

**National Interest Analysis [2014] ATNIA 23
with attachments**

**First Protocol to Amend the
Agreement Establishing the ASEAN-Australia-New Zealand
Free Trade Area (AANZFTA)**

(Nay Pyi Taw, 26 August 2014)

[2014] ATNIF 27

Attachments:

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NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

**First Protocol to Amend the Agreement Establishing the
ASEAN-Australia-New Zealand Free Trade Area
(Nay Pyi Taw, 26 August 2014)
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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the *First Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* (the First Protocol) into force. The First Protocol was signed on 26 August 2014.
2. The First Protocol amends the *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* (AANZFTA)¹, as provided for in Article 6 (Amendments) of Chapter 18 (Final Provisions) of AANZFTA. This Article provides that AANZFTA may be amended by agreement in writing by the Parties, and that such amendments shall come into force on such date or dates as agreed among them.
3. Article 5 of the First Protocol provides that it shall enter into force 30 days after the date on which Australia, New Zealand and at least four of the ten ASEAN Member States have notified other AANZFTA Parties of the completion of their respective internal requirements necessary for entry-into-force. The Parties are aiming for entry-into-force in the first half of 2015.

Overview and national interest summary

4. The First Protocol addresses a number of administrative requirements and implementation issues with AANZFTA that have discouraged or hampered business utilization of AANZFTA's provisions when importing or exporting goods. Amendments to these requirements should facilitate greater business use of AANZFTA.
5. The First Protocol responds to the concerns of a range of businesses which have not been able to make use of AANZFTA due to the requirement to include on the certificates of origin information which these businesses regard as commercially sensitive. It also simplifies the presentation of AANZFTA's rules of origin, so that they should be more user-friendly for business and this should facilitate greater business use of the Agreement. There are also improvements to the Parties' administration of AANZFTA, which will also enable the Parties to respond more effectively in future to business needs, including through adjusting administrative practice to changing business requirements.

¹ [2010] ATS 1

Reasons for Australia to take the proposed treaty action

6. The First Protocol amends AANZFTA by replacing the Rules of Origin (ROO)² set out in Chapter 3 (Rules of Origin) of AANZFTA and in Annex 2 (Product Specific Rules -PSR) with an amended Chapter 3 and Annex 2 that:
 - present the PSR in a single consolidated schedule that covers all products and which also implements the ROO in the updated version of the Harmonized Commodity Description and Coding System (HS);³
 - remove the requirement for business to provide information on the free-on-board (FOB)⁴ value of goods on certificates of origin (COO)⁵ for most shipments.
 - streamline the process by which the Parties make any agreed administrative changes to the list of data requirements to be included on COO, so that such changes can be implemented administratively and without the need for a treaty amendment; and
 - clarify the process for future introduction of an updated version of the HS into AANZFTA's ROO.
7. It also amends Chapter 2 (Trade in Goods) of AANZFTA to establish arrangements to expedite the process by which AANZFTA Parties implement HS updates in AANZFTA's tariff commitments.

Certificates of origin

8. The tariff commitments in AANZFTA only apply to goods which comply with its ROO provisions and are therefore considered to be AANZFTA "originating" goods. Traders wishing to claim AANZFTA tariff treatment when importing goods must be in possession of a COO declaring that the goods are originating in accordance with AANZFTA's provisions on ROO. COOs must contain the data elements specified in the List of Minimum Data Requirements set out in Appendix 2 to Chapter 3 of AANZFTA. At present, this includes the FOB value for all shipments.

² Rules of origin (ROO) establish the criteria for determining whether goods will qualify for preferential tariff treatment under AANZFTA (i.e. whether a good 'originates' in one or more of the Parties).

³ The Harmonized Commodity Description and Coding System is a structured nomenclature, maintained by the World Customs Organization (WCO), which assigns an internationally-recognised 6-digit code to every traded product. Among other things, the HS is used to record tariff commitments and PSRs in free trade agreements. The WCO updates the HS every five years to reflect the types of goods being traded.

⁴ The FOB value refers to the value of the goods at the time of export, including the cost of transport to the port or site of final shipment abroad.

⁵ A certificate of origin (COO) is a certificate issued by a designated body in the exporting Party that provides *prima facie* evidence of origin for the purposes of claiming preferential tariff treatment.

