



Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

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Glossary of abbreviations

ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AFTA	ASEAN Free Trade Area
ALP	Australian Labor Party
AMWU	Australian Manufacturing Workers' Union
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AUSFTA	Australia-US Free Trade Agreement
CER	Closer Economic Relations
CIE	Centre for International Economics
Customs Amendment Bill	Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004
Customs Tariff Amendment Bill	Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004
DFAT	Department of Foreign Affairs and Trade
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1947
GNP	Gross national product
JSCOT	Joint Standing Committee on Treaties
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
PMV	Passenger motor vehicle
SAFTA	Singapore-Australia Free Trade Agreement
TAFTA	Thailand-Australia Free Trade Agreement
TCF	Textile, Clothes and Footwear
TRQ	Tariff rate quota
US	United States
WTO	World Trade Organization

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Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Date Introduced: 17 November 2004

House: House of Representatives

Portfolio: Foreign Affairs and Trade

Commencement: The formal provisions of the Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004 (the Customs Amendment Bill) and the Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004 (the Customs Tariff Amendment Bill) commence on Royal Assent. The measures contained in both Bills have various application dates, which are referred to in the Main Provisions section.

Purpose

The Bills together aim to implement the Thailand-Australia Free Trade Agreement.

Background

The Agreement

Existing situation and rationale

Thailand is Australia's twelfth largest trading partner and has been increasing in relative importance for a number of years. In comparison, Thailand is only the 23rd largest exporting nation on a global scale, having risen from 46th place in 1982 (Australia is currently 26th).¹ There have been few major trade disputes between the two nations although Thailand has indicated some concerns with Australia's quarantine system.² Both nations are members of the [Cairns Group](#), which seeks freer trade in agriculture at the World Trade Organization (WTO).³ Discussions regarding a free trade agreement began in May 2002, following initial exploration of the idea through a [scoping study](#) started in July 2001.⁴ The logic for a free trade agreement between Australia and Thailand seems to be that:

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- i. Thailand is actively seeking free trade agreement (FTA) partners around the world, in part to keep ahead of competition from emerging economies like China⁵
- ii. Thailand is a major Association Of Southeast Asian Nations (ASEAN) trading partner for Australia
- iii. there are significant barriers to trade in *both* countries that could be reduced in an FTA to the long-run benefit of the Australian community, and⁶
- iv. trade facilitation measures can be enhanced beyond those put in train by the Asia-Pacific Economic Cooperation (APEC) process.

Existing trade

Two-way trade between Thailand and Australia in 2003 was A\$7.1 billion, or approximately 2.3 per cent of Australia's total trade.⁷ Thailand was a more important source of imports (A\$4.4 billion) than a destination for exports (A\$2.7 billion).⁸ Singapore, Indonesia and Malaysia remain more important trading partners for Australia within ASEAN than Thailand. Merchandise trade with Thailand has been growing rapidly over the past two decades and the relative importance of Thailand as a trade partner has been increasing. While services trade with Thailand has been increasing, growth has been slow since the start of the Asian financial crisis and Thailand's share of Australia's services trade (1.8 per cent in 2003) has yet to return to the levels of 1995-96 (2.1 per cent).⁹ Gold and aluminium dominate merchandise exports, while imports are principally cars and parts, and heating and cooling equipment.

Australia is a reasonably important trading partner for Thailand, with 2.2 per cent of total Thai trade, or US\$2.7 billion, in 2001.¹⁰ Australia has been slowly increasing its share of Thai (merchandise) trade over the past decade, from 1.7 per cent in 1991 to 2.2 per cent in 2001, and this is true for both exports and imports. The increase in Australia's share of imports is somewhat surprising given that Thai imports are dominated by manufactured products.¹¹ Unlike Australia, Thailand runs a moderate overall trade surplus (at least since the Asian financial crisis).¹²

