

First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area

Introduction

- 3.1 This chapter examines the *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area* (AANZFTA). The First Protocol was signed on 26 August 2014 and tabled in the Commonwealth Parliament on 10 February 2015.
- 3.2 The AANZFTA is Australia’s largest existing free trade agreement, accounting for 18 per cent of Australia’s total trade in goods and services, worth \$121.6 billion in 2013–14. With a combined population of 650 million people, the Parties to the Agreement account for \$4.1 billion of global GDP.¹

Overview and national interest summary

- 3.3 According to the NIA the First Protocol addresses a number of administrative requirements and implementation issues with AANZFTA that have discouraged or hampered business utilization of the Agreement’s provisions when importing or exporting goods. The NIA

1 Dr Milton Church, Coordinator, South-East Asia Goods Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 2 March 2015, p. 9.

claims that the amendments should facilitate greater business use of AANZFTA.²

3.4 The Regulation Impact Statement (RIS) identifies three key problems relating to administrative arrangements for claiming preferential tariff treatment that may be contributing to underutilisation of AANZFTA:

- the Minimum Data Requirements setting out the information that must be included on AANZFTA Certificates of Origin (COO) require traders to disclose information which some companies regard as of a commercial-in-confidence nature; this has either prevented these companies from making use of AANZFTA or forced them to divulge information to either their suppliers or customers that may adversely affect their competitive position;
- the presentation of the Agreement's Product Specific Rules of Origin (PSR) are currently not in a business-friendly format and the format is very different from the PSR in Australia's other free trade agreements (FTAs), imposing additional complexity on business when seeking to determine whether goods comply with the rules of origin; and
- the PSR are also recorded in a superseded version of the Harmonized Commodity Description and Coding System (HS) imposing administrative costs on companies as all other commercial and Customs documents that they need to use are in the current HS version (HS 2012).³

3.5 The RIS claims that these issues impose excessive compliance costs on businesses, as they involve information and other requirements which are unnecessary to conform to the substantive obligations of AANZFTA. The issue relating to commercial-in-confidence information may either be:

- resulting in reduced overall trade under AANZFTA; or
- leading multinational corporations and other large companies to directly source products from suppliers at the expense of a range of small and medium sized enterprises who operate as intermediary companies in the sourcing and supply of goods and whose business model is discriminated against by AANZFTA's current requirements.⁴

3.6 The RIS suggests that small and medium sized enterprises may be particularly affected by these requirements. Such businesses are less likely to have dedicated staff with expertise in international trade and therefore

2 National Interest Analysis [2014] ATNIA 23 with attachments *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (AANZFTA)*, done at Nay Pyi Taw, 26 August 2014, [2014] ATNIF 27 (hereafter referred to as 'NIA'), para 4.

3 Regulation Impact Statement, *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, November 2014, (hereafter referred to as the 'RIS'), para 2.

4 RIS, para 3.

find it more challenging to ensure that they meet these additional regulatory requirements currently imposed by AANZFTA.⁵

Reasons for Australia to take the proposed treaty action

3.7 The First Protocol attempts to address the three key problems hindering businesses from taking full advantage of the opportunities presented by AANZFTA.

Minimum Data Requirements prevent some companies from using AANZFTA due to concerns about commercial-in-confidence information

3.8 The AANZFTA Rules of Origin (ROO) require the Free-on-Board (FOB) value of the goods at the country of export to be included on the COO. The FOB value refers to the value of goods at the time of export, including the cost of transport to the port or site of final shipment abroad. No other Australian FTA includes this requirement and Australia opposed the inclusion of the FOB value on the COO during the AANZFTA negotiations. However, ASEAN was not prepared to move on the issue and Australia was forced to agree to the inclusion of the requirement as part of the final negotiated package.⁶

3.9 The purpose of the COO is to provide *prima facie* documentary evidence of the origin of the goods. The RIS maintains that the FOB value is not a necessary requirement for this purpose. Australia therefore considers AANZFTA's requirements in this area as an unnecessary regulatory burden.⁷

3.10 The RIS claims that a range of businesses have expressed concern including that the FOB value on the COO may disclose to their clients the profit margin of companies who act as intermediaries in the sourcing and supply of goods. The RIS states that the companies affected are mainly small and medium sized enterprises, but some larger trading houses and manufacturers may also be affected.⁸

3.11 However, in its submission to the inquiry, the Australian Chamber of Commerce and Industry (ACCI) claims that, although this issue was

5 RIS, para 4.

6 RIS, para 5.

7 RIS, para 5.

8 RIS, para 6.

initially of concern, business and industry have found means to mitigate the problem:

