US BARRIERS TO TRADE

INTRODUCTION

In addition, to the US's tariff barriers against imports of textiles and textiles products, it also imposes a series of non-tariff barriers against such imports. The following paper highlights the most significant of these, that could be applied against textile trade, as identified by a European Commission Report in November 2002.

TARIFF PEAKS

Firstly, it should be recognised that despite the substantial tariff reduction and elimination agreed in the Uruguay Round, the US (as do other countries) retains a significant duties and tariff peaks on textiles and textile products.

The average trade weighted reduction made by the US in the Uruguay Round was 12% for textiles and clothing (to be implemented over ten years). This means that many significant tariff peaks will remain on products of export interest to Australia. For cotton and man-made fibre fabrics the duties range from 7% - 15.5%, although in the main they are at the higher end.

NON – TARIFF BARRIERS

Other customs barriers

The US imposes a number of additional customs impediments, such as the customs user fees (Merchandise Processing Fee or Harbour Maintenance Tax) and often excessive invoicing requirements on importers, which add to costs in a similar way to tariffs.

Technical barriers to trade

The proliferation of regulations at State level presents particular problems for companies without offices in the US. In addition, some federal standards differ from international standards meaning that manufacturers cannot directly export to the US products made to international standards. Other related difficulties concern labelling requirements and excessive reliance on third-party certification.

A particular problem in the US is the relatively low level of use, or even awareness, of standards set by international standardising bodies. All parties to the TBT are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, and some are indeed widely used internationally, very few international standards are adopted directly and some US standards are in direct contradiction to them.

Subsidies and Government Support

The US Government continues to provide significant direct and indirect support to US industry, by means of direct subsidies, protective legislation or tax policies. For example:

- The *Foreign Sales Corporations* (FSC) scheme - the US has failed so far to implement the Appellate Body's report of 20 August 2001, which confirmed that the FSC replacement, the *FSC Repeal and Extraterritorial Income Exclusion Act*

(ETI), is still an export subsidy inconsistent with the WTO Subsidies Agreement and the Agreement on Agriculture.

- The adoption by the US Congress of the 2002 Farm Act increases significantly the trade distorting effect of US farm subsidies (including for cotton and cotton processing). This Act is clearly inconsistent with the express commitments of WTO Members, reinforced at Doha in November 2001.

Excessive invoice requirements

Invoice requirements for exporting certain products to the US can be excessive. The information requirements far exceed normal customs declaration and tariff procedures. There should be no systematic demand for this kind of information. These formalities are burdensome and costly, constituting a barrier against new entrants and small companies. These effects are particularly disruptive in diversified high-value and small-quantity markets that would be serviced by Australian exports.

Customs formalities for imports of textiles, clothing and footwear to the US require the provision of particularly detailed and voluminous information. These requirements lead to additional costs and in some cases include confidential processing methods (type of finishing, of dyeing, etc.). Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outer shell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component; for outer shell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

The extension of the liquidation period up to 210 days also functions as an important trade barrier. Apparel articles often have a short life span (e.g. fashion items must be sold within 2 to 3 months) and therefore have to be marketed immediately. Consequently, the retailer or the importer is often not in a position to re-deliver the goods upon Customs request, in which case Customs applies a high penalty (100% of the value of the goods). In addition, during the liquidation period, Customs may still request any additional information necessary to establish the classification and the country of origin.

Container Security Initiative (CSI)

The US has launched a *Container Security Initiative* (CSI) as a response to US concerns involving potential terrorist threats to the international maritime container trade system. The CSI consists of four elements: security criteria to identify high-risk containers; pre-screening containers before they arrive to US ports; using technology to pre-screen high-risk containers and developing and using smart and secure containers.

User Fees

There is a series of user fees by which the user of a particular (formerly free) service pays an amount presumed to cover the cost of the service provided. As a result of laws enacted in 1985 and 1986, the US imposes user fees on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The *Customs and Trade Act of 1990* and the *Omnibus Budget Reconciliation Act of 1990* modified these provisions by, among other things, considerably increasing the level of the fees. Excessive fees levied for customs, harbour and other arrival facilities (facilities mainly used by importers) place foreign products at a disadvantage vis-à-vis US competition.