Thailand is not currently an important partner for investment with Australia.¹³ At the end of 2003, the stock of Thai investment in Australia was some A\$161 million, or less than 0.1 per cent of the total, while Australian investment in Thailand was some A\$480 million, or 0.1 per cent of Australian investment abroad.¹⁴

Existing barriers

The WTO's 2002 Trade Policy Review of Australia found that 45 per cent of Australia's tariff lines were duty free and more than 80 per cent faced duties of 5 per cent or less.¹⁵ Trade barriers in Australia's durable and non-durable manufacturing sectors will be reduced the most as a result of the Thailand Australia Free Trade Agreement (TAFTA),

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although the average reduction will be less than 5 percentage points.¹⁶ Australia applies only one tariff rate quota (TRQ)¹⁷ which is for cheese.¹⁸ The highest tariffs are applied to automobiles and parts, and textiles, clothing and footwear (TCF)—both being major Thai exports.

In the WTO's November 2003 Trade Policy Review of Thailand, the Thai Government estimated that in 2003, the average tariff for products from WTO members is 14.61 per cent. Only 4 per cent of Thailand's tariff lines were duty free in 2003, and only 72 per cent of tariff lines had bound tariff rates.¹⁹ Tariffs in Thailand tend to be complex with multiple rates for the same tariff line and *non-ad valorem* tariffs (tariffs not expressed as a percentage of the price) apply to more than 20 per cent of tariff lines. TRQs apply to 1.0 per cent of all tariff lines, including rice, sugar and milk. An extensive system of import and export licensing is in place in Thailand, and this has some opaque features. Average agricultural and manufacturing tariffs facing Australian exports meeting rules of origin requirements in Thailand will be reduced by around 20 percentage points as a result of TAFTA.²⁰ According to the Centre of International Economics (CIE) report on a FTA with Thailand, the complete elimination of tariff barriers by Thailand will mean this is Thailand's first comprehensive FTA.²¹

Those sectors of merchandise trade that already face no tariff barriers (only likely to be around 4 per cent of goods in this case) and those services sectors where no improvement on the two nations' *General Agreement on Trade in Services* (GATS) commitments have been made, do not stand to gain directly from TAFTA.²² However, even these sectors may gain from the increased investment stimulated by the agreement, the reduced uncertainty resulting from enhanced government cooperation and trade facilitation, and to the extent that the most-favoured nations (MFN) clauses in TAFTA are applied, from liberalisation by the parties in future FTAs.

History of negotiations

The Government's 1997 White Paper on Foreign and Trade Policy, *In the National Interest*, foreshadowed a shift to increased emphasis on bilateral relations, including trade.²³ According to the Minister for Trade, Mr Vaile, the possibility of a free trade agreement between Australia and Thailand was first raised by Mr Vaile with Dr Adisai Bodharamik, Thailand's Commerce Minister, at the APEC Trade Ministers' Meeting in June 2001 in Shanghai.²⁴ In July 2001, Thailand's Foreign Minister confirmed that Australia and Thailand would undertake a joint scoping study on the possibility of an FTA. At that point, Mr Vaile stated that:

Any FTA should be comprehensive in scope, removing barriers to trade in goods and services, as well as addressing other issues such as electronic commerce. It should be genuinely liberalising, WTO-consistent and consistent with APEC goals and principles.

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On 7 May 2002, the scoping study was released, pointing to significant benefits to both countries from comprehensive liberalisation and was forwarded to both governments.²⁵ On 30 May 2002, it was announced that formal negotiations on an FTA would begin the next day.²⁶ The background to a press release issued by Mr Vaile in November 2002 indicates Australia's negotiating objectives:

Australia's aim is to secure an agreement that eliminates tariffs and non-tariff barriers on goods and services and liberalises the investment regime. The Government is determined to achieve an ambitious agreement even if this takes a little longer.²⁷

On 19 October 2003, the prime ministers announced the successful conclusion of negotiations for an FTA.²⁸ The text of the agreement was released on 12 May 2004²⁹ and was signed by Thai Prime Minister Thaksin and Prime Minister Howard in Canberra on 5 July 2004.³⁰ DFAT issued a [guide](#) to doing business with Thailand on the same day.³¹