Over time ... users of the treaty have found ways to avoid disclosing this information to counterparts, and Customs have also allowed this information to be provided on a separate removable sheet. Hence the original issue has been overcome through alternate means. ACCI has not been alerted to any ongoing concerns on this issue for some time and we have not maintained any concerns over this issue for a number of years.⁹

3.12 The RIS states that a wide range of businesses have reported to the Department of Foreign Affairs and Trade (DFAT) and the Australian Customs and Border Protection Service (ACBPS) that they are not claiming tariff preferences available to them solely due to the administrative requirements of the Agreement that would reveal information that these businesses regard as commercial-in-confidence. Therefore Most Favoured Nation (MFN) tariffs continue to be paid adding to the cost of products for consumers while potentially diminishing business competitiveness for those involved.¹⁰

3.13 The RIS indicates that this issue does not only affect the business opportunities of the intermediary companies. Many of the companies that have complained about this issue to DFAT and ACBPS are customs brokers, freight forwarders or logistics companies involved in enabling various aspects of the supply chain. These trade services companies complain that they are losing business as their client companies are frustrated at being unable to make use of AANZFTA due to their concerns with the FOB value issue.¹¹

3.14 As mentioned, the ACCI contests the currency of the data on which these assertions are made and states:

ACCI has asked on a number of occasions for DFAT to provide contemporary information on the number of and level of concerns being raised by industry with regards to the FOB issue, however this has not been forthcoming.¹²

Complex presentation of the Agreement's Rules of Origin

3.15 The current presentation of the Agreement's ROO involves a combination of:

9 Australian Chamber of Commerce and Industry (ACCI), *Submission 1*, p. 6.

10 RIS, para 8.

11 RIS, para 12.

12 ACCI, *Submission 1*, p. 6.

- Annex 2 of the Agreement, containing a partial list of PSR, i.e. it only covers a subset of products. Annex 2 sets out the detailed ROO requirements for the products listed, which are identified using the internationally harmonized six-digit HS nomenclature; and
 - a general rule set out in Article 4 of Chapter 3 of the Agreement. This applies to all products not listed in Annex 2. The general rule is a choice of: (i) a Regional Value Content (RVC) of 40 per cent of the FOB value of the good, and the final process of production performed within a Party, or (ii) a change in tariff classification (CTC) at the four-digit level.¹³
- 3.16 Australia's other FTAs present the detailed ROO requirements for individual products in a consolidated annex setting out the PSR for all products. The RIS maintains that the AANZFTA's ROO presentation creates unnecessary complexity for business, and is often the subject of enquiries to DFAT due to both the very different approach compared to other Australian FTAs, and the difficulties in understanding the structure.¹⁴
- 3.17 The RIS suggests that the set of codes needed to identify the ROO requirement that is met by the product covered by the COO causes further confusion. While the business may correct this issue, the RIS points out that this can incur time and financial costs due to delays while the paperwork is corrected.¹⁵
- 3.18 The RIS claims that the complex presentation of the ROO continues to generate confusion and frustration, particularly for less experienced small and medium businesses with fewer resources.¹⁶

The nomenclature used to describe the tariff commitments and PSR

- 3.19 The HS Code is a structured nomenclature that assigns a 6-digit code to every good. The World Customs Organization (WCO) updates the HS regularly, usually every five years, to keep it relevant to the needs of the international community.¹⁷
- 3.20 The PSR in Annex 2 of AANZFTA is recorded using the 2007 edition of the HS. This was current when AANZFTA was concluded but has since been superseded by the latest revision, HS 2012, which came into effect on 1 January 2012. This version is currently used to complete all export and

13 RIS, para 13.

14 RIS, para 14.

15 RIS, para 15.

16 RIS, para 16.

17 RIS, para 17.

import declarations in Australia. Most of Australia's trading partners also require the use of HS 2012 on Customs documentation. Commercial documentation would generally also use HS 2012.¹⁸ (An example of an amendment between HS 2007 and HS 2012 is at Attachment A to the RIS.)

