# 5 Recent developments in trade policy

This chapter reports on selected developments in Australia’s trade policy, including:

* post-GFC trade developments;
* continued efforts to conclude the Doha Round of multilateral trade negotiations;
* ongoing negotiation of preferential bilateral and regional trade agreements, and the intention to initiate further agreements;
* international trade disputes at the World Trade Organization (WTO) that involve Australia; and
* other recent trade policy developments and program reviews.

The chapter is supported by appendix C which provides information on recent anti-dumping and countervailing duty cases in Australia.

## 5.1 Post-GFC trade developments

The GFC has been associated with significant disruption of global financial markets and some asset markets, the effects of which have been felt unevenly across the globe.

When the crisis began in 2008, world trade contracted more severely and rapidly than had occurred during the Great Depression (figure 5.1). One of the key risks then associated with the initial decline in trade and economic activity was an outbreak of protectionist policies, which could have risked extending the decline in global trade and economic activity, as occurred following the Great Depression.

The risk of increased protectionism and associated economic costs were recognised and a number of warnings were issued by bodies such as the OECD, which noted:

Open markets for trade and investment are a key driver of economic growth and development. Keeping markets open will therefore be an essential condition for recovery and long-term growth. Yet, just as the need to maintain open markets is greatest, concerns about the consequences of liberalisation and the perception that liberalisation may have even contributed to the current crisis have been growing. If these concerns result in a wavering commitment to multilateralism and in rising protectionism, the crisis will become even worse and recovery will be delayed. (OECD 2008, p. 8)

Figure 5.1 World merchandise trade by volume

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| Figure 5.1. World merchandise trade by volume. This figure compares  growth in world merchandise trade during the great depression with growth in world merchandise trade during the global financial crisis. |

*Sources*: CPB (2012); League of Nations (1939).

Governments across the globe also acknowledged the risks and made high-level commitments to avoid protectionist policies. For instance, the G-20, in its November 2008 Declaration, stated:

We underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports. (G-20 2008)

While global trade has since recovered, and now exceeds pre-GFC levels (figure 5.1), and average tariffs worldwide have continued on a downward trend (figure 5.2), the onset of the crisis was marked by an increase in the incidence of protectionist measures. The implementation of new protectionist measures has continued, although the rate of expansion appears to have moderated more recently (figure 5.3). Further, some of these measures have been temporary. For instance, in its May 2012 report, the WTO noted that nearly one fifth of measures that were introduced by G-20 countries from 2008 had since been removed (WTO 2012a).

Figure 5.2 World tariff rates (simple mean), 1996-2010**a**

Per cent

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a The simple mean of most favoured nation (MFN) tariff rates is the unweighted average of MFN rates for all products subject to tariffs calculated for all traded goods. Data are classified using the Harmonized System of trade at the six- or eight-digit level. Tariff line data were matched to Standard International Trade Classification (SITC) revision 3 codes to define commodity groups.

*Source*: World Bank (2013).

Trade remedies (such as anti-dumping investigations) have been the most common measure, followed by border measures (which include some instances of increases in tariffs). Combined, these two categories account for the bulk of the new measures (figure 5.3). While the number of measures is a poor indicator of the aggregate restrictiveness of measures on trade and does not identify their economic impact, it does provide an indication of government trade-measure activity.

In his 2012 report on trade-related developments, the Director-General of the WTO expressed the concern that the implementation of new measures is continuing to add to the stock of trade restrictions:

The new measures restricting or potentially restricting trade that were implemented over the past seven months are adding to the trade restrictions put in place in previous periods. The accumulation of trade restrictions is becoming a matter of concern. Moreover, this has to be considered in a broader perspective where the stock of trade restrictions and distortions that existed before the global crisis struck, such as in agriculture, is still in place. (WTO 2012a, p. 1)

Figure 5.3 Implementation of trade restrictive measures by WTO members**a**

Number of measures

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a Includes measures notified to the WTO that restrict, or have the potential to restrict trade. The potential impact of the respective measures are not necessarily comparable.

*Sources*: WTO (2011, 2012a).