The most significant of the customs user fees is the *Merchandise Processing Fee* (MPF). The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US offshore possessions. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% *ad valorem* on formal entries with a maximum of US$485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 30 September 2003.

Harbour Maintenance Tax and Harbour Services Fee
US Customs also participates in the collection of the *Harbour Maintenance Tax* (HMT). The HMT is levied in all US ports on waterborne imports, at an *ad valorem* rate of 0.125%. Collected monies are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours.

Complex Regulatory System
In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection.

Regulatory differences at State level
There are more than 2700 State and municipal authorities in the US that require particular safety certifications for products sold or installed within their jurisdictions. The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components that have already been individually tested and certified.

Excessively Burdensome Labelling Requirements
US labelling and product description requirements, in particular for textiles, are often unnecessarily cumbersome. In addition, detailed information required about the country of origin of components of some products, such as automobiles, is aimed at favouring consumption of products of US origin.

Extensive product description requirements complicate textiles exports to the US. Particular rules for marking and labelling of retail packages to clarify the country of origin, indicate the ultimate purchaser in the US and state the name of the country in which the article was manufactured or produced are burdensome. Articles that are otherwise specifically exempted from individual marking are an exception to this rule.

All textile fibres imported to the US have to be marked with the generic names and percentages by weight of the constituent fibres present in the textile fibre product in amounts of more than 5%. Any products containing woollen fibre, with the exception of carpets, rugs, mats, upholsteries and articles made more than 20 years prior to importation, have to be clearly marked so as to satisfy the requirements of the *Wool Products Labelling Act of 1939* (with regard to information on weight and importer).

GOVERNMENT PROCUREMENT

Despite the WTO Government Procurement Agreement that the US is signatory to, there is a wide variety of *Buy America* provisions that persist, and to which are being added others for federally funded infrastructure programmes. Small business set-aside schemes also limit bidding opportunities for foreign contractors in a substantial manner.

Federal Buy America legislation

The *Buy America Act* (BAA), initially enacted in 1933, is the core domestic preference statute governing US procurement. It covers a number of discriminatory measures, generally termed Buy America restrictions, which apply to government-funded purchases. These take several forms:

- some prohibit public sector bodies from purchasing goods and services from foreign sources
- some establish local content requirements
- while others still extend preferential price terms to domestic suppliers.

Buy America restrictions therefore not only directly reduce the opportunities for exports, but also discourage US bidders from using imported products or services. The US industry, through the court system and legislative lobbying, ensures that Buy American preferences are enforced vigorously and maintained. The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only manufactured goods with at least a 50% local content.

The *Executive Order 10582 of 1954*, as amended, expands the scope of the BAA in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. As a result some Buy America provisions continue to significantly limit access to the US procurement market.

National security issues

The Department of Defence (DoD) also has significant procurement expenditures that exclude foreign suppliers of goods or services. The DoD is the largest public procurement agency within the US government, spending many tens of billions of dollars annually on supplies and other requirements. Except as required by the *Defence Supplement to the Federal Acquisitions Regulation* (DFARS), contracting officers must apply BAA requirements to supply contracts exceeding the US$2,500 micro-purchase ceiling and to service contracts that involve finishing of supplies when the supply portion exceeds the micro-purchase ceiling. In March 1999, the Director of Defence Procurement reminded US defence agencies and military departments to ensure that their contracting officers comply with requirements of the BAA, as an audit report had revealed that some contracts had been awarded to foreign firms in contravention of the relevant provisions.

The concept of “national security” was originally used in the *1941 Defence Appropriation Act* (now known as the **“*Berry Amendment*”**) to restrict procurement by the DoD to US sourcing, especially in relation to intermediate textile products, ie fabrics. Its scope has been subsequently extended to secure protection for a wide range of products.

