discussion is limited to FTAs involving ASEAN and CER members, there is much to be said in favour of adopting a CTC-based rule, as already exists in TAFTA, NZTCEP and TPSEP. The advantages of CTC-based rules has been discussed already earlier in this report, and there does appear to be a worldwide trend towards adoption of CTC rules in new FTAs. Since TPSEP and NZTCEP already have common rules, these could be used as a basis. This would require a considerable relaxation of the rules in TAFTA, reducing the RVC requirement for textiles and clothing from 55% to 50% and eliminating the RVC requirement for other products, which would all be steps in a desirable direction. But the 50% RVC requirements for textiles and clothing in TPSEP and NZTCEP are still undesirably restrictive. If the AANZFTA rules are to be CTC-based, they should ideally eliminate all RVC requirements as far as possible. Introduction of CTC-based rules would be a major change from SAFTA, but it is reasonable to assume that Australia and Singapore might be amenable to this change, since they have already adopted CTC-based rules in TAFTA and TPSEP, respectively. The key would be to achieve agreement on a "clean" set of CTC-based rules for AANZFTA, as far as possible free from additional RVC requirements. Exporters within AANZFTA would then have the benefit of modern easy-to-use rules that meet the criteria established by APEC, PECC and RIRDC for "best practice" ROOs.

However the question remains as to how CTC-based rules in AANZFTA would cohere with the ROOs in other FTAs involving AFTA members. As already noted ACFTA has adopted the AFTA ROOs, which are RVC based, and there may be other FTAs involving ASEAN members that use either RVC-based ROOs or CTC-based rules that differ significantly than those suggested above for AFTA. It is likely that trade with China is going to be more important for most AFTA members than trade with Australia and New Zealand. This would imply that the AFTA rules should be adopted in AANZFTA if harmonized ROOs are sought across ACFTA and AANZFTA, especially as ASEAN exporters are already familiar with these rules. This would however be a backward step, assuming that the arguments on the superiority of CTC-based rules are accepted.

An alternative could be for ASEAN to seek to establish two "models" of ROOs: a CTC-based model along the lines suggested above, and an RVC-based model, perhaps based on the AFTA rules. ASEAN could then seek to have these two "models" adopted as equally valid alternatives in each of the FTAs that it negotiated. Ideally the ROOs in bilateral FTAs negotiated by ASEAN members would also converge towards one of these two "models". This is by no means an ideal solution but it may be practical as a first step towards rationalizing ASEAN's "spaghetti bowl". It would mean at least that the best available "models" of each type of rule would be available to exporters in all of ASEAN's preferential trade arrangements. This would be a considerable improvement over the situation in all of the existing bilateral FTAs between ASEAN and CER members. The proviso for this is that the availability of parallel rules does not create further difficult problems. Some indication of the likelihood of this may be gained when the TPSEP enters into force.

Views on "spaghetti bowl" issues were sought in interviews with officials and business representatives. Some of these views were presented in the section on analyses of existing agreements. Other views included that the BCA, ACCI and ABAC see the multilateral WTO agreements as the main game and are worried about the "spaghetti bowl" effects so in a sense pluri-lateral agreements are more acceptable than bi-lateral ones. The ACTU also raised its concerns with the increased complexity and compliance costs to exporters as a result of differences in rules of origin in FTAs.

5. CONCLUSION

A. SUMMARY OF ISSUES COVERED

The purpose of the report is to present a comparative analysis of CEPs/FTAs, mainly those completed or currently being negotiated by Australia and New Zealand with ASEAN countries, aimed at drawing implications for the AANZFTA.

Significant differences as well as similarities in the provisions of the agreements were found. Differences are found in both the content of specific provisions such as market access for trade in goods and services, and in the inclusion or not of provisions covering particular issues, for example chapters on trade in services and investment, or understandings on labour and environmental issues. Many of these differences reflect differences in the socio-economic environment or the political economy or the time of agreement. Similarities tend to reflect WTO consistent aspects.

A comparative analysis of the provisions of the existing FTAs, classifying them according to whether they indicate a standard approach that may be applicable to the proposed AANZFTA or whether they reflect country specific priorities or sensitivities, is undertaken. It is envisaged that AANZFTA will cover in a consistent and compatable way bilateral trade between Australia and New Zealand on the one hand and each individual ASEAN member on the other, but not the bilateral trade between Australia and New Zealand themselves, or the trade among the ASEAN members themselves. Particular emphasis in the analysis is on rules of origin, given their potential importance in the "spaghetti bowl" effects, and these have evolved over time, for example early FTAs involving Australia had ROOs based on a value added approach whereas more recent ones were based on a change in tariff classification.

Market access and related commitments on goods and services by members of an FTA establish preferences for the other partner(s) which are key determinants of the trade effects of the FTA. Commitments can be viewed as concessions by the members making the commitments, providing an indication of the degree of adjustment that the FTA is likely to impose on them. It is noted in the report that several dimensions need to be taken into account in the analysis of preferences, including the margins of preference, product coverage, and the length of the transition period over which the preferences are introduced. It is also important to consider the relationship of the preferences to the trade competitiveness of the countries receiving them. As well as the relationship to MFN tariffs, the relationship to preferences available under other preferential arrangements needs to be considered, and it is also necessary to consider the special position of the CLMV countries.

Preferences in services trade are measured in principle by comparing each member's FTA commitment with its GATS commitment where these have been made, or with its existing practices in sectors for which no GATS commitments have been made. In practice, information other than on GATS commitments is likely to be difficult to obtain on a systematic basis.

Interviews with government and business representatives in Australia and New Zealand were undertaken, along with reading submission and attending presentations, to assist in assessing the likely attitudes of those countries towards the preferences to be granted within the proposed AANZFTA.

The question of difficulties that may be encountered by ASEAN as a group if it were to provide the same concessions as in the existing CEPs/FTAs could be answered to a degree in relation to the concessions offered by either Singapore or Thailand, or both. It is likely that the Thailand case, which is more representative and recent, is more relevant for other ASEAN members, though less so for CVLM. There are two possibilities to be considered: the offering of the same concessions on the same products, or the more relevant offering of equivalent concessions on sensitive products of the other ASEAN members, which are different from the

sensitive products of Thailand. This latter possibility requires an identification of the sensitive products of each ASEAN member, and an assessment of whether the treatment provided to Thailand's sensitive products in its FTAs with Australia and New Zealand would be adequate for those sensitive products of other ASEAN members. This assessment was based on information obtained from a range of sources, including the ASEAN Secretariat.

In principle the proposed AANZFTA could either reduce or intensify "spaghetti bowl" effects, the proliferation and overlapping of CEPs/FTAs that may lead to complications for traders and administrators, increasing the cost of trading. The scope to reduce "spaghetti bowl" effects will depend on factors such as:

- Existence of common provisions in existing FTAs that could be adopted within the AANZFTA.
- Ability to agree on harmonisation provisions in the AANZFTA.
- Possibility that AANZFTA provisions could operate in parallel with provisions in the existing FTAs (as apparently will be the case with the TPSEP and the NZSCEPA).

B. IMPLICATIONS FOR ASEAN IN FTA NEGOTIATIONS

A number of implications for ASEAN in the AANZFTA negotiations were raised in the earlier sections but are covered in this specific section for emphasis. It should be borne in mind that the TOR related to implications only but some guidance will be given on approaches to developing associated strategies, including involving the agreement negotiations. More analysis will be provided in relation to the negotiations on the "spaghetti bowl" effect as this was an aspect of the TOR.