There also appears to have been a shift in the policy emphasis of the trade remedies and other trade-restricting measures being implemented. In this regard, the Director-General of the WTO has noted:

The more recent wave of trade restrictions seems no longer to be aimed at combatting the temporary effects of the global crisis, but rather at trying to stimulate recovery through national industrial planning, which is an altogether longer-term affair. In addition to trade restrictions, many of these plans envisage the granting of tax concessions and the use of government subsidies, as well as domestic preferences in government procurement and local content requirements. (WTO 2012a, p. 2)

Separate monitoring of the implementation of trade-restricting policies, such as that undertaken by Global Trade Alert, also points to a continued increase in protectionism over recent years (Evenett 2012). In this monitoring, the majority of identified new measures were implemented by G-20 countries, in spite of the high‑level public assurances to eschew protectionism. Further, the monitoring indicates that crisis-era protectionism has been dominated by non-traditional forms of protectionism (such as direct industry assistance, export taxes/subsidies, investment restrictions and government procurement requirements):

During the crisis era, then, governments have circumvented tougher WTO rules and used beggar-thy-neighbour policies subject to less demanding or no binding multilateral trade rules. Much of that discrimination is pretty non-transparent — that is, it is murky protectionism. (Evenett 2012, p. 2)

Concern has also been expressed about the impact of countries using competitive devaluations to improve their trade performance post-GFC. A communique of Ministers of Finance and Central Bank Governors of the G20 stated:

… we reiterate our commitments to move more rapidly toward more market-determined exchange rate systems and exchange rate flexibility to reflect underlying fundamentals, avoid persistent exchange rate misalignments and refrain from competitive devaluation of currencies; to boost domestic sources of growth in surplus economies, and boost national savings in deficit economies. We reiterate that excess volatility of financial flows and disorderly movements in exchange rates have adverse implications for economic and financial stability. (G20 2012, p. 2)

The Director-General of the WTO recently also referred to the need for reform of the international monetary system to facilitate international trade and investment (Lamy 2012b).

With regard to protective measures, while on one hand, available evidence suggests that the incidence of such measures has risen, on the other hand, the actual monitoring of changes is encountering difficulties — for example, only eight delegations had volunteered information on government support for the preparation of the WTO Director-General’s 2012 report on trade-policy developments (WTO 2012a). In response, he has suggested improvements in transparency and peer review:

A complete and timely notification of all trade and trade-related measures will help strengthen WTO's trade monitoring. One specific area where efforts need to be heightened is in the field related to government support measures where the monitoring of developments is more complex and the relevant information publicly available is scarcer. Enhanced multilateral peer review should help Members abide by their commitments. (WTO 2012a, pp. 3-4)

While the impacts of the GFC on trade and protectionist measures are still unfolding, and concerns continue to be raised about the increased incidence of trade restricting measures, there are a number of factors which may be acting to moderate a possible shift to even greater protectionism. These include the constraining effects of multilateral trade rules, and the higher costs of protection associated with the increased global integration of manufacturing and commerce accompanied by higher trade of intermediate products.

The future of the multilateral trading system was discussed by the Director-General of the WTO at the Productivity Commission’s 2012 Richard Snape Lecture. Lamy drew attention to, amongst other things, the adverse effects of protectionism in the context of increasing trade in intermediate products, that is, of country dependence on imports to supply their export markets (box 5.1).

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| Box 5.1 Lamy’s 2012 Richard Snape Lecture |
| Pascal Lamy, Director-General of the WTO, delivered the Commission’s 2012 Richard Snape Lecture on 26 November, addressing *The Future of the Multilateral Trading System.* Lamy highlighted that the global economic outlook has increased the risks of higher protectionism:  … there has been worrying signs of the traditional propensity of nation-states to turn inwards when the global economic outlook is bad, but for the most part, countries have exercised restraint. There is the fear however that if unemployment and economic stagnation persists, this discipline may be tested. (p. 3)  He then stated that:  Protectionism does not work however. Closing off markets would be a mistake in a world where hampering imports will actively harm prospects for exporting success. Protectionism does not protect. It does not strengthen economies and it does not save jobs. Governments protect people by supporting domestic economic growth and social protection, not by resorting to short-term policies that may benefit the few at the expense of the many. (p. 3)  Lamy then discussed the changing nature of international trade, pointing to the increase in trade by developing countries, including increasing trade flows between developing countries. He also emphasised that trade is increasingly being made up of intermediate components rather than just final products:  Increasingly countries are trading in intermediates not final products. The concept of made in country X is becoming obsolete as we see the exponential increase of trade in intermediates or trade in tasks — where components of goods and services are produced and assembled in different countries. … This is why, as I intimated earlier, enacting protectionist measures, which could be trade distorting or trade diversionary, will actually have an inverse reaction in economies which are increasingly reliant on imports to complete their exports. (p. 6)  Lamy also outlined the role of the WTO, noting the importance of improved transparency provided through the monitoring and surveillance functions of the WTO:  The WTO, in many ways, is one of the most successful examples of rules-based multilateralism at work. Its capacity to administer and enforce the global trade rules especially through its monitoring and surveillance function has been a major input into preventing a widespread resort to protectionist measures. (p. 11) |
| *Source*: Lamy (2012a). |
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As the Commission has noted previously (PC 2009b), good transparency processes can be used as a basis to begin unwinding protective measures introduced in response to the crisis, and, more generally, to progress multilateral reform in new areas.