Economic Studies

Productivity Commission

The Productivity Commission is the Australian Government's principal review and advisory body on microeconomic policy and regulation. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians, including: competition policy, productivity, the environment, economic infrastructure, labour markets, [trade and assistance](#), structural adjustment and microeconomic reform. Although there is a large amount of expertise in the Commission regarding trade issues, no reference to the Commission regarding TAFTA was made by the Government. The absence of any input from the Productivity Commission in the treaties making process generally has recently been criticised at a seminar in relation to Australia-US Free Trade Agreement (AUSFTA).³²

Centre for International Economics Scoping Study (2002)

The Centre for International Economics (CIE) was commissioned by the Government in 2001 to evaluate the economic impacts of a possible Australia Thailand FTA, and the results were released in May 2002. The report found that the net present value of Australia's consumption could be boosted by some A\$ 4.9 billion, while for Thailand it could increase by A\$ 25.2 billion. It should be noted that this modelling assumed full liberalisation of both goods and services.

ACIL Consulting

Although ACIL Consulting has not separately published a study on TAFTA, it has compared its results for AUSFTA, TAFTA and a possible China-Australia Free Trade Agreement in a recent paper on the latter.³³ It estimates that Australia's real gross national product (GNP) would fall by A\$ 3 billion under AUSFTA, rise by A\$ 7.6 billion under TAFTA, and rise by A\$ 10.3 billion under an FTA with China.

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Centre for International Economics (2004)

Once the negotiations between Thailand and Australia were concluded the Department of Foreign Affairs and Trade (DFAT) commissioned a new study based on the specific outcomes rather than the general concept of an FTA. Some of the earlier assumptions had not been realised—notably rapid liberalisation in all goods sectors and full services liberalisation particularly by Australia—but the new report, released in March 2004, found that the actual agreement was still likely to lead to economic benefits.³⁴ In particular, it found that:

- the net present value of additional consumption in Australia (the best measure of welfare gains to the Australian community) is estimated to be some US\$ 1.6 billion
- the net present value of additional consumption in Thailand is estimated to be some US\$ 4.6 billion
- the absolute gains are larger to Thailand than Australia due to its higher existing tariff barriers (and more distorted economy), and the fact that it liberalises more widely than Australia under TAFTA, and
- the relative gains to Thailand are higher than to Australia due to the larger absolute gains accruing in Thailand, and the fact that its economy is currently smaller than Australia's.

CIE's report also noted that:

Australia and Thailand have committed to strengthen trade in a range of services by progressively liberalising the barriers that prevent businesses from entering markets in the other country. However, Australia's commitment under the Agreement is essentially standstill (that is, no *additional* trade liberalisation is being undertaken as a result of the Agreement). Thailand has agreed to relax some equity thresholds and implement business facilitating measures (relaxing visa requirements and the like). While an encouraging start to liberalisation of services trade, the measures contained as part of the Agreement, do not, however, constitute significant (additional) reductions to trade in services.³⁵

Introduction of the legislation: timing and 'democratic deficit' in the treaties making process

The most interesting aspect about the timing of this legislation relates to the involvement of the Joint Standing Committee on Treaties (JSCOT) in the treaty making process which may be compared with the making of and entering into the Singapore-Australia Free Trade Agreement (SAFTA). The history of SAFTA was as follows:

- SAFTA was signed by Trade Ministers on 17 February 2003
- the agreement was tabled in Parliament on 4 March 2003

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- the Second Reading Speech in the House of Representatives was on 15 May 2003
- the JSCOT Report ([Report No. 52](#)) was tabled on 26 June 2003, and
- the Second Reading Speech in the Senate was made on 26 June 2003.