In terms of the analysis of existing agreements which showed there are similarities and some differences, there are a number of implications in terms of core issues such as WTO consistency and WTO plus. There is a clear implication that the CER countries will be looking for negotiating a comprehensive agreement in terms of both product coverage and issue coverage, from which all parties would benefit. This would open up opportunities for new trade and investment opportunities as well as improved approaches to domestic policies such as in relation to competition, intellectual property and government procurement which research has shown are of most benefit to the liberalising country, leading to growth, and associated trade and benefits to other countries in a similar fashion to ODA. Industry has raised the position on some of these issues as critical to their investment etc decisions.

There are many similarities between the existing agreements in the treatment of the "core" FTA issues of trade in goods, trade in services, investment and dispute settlement. There is a clear preference for comprehensive product coverage. In the TAFTA and NZTCEP, rather than exclude Thailand's sensitive products altogether, their inclusion is facilitated by the use of extended time periods for implementation, and by allowing recourse to TRQs and special safeguards during the implementation period. The experience with TAFTA demonstrates that with patience and flexibility a comprehensive approach to market access for goods can be achieved that is acceptable to both sides.

There is a concern among Australian and New Zealand business that the comprehensive approach to product coverage should also be followed in AANZFTA, although it is also recognised that greater flexibility will inevitably be required in the commitments of Cambodia, Laos and Myanmar. It should not be impossible to structure the commitments of those countries in a way that provides the necessary flexibility, while at the same time maintaining the overall agreement in a form that can be defended as consistent with the requirements of GATT Article XXIV.

Consolidation of liberalisation commitments within ASEAN would make an FTA such as ANZFTA more attractive to partner countries as well as facilitating intra-ASEAN trade with its associated benefits to ASEAN countries and countries that trade with them. There would be

advantages in terms of linking directly into production networks and easier access to the ASEAN market as a whole for exporters and investors in the partner countries. The complexities highlighted in the analysis of treatment of sensitive sectors in ACFTA suggested that rationalisation of sensitive sectors and associated tariffs and other constraints to trade and investment within ASEAN and accelerating intra-ASEAN integration would be a useful preparatory step for any ASEAN level FTA.

Analysis of preferences obtained by Singapore and Thailand in SAFTA and TAFTA suggests that the generosity of concessions offered by New Zealand may be related to the degree of openness in the partner's market. At the same time the length of the transitional period over which the concessions are phased in appear to be positively correlated with the height of the base tariff. Textile and clothing products feature prominently among products with the highest base tariffs and the longest transitional periods. These are factors that ASEAN will want to take account in determining its negotiating position, once it has established its own priorities for market access in Australia and New Zealand.

The worldwide explosion in FTAs, where every country is tending to have a group of FTA partners will tend to progressively diminish the value of preferences. Thus the preferential impact of AANZFTA will be largely in the nature of "levelling the playing field" in the Australian and New Zealand markets, both among ASEAN members and between ASEAN and other existing and future FTA partners of those two countries. Preferences will also diminish over time as the level of tariffs continues to decline with liberalisation, unilaterally, bilaterally and multilaterally. One implication of these trends is that other provisions in the FTAs such as investment will grow in importance, supporting a comprehensive approach at the outset.

In relation to services trade, the existing agreements all broadly follow the GATS approach in a number of respects, but one point of divergence is between those that follow the positive list approach and those that adopt a negative list approach. ASEAN has a choice to make in deciding which approach to promote in the AANZFTA negotiations.

Provisions on investment are similar across the agreements. An important question that will need to be decided in negotiating AANZFTA is the relationship between the investment provisions and the services provisions on Mode 3 (commercial presence). The investment provisions of existing agreements do not provide for much liberalisation of pre-establishment policies, so that liberalisation of pre-establishment occurs mainly in the services commitments on Mode 3. On the other hand there is merit in providing for services Mode 3 investors to benefit from the investor protection provisions of the investment chapter. Investor-state dispute settlement is another important issue on which decisions will be needed. This is a separate matter from the dispute settlement chapters of the agreements, which generally follow a similar approach.

The existing agreements provide examples of two different approaches to treatment of government procurement, intellectual property and competition policy. Some modest substantive obligations on government procurement are found in the agreements involving Singapore. On the other hand the corresponding provisions in the two agreements involving Thailand do not contain substantive obligations, nor are there substantive obligations on competition policy in any of the existing agreements. A key issue in the treatment of such issues is whether the provisions should be subject to dispute settlement. The existing agreements thus demonstrate that inclusion of these issues in AANZFTA does not necessarily imply a need for ASEAN countries to undertake substantive obligations in these areas.

Rules of origin have emerged as a crucial issue where decisions have to be made that will require very careful consideration. Consistency between the rules in AANZFTA and the rules in individual bilateral FTAs of ASEAN members with Australia and New Zealand would appear to be obviously desirable. Consistency of rules across all of ASEAN's FTAs could be an important contribution to untangling the "spaghetti bowl" and/or minimising its adverse effects. However the task of achieving consistency in ROOs has been made more difficult by the

growing divergence that has recently appeared between the approaches to ROO design taken by ASEAN members and by Australia and New Zealand.

Although both ASEAN and the CER countries have traditionally adhered to RVC-based rules, Australian and New Zealand have more recently become converts to the Change in Tariff Classification (CTC) approach, which is now being introduced into ANZCERTA and has already been adopted as the basic approach in TAFTA, NZTCEP and TPSEP. ASEAN on the other hand has been endeavouring with some success to persuade new partners and prospective partners such as China and Japan to adopt the ASEAN RVC-based rules as the basis for the ROOs in ASEAN's FTAs with those countries. Thus there is already a basic difference in approach between the ROOs in AZCERTA, SAFTA and NZSCEP on the one hand, and AFTA, TAFTA, NZTCEP TPSEP and the FTAs or prospective ASEAN FTAs with China and Japan.

Given these developments, convergence in approaches to ROOs may be difficult to achieve. Nevertheless the issue is so important that the relevant considerations should be thoroughly explored. In particular it would be desirable to seek a definitive assessment of the relative advantages and disadvantages of the two approaches in facilitating trade. If the assessment bears out anecdotal evidence of problems with RVC-based rules, that might be a signal to ASEAN to consider changing its approach. While convergence in approaches to ROOs is certainly desirable, it would be unfortunate if convergence occurred around the less satisfactory of the two approaches.

The above conclusions drawn from the report could be used to come up with strategies to be used in the AANZFTA negotiations through current structures put in place by ASEAN for these negotiations. Lead groups on particular issues like goods trade could use the information to identify the initial position by CER countries and task individual ASEAN country officials and relevant business interest to come back with responses that could determine an initial ASEAN offer. This initial offer could then be further considered in light of previous CER countries (individual or joint) positions in relevant FTAs to determine whether it is a point for progressing negotiations or requiring further interaction with individual ASEAN countries before negotiations could progress. Aspects that could increase or diminish the 'spaghetti bowl' effect should be highlighted in these processes.