## 5.2 Trade negotiations and agreements

### Doha Round negotiations

The Doha Round of multilateral trade negotiations was launched in 2001 with an ambitious agenda.[[1]](#footnote-1) Originally, the goal was to conclude negotiations by 2005, but a conclusion is not yet in sight. One feature of the negotiations contributing to the delays is the ‘single undertaking’ condition, whereby no agreement can be reached until there is consensus amongst all parties across the entire scope of the agreement.

In order to progress the Doha agenda, the Australian Government has been promoting a ‘new pathways’ approach that involves attempting to conclude on those areas of the agenda where agreement might be more attainable. Two areas being pursued by the Australian Government as candidates for early completion are negotiations on trade facilitation and a plurilateral agreement on trade in services (Australian Government 2012a).

Trade facilitation is aimed at reducing barriers to trade, such as customs procedures. Estimates put the trade facilitation agreement as contributing almost half of the benefits that could accrue from completion of the Doha Round (Australian Government 2012a).

Non-tariff measures are a substantial source of impediments to global trade in their own right, but their relative importance has also increased over time, as average applied tariffs have decreased since the conclusion of the Uruguay Round. In regard to non-tariff measures, the WTO’s *World Trade Report 2012* reported, amongst other things, that:

* the range of non-tariff measures (on goods trade) and measures affecting services is vast, covering a broad range of different measures, further there is a lack of transparency, and in many cases, it is the way in which measures are administered, rather than the measures per se, that represents the greatest barrier;
* while non-tariff measures can have genuine public policy objectives, they are often used for protectionist purposes; and
* the mix of measures is constantly changing and when measures are subject to stricter disciplines there is the risk of substitution towards less regulated or transparent replacements (WTO 2012b).

On services, Australia is currently co-chairing, with the United States, plurilateral negotiations amongst 48 WTO members on liberalisation of trade in services. A plurilateral agreement (which would be known as the ‘Trade in Services Agreement’) amongst these parties would cover around 70 per cent of global services trade, but could be expanded further through the participation of other WTO members (Australian Government 2012a).

### Asia-Pacific Economic Cooperation

The broad objectives of the Asia-Pacific Economic Cooperation (APEC) are to promote free and open trade and investment, accelerate regional economic integration, encourage economic and technical cooperation, enhance human security, and facilitate a favourable and sustainable business environment (APEC 2012a). APEC operates on the basis of non-binding commitments and open dialogue. All decisions are reached by consensus and undertaken on a voluntary basis.

APEC’s 21 member economies account for 56 per cent of the world’s GDP, 40 per cent of world trade and more than 70 per cent of Australia’s trade in goods and services. APEC has been instrumental in achieving reductions in trade and investment barriers by member countries since its formation in 1989. This has been achieved through step-by-step, voluntary cooperation on practical issues, simplifying customs procedures, improving logistics and infrastructure, and encouraging unilateral trade and investment liberalisation.

The 20th APEC Economic Leaders’ Meeting was held in Vladivostok, Russia in September 2012. Leaders reaffirmed the commitment of APEC economies to the multilateral trading system, working towards successful conclusion of the Doha Round and the pledge to refrain from the introduction of new protectionist measures until the end of 2015. In addition, commitment was reached for APEC economies to reduce their applied tariffs on a list of 54 products designated as environmental goods (this includes products such as solar panels and waste treatment items) to 5 per cent or less by the end of 2015 (APEC 2012b).

APEC also facilitates capacity building initiatives amongst member economies.[[2]](#footnote-2) Its extensive network of officials-level committees address issues pertinent to regional cooperation and identify capacity building projects. APEC contributes funding to upwards of 100 of these programs each year.

### Preferential trade agreements

Australia has had some long standing preferential trade agreements with New Zealand, the Forum Island Countries,[[3]](#footnote-3) Papua New Guinea and Canada. In the last decade, Australia has also entered into agreements with: Singapore, (entered into force on 28 July 2003); Thailand (1 January 2005); the United States (1 January 2005); Chile (6 March 2009); and ASEAN and New Zealand (1 January 2010). The Malaysia-Australia agreement entered into force on 1 January 2013.

Further bilateral agreements are currently being pursued with China, Japan, Korea, Indonesia and India, although some of these negotiations have been protracted — for instance, negotiations with China commenced in 2005.

Australia is involved in negotiations for a number of regional agreements:

* a proposed Pacific Agreement on Closer Economic Relations (PACER) Plus agreement with Pacific Islands Forum members;
* an agreement with the Gulf Cooperation Council (GCC);[[4]](#footnote-4)
* a proposed Trans-Pacific Partnership (TPP) Agreement that would, on conclusion, expand on the current Trans-Pacific Strategic Economic Partnership Agreement between Brunei Darussalam, Chile, New Zealand and Singapore (which entered into force in 2006), to include Australia, Canada, Peru, Malaysia, Mexico, the United States, Vietnam, and Japan; and
* the ASEAN-originated Regional Comprehensive Economic Partnership (RCEP), which includes the 10 ASEAN members,[[5]](#footnote-5) as well as China, India, Japan, Korea and New Zealand.