In relation to the making of SAFTA, Senator Kirk pointed towards:

a matter of considerable concern to the Committee. In the case of the Singapore-Australia Free Trade Agreement [...] the relevant legislation was introduced and passed through the House of Representatives prior to the Committee reviewing the proposed treaty action and tabling its report. While the Committee accepts that binding action has not been taken in a strict sense, the introduction of enabling legislation to implement treaty obligations before the Committee has completed its review and reported to Parliament could undermine the workings of the Committee over time. It is, at least, in contravention of the spirit of the Committee's terms of reference.³⁶

The Government response to the JSCOT report on SAFTA was issued in June 2004.³⁷ In its response, the Government claimed that, in general, the national interest could not always wait for JSCOT's report. However, it did not directly extend the claim that SAFTA's passage prior to the JSCOT report was based on a national interest case.

A similar train of events would appear to be occurring in relation to the TAFTA – the implementation legislation has already been introduced in the House of Representatives, yet the JSCOT report, so far, has not emerged and indeed, there may even be a need for further hearings.

Position of significant groups

The Coalition parties have made clear their support for TAFTA. Despite some early criticisms—for example, of the quarantine provisions—and some continuing reservations, such as the length of phasing-in arrangements, the ALP has indicated support for TAFTA.³⁸ The Greens have indicated disagreement with TAFTA; in a July 2004 press release Senator Brown claimed it was biased toward corporate interests, in part because of the inclusion of investor-state dispute resolution provisions as contained, for example, in NAFTA.³⁹

Generally, manufacturing industry groups have supported TAFTA.⁴⁰ The Australian Industry Group and the Australian Chamber of Commerce and Industry have been assigned important roles in certifying local content for the purposes of rules of origin under TAFTA.⁴¹ In Holden's submission to JSCOT, they make clear that while they find TAFTA acceptable, the rules of origin used were not their preferred approach. Ford's submission and the Federal Chamber of Automotive Industries' submission make clear both are positive about TAFTA.

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In contrast, the Australian Manufacturing Workers' Union (AMWU) made a submission to the Joint Standing Committee on Treaties (JSCOT) regarding TAFTA, with a negative conclusion⁴². The Australian Council of Trade Unions (ACTU) submission also expresses a number of qualms, pointing towards their preference for multilateral trade agreements generally and voicing their disagreement, for example, with the investor-state dispute resolution mechanism and the lack of labour standards.⁴³

Finally, the ACT Government made a submission to JSCOT, claiming that the consultation process with the states and territories in negotiation of TAFTA was somewhat perfunctory.⁴⁴ This submission is conceptually linked to the general criticism that there is an apparent lack of public consultation and input in the treaties making process.

Main Provisions

Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Part 1—Thai originating goods

Why are the amendments necessary?

Chapter 4 of TAFTA provides comprehensive and descriptive rules to determine the origin of individual goods and products (these are known as 'rules of origin'). These rules are necessary to determine whether a particular good or product originates in Thailand, qualifying as 'Thai originating good'. If it does, it would be eligible for preferential customs rates under the *Customs Tariff Act 1995*.⁴⁵

Commencement

This part will commence on 1 January 2005 or the day the TAFTA will come into force in Australia, whichever day is later. If the TAFTA does not come into force in Australia, this part will not commence at all.

Key changes

Part 1 of Schedule 1 of the Customs Amendment Bill will introduce a new **proposed Division 1D—Thai originating goods** into the *Customs Act 1901*. This new proposed Division will be central to defining what constitutes a 'Thai originating good'. In its current proposed form, **Division 1D** would be comprised of the following rules of origin:

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Rule 1—wholly obtained goods of Thailand (proposed Subdivision B)

Proposed new section 153ZB stipulates that goods ‘wholly obtained’ of Thailand are Thai originating goods for the purpose of the Customs Amendment Bill. **Subsection 153ZB(2)** provides a list of circumstances according to which a good is classified as ‘wholly obtained goods of Thailand’. The list is modelled after the definition of ‘wholly obtained goods’ set forth in Article 401 of the TAFTA and includes, for example:

- mineral goods extracted in Thailand (**proposed paragraph 153ZB(2)(a)**)
- goods obtained from live animals (**proposed paragraph 153ZB(2)(d)**), or
- certain ‘fish, shellfish, plant or other marine life’ (**proposed paragraph 153ZB(2)(f)**).