C. AREAS FOR FUTURE RESEARCH

There are a number of areas that would benefit from further research. It is also hoped the implications identified in this report will be taken up by groups more closely related to the ASEAN negotiators and turned into strategies that could be used by them in the negotiations. Some illustrations of this have been included in the report. Furthermore, the identified implications will have impacts on specific ASEAN country's industries which is outside the TOR, and too big a task for the resources provided for this report, but again approaches to this are illustrated in the report.

One key area for further research is the assessment of the relative merits of the two main approaches to ROOs, as highlighted in the preceding section. Other avenues for research would relate to clarifying the priorities of individual ASEAN members regarding offers and requests to be made in the AANZFTA negotiations on goods and services, and refining these into a common ASEAN position.

Feedback stimulated by the report could be taken into a workshop involving ASEAN officials and business interests, incorporating the views of these groups into a more comprehensive report than the one defined under this report's terms of reference. Finally, it is hoped the importance of some issues such as the choice of ROO and the benefits of services liberalisation will encourage the provision of better data for analysing such issues in the longer term.

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APPENDICES

Appendix 1. ANALYSIS OF THE EXISTING AGREEMENTS BETWEEN ASEAN AND CER COUNTRIES

	SAFTA	NZSCEP	TAFTA	NZTCEP	TPSEP
Market Access for Goods					
National Treatment	Yes		Yes	Yes	Yes
Customs Valuation for Imported Goods – follow GATT VII	Yes		Yes		Yes
MFN provisions re FTA/CU with third parties					
TRQs			Yes	Yes	
TRQ allocations methods (subject to no increase in restrictiveness)			Yes	Yes	
Special Safeguards					Yes
Standstill			Yes	Yes	Yes
Provision for Accelerating/Consultations to accelerate			Yes	Yes	Yes
NTMS					
Prohibit NTMs except as permitted under WTO/other articles	Yes	Yes	Yes	Yes	Yes
Admin fees etc approximate cost of services			Yes	Yes	Yes
Prohibition of import or export restrictions/bans					Yes
Prohibition of Export Taxes	Yes			Yes (ag)	
Prohibit Export Subsidies	Yes	Yes	Yes		Yes
Reaffirm adherence to WTO SCM	Yes	Yes	Yes	Yes	
Consultation re export-increasing subsidies – comply with SCM		Yes		Yes	

Prohibition of Subsidies					
Advance notice of changes to subsidy policies			Yes		
Customs					
Reaffirm Kyoto Convention	Yes			Yes	Yes
Conform with WCO standards/practices		Yes		Yes	Yes
Consider more detailed agreement within one year		Yes			
Periodic review to Facilitate Trade	Yes	Yes			
Transparency			Yes		
Share Information	Yes				Yes
Share Best Practices	Yes				
Mutual assistance in dealing with breaches			Yes	Yes	
Advance notification of changes			Yes	Yes	
Release of Goods					Yes
Treatment of Goods for which Cert of Origin issued			Yes		
Accessible process for judicial review or appeal procedures			Yes	Yes	Yes
Automation					
Paperless Trading – take APEC/WCO methodologies into a/c	Yes		Yes	Yes	Yes
Move to complete paperless trading as soon as practicable	Yes	Yes	Yes	Yes	
Risk Assessment					
Facilitate clearance of low-risk goods/focus on high risk items	Yes	Yes	Yes	Yes	Yes

Further develop risk management techniques	Yes				
Confidentiality				Yes	Yes
Publication and Enquiry Points			Yes	Yes	Yes
Express Shipments					Yes
Penalties					Yes
Advance Rulings			Yes	Yes	Yes
Resolution of differences over application of agreement				Yes	
Trade Remedies					
Anti-Dumping					
Reaffirm commitment to WTO rules			Yes	Yes	Yes
Retention of rights under WTO rules				Yes	Yes
Prohibit AD Actions	No				
Provision of price undertakings			Yes		
Investigation timeframe "reasonable" wrt dumped/non-dumped goods	Yes	Yes	Yes		
"Lesser duty rule"	Yes				
Raise de minimis threshold (dumping margin) to 5%		Yes			
Raise threshold for negligible level of dumped imports		Yes			
Reduced period for review		Yes			
Prompt notification to partner of AD applications	Yes	Yes			

Safeguards					
Safeguard actions prohibited	Yes	Yes			
Retention of rights to global safeguards under WTO rules			Yes		
Transitional Safeguards					
Restrictions on Use			Yes	Yes	
Investigation required			Yes	Yes	
Non-duplication with global safeguards under WTO rules			Yes	Yes	
Provisional safeguards allowed			Yes	Yes	
Notification and consultations			Yes	Yes	
Provisions for compensation			Yes	Yes	
Special safeguards					
For limited number of specified sensitive ag goods			Yes	Yes	
Limitations on use			Yes	Yes	
Balance of Payments Exception as per GATT 1004	Yes				
TBT and SPS					
Choose MR, UR or harmonisation based on cost effectiveness		Yes			

Positive List (product chapters)		Yes			
Work Programme to identify Priority Sectors		Yes			
Regular joint review with view to extension, resolving disputes		Yes			
Work toward harmonisation					
Equivalence of Mandatory requirement					
Provisions for MR for products in product chapters		Yes			
Commitment to favourable consideration	Yes				
Details to be set out in sectoral annexes	Yes				
Provisions for MR of conformity assessment for products in product chapters		Yes			
MR of equivalence of standards based on equivalence of outcome		Yes			
Exchange of Information		Yes			
Preservation of Regulatory Authority					
Confidentiality		Yes			
Work programme for cooperation on SPS	Yes				
Conformity Assessment					
Consider extending MR arrangements	Yes				
Reasonable steps to facilitate access	Yes				
Intention to apply APEC principles	Yes				
Information Exchange and Consultation					
Observe WTO obligations	Yes				
Go further on request	Yes				

SPS and Food Standards (stand alone)					
Reaffirmation of mutual rights/obligations under WTO SPS and relevant TBT provisions			Yes	Yes	Yes
Right to impose necessary measures consistent with international rights and obligations			Yes	Yes	Yes
Work towards harmonisation without changing protection levels			Yes		
Follow internationally accepted procedures for determining equivalence, without prejudice to need to comply with other mandatory standards			Yes		
Consider accepting control, inspection and approval procedures of partner, following internationally recognised procedures – review own procedures in request wrt reasonable and necessary			Yes		Yes
Trace-back for notification of non-complying shipments			Yes		
Consultative/cooperative approach to non-complying shipments			Yes	Yes	Yes
Avoid suspending trade based on one shipment			Yes	Yes	
Information exchange and cooperation			Yes	Yes	Yes
Establish expert group or SPS/Joint SPS Committee			Yes	Yes	Yes
DS not applicable			Yes	Yes	Yes
Confidentiality				Yes	
Urgent problems of health protection				Yes	Yes
Industrial TBT (stand alone)					
Reaffirmation of mutual rights/obligations under WTO TBT provisions			Yes	Yes	Yes