#### Australia-New Zealand Closer Economic Relations

The Closer Economic Relations (CER) agreement between Australia and New Zealand entered into force in 1983. While the initial focus of the agreement was on merchandise trade, the CER agenda was progressively expanded to cover matters including trade in services, business regulation, taxation and government procurement. An investment protocol came into force on 1 March 2013.

In January 2012, the Australian and New Zealand Governments agreed that the Productivity Commissions of the two countries would conduct a joint study on the options for further reforms to enhance integration and improve economic outcomes across the countries. The final report was submitted to both governments in December 2012 (Australian Productivity Commission and New Zealand Productivity Commission 2012).

Some key points from the study include:

* the Commissions’ qualitative assessment is that CER has produced benefits overall for Australia and New Zealand, even though evidence is limited in some areas;
* CER initiatives have contributed significantly to trans–Tasman integration over the past 30 years; and
* barriers to further integration remain and new issues will emerge, often in complex areas including the regulation of services.

The study made 32 recommendations aimed at furthering (beneficial) integration. Most are intended to reduce regulatory barriers to services trade and commercial presence, and some remaining impediments to integration in goods, capital and labour markets.

At their February 2013 Leaders’ Meeting, the Prime Ministers of Australia and New Zealand welcomed the findings and recommendations of the joint study and ‘committed to finalising their joint response to the report by mid-2013 with an emphasis on measures that will produce net trans-Tasman benefits’ (Gillard and Key 2013).

#### Asia-Pacific regional agreements

In the Asia-Pacific region, the number of preferential trade agreements has increased substantially over the last two decades or so. In 1990, there were only five agreements in force in the region, accounting for around 20 per cent of agreements across the globe (figure 5.4). By 2000, 20 agreements were in force in the Asia-Pacific, including regional agreements such as the NAFTA and ASEAN agreements. By the end of 2012, the number of preferential trade agreements in force in the region had risen to 150, accounting for over 40 per cent of global agreements.

Figure 5.4 Number of trade agreement notifications to the WTO, January 2013**a**

Number and date of entry into force

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a Only includes agreements that are presently in force. Includes notifications under the Enabling Clause, GATT Art. XXIV and GATS Art. V. An agreement covering goods and services would require two separate notifications (in two instances, an agreement has three notifications, and one goods only agreement has two notifications). The Asia-Pacific category includes countries in South-East Asia, East Asia, Pacific Islands, and countries in North, Central and South America bordering the Pacific.

*Source*: Commission estimates based on WTO (2013b).

The large number of preferential trade agreements entered into in recent years means that such agreements potentially cover a large proportion of bilateral trade flows. The prevalence and over-lapping nature of these agreements among APEC economies is illustrated in figure 5.5.

Figure 5.5 Inter-linkages between PTAs in the APEC economies

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| Figure 5.5 Inter-linkages between PTAs in the APEC economies. This diagrams shows a very complex web of interlinkages |

*Sources*: Based on Lloyd and Maclaren (2004) and WTO (2013b).

As noted, Australia is already a party to nine agreements in the Asia-Pacific region, is negotiating a further four bilateral agreements and is participating in the negotiation of three new regional agreements — the Pacific Agreement on Closer Economic Relations (PACER) Plus, Trans-Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP).

The Australian Government’s stated ‘highest regional trade negotiation priority’ is the conclusion of a Trans-Pacific Partnership agreement (DFAT 2012). Australia decided to participate in the negotiations towards such an agreement in 2008. The first formal round of negotiations were held in Melbourne in March 2010. The most recent (seventeeth) round was held in May 2013 in Lima. Over the course of the process, the number of participating nations has increased, with Mexico and Canada joining the negotiations in mid-2012. In April 2013, Japan accepted an invitation to join the negotiations.

Negotiations for the proposed Regional Comprehensive Economic Partnership (RCEP) were launched at the East Asia Summit in November 2012. The negotiations will be guided by a set of guiding principles and objectives that were agreed to by the negotiating countries (ASEAN 2012). In addition to matters typically covered in preferential trade agreements (such as trade in goods and services, investment, competition, intellectual property, and dispute settlement), the negotiations will also cover matters relating to economic integration, development and cooperation. The guiding principles and objectives recognise ‘ASEAN centrality in the emerging regional architecture’.