9. The removal of the obligation to include the FOB value on most COOs will address the concerns of a range of businesses which have not been able to make use of AANZFTA because they consider that this requirement would force them to share commercially sensitive information with other companies in the supply chain.
10. The First Protocol also deletes the List of Minimum Data Requirements from AANZFTA and provides instead for a list of data requirements to be managed by the Parties in the future administratively (without the need for treaty amendments). This should improve the administration of AANZFTA by allowing any future problems that business identifies with the data requirements on the COO to be addressed more expeditiously by the Parties.⁶

Consolidation and transposition of product-specific rules

11. Currently AANZFTA has a relatively complex combination of a partial PSR Annex, covering only some products, and a general rule that applies to all other products. The First Protocol will amend the ROO to present them in a more user-friendly form, with a single annex setting out product-specific rules for all goods, consistent with the approach used in Australia's other free trade agreements (FTAs). This should assist business' understanding of and compliance with the ROO.
12. The Parties are also taking advantage of the consolidation of the PSR (which are the detailed ROO applying to individual products) into a single schedule to update the format of the PSR to be consistent with the current version of the HS (HS 2012). Whereas most AANZFTA Parties now use HS 2012, the AANZFTA PSR are recorded in the previous version of the HS (HS 2007). Consequently, traders need to use HS 2012 when making the customs import declaration to import goods into an AANZFTA Party, but need to be in possession of a COO which is issued using HS 2007. This has introduced unnecessary complexity for businesses, as they need to operate in both HS 2007 and HS 2012 nomenclatures, and creates a risk that business will inadvertently make a mistake as a consequence when claiming AANZFTA tariff preference.
13. The First Protocol also provides guidance on the process to be followed by the Parties in undertaking the updating ("transposition") of AANZFTA's PSR and tariff commitments into revised versions of the HS, when this is updated at five-yearly intervals by the World Customs Organization (WCO). It specifically provides that each Party shall ensure that the transposition of its tariff commitments "is carried out without impairing existing tariff concessions" and that the transposition of the PSR "shall be carried out without impairing the existing commitments". The First Protocol also provides for the Parties to develop methodologies and guidelines to ensure the transposition is done in a timely and effective manner to respond to business needs.⁷

⁶ For more information on COOs and minimum data requirements, see Attachment II – *Regulation Impact Statement*, paragraphs 5-12.

⁷ For more information on the PSR, see Attachment II – *Regulation Impact Statement*, paragraphs 13-20.

Obligations

14. Article 1 of the First Protocol provides for the insertion of a new Article 13 (Transposition of Schedules of Tariff Commitments) into AANZFTA, which will require the Parties to carry out transposition of the schedules of tariff commitments without impairing existing tariff concessions and in accordance with procedures to be adopted by the Committee on Trade in Goods. The new Article 13 will sit in the existing Chapter 2 (Trade in Goods) of AANZFTA.
15. Article 2 of the First Protocol provides for the replacement of the existing Articles 4 and 19 of AANZFTA (which sit in Chapter 3 - Rules of Origin) with amended versions of each Article to reflect the change to a consolidated PSR Annex. The amendment to Article 19 also provides for the Parties, through AANZFTA's Committee processes, to adopt a List of Data Requirements that will set out data requirements for COOs when the List of Minimum Data Requirements is deleted from AANZFTA in accordance with Article 3(2) of the First Protocol. In addition, the amended Article 19 provides for the AANZFTA Committees to adopt transposed PSR, following the periodic updating of the HS, and for such transposed PSR to be carried out without impairing the existing commitments.
16. Article 3 of the First Protocol provides for amendments to the Annex on Operational Certification Procedures (OCP) of Chapter 3 (Rules of Origin) of AANZFTA, with rules 6, 7 and 10 to be replaced by new rules 6, 7 and 10 relating to the content, issuance and acceptance of certificates of origin. These amendments are necessary to reflect the deletion of the list of Minimum Data Requirements from AANZFTA. Article 3, paragraph 2 of the First Protocol deletes the existing list of minimum data requirements for an application for a COO (Appendix 1 to Chapter 3 of AANZFTA) and list of minimum data requirements for a COO (Appendix 2 to Chapter 3 of AANZFTA) and provides that the revised list of data requirements set out in Appendix 3 to the First Protocol shall apply on a transitional basis until the FTA Joint Committee adopts a new list of data requirements in accordance with the amended Article 19.
17. Article 4 of the First Protocol provides for the replacement of the existing Annex 2 to AANZFTA, which sets out PSR for only some products, in the HS 2007 nomenclature, with a new Annex 2 of consolidated PSR, in the HS 2012 nomenclature, applying to all products.
18. Appendix 1 to the First Protocol sets out the new version of Chapter 2 for AANZFTA, as a result of the amendments provided for in Article 1 of the First Protocol.
19. Appendices 2A and B to the First Protocol set out the new version of Chapter 3 for AANZFTA, as a result of the amendments provided for in Article 2, and the replacement OCP, as result of the amendments provided for in Article 3 of the First Protocol.
20. Appendix 3 to the First Protocol is the List of Data Requirements that the Parties will apply as a transitional measure until the Parties adopt a List of Data Requirements in the Committee processes in accordance with the amended Article