Right to impose necessary measures consistent with international rights and obligations			Yes	Yes	Yes
Retention of authority to implement technical regulations			Yes	Yes	
Adopt and apply APEC principles			Yes	Yes	
Work toward harmonisation and equivalence			Yes	Yes	Yes
Work towards compatibility and mutual acceptance of conformity assessment			Yes	Yes	Yes
Technical Cooperation and Contact Point			Yes	Yes	Yes
Consultation re impact of other agreements				Yes	
Services					
Services defined to include all 4 GATS modes of supply	Yes	Yes	Yes		Yes
Positive list of sectors to be committed		Yes	Yes		
Negative list of sectors to be excluded	Yes				Yes
Market Access commitments	Yes	Yes	Yes		Yes
National Treatment commitments	Yes	Yes	Yes		Yes
Use of GATS Scheduling procedures		Yes	Yes		
List of non-conforming measures	Yes				Yes
Non coverage of:					
Subsidies	Yes	Yes	Yes		Yes
Services supplied in exercise of government authority	Yes	Yes	Yes		Yes
Access to employment market	Yes	Yes	Yes		Yes

Government procurement	Yes	Yes	Yes		Yes
Provisions on domestic regulation of services	Yes	Yes	Yes		Yes
Provision for modification of commitments	Yes	Yes	Yes		Yes
Focus on priority areas/early outcomes on professional services		Yes			Yes
Prudential "carve-out" for financial services	Yes	Yes			
Separate chapter on telecommunications services	Yes				
Temporary Entry					
Full retention of right to regulate	Yes	Yes	Yes	Yes	Yes
Short-term entry of business visitors	Yes		Yes		
Long-term entry of intra-corporate transferees	Yes		Yes		
Government Procurement					
Single GP Market		Yes			
Exception for ODA purchases	Yes				Yes
Exception for extra-territorial procurement	Yes				Yes
Monetary threshold for transactions to be covered		Yes			Yes
National treatment		Yes			Yes
To be applied by listed entities	Yes				Yes
No preference to government owned companies	Yes				Yes
Value for Money Criterion	Yes	Yes			Yes
Abide by APEC principles		Yes		Yes	

Promote application of general provisions for open GP			Yes		
Working Group report on bringing GP within the agreement			Yes		
ROOs of the agreement to apply	Yes	Yes			Yes
Technical specs not to be designed to disadvantage partner suppliers	Yes				Yes
Tendering Process: open or limited	Yes				
Registration and Qualification – not to discriminate	Yes	Yes			Yes
Prohibition of offsets		Yes			Yes
Respect confidential information	Yes				Yes
Protection of IP	Yes				
Promotion of electronic procurement	Yes				Yes
Review of tender process	Yes				Yes
Transparency requirement	Yes				Yes
Opportunities for indigenous persons	Yes				
Exception for industry development	Yes				
Limitation on access to dispute settlement	Yes				
Staged DS process with NZSCEP DS as final step		Yes			
DS not applicable			Yes	Yes	
Exchange of information			Yes	Yes	
Working Group/future negotiations				Yes	
Investment					
MFN (wrt subsequent agreements)	Yes		Yes	Yes	

MFN (unrestricted)		Yes	Yes		
National Treatment	Yes	Yes			
Pre/post establishment, subject to any provisions in Annex			Yes	Yes	
Exceptions to NT for non-conforming measures	Yes				
Exceptions to NT for sectors, subsectors, activities	Yes				
Exceptions to NT permissible in future privatisations	Yes				
Delay on NT at regional level	Yes				
Schedules of limitations		Yes		Yes	
Regular review with a view to removing limitations		Yes			
Ability to modify or add to reservations/limitations	Yes	Yes	Yes		
NT wrt entitlement to benefit from agreements relating to investment			Yes	Yes	
MFNwrt IPP				Yes	
Expropriation permitted only if non-discriminatory	Yes		Yes	Yes	
Compensation required for expropriation	Yes		Yes	Yes	
Expropriation of land in accordance with national legislation	Yes				
Expropriation provisions not applicable to TRIPs-consistent compulsory licensing	Yes				
Provisions for unimpeded transfers	Yes	Yes	Yes	Yes	
Ability to block transfers via application of existing domestic law	Yes	Yes	Yes	Yes	
Ability to restrict transfers in event of serious BoP problems			Yes	Yes	
Subrogation	Yes	Yes	Yes	Yes	

Provisions for investor-state dispute settlement	Yes	Yes	Yes	Yes	
Access to competent judicial or admin bodies				Yes	
Review of subsidies	Yes				
Denial of benefits based on ownership/control	Yes		Yes	Yes	
Competition Policy					
Requirement to address anti-competitive practices	Yes		Yes	Yes	Yes
Implement APEC Competition Principles (best endeavours)		Yes		Yes	
Application of competition laws	Yes			Yes	Yes
Competitive neutrality	Yes				
Scope for exempting specific measures or sectors	Yes		Yes	Yes	Yes
Consultation and review	Yes		Yes	Yes	Yes
Review 6 months after introduction of generic competition law in Singapore	Yes				
Transparency	Yes		Yes	Yes	
Cooperation and information exchange			Yes	Yes	Yes
Intellectual Property					
Reaffirm commitment to TRIPs, WIPO etc	Yes	Yes	Yes	Yes	Yes
Copyright applies to IP stored in electronic media subject to permissible" limitations/exceptions	Yes				
Prevent export of goods infringing copyright/trade marks	Yes		Yes		

Cooperation on enforcement	Yes		Yes	Yes	Yes
Exchange information	Yes		Yes	Yes	Yes
Electronic Commerce					
Transparency	Yes				
Continue zero duties on inter-Party electronic transmissions	Yes		Yes	Yes	
Maintain domestic legal framework based on UNICITRAL model	Yes		Yes	Yes	
Minimise regulatory burden	Yes		Yes		
Legislation for electronic authentication/signatures			Yes		
Online consumer protections	Yes		Yes	Yes	
Online personal data protection	Yes		Yes	Yes	
Availability of electronic versions of trade admin documents	Yes		Yes	Yes	
Limitation on dispute settlement					
Cooperation			Yes	Yes	
DS not applicable			Yes	Yes	
Transparency			Yes	Yes	Yes
Educational Cooperation					
Dispute Settlement					

Choice of forum					Yes
Chosen forum to be used exclusively					Yes
Time-bound period for consultation		Yes	Yes		Yes
Use (by agreement) of good offices, conciliation, mediation		Yes	Yes		Yes
Provision for Arbitral tribunal		Yes	Yes		Yes
Rules on composition of arbitral tribunal		Yes	Yes		Yes
Rules on procedure of arbitral tribunal		Yes	Yes		Yes
Absence of right of appeal against tribunal finding		Yes	Yes		Yes
Provision for fresh dispute re adequacy of implementation			Yes		Yes
Compensation and/or Withdrawal of Benefits		Yes	Yes		Yes

Appendix 2: GUIDELINES ON "HIGH-QUALITY" FTAs

PECC Trade Forum Proposal for an APEC Common Understanding on RTAs

The APEC economies are committed to the establishment of free trade in the Asia-Pacific region, to be achieved on a non-discriminatory basis, by 2010 in the case of APEC developed economies and by 2020 in the case of developing economies. In recent times APEC economies have demonstrated an increasing propensity to engage in preferential trade arrangements (PTAs) with each other. These arrangements are often described as regional trading arrangements (RTAs), and some are called Closer Economic Partnerships (CEPs), reflecting a coverage that extends far beyond the traditional liberalisation measures. It is however the preferential character of these arrangements that distinguishes them from APEC's approach of "open regionalism". Nevertheless these preferential arrangements can contribute to the achievement of APEC's goals provided certain conditions are met regarding their design and implementation. It is proposed that APEC member economies enter into a "common understanding" on RTAs that will reflect their commitment to meeting these conditions. The "common understanding" will thus lay out a set of guidelines for ensuring that RTAs in the APEC region do in fact contribute to the achievement of APEC's objectives.