DoD's procurement director has recently taken steps to ensure that contracts at or above the simplified acquisition threshold (presently US$100,000) are domestically sourced. To comply with the Buy America provisions, contracting officers must generally add 50% to the price when evaluating offers with non-qualifying country end products against offers with domestic end products.

In September 1996 Congress adopted an amendment that extended the initial scope of the Berry Amendment to cover also all textile fibres and yarns used in the production of fabrics. The result of this extension is that foreign fibres and yarns can no longer be used by US manufacturers for producing fabrics that they sell to the DoD.

There has been a trend towards making DoD's other domestic preferences (apart from the BAA preferences), less restrictive – by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. In practice, all NATO countries (except Iceland), all major non-NATO allies of the US (e.g. Australia, New Zealand) as well as Sweden, Finland and Austria have signed MoUs with the US allowing for a waiver of the corresponding restrictions.

However, these MoUs are subject to US laws and regulations, and consequently, other restrictions can be imposed annually by Congress through the appropriations process. For example, US legislation allows the Administration (DoD and USTR) to rescind a waiver if it determines that a particular ally discriminates against US products. In addition, Congress is unilaterally overriding the MoU by imposing *ad hoc* Buy America requirements during the annual budget process.

An amendment to the FY1998 Defence Appropriations bill, which would have given the Secretary of Defence blanket authority to waive the domestic preference for American speciality metals, stainless steel, flatware, clothing, or naval components, was substantially diluted by Congress. The compromise language only permits the Secretary of Defence to waive the restriction on a case by case basis under certain circumstances on a limited number of products, rendering the application of a waiver much more difficult.

In fact, the barriers to defence trade with the US result from a complex set of rules and practices aiming at imposing "domestic source restrictions" in US defence acquisition. The defence budget is approved line-byline and Congress regularly strikes out lines, including procurement programmes. The effect is that defence contractors lobby Members for support for individual programmes, offering inducements in return – sometimes ensuring that production capability will be located in Members' districts. This represents a kind of "regional juste retour" built into the budget approval process.

State Buy America legislation and restrictions

Buy America or "buy local" legislation is also rife at State level. More than half of all US States and a large number of localities do apply some "buy local" restrictions in one form or another. In some cases, the procurement of particular products is subject to such restrictions. Affirmative action schemes favouring small business or particular types of business (e.g. minority-owned) are also applied extensively in a large number of States.

Set-aside for small businesses

The Federal government actively seeks to promote the growth of small businesses in numerous ways. It provides loans and grants, develops programmes to encourage bids from small business, and sets aside certain procurement contracts for small business. The “setasides” are specifically exempted from application of the GPA. Small business set-asides account for tens of billions in expenditures or around 30% of all federal procurement dollars.

The relevant legislation is the *Small Business Act of 1953*, as amended, which requires executive agencies to place a fair proportion of their purchases with small businesses. This is achieved through two different types of set-aside schemes: one where US Federal government contracts are set-aside, regardless of the size of the contractor, in the event that there is a reasonable expectation of bids from two or more eligible US small or minority businesses; the other where all contracts below a certain threshold (currently US$2,500 to US$100,000) are set aside for US small or minority businesses - contracts are only released for competitive bidding in the event that two or more eligible bidders cannot be identified. In this context, small businesses are defined as businesses located in the US that make a significant contribution to the domestic economy (through payment of taxes and/or use of US products, materials, and/or labour) and are not dominant. The standard size criterion for eligibility as a small business for goods-producing industries is 500 employees or fewer. For services industries, depending on the sector, firms with total annual revenues of less than US$2.5 million to 17 million are considered to be small businesses.

In 1999, the Small Business Administration launched another programme -HUBZone- that provides contracting benefits to small businesses located in “historically under-utilised business zones”. The first goal of the programme is to channel at least 1% of overall federal procurement to HUBZone small businesses, which at current federal spending levels equates to about $2 billion. By the year 2003, that goal rises to 3% or about $6 billion.

The notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under normal bid procedures, there is a 12% preference for small businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the DoD, the standard 50% preference applies to all US businesses offering a US product.