19 of Chapter 3. This list will only require that FOB value be included on the COO in those cases where the exporter is claiming origin on the basis of regional value content (RVC). Under AANZFTA's ROO, except for automotive vehicles and parts, all other products have "co-equal" ROO which provide exporters with the choice of claiming origin on the basis of an RVC rule or a change in tariff classification rule or, for some products, a production process rule. Therefore, for almost all products exporters who did not wish to include the FOB in the COO will have the option of avoiding this through claiming origin on the basis of a rule other than an RVC.⁸

21. Appendix 4 to the First Protocol sets out the replacement Annex 2 (PSR), as provided for in Article 4 of the First Protocol.

Implementation

22. Implementation of the First Protocol will require amendment of the *Customs (ASEAN-Australia-New Zealand Free Trade Agreement Rules of Origin) Regulations (2009)*. The amendment will replace the existing PSR in the Regulations, which are recorded in the HS 2007 nomenclature, with equivalent PSR recorded in the HS 2012 nomenclature.
23. The other aspects of the First Protocol will be implemented administratively. The two industry associations which are designated by the Australian Government as Issuing Authorities for issuing FTA COOs, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group), will implement the First Protocol by issuing COOs using the HS 2012 PSR, and no longer requiring all applications for a COO to include the FOB value. The Australian Customs and Border Protection Service will also no longer require that all COOs include the FOB value.

Costs

24. There will be no additional costs to Government administration due to the implementation of the First Protocol, as the amendments it contains will not involve any change in the implementation of the ROO and tariff commitments by the Australian Customs and Border Protection Service. Updating of AANZFTA's PSR and tariff schedules to address periodic updates to the HS is a normal part of the implementation of FTAs and no additional costs are envisaged.
25. The First Protocol will not involve any additional ongoing costs for the Issuing Authorities and may generate new business and revenue for them through greater business use of AANZFTA (as the Issuing Authorities charge business fees for issuing COOs). There may be some small transitional expenses for the Issuing Authorities to ensure personnel are fully trained to implement any necessary changes to COO forms and their COO processing arrangements. There will be no

⁸ For more an explanation of the different PSR types used in AANZFTA, see Attachment II – *Regulation Impact Statement*, paragraphs 28-29.

additional costs for business, but an alleviation of some of the requirements that they currently have to meet if they want to use AANZFTA tariff preferences.⁹

Regulation Impact Statement

26. A Regulation Impact Statement is attached (Attachment II).

Future Treaty Action

27. Article 6 (Amendments) of Chapter 18 (Final Provisions) of AANZFTA provides that AANZFTA may be amended in writing by the Parties. Any amendment would be subject to Australia's domestic treaty process and would enter into force on a date agreed between the Parties.

Withdrawal or denunciation

28. Article 8 (Withdrawal and Termination) of Chapter 18 (Final Provisions) of AANZFTA provides that a Party may withdraw from AANZFTA by giving six months advance notice in writing to the other Parties. It is not possible to withdraw separately from the First Protocol. Withdrawal by Australia would terminate AANZFTA.

Contact details

South-East Asia Goods Branch
Free Trade Agreement Division
Department of Foreign Affairs and Trade

⁹ For further analysis of anticipated costs and benefits, see Attachment II – *Regulation Impact Statement*, Attachment B (Regulatory Burden Measurement).