Suggested elements of the 'common understanding" are outlined below.

Relation to the "Pathfinder" Concept

While preferential trading arrangements (PTAs) may not meet the formal criteria for "Pathfinder" initiatives, the array of PTAs in which APEC economies have engaged may usefully be viewed in the spirit of the "Pathfinder" concept. This implies that they should be fully consistent with APEC objectives and principles. It also implies that participation in the network of PTAs being developed within the APEC region should, over time, become open to all APEC economies.

Conformity with APEC Liberalization Objectives

Commitment to the Bogor Goals

It is important that APEC members engaging in PTAs re-affirm that they remain committed to the Bogor goals and that pursuit of PTAs does not detract from that commitment. It should be acknowledged that this means that the liberalisation and facilitation provisions of PTAs between APEC members must be extended to all APEC economies by the Bogor target dates.

Timetable

The timetable for liberalisation within PTAs between APEC members should be consistent with the Bogor dates i.e. it should not extend beyond 2010 in PTAs involving developed APEC economies and beyond 2020 in other PTAs.

MFN Liberalisation

It is important that MFN liberalization should proceed in parallel with PTAs being implemented by APEC members. This will assist in minimising negative effects of PTAs and will provide assurance that the Bogor goals will ultimately be reached. In order to minimise

negative effects of PTAs it is important that all MFN barriers be reduced to moderate levels as soon as possible, thereby limiting margins of preference in PTAs and so reducing the scope for trade diversion. Elimination of peak tariffs and tariff escalation must be a priority.

Conformity with APEC Principles in the Osaka Action Agenda

Non-Discrimination

In line with the APEC principle of non-discrimination, credible assurances should be given that the concessions provided within the PTAs between APEC members will be made available to all APEC members as soon as circumstances allow, and no later than the Bogor target dates, *by one of the three following means:*

- *a credible up-front commitment on the part of APEC members to eventually multilateralise the concessions that they make to PTA partners.*
- *inclusion in each PTA of an "open accession" clause, providing for the automatic acceptance of a membership application from any economy willing to join the PTA on the same terms and conditions.*
- *a credible form of commitment to inclusiveness, whereby each member demonstrates preparedness to entertain the possibility of a PTA relationship with every other member, whether through negotiation of a bilateral PTA or through membership of a larger PTA grouping, and that no APEC member will be permanently excluded from larger PTA groupings that may develop among APEC economies.*

WTO-Consistency

In line with the APEC principle of WTO-consistency, PTAs between APEC members should be fully consistent with GATT Article XXIV and GATS Article V. It must be recognised that this is a necessary but not a sufficient condition for ensuring that these PTAs contribute to the achievement of APEC objectives.

Comprehensiveness and Flexibility

In line with the APEC principles of comprehensiveness and flexibility, PTAs among APEC members should cover trade in both goods and services, and should also cover all sectors, with sensitive sectors being liberalised on a slower timetable with due regard to the sensitivities of member economies.

Transparency

In line with the APEC principle of transparency, APEC members should institute their own process of peer review of PTAs involving APEC members. To be fully effective, peer review should occur before the PTAs are finally concluded. It is also important that provision be made for the inclusion of PTAs in the IAPs of APEC members. Also in the interests of transparency, the texts of PTAs should be made publicly available as soon as possible after agreements are concluded.

Cooperation

In line with the APEC principle of cooperation, peer reviews of PTAs involving APEC members should provide an opportunity for discussion of any problems that the PTAs being reviewed may be causing for other APEC members, and of ways of resolving those problems.

Consistency with other APEC Principles

Where relevant, provisions in PTAs among APEC members should be linked to the specific sets of Principles that APEC members have adopted such as the Principles on Competition and Regulatory Reform, the Non-Binding Investment Principles, the Principles on Government Procurement, and the Principles on Trade Facilitation.

Promoting Convergence and Minimising "Spaghetti Bowl" Problems

Rules of Origin

Rules of origin are not an appropriate mechanism for protecting "sensitive sectors" or for facilitating adjustment to liberalisation. Complex rules with protectionist purposes should be avoided. Ideally rules of origin should as far as possible be neutral in their impacts on trade flows. Rules of origin should be as straightforward as possible, and should be transparent, clear and consistent, and should not impose unnecessary compliance costs. It is important to allow full cumulation in PTAs with multiple members. The development by APEC members of "best practice guidelines" for preferential rules of origin would be a very useful contribution.

Facilitation Measures

Adoption of harmonised provisions across PTAs in the APEC region should be encouraged, especially for provisions on trade and investment facilitation. Use should be made wherever possible of international standards and APEC-wide agreements and processes, including mutual recognition agreements.

Exploration should be undertaken of the potential for harmonisation of facilitation provisions across PTAs to contribute to APEC objectives by opening the way for APEC-wide application of the provisions in question and by assisting eventual convergence of PTAs.

Consideration should be given to the development of "best practice" guidelines for each type of provision typically found in PTAs.

"Best Practice" Guidelines for PTA Liberalisation

APEC members should endeavour to ensure that the liberalisation of both goods and services within PTAs is progressive and automatic.

In the case of services trade, binding of the status quo should be regarded as acceptable. Where liberalisation is undertaken, MFN liberalisation should be regarded as the norm, especially in key infrastructure sectors. APEC members should not insist on preferential liberalisation by their PTA partners in these key sectors. To facilitate liberalisation of trade in services, relevant domestic regulations should be subject to a necessity test, and should be applied in the least trade restrictive manner possible.

In cases where liberalisation cannot commence immediately "negative lists" should be employed, with provision for regular reviews aimed at removing all remaining trade restrictions. This should apply to both goods and services trade, including "sensitive sectors". The "negative lists" should be subject to "sunset clauses" and there should be no permanent exclusions.

Development Dimension

PTAs and Closer Economic Partnerships (CEPs) between APEC economies should allow for assistance in capacity building to be provided to developing economy members by their developed economy partners. The potential for CEPs to serve as vehicles for the provision of regional public goods should be recognised and exploited.

PECC Best Practice for RTAs/FTAs/ in APEC

RTAs/FTAs involving APEC economies can best support the achievement of the APEC Bogor Goals by having the following characteristics:

Consistency with APEC Principles and Goals

- They address the relevant areas in Part 1 (Liberalisation and Facilitation) of the Osaka Action Agenda (OAA) and they are consistent with its General Principles. In this way they help to ensure that APEC accomplishes the free trade and investment goals set out in the 1994 Bogor Leaders Declaration.
- They build upon work being undertaken by APEC.
- Consistent with APEC goals, they promote structural reform among the parties through the implementation of transparent, open and non-discriminatory regulatory frameworks and decision-making processes.

Consistency with the WTO

- They are fully consistent with the disciplines of the WTO, especially those contained in Article XXIV of the GATT and Article V of the GATS.
- When they involve developing economies to whom the Enabling Clause applies, they are, whenever possible, consistent with Article XXIV of the GATT and Article V of the GATS.

Go beyond WTO commitments

- In areas that are covered by the WTO, they build upon existing WTO obligations. They also explore commitments related to trade and investment in areas not covered, or only partly covered, by the WTO. By so doing, APEC economies are in a better position to provide leadership in any future WTO negotiations on these issues.