RCEP negotiations are scheduled to be completed by the end of 2015. The completion of RCEP could help realise an ASEAN Leaders agreement to:

… hasten the establishment of the ASEAN Economic Community by 2015 and to transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital. (ASEAN 2007, p. 5)

In regard to the negotiations towards both the TPP and RCEP, the Australian Government stated in its Asian Century White Paper:

There are different possible pathways to a free trade area of the Asia–Pacific. The Trans-Pacific Partnership Agreement negotiations involve 11 APEC members and membership is likely to continue expanding. Australia will support the November 2012 launch of, and participate in negotiations for, the Regional Comprehensive Economic Partnership involving ASEAN, Australia, China, India, Japan, New Zealand and South Korea. (Australian Government 2012a, p. 208)

The two agreements, if formed to include the current negotiating parties, would constitute two separate trading blocs with little overlap in member-to-member trade. Trade between the negotiating parties of either agreement collectively accounts for around 27 per cent of total global merchandise trade (figure 5.6, left hand panel). Almost one third of the trade between negotiating parties would be covered only by the TPP, while a bit over a quarter would only be covered by RCEP (figure 5.6, right hand panel). A relatively small share of bilateral trade between negotiating parties would be covered by both agreements. Around one third of the trade between negotiating parties to either agreement, however, would not be covered — mainly because a substantial portion of this trade is between the United States (a negotiating party to the TPP) and each of China and South Korea (negotiating parties to RCEP).

### Future Australian engagement in preferential trade agreements

In late 2009, the Commission commenced a study on the ‘impact of bilateral and regional trade agreements on trade and investment barriers and on Australia's trade and economic performance’. Some of the key points from the study are reproduced in box 5.2.

Following the Commission’s final report, the Australian Government (2011) released a trade policy statement, which included its responses to the Commission’s report. The Government indicated that it agreed with most of the Commission’s recommendations, save for some elements of the recommendations relating to undertaking independent quantitative analysis on both the potential gains from an agreement and on the negotiated outcomes prior to ratification.

Figure 5.6 Contribution of TPP and RCEP negotiating parties to global merchandise trade and potential coverage of agreements, 2010

Per cent

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| Global merchandise tradea | TPP and/or RCEP coverage of trade between negotiating partiesb |
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a Calculated with reference to global exports. b Calculated with reference to exports by the 21 negotiating parties to RCEP and/or the TPP to other members, except for Brunei and Lao PDR, where reported imports by other members from these two countries have been used. There are 16 negotiating parties to RCEP and 12 negotiating parties to the TPP, with 7 countries being negotiating parties to both.

*Source*: Commission estimates based on Comtrade (2013) data.

The trade policy statement outlined five principles to guide Australia’s trade policy — unilateralism, non-discrimination, separation of trade and foreign policy, transparency, and the indivisibility of trade policy and economic reform. Citing these as a basis, the Australian Government identified the following as guiding the negotiation of further trade agreements:

* Multilateral agreements offer the largest benefits;
* Regional and bilateral agreements must not weaken the multilateral system – they must be genuinely liberalising, eliminating or substantially reducing barriers to trade;
* Australia will not seek to entrench preferential access to markets in trade negotiations, but simply an opportunity to compete on terms as favourable as anyone else’s;
* Australia will not allow foreign policy to dictate parties to and the content of trade deals;

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| Box 5.2 The Commission’s study on bilateral and regional trade agreements (BRTAs) |
| Some of the key points from the Commission’s 2010 study include:   * Theoretical and quantitative analysis suggests that tariff preferences in BRTAs, if fully utilised, can significantly increase trade flows between partner countries, although some of this increase is typically offset by trade diversion from other countries. The increase in national income from preferential agreements is likely to be modest. * The Commission received little evidence from business to indicate that bilateral agreements (to date) had provided substantial commercial benefits. This may be because the main factors that influence decisions to do business in other countries lie outside the scope of BRTAs. * Domestic economic reform offers relatively large economic benefits and should not be delayed to retain ‘bargaining coin’. * In the international arena, the Australian Government should continue to pursue progress in the Doha Round. * While BRTAs can reduce trade barriers and help meet other objectives, their potential impact is limited and other options often may be more cost-effective. * Current processes for assessing and prioritising BRTAs lack transparency and tend to oversell the likely benefits. To help ensure that any further BRTAs entered into are in Australia’s interests: * Pre-negotiation modelling should include realistic scenarios and be overseen by an independent body. Alternative liberalisation options should also be considered. * A full and public assessment of a proposed agreement should be made after negotiations have concluded — covering all of the actual negotiated provisions. * Matters that could increase barriers to trade, raise costs or affect established social policies should not be included in future agreements without a review of the implications and available options. More specifically, the Government should avoid the inclusion of IP matters as an ordinary matter of course. It should also seek to avoid the inclusion of investor-state dispute settlement provisions that confer additional substantive or procedural rights on foreign investors beyond those enjoyed by Australian investors. * The Government should also develop and publish an overarching trade policy strategy, to better coordinate and track the progress of trade policy initiatives, and to ensure that efforts are devoted to areas of greatest likely return. |
| *Source*: PC (2010b). |
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* The public will be well informed about negotiations for, and the content of, proposed trade agreements and have an opportunity for input; and
* Australia will press ahead with domestic economic reform irrespective of whether other countries agree to reform their economies. (Australian Government 2011, p. 9)