Rule 2—Goods produced entirely in Thailand or in Thailand and Australia (proposed Subdivision C)

Proposed new section 153ZD provides the criteria against which goods, produced entirely in Thailand or in Thailand and Australia, will be assessed to determine whether they can be considered to be of Thai origin. **Proposed subsection 153ZD(1)** sets out four criteria a particular good must meet before it can qualify as a Thai originating good. These requirements include that:

- the good can be classified according to a heading or subheading of the *Harmonized Commodity Description and Coding System* as established under the *International Convention on the Harmonised Commodity Description and Coding System*.⁴⁶ These headings and subheadings are the codes used in Column 1 or 2 of the tariff table set out in Schedule 1 to the TAFTA Regulations (the tariff table)
- the good was produced from either originating or non-originating material. Originating material is material that is:
 - used to produce other goods, and
 - of Thai or Australian origin in its own right.

Non-originating material is material that lacks one or both of the above characteristics

- the good can fulfil the requirement or requirements to be set out in Column 4 of the tariff table. Column 4 of the tariff table will set out product specific rules, and
- the importer of the goods holds a Certificate of Origin at the time the goods are imported into the market.

In addition to these criteria, the Customs Amendment Bill stipulates further possible requirements which can be added by the executive under regulation. These include:

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- tariff change requirements—**proposed subsection 153ZD(2)** allows the TAFTA Regulations to stipulate certain tariff change requirements. According to the [Explanatory Memorandum](#), a tariff change occurs where a good is:
 - classified under one tariff classification before the production process and under a different one after the production process. This approach ensures that sufficient transformation of materials has occurred within Thailand, or Australia and Thailand, to justify that the claim that the goods originate in Thailand.⁴⁷
- a *de minimis* provision—where the value of all non-originating materials does not exceed 10 per cent of the customs value of the entire produced good, **proposed subsection 153ZD(3)** deems the transformation requirement to have been fulfilled regardless of **proposed subsection 153ZD(2)**. This proposed subsection reflects Article 402.3(a) of the TAFTA.
- regional value content—**proposed subsection 153ZD(4)** provides that the TAFTA Regulations may proscribe a regional value content for certain goods. Regional value content prescribes a certain percentage of Thai originating goods that a product must contain to qualify as of Thai origin. The regional value content may vary from product to product.

Rule 3—Goods that are chemicals, plastics or rubber (proposed Subdivision C)

Proposed section 153ZE provides specific rules for goods that classify as chemicals, plastics and rubber. Under this rule, such a good will qualify as a Thai originating good if it was produced entirely in Thailand, or in Thailand and Australia, was the result of a chemical reaction and the importer holds a Certificate of Origin.

Rule 4—Other Thai originating goods (proposed Subdivision D)

This rule would apply to standard accessories, spare parts and tools. **Proposed section 153ZF** sets out the test to be applied to goods comprised of an ‘underlying good’ and standard accessories, standard spare parts or standard tools (‘parts’). The parts would only qualify as Thai originating goods, if:

- the underlying goods are Thai qualifying goods
- the parts are not invoiced separately, and
- the parts are of a usual quantity and value in relation to the underlying good (**proposed paragraphs 153ZF(1)(a) to (c)**).