Comprehensiveness

- They deliver the maximum economic benefits to the parties by being comprehensive in scope, and providing for liberalisation in all sectors. They therefore eliminate barriers to trade and investment between the Parties, including tariffs and non-tariff measures, and barriers to trade in services.
- Phase-out periods for tariffs and quotas in sensitive sectors are kept to a minimum, and take into account the different levels of development among the parties. Thus they are seen as an opportunity to undertake liberalisation in all sectors as a first step towards multilateral liberalisation at a later stage.

Transparency

- By making the texts of RTAs/FTAs, including any annexes or schedules, readily available, the Parties ensure that business is in the best possible position to understand and take advantage of liberalised trade conditions. Once they have been signed, agreements are made public, in English wherever possible, through official websites as well as through the APEC Secretarial website.

- Member economies notify and report their new and existing agreements in line with WTO obligations and procedures.

Trade Facilitation

- Recognising that regulatory and administrative requirements and processes can constitute significant barriers to trade, they include practical measures and cooperative efforts to facilitate trade and reduce transaction costs for business consistent with relevant WTO provisions and APEC principles.

Mechanisms for consultation and dispute settlement

- Recognising that disputes over implementation of RTAs/FTAs can be costly and can raise uncertainty for business, they include proper mechanisms to prevent and resolve disagreements in an expeditious manner, such as through consultation, mediation or arbitration, avoiding duplication with the WTO dispute settlement mechanism where appropriate.

Simple Rules of Origin that facilitate trade

- To avoid the possibility of high compliance costs for business, Rules of Origin (ROOS) are easy to understand and to comply with. Wherever possible, an economy's ROOS are consistent across all of its FTAs and RTAs.
- They recognise the increasingly globalised nature of production and the achievements of APEC in promoting regional economic integration by adopting ROOS that maximise trade creation and minimise trade distortion.

Cooperation

- They include commitments on economic and technical cooperation in the relevant areas reflected in Part II of the OAA by providing scope for the parties to exchange views and develop common understandings in which future interaction will help ensure these governments have maximium utility and benefit to all parties.

Sustainable Development

- Reflecting the inter-dependent and mutually supportive linkages between the three pillars of sustainable development – economic development, social development and environmental protection – of which trade is an integral component, they reinforce the objectives of sustainable development.

Accession of Third Parties

- Consistent with APEC's philosophy of open regionalism and as a way to contribute to the momentum for liberalisation throughout the APEC region, they are open to the possibility for accession of third parties on negotiated terms and conditions.

Provision for periodic review

- They allow for periodic review to ensure full implementation of the terms of the agreement and to ensure the terms continue to provide the maximum possible

economic benefit to the parties in the face of changing economic circumstances and trade and investment flows. Periodic review helps to maintain the momentum for domestic reform and further liberalisation by addressing areas that may not have been considered during the original negotiations, promoting deeper liberalisation and introducing more sophisticated mechanisms for cooperation as the economies of the Parties become more integrated.

RIRDC Ten-point checklist for better PTAs

1. Is the price reduction maximised?
2. Are 'problem' industries included in the PTA?
3. Is the PTA comprehensive, including substantially all trade that would have occurred under free trade?
4. Are the rules of origin simple, consistent and flexible?
5. Does the PTA increase certainty for trade and investment?
6. Does the PTA also liberate investment rules?
7. Is the PTA free of any 'new protectionist' measures, such as unnecessary environment, labour market or competition law requirements?
8. Are the details and consequences of the PTA well understood following a transparent process and independent analysis?
9. Have PTA partners reinforced their commitment to the WTO and is there a sunset clause to multilateralise the PTA?
10. Does the PTA allow for expansion to include new members and potential integration with other PTAs?

Appendix 3
Questionnaire

Officials

1) General – Relation Between Bi-laterals and AANZFTA

What implications do you see for the AANZFTA from Australian and NZ bi-laterals with ASEAN countries (list)?

Do you see any implications for the AANZFTA from Australian and NZ bi-laterals with non-ASEAN countries (list)?

Do you see any potential difficulties from AANZFTA not covering bilateral trade between Australia and New Zealand or trade amongst ASEAN countries (e.g. GATT Article XXIV) and if so how might these be averted, drawing on any precedents?

Identify any difficulties that prospective provisions may pose for ASEAN members not yet in bi-laterals with Australia or New Zealand.

Do you anticipate that an AANZFTA would operate in parallel with existing bi-laterals with individual ASEAN countries?

If so, which provisions do you expect to be found in the bi-laterals and not in AANZFTA, or vice versa, and which provisions do you think would be found in both, but with some differences between the two?

What problems if any do you foresee arising from any differences or inconsistencies between provisions in AANZFTA and the bi-laterals?

(For respondents with experience of multiple FTAs)

What are any main common elements and differences within all provisions?

Do you have an explanation for any differences?

Do you expect any common elements to form part of the AANZFTA and if so why?

2) Negotiating Issues in AANZFTA

Are there any issues such as comprehensiveness (the agreement covering trade in goods, services, investment etc), Rules of Origin, and Most Favoured Nation, being an issue that could cause negotiations to breakdown?

Would you see investment being covered in separate provisions or form part of the services provisions (Mode 3)?

3) Practical Impact

What changes (if any) in policies, laws, regulations or practices, or what specific government actions (if any) can be attributed to the bi-laterals in each of the following areas (a) in Australia or New Zealand (b) in Singapore, Thailand or Brunei?

- Customs
- SPS
- TBT
- Investment
- Competition Policy
- Government Procurement
- Intellectual Property
- E-Commerce

4) Intended Impact of AANZFTA

What changes (if any) in policies, laws, regulations or practices in any of the above areas are you hoping to encourage/catalyse in the ASEAN countries as a result of AANZFTA?

5) Further Development

What further developments have occurred since the entry into force of each agreement in any of the above areas as a result of the provisions in the agreement for review, consultation, or future negotiations?

6) Preferences

What were the main preferences secured by both parties in any relevant FTA and the key features behind these (list) e.g. special safeguards, high priority sectors? What do you consider the most valuable preferences achieved?

Would you expect such preferences to flow into the AANZFTA and if so why? Which potential preferences in AANZFTA do you regard as especially valuable?

7) Concessions

What were the main concessions extended to each party in any relevant FTA (list) and the key features behind these e.g. CLMV, sensitive sectors?

What difficulties (if any) were posed by the concessions required to be made?

Would you expect there would be difficulties providing the same concessions in the AANZFTA and if so what are these?

8) "Spaghetti Bowl" Issues

Are there possible risks, difficulties and/or increased transaction costs from the 'spaghetti bowl' effect with the development of the AANZFTA, for example in relation to Rules of Origin?

Is it feasible to achieve common Rules of Origin covering preferential trade with all ASEAN countries?

How might any 'spaghetti bowl' effects be addressed in the negotiations stage to diminish these (e.g. ability to harmonise)?

What do you see as the implications of a change in the basis of the Rules of Origin within CER for the proposed AANZFTA?

Businesses

1) Market importance

What are your important markets in ASEAN?

Which markets would you see it being important to bring into a FTA?

Do you have international supply chains, and if so how important are the ASEAN countries in those supply chains?

How important for you is it to extend FTA coverage to ASEAN markets not covered by existing bi-laterals (including those already under negotiation)?