More recently, in its White Paper, *Australia in the Asian Century*, the Australian Government outlined a number of commitments relating to trade and investment. It recommitted to existing schedules to lower tariffs and to commitments encompassed by trade agreements. It also committed to work towards reducing unnecessary domestic regulatory impediments to cross-border business activity, investment and skilled-labour mobility. On its preferential trade agreement agenda, the Government expressed its support for an Asia-Pacific regional agreement, and confirmed its commitment to regional and bilateral negotiations currently underway (Australian Government 2012a).

## 5.3 Dispute settlement in the global trading system

### Disputes under WTO

Dispute settlement is central to the multilateral trading system under the WTO. It helps make global trade more secure and predictable. Disputes are dealt with by the WTO’s Dispute Settlement Body (DSB), which follows defined rules and specified timetables in resolving a case. Since the WTO’s inception in 1995, 458 disputes have been initiated (by 3 May 2013) under the dispute settlement system (WTO 2013a).

Australia has been a complainant in 7 cases since the commencement of the WTO in 1995 and has been a third party in 79 cases between WTO Members.

Fourteen complaints have been lodged against Australia since 1995. The last four have concerned certain Australian laws and regulations relating to plain packaging requirements for tobacco products. Separate complaints were lodged by Ukraine (DS434 — 13 March 2012), Honduras (DS435 — 4 April 2012), the Dominican Republic (DS441 — 18 July 2012) and Cuba (DS458 — received by Australia on 6 May 2013). After 60 days, if consultations have failed to resolve the complaint, the complainants may request adjudication by a panel. The first three complainants have requested the establishment of a panel, but to date, only in the Ukraine case has a panel been subsequently established (on 28 September 2012). The more recent Cuba case is at the consultation stage.

As alluded to above, countries can request to join disputes as a third party where they have a substantial interest in the matter. There are numerous third parties to the current disputes against Australia.[[6]](#footnote-6)

### Investor-state dispute legal proceedings against the Australian Government

Some trade agreements and investment treaties entered into by the Australian Government contain investor-state dispute settlement (ISDS) provisions for settling disputes between an investor of one party to the agreement and the other government. Under the provisions, dispute settlement options can include third-party arbitration.

Pursuant to the *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, which entered into force in 1993, Philip Morris Asia Limited has lodged a dispute against the Australian Government over its tobacco plain packaging requirements, which is subject to third-party arbitration. A tribunal was constituted on 15 May 2012. Philip Morris Asia Limited filed its Statement of Claim on 28 March 2013. Australia is due to file its Statement of Defence by 23 October 2013. A hearing on bifurcation (whether to split the hearing into a preliminary jurisdictional phase and a subsequent merits phase) is scheduled for 20 February 2014 (Permanent Court of Arbitration 2013).

There has also been a completed case where an Australian company (White Industries) brought proceedings against the Indian Government in relation to a contractual agreement between White Industries and state-owned enterprise (Rowley, Brower and Lau 2011).

There are also two other ongoing ISDS cases where Australia-incorporated companies (Planet Mining and Tethyan Copper Company) have initiated ISDS claims under Australian treaties, against the Governments of Indonesia and Pakistan, respectively (ICSID 2013).

## 5.4 Other trade policy developments

### Foreign investment

Considerable public comment has arisen over foreign investment in Australia, particularly with respect to agricultural land. In response, the Australian Government requested the ABS to collect information on the foreign ownership of land and water and ABARES, through the Rural Industries Research and Development Corporation, to report on the role of foreign investment in Australian agriculture. ABARES noted that in 2010, around 11 per cent of farmland was wholly or partly foreign owned and that the inflow of capital had boosted capacity and improved the efficiency of Australian agriculture. It concluded that introducing further barriers to foreign investment could adversely affect the performance of the agricultural sector (Moir 2011).

The issue is also being considered, in part, by a Senate Committee inquiry. In July 2011, the Senate referred an examination of the Foreign Investment Review Board national interest test to the Senate Standing Committees on Rural and Regional Affairs. In its November 2012 interim report, the Senate Committees recommended that the Government further review a number of the taxation arrangements that apply to foreign investors, including ways to prevent leakage of taxation revenue where foreign governments undertake agricultural production for humanitarian or food security reasons. The Committee is due to submit its final report in May 2013 (Senate Standing Committees on Rural and Regional Affairs 2013).