3.21 As AANZFTA's PSR are still in HS 2007, this has imposed compliance costs and administrative complexity for business:

- exporters need to apply for an AANZFTA COO using PSR in HS 2007, but all other Customs and commercial documentation for the same goods needs to be in HS 2012. They have to operate in two different versions of the HS, and may need to refer to detailed transposition tables or to HS experts to ensure that they have correctly identified the relevant HS lines under both HS 2007 and HS 2012. In addition, some of the documentation they would use to help determine whether the HS 2007 PSR for the product is met would be in HS 2012 (e.g. import declarations or commercial invoices for non-originating materials); and
- importers need to be in possession of an AANZFTA COO that identifies the goods using HS 2007, but other commercial documentation and the Customs import declaration need to be in HS 2012. They have to apply great care to ensure that they do not claim AANZFTA tariff treatment for the wrong goods or on the basis of incorrect documentation.¹⁹

3.22 The RIS states that the lack of consistency in the HS used in the AANZFTA ROO with other commercial documentation and the customs import declaration adds to the cost and complexity of international trade. The RIS maintains the time taken to prepare documentation adds compliance costs, potentially impacts on business competitiveness and further undermines the use of AANZFTA tariff preferences.²⁰

Outcomes in the First Protocol

3.23 To address the issues identified above, the following specific outcomes were sought in the First Protocol:

- removal of the requirement to include the FOB value on all COOs, so that affected businesses would be better able to make use of AANZFTA to import and export goods;
- removal of the list of Minimum Data Requirements from the text of the Agreement to allow for more efficient administration of documentation;
- presenting the PSR in a consolidated annex in the HS 2012 version; and

18 RIS, para 18.

19 RIS, para 19.

20 RIS, para 20.

- improving the arrangements to update tariff schedules to reflect the periodically updated HS.²¹
- 3.24 To achieve these outcomes, the RIS states that the First Protocol will:
- update AANZFTA to reflect modern business practices and further secure Australia’s competitiveness in key markets;
 - remove regulatory impediments that have hindered business use of AANZFTA; and
 - make AANZFTA more consistent with Australia’s other FTAs, reducing the regulatory complexity faced by businesses using the FTAs to import or export goods.²²

Obligations

- 3.25 **Article 1** 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.²³
- 3.26 **Article 2** provides for the replacement of the existing **Articles 4** and **9** with amended versions of each Article to reflect the change to a consolidated PSR Annex.²⁴
- 3.27 **Article 3** provides for amendments to the Annex on Operational Certification Procedures (OCP) of **Chapter 3** (Rules of Origin), with rules 6, 7 and 10 to be replaced by new rules 6, 7 and 10 relating to the content, issuance and acceptance of COO. These amendments are necessary to reflect the deletion of the list of Minimum Data Requirements.²⁵
- 3.28 **Article 4** provides for the replacement of the existing **Annex 2**, 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.²⁶
- 3.29 **Appendix 1** sets out the new version of **Chapter 2** as a result of the amendments provided for in **Article 1**.²⁷

21 RIS, para 23.

22 RIS, para 68.

23 NIA, para 14.

24 NIA, para 15.

25 NIA, para 16.

26 NIA, para 17.

27 NIA, para 18.

- 3.30 **Appendices 2A and B** set out the new version of **Chapter 3**, as a result of the amendments provided for in **Article 2**, and the replacement OCP, as a result of the amendments provided for in **Article 3**.²⁸
- 3.31 **Appendix 3** is the List of Data Requirements that the Parties will apply as a transitional measure until the Parties adopt a List of Data Requirements.²⁹
- 3.32 **Appendix 4** sets out the replacement **Annex 2** (PSR), as provided for in **Article 4**.³⁰

Implementation

- 3.33 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.³¹
- 3.34 The other aspects of the First Protocol will be implemented administratively. The two Issuing Authorities for FTA Certificates of Origin, the Australian Chamber of Commerce and Industry and the Australian Industry Group (Ai Group), will implement the First Protocol by issuing Certificates of Origin using the HS 2012 PSR, and no longer requiring all applications for a Certificate of Origin to include the Free-on-Board value. The ACBPS will also no longer require Certificate of Origin to include the Free-on-Board value.³²

Implementation timeframe

- 3.35 The RIS states that the Agreement will enter into force 30 days after Australia, New Zealand and at least four ASEAN Member States have notified all AANZFTA Parties that they have completed their internal requirements necessary for entry-into-force. The Agreement would enter into force for other ASEAN Member States 30 days after they notify all Parties they have completed their internal processes. Parties are aiming for entry-into-force in the first half of 2015.³³