How important is ASEAN to your business relative to other markets?

2) Opportunities and threats

What are your views on the opportunities and threats from FTAs between Australia or NZ with ASEAN countries?

What are your views on the opportunities and threats from FTAs between Australia or NZ with non-ASEAN countries?

What are your views on the opportunities and threats from an AANZFTA?

3) Impacts

What are the specific impacts (positive or negative) on your business from the existing bi-laterals? What additional impacts would you expect from AANZFTA?

What provisions (if any) are missing from the existing bilaterals that would have a particularly positive impact on your business if they were included? Would these provisions be equally important in AANZFTA?

What are the main obstacles to expanding your business (a) in the existing ASEAN bilateral partners? (b) in the other ASEAN countries?

Are you experiencing any difficulties with inconsistencies between the provisions of the different FTAs with partner country markets in which you are involved? If yes, what are these difficulties? How severe are they? How are you overcoming them?

4) Rules of origin

How important are rules of origin for your business?

In particular, are the rules of origin in the bilaterals (a) imposing additional costs on you and if so how significant are these costs? (b) causing you to change the way you produce, manage your supply chains, and/or do business generally, and if so in what way?

Do you foresee additional problems with rules of origin arising from an AANZFTA?

If the rules of origin in AANZFTA were different from those in some or all of the bi-laterals, would parallel operation of different rules of origin for the same market create any problems for your business? If so, how serious would these problems be?

Do you consider that it would be (a) beneficial and (b) feasible to achieve common Rules of Origin covering preferential trade with all ASEAN countries?

What do you see as the implications of a change in the basis of the Rules of Origin within CER towards changes in tariff classification rather than area content for the proposed AANZFTA?

What would be your preferred Rules of Origin?

Appendix 4. ANALYSIS OF CONCESSIONS IN TAFTA (by year of duty-free treatment and base tariff)

Year of Duty Free Treatment, HS Chapter group and description	Base tariff	HS tariff lines	Year of Duty Free Treatment, HS Chapter group and description	Base tariff	HS tariff lines
2005			**2007**		
01-24 Foods, beverages	Specific Duty	9	16 Fish (tuna)	5%	1
87 Motor Vehicles etc	Specific Duty	8			
50-59 Textiles	15%	2	**2008**		
87 Motor Vehicles etc	15%	9	25-38 Chemicals, plastics	5%	70
39-40 Plastic, rubber car parts	10%	17	40-43 Rubber and leather products	5%	5
56 Cordage, netting	10%	3	50-59 Textiles (cloth, yarn)	5%	163
64 Footwear Components	10%	1	61-63 Clothing, other textile products	5%	11
68-73 Vehicle Components	10%	7	90-91 Miscellaneous products	5%	3
84-96 Machinery, Other car parts	10%	21	43 Fur products	4%	1
01-24 Foods, beverages	5%	83	59 Textile wall coverings	4%	1
25-38 Chemical Products etc	5%	188			
39 Plastic products	5%	64	**2009**		
40 Rubber products	5%	56	64 Footwear components	5%	2
41-43 Leather products	5%	44			
44-45 Wood products	5%	24	**2010**		
48-49 Paper products	5%	168	51-63 Textiles	15%	270
59 Tyre cord fabric	5%	1	64 Footwear	15%	22
64-68 Footwear parts, umbrellas etc	5%	8	84-87 Automotive parts	15%	8
69 Ceramic products	5%	5	90 Medical appliances	15%	1
70 Glass Products	5%	16	38-40 Plastic and leather products	10%	40
71 Jewellery	5%	11	42-43 Leather products etc	10%	6
73-83 Metal products	5%	163	55-60 Textiles	10%	46

84-86 Machinery	5%	319	61-62 Garments	10%	28
87 Motor Vehicles etc	5%	59	63-65 Textile Products	10%	43
89 Marine vessels	5%	17	70 Automotive Glass Products	10%	3
90-96 Misc Products	5%	116	73-83 Metal products	10%	8
01-24 Foods, beverages	4%	77	84-85 Machinery and parts	10%	42
25-38 Chemical Products etc	4%	19	87 Automotive parts	10%	16
41-43 Leather products	4%	8	90-94 Miscellaneous Products	10%	8
44-45 Wood products	4%	38	72-73 Metal products	4%	8
48-49 Paper products	4%	13			
64-69 Stone, ceramic products etc	4%	52	**2015**		
70 Glass Products	4%	23	39-40 Plastic and rubber products	25%	2
72-83 Metal products	4%	146	42 Leather products	25%	3
84-85 Machinery	4%	157	58-60 Textiles	25%	3
87 Motor Vehicles etc	4%	14	61-62 Garments	25%	216
90-96 Misc Products	4%	11	63 Textile products	25%	15
22 Alcoholic beverages	3%	14			
28 Chemicals	2.50%	1			

Appendix 5

COMPARISON OF COMMITMENTS IN GATS, ANZCERTA, NZSCEP AND TPSEP SELECTED SECTORS

Key

	Liberalised
	Partially Liberalised
	No Commitment/Not Listed

(1) TELECOMMUNICATIONS

		Cross Border	Commercial Presence
(1) GATS Commitments			
Australia	Fixed Line		
	Mobile Network		
	Value-Added Services		
New Zealand	Fixed Line		
	Mobile Network		
	Value-Added Services		
Singapore	Fixed Line		
	Mobile Network		
	Value-Added Services		
Thailand	Fixed Line		
	Mobile Network		
	Value-Added Services		
(2) FTAs			
ANZCERTA Australia schedule			
ANZCERTA NZ Schedule			
NZSCEP NZ Schedule			
NZSCEP Singapore schedule			
TPSEP NZ Schedule			
TPSEP Singapore Schedule			