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CONSULTATION

29. States and Territories were informed of the negotiation of the First Protocol through its inclusion in the biannual schedule of treaties under consideration, negotiation and review by the Australian Government, as well as in regular briefings provided to meetings of the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No concerns have been raised.
30. The Department of Foreign Affairs and Trade (DFAT) has regular contact with business on AANZFTA implementation issues through its AANZFTA enquiries email line, and key issues addressed by the First Protocol were first raised by business through this enquiries line, and with the Australian Customs and Border Protection Service (ACBPS) through its stakeholder engagement processes and enquiries services. Initial concerns were raised during information sessions conducted with industry immediately prior to the entry-into-force of AANZFTA on 1 January 2010 (e.g. concerns were raised at an information session held by the ACBPS with customs brokers in Perth on 25 November 2009).
31. Australia's position in the negotiation of the First Protocol was developed on the basis of the concerns detailed in these contacts with individual companies adversely affected by the current requirements in AANZFTA. ACBPS issued Customs Notice 2010/13 on 15 March 2010¹⁰ in response to the concerns raised. The Customs Notice reported ACBPS "has received numerous questions from importers and brokers in regard to the Free on Board (FOB) price on the certificate of origin (COO) being different from the FOB price on the invoice used to determine the customs value."
32. Sometimes the small or medium sized enterprise which acts as an intermediary between a manufacturer/exporter in the exporting country and a final customer in the importing country has made direct representations to DFAT or ACBPS. However, many of the enquiries received by DFAT and ACBPS have been from customs brokers, freight forwarders, logistics companies, or trade advisory firms reporting concerns raised with them by client companies. Companies have repeatedly expressed a concern that the issue needed to be addressed urgently. (Names of individual companies have not been supplied in the following summary as the contacts reported have been in relation to specific commercial transactions and DFAT treats all such information as commercial-in-confidence).
33. In some cases the companies have indicated that they have had no choice but to not make use of AANZFTA and expressed concern that this meant "the prospect

¹⁰ See Attachment C to Attachment II – *Regulation Impact Statement*

of major loss of business” to both them and their supplier companies (e.g. letter from a New South Wales based company dated 1 February 2012). However, some companies have reported that they had reluctantly divulged the information to either the supplier or the final customer. For example, one intermediary company based in Victoria wrote to DFAT stating that “We have had to divulge our selling price to the supplier, which was the ‘lesser of the two evils’” after failing to find alternative redress through extensive correspondence with DFAT and Austrade, and the engagement of a Singaporean lawyer to look at possible changes to their business model (email of 6 June 2013). A representative of a logistics company also based in Victoria detailed that “I am at my wits end to understand how now...[name of a client company] can use current format of ASEAN-ANZ COO 3rd party invoice and not show first FOB price” (email of 12 September 2012). Sometimes the intermediary company is a trading house located outside the AANZFTA Parties (e.g. email of 20 August 2014 from a freight forwarder based in New South Wales reporting that “the Indonesian factory, with input from the Japanese trading house, refuse to complete the section requiring the disclosure of the FOB value for commercial-in-confidence reasons around profits”).

34. DFAT wrote to the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group) on 1 July 2010 about AANZFTA implementation, and drew the attention of these peak industry bodies to the fact that individual businesses were raising concerns that the FOB value requirement on the COO was restricting trade. DFAT informed ACCI and Ai Group that Australia had raised these concerns in meetings of the AANZFTA Sub-Committee on Rules of Origin (SC-ROO), and that the SC-ROO had agreed to consider how to respond to these trade concerns following further investigation back in capitals.
35. DFAT has kept industry informed of developments in AANZFTA consideration of this issue, including progress in the negotiation of the Protocol, through briefings to the biannual Stakeholder Consultations on FTAs, as well as in regular email reports on SC-ROO meetings provided to ACCI and Ai Group (emails of 15 December 2011, 7 June 2012, 16 August 2013 and 28 May 2014). In addition, the DFAT booklet on “Making Use of AANZFTA to Export or Import Goods”, widely circulated to both industry associations and individual companies, and available on the DFAT and ACBPS websites, provided a discussion of the problems identified by business and advised business of the steps the Parties were taking to address this issue through negotiation of the First Protocol.
36. The position taken by Australia in the negotiation of the First Protocol, that the FOB value requirement on the COO is unnecessary and should be removed, is consistent with the position that Australia took during the original negotiation of AANZFTA, based on industry input, and is consistent with Australia’s general approach on FTAs. Australia does not have such a requirement in any of our other FTAs. When pressed by ASEAN to include this requirement in AANZFTA we opposed this and only agreed to it as part of the final negotiated package when ASEAN was not prepared to move on the issue. Ai Group advised by email on 20 June 2008 that it strongly opposed the FOB value requirement. ACCI advised by email on 19 May 2008 that on the basis of its consultations with industry the strong view was that Australia should not agree to this requirement.

37. DFAT is consulting closely with industry to ensure that the First Protocol is implemented by the Parties in a manner that would be trade facilitating and business friendly. DFAT met with representatives of ACCI and Ai Group on 12 June 2014 to explain the final outcome in the First Protocol and to invite industry views and input on potential issues that the Parties should address as part of the implementation process. DFAT also made publicly available on 25 August 2014 an Issues Paper inviting public submissions or other input on the implementation aspects of the First Protocol (available at www.dfat.gov.au).