28 NIA, para 19.

29 NIA, para 20.

30 NIA, para 21.

31 NIA, para 22.

32 NIA, para 23.

33 RIS, para 72. There are currently 10 ASEAN countries: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

- 3.36 This indicates that implementation of the First Protocol will be staggered across the Parties. Further, **Appendix 3** of the Agreement states that for Cambodia and Myanmar, the FOB value shall be included in the COO for all goods for two years from the date of entry into force.³⁴
- 3.37 ACCI warn that the staggered, non-uniform implementation process will cause ongoing problems for business during the transition period:
- ... [staggered implementation of] the protocol will mean Australian businesses constantly have to check whether their goods going through the free trade zone will comply with specific requirements where supply chains reach across borders, or else face a loss of the tariff concession. By agreeing to staggered implementation and varied conferring criteria ... parties have made the AANZFTA more complicated and therefore more costly to use for business, risking a commensurate reduction in utilisation of the agreement by Australian business.³⁵
- 3.38 DFAT acknowledge the concerns but warns that waiting for uniform implementation will cause considerable delay.³⁶ DFAT emphasise that all Parties are working closely together to ensure that implementation facilitates business:
- Officials and representatives of the COO issuing bodies from all parties will meet at the end of April to develop arrangements to ensure a business-friendly implementation of the first protocol, including looking at coordination over business activities.³⁷
- 3.39 DFAT told the Committee that representatives from Australia's Certificate of Origin issuing bodies, the ACCI and Ai Group, have been invited to attend the meeting in April 2015.³⁸

34 *First Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, Appendix 3, ft 1.

35 ACCI, *Submission 1*, p. 13.

36 Dr Church, DFAT, *Committee Hansard*, Canberra, 2 March 2015, p. 10.

37 Dr Church, DFAT, *Committee Hansard*, Canberra, 2 March 2015, pp. 9-10.

38 Dr Church, DFAT, *Committee Hansard*, Canberra, 2 March 2015, p. 10.

Costs

- 3.40 According to the NIA, 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 ACBPS. Updating of AANZFTA's PSR and tariff schedules to address periodic updates to the HS is a normal part of implementation of FTAs and no additional costs are envisaged.³⁹
- 3.41 The NIA also states that the Agreement 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 the AANZFTA. The NIA concedes that 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 processing arrangements.⁴⁰
- 3.42 The RIS states that the Agreement is a deregulatory measure which will reduce the regulatory requirements and compliance costs for Australian businesses using AANZFTA. A Regulatory Burden Measurement is at **Attachment B** of the RIS which sets out an example of the possible ongoing savings for exporters and importers.⁴¹
- 3.43 On the other hand, ACCI argue that the staggered implementation of the First Protocol across the Parties will result in multiple sets of rules to use AANZFTA and may mean that 'two types of AANZFTA Certificates of Origin may be required for a single shipment of goods.' ACCI claim that both the NIA and the RIS 'ignore the resulting cost realities for business caused by the duplication'.⁴²
- 3.44 DFAT informed the Committee that attempts are being made to ensure that businesses will only have to deal with one system during the transition period:
- The indication we are getting ... is that there will probably be only one system and that, for most of the parties, even if the protocol enters into force for a number of parties but not for that country then they will still be prepared to accept the new Certificate of Origin and the new presentation of the rules of origin. That would mean, in the case of Australia, that exporters and the certificate of origin authorities will have one system to operate from the point

39 NIA, para 24.

40 NIA, para 25.

41 RIS, Attachment B: Regulatory Burden Measurement, para 1, 5-7.

42 ACCI, *Submission 1*, p. 7.

when this enters into force for Australia. There may be one or perhaps two countries where that does not happen, so we are talking about a very manageable problem from our perspective.⁴³

3.45 ACCI also claim that the changes to the pro forma AANZFTA COO which is hard-coded into many business information systems will require costly changes.⁴⁴ DFAT assured the Committee that the proposed changes to the COO form are necessary to establish clarity and will be minimal:

We expect that there will be some small changes. These will only be to some elements, identifying what is actually entered into particular boxes, and that is to have clarity ... Leaving the Certificate of Origin unchanged could actually give rise to confusion for business.⁴⁵

Conclusion

3.46 The Committee acknowledges concerns that the transition period could prove difficult for some small to medium businesses if it is not managed effectively. The Committee urges relevant departments to monitor the transition period carefully and provide adequate assistance to businesses that may be affected.

3.47 The Committee supports Australia's ratification of the Protocol and recommends that binding treaty action be taken.

Recommendation 2

3.48 **The Committee supports the *First Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* and recommends that binding treaty action be taken.**

43 Dr Church, DFAT, *Committee Hansard*, Canberra, 2 March 2015, p. 10.

44 ACCI, *Submission 1*, p. 7.

45 Dr Church, DFAT, *Committee Hansard*, Canberra, 2 March 2015, p. 10.