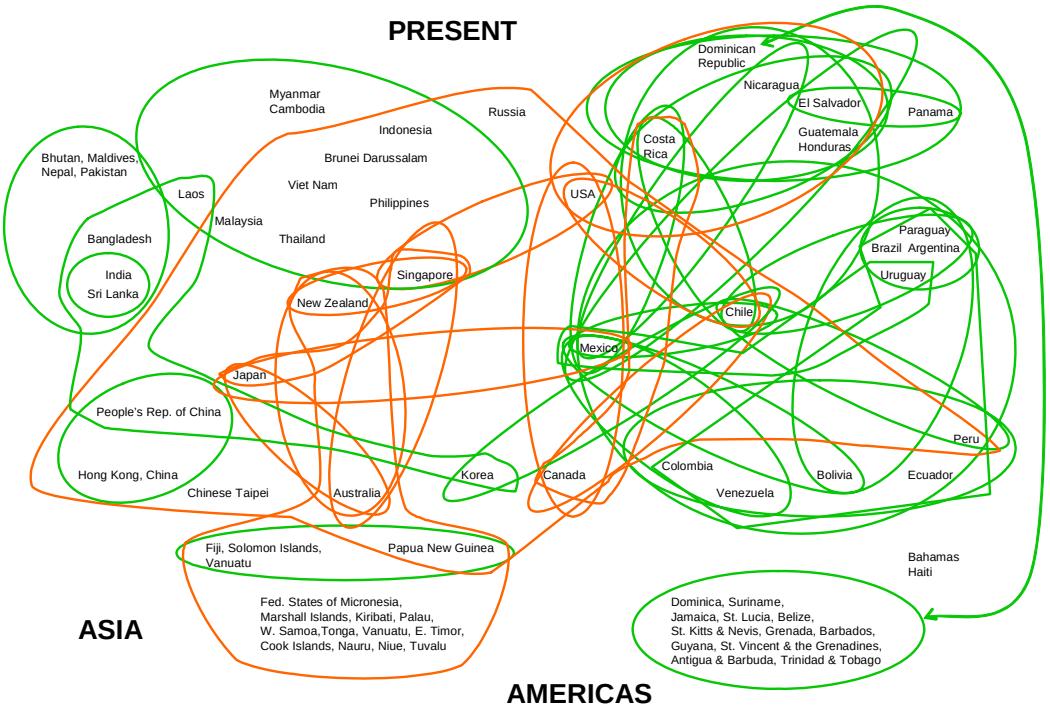
(2) DISTRIBUTION SERVICES

		Cross Border	Commercial Presence
(1) GATS Commitments			
Australia	Wholesale Trade Services		
	Retail Trade Services		
	Franchising		
New Zealand	Wholesale Trade Services		
	Retail Trade Services		
	Franchising		
Singapore	Wholesale Trade Services		
	Retail Trade Services		
	Franchising		
Thailand	Wholesale Trade Services		
	Retail Trade Services		
	Franchising		
(2) FTAs			
ANZCERTA Australia schedule			
ANZCERTA NZ Schedule			
NZSCEP NZ Schedule	Wholesale Trade		
	Retail Trade Services		
	Franchising		
NZSCEP Singapore schedule	Wholesale Trade Services		
	Retail Trade Services		
	Franchising		
TPSEP NZ Schedule			
TPSEP Singapore Schedule			

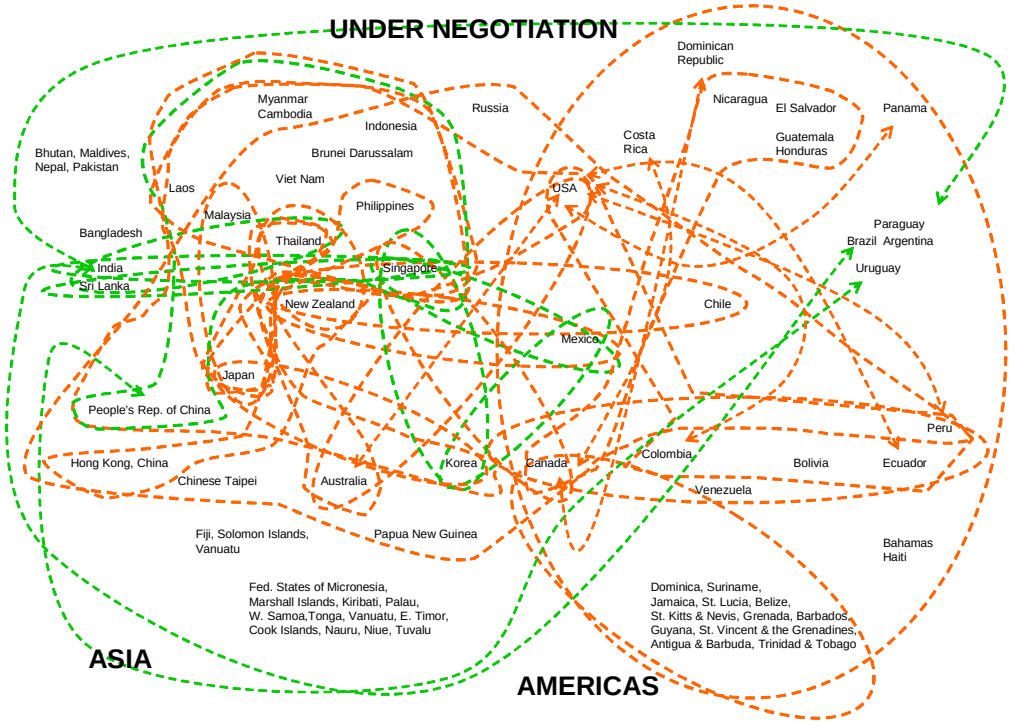
(3) CONSTRUCTION AND ENGINEERING SERVICES

		Cross Border	Commercial Presence
(1) GATS Commitments			
Australia			
New Zealand			
Singapore			
Thailand			
(2) FTAs			
ANZCERTA Australia schedule			
ANZCERTA NZ Schedule			
NZSCEP NZ Schedule			
NZSCEP Singapore schedule			
TPSEP NZ Schedule			
TPSEP Singapore Schedule			

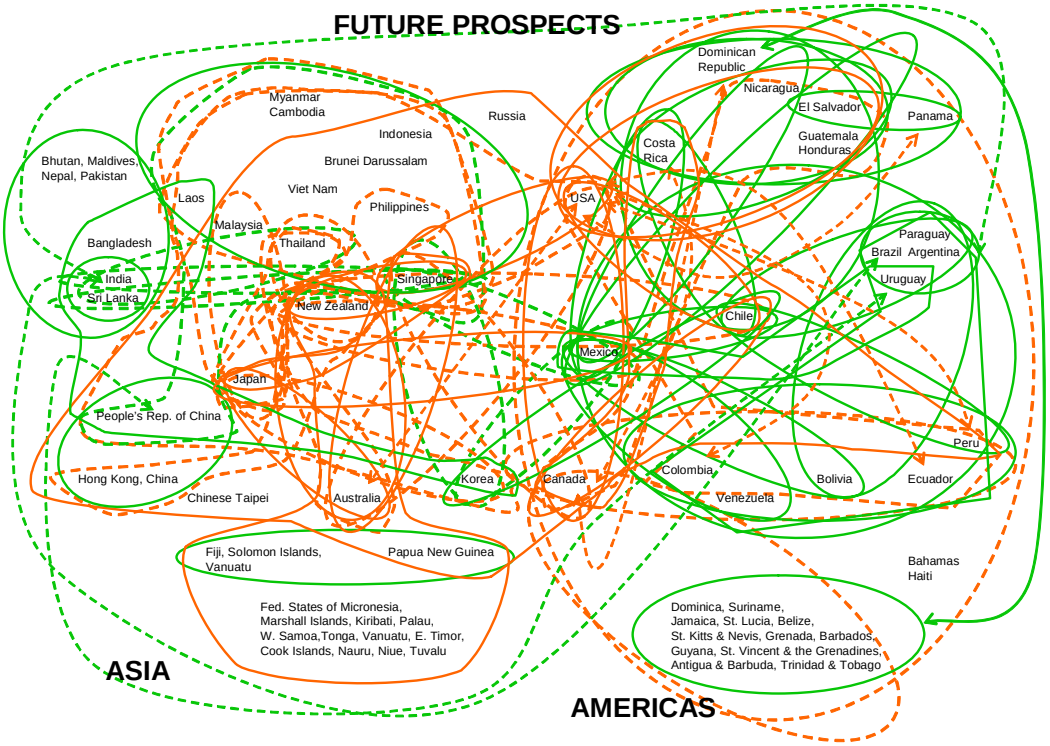
Appendix 6 SPAGHETTI BOWLS



Source: Integration and Regional Programs Department, Inter-American Development Bank



Source: Integration and Regional Programs Department, Inter-American Development Bank



Source: Integration and Regional Programs Department, Inter-American Development Bank