The Australian Government has also indicated that it will implement a national foreign ownership register of agricultural land. A working group has been established to consider the design of such a register, taking into account existing State and Territory land registration processes. The objective of the new register will be to ‘improve transparency of foreign ownership in agriculture without imposing unnecessary burdens on investors’ (Ludwig 2012c).

### Export Finance and Insurance Corporation

The Export Finance and Insurance Corporation (EFIC) is a statutory authority that provides export credits, insurance, reinsurance and other financial services that support Australian exports and overseas investments. EFIC is to operate its commercial account under a ‘market gap’ mandate, whereby it is only to provide services to viable projects where the private sector is unwilling or unable to provide those services.

In September 2011, the Australian Government announced that the Productivity Commission would conduct an inquiry into the arrangements for the provision of export credit through EFIC.

The Commission’s final report was submitted to Government on 31 May 2012. The Commission identified that the bulk of exports takes place without EFIC assistance, and that EFIC’s support goes to a relatively small number of large firms, often on a repeat basis. Further, EFIC’s commercial account operations have yielded a low rate of return, with some facilities subsidised by taxpayers. The Commission also found that there was no convincing evidence of systemic market failures for large firms in accessing export finance, nor for resource-related projects in Australia. Rather, information-related failures were likely to be limited to small and medium-sized enterprises that are new to exporting, or are attempting to access emerging markets. Accordingly, the Commission recommended that EFIC’s role should be limited to demonstrating to the private sector that providing export finance to newly exporting small and medium sized businesses can be commercially viable. To fulfil this demonstration role, EFIC should provide services on a commercial basis, including setting prices to cover the expected full economic costs of provision and being subject to competitive neutrality arrangements. Amongst the Commission’s other recommendations were the introduction of measures to enhance the transparency of EFIC’s operations (PC 2012b).

The Australian Government, in its White Paper on the Asian Century, indicated that it:

… will revise EFIC’s mandate to ensure more of its resources are devoted to addressing the market failures that impede Australian small and medium-sized exporters, especially in emerging and frontier markets. (Australian Government 2012a, p. 203)

In January 2013, the Australian Government announced further reforms to EFIC and provided its formal response to the Commission’s report (Emerson 2013). The Government announced that EFIC will apply a new market failure test to determine exporters’ eligibility for EFIC services and will direct more resources to small and medium-sized enterprises looking to expand into Asian markets. The Government agreed, in whole or in part, with 16 of the Commission’s recommendations, and noted the remaining six.

### The Anti-Counterfeiting Trade Agreement (ACTA)

The stated aim of the ACTA is to reduce the international trade of goods that infringe intellectual property rights, in particular, counterfeit trade marks and copyright pirated products. The ACTA text was finalised in 2010, and signed by Australia in November 2011. The treaty was subject to review by the Joint Standing Committee on Treaties, with a report tabled in Parliament on the 27 June 2012 (JSCT 2012).

The Committee raised a number of concerns about the proposed treaty, including what it saw as a lack of clarity in the text, the absence of provisions protecting individuals’ rights and the potential of the treaty to shift the balance of interpretation of copyright, intellectual property and patent laws in favour of intellectual property rights holders. It also noted the international reactions to the treaty and that the treaty had not yet been voted on by the European Parliament and that the ratification process in the United States appeared to have stalled.

The Committee recommended (Recommendation 8):

That the *Anti-Counterfeiting Trade Agreement* not be ratified by Australia until the:

* Joint Standing Committee on Treaties has received and considered the independent and transparent assessment of the economic and social benefits and costs of the Agreement referred to in Recommendation 2;
* Australian Law Reform Commission has reported on its Inquiry into Copyright and the Digital Economy; and the
* Australian Government has issued notices of clarification in relation to the terms of the Agreement as recommended in the other recommendations of this report. (JSCT 2012, p. 61)

And (Recommendation 9):

In considering its recommendation on whether or not to ratify the *Anti-Counterfeiting Trade Agreement* (ACTA), a future Joint Standing Committee on Treaties have regard to events related to ACTA in other relevant jurisdictions including the European Union and the United States of America. (JSCT 2012, p. 62)

In its response, the Australian Government agreed in full or part with the Committee’s recommendations. It agreed to commission an analysis of the economic and social benefits and costs. It also agreed to take into account events in other jurisdictions into its consideration to ratify ACTA (Australian Government 2012b).

To date, the ACTA has not been ratified by Australia.

### Australia’s anti-dumping arrangements and activity

#### Review into Australia’s anti-dumping arrangements

Like other forms of protection, anti-dumping helps some at a cost to others. The Productivity Commission considered Australia’s anti-dumping and countervailing system in an inquiry commencing March 2009 (PC 2009e). The Commission found that the anti-dumping system benefited a small number of import-competing firms, but imposed greater costs on the rest of the economy, although the net economic cost was likely to be small. The Commission recommended that a public interest test be introduced, as well as changes to arrangements for continuing anti-dumping measures and measures to improve transparency.

The government’s response was provided in June 2011, when the Government announced a range of changes to Australia’s anti-dumping system (O’Connor and Emerson 2011). While it accepted (in full or in part) 15 of the Commission’s 20 recommendations, it did not accept the introduction of a public interest test.

In July 2012, the Australian Government announced a further review into the arrangements for assessing and investigating anti-dumping matters and to consider the feasibility of establishing an anti-dumping agency (Clare 2012). The review, headed by the Hon. John Brumby, reported to Government in November 2012. Broadly, the review found that despite recent reforms, the administration of Australia’s anti-dumping system was under-resourced and required further ongoing reform to restore public confidence.

It is recommended that a new International Trade Remedies Authority, Agency or Commission be established under legislation. To fully realise its benefits, the agency must be:

* separately and adequately resourced, and
* headed by a legislated CEO or Commissioner who reports directly to the Minister for Home Affairs and Justice.

The agency should be established within Customs and Border Protection to preserve the links and synergies with Customs that are critical to the effectiveness of the system.

It is recommended that the new agency be principally located in a major capital city where there is a high concentration of Australian industry.

It is recommended that an immediate increase in resources be made available to facilitate establishment of the new agency and ensure timely resolution of the underlying issues. (Brumby 2012, p. 11)

In response to the Brumby Review and a report by the non-Government members of the Prime Minister’s Taskforce on Manufacturing, in December 2012, the Australian Government announced changes to the administration of Australia’s anti-dumping system (Combet *et al.* 2012). The changes include the establishment of a Melbourne-based Anti-Dumping Commission to investigate complaints and an increase in funding for the administration of the anti-dumping system (of $27.4 over four years) to enable it to deal with anti-dumping cases more quickly. The Government will also introduce stricter remedies, including:

* removal of the mandatory consideration of lesser duty, to allow dumping duties to be imposed at the highest permissible level in complex cases;
* clarification of the existing legislation to make it easier to impose retroactive duties;
* the introduction of a new review mechanism; and
* increases in the penalties for importers who make false or misleading statements to Customs to avoid duties (Department of Industry, Innovation, Science, Research and Tertiary Education 2012).

The changes to the anti-dumping system formed part of the Australian Government’s February 2013 Industry and Innovation Statement (see chapter 3).

#### Recent anti-dumping and countervailing duty cases in Australia

Appendix C provides information on recent anti-dumping and countervailing duty cases in Australia.

1. The list of topics covered by the Doha Round covers traditional tariff and non-tariff measures and a wide range of other measures, namely: intellectual property, investment rules, competition policy, transparency in government procurement, trade facilitation, anti-dumping, regional trade agreements, dispute settlement understanding, environment, e‑commerce, small economies, debt & finance, technology transfer, capacity building, least‑developed countries, special & different treatment. [↑](#footnote-ref-1)
2. As part of APEC’s New Strategy for Structural Reform program, the Productivity Commission is involved in a twinning program, whereby it is hosting officials from other APEC economies to impart its experiences as an advisory body to government. [↑](#footnote-ref-2)
3. Under the South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA), Australia and New Zealand have a non-reciprocal agreement which offers duty free or concessional access for goods originating from the Forum Island Countries, which include: Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. [↑](#footnote-ref-3)
4. The GCC has suspended negotiations pending a review of their trade agreement policy. [↑](#footnote-ref-4)
5. ASEAN members include Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam (7 January 1984), Viet Nam (28 July 1995), Lao PDR (23 July 1997), Myanmar (23 July 1997) and Cambodia (30 April 1999). [↑](#footnote-ref-5)
6. Third parties include: DS434 (Panel) — Argentina, Brazil, Canada, Dominican Republic, Ecuador, European Union, Guatemala, Honduras, India, Indonesia, Japan, Republic of Korea, New Zealand, Nicaragua, Norway, Oman, Philippines, Singapore, Chinese Taipei, Turkey, United States, Uruguay, Zambia, Zimbabwe, Chile, China, Cuba, Egypt, Malaysia, Mexico, Republic of Moldova, Nigeria, Peru and Thailand; DS435 (Consultations) — Brazil, Canada, El Salvador, European Union, Guatemala, Indonesia, Nicaragua, New Zealand, Norway, Philippines, Ukraine, Uruguay and Zimbabwe; and DS441 (Consultations) — Brazil, Canada, El Salvador, European Union, Guatemala, Honduras, New Zealand, Nicaragua, Norway, South Africa, Ukraine and Uruguay. [↑](#footnote-ref-6)