However, where the underlying good has to be tested for its origin by determining the regional content value under Rule 2, the parts will not qualify as Thai originating goods where they were ‘imported solely for the purpose of artificially raising the regional value

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content of the underlying good' (**proposed subsection 153ZF(2)**). In addition, **proposed subsection 153ZF(3)** provides that in that case, the TAFTA regulation must require that the value of the parts, used to artificially raise the value of the underlying good, is considered for the purpose of the regional value content. The [Explanatory Memorandum](#) provides a useful example demonstrating the operation of **subsections 153ZF(2) and (3)**.⁴⁸

Rule 5—Packaging material and containers (proposed Subdivision E)

As a general rule, packing material and containers used to package goods for retail are to be disregarded from the operation of the Division, if they are classified with the goods in accordance with Rule 5 of the *General Rules for the Interpretation of the Harmonized System*. Rule 5 specifies, for example, containers and packing material such as camera cases, musical instrument cases, gun cases, drawing instrument cases or necklace cases.⁴⁹

However, where the packaged goods have to be tested for their origin by determining the regional value content under Rule 2, to satisfy the regional value content, the value of the packaging material must be taken into consideration (**proposed subsection 153ZG(2)**).

Rule 6—Consignment (proposed Subdivision F)

Where goods went through any other country than Thailand or Australia, and those goods:

- underwent a process of production or other operation (**proposed subparagraph 153ZH(1)(b)(i)**), or
- were traded or used there (**proposed subparagraph 153ZH(1)(b)(i)**)

then **proposed section 153ZH** provides that the goods cannot be Thai originating goods within the meaning of the **proposed new Division**.

Summary and comments

- The rules of origin set out in proposed **new Division 1D—Thai originating goods** create a framework according to which it can be determined whether a particular good qualifies as 'Thai originating good'
- Where a product is a 'Thai originating good', it will qualify for preferential tariff treatment under the *Customs Tariff Act 1995*,⁵⁰ and
- The provisions proposed in the Customs Amendment Bill will be complemented and refined by regulation.

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Part 2—Verification powers

Part 4 of TAFTA further requires each party to impose certain obligations on exporters or importers who claim preferential tariff treatment under the TAFTA.

Why are the changes necessary?

Chapter 4 of the TAFTA further requires the parties to implement certain measures to monitor and verify the claims for preferential tariff treatment.

Commencement

Part 2 has the same commencement date as Schedule 1 of the Customs Amendment Bill.

Key changes

Item 2 of the Customs Amendment Bill proposes to insert a **new Division 4C** into the *Customs Act 1901*. This new Division creates the following obligations and powers:

Obligation to keep records (proposed section 126AG)

Under **proposed section 126AG**, a producer or exporter of goods may be required to keep certain records for a specified period of time as prescribed by regulation.

Power to require records (proposed section 126AH)

The records kept by a producer or exporter under **proposed section 126AG** may have to be produced to authorised officers within the meaning of the *Customs Act 1901*. **Proposed section 126AH** would confer the relevant power on authorised officers.

Unlike similar amendments made to the *Customs Act 1901* to implement AUSFTA, non-compliance with the request to produce documents would, under certain circumstances, constitute an offence under section 243SB of the *Customs Act 1901* (failure to provide documents or records).

Power to ask questions (proposed section 126AI)

In addition to the power to request documents, authorised officers would have the power to ask a producer or exporter of goods questions in order to verify the origin of the goods (**proposed section 126AI**).

Unlike under AUSFTA, failure to answer questions would, under certain circumstances, constitute an offence under section 243SA of the *Customs Act 1901* (failure to answer questions).

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Power to disclose information to Thai customs officials

Under **proposed subsections 126AH(2) and 126AI(2)**, authorised officers who collected information by requesting documents or asking questions have the power to disclose any document or answer received to Thai customs officials ‘for the purpose of verifying a claim for preferential tariff in Thailand’.

Summary and comments

- Under the **proposed new Division 4C**, exporters could be required to keep certain records for a specified period of time.
- Authorised officers will have the powers to request documents and ask questions of an exporter, the latter with a view to verifying the origin of the goods.
- Non-compliance with the request for documents or failure to answer a question constitutes an offence under the strict liability offence provisions contained in the *Customs Act 1901*.
- The proposed amendments to the *Customs Act 1901* do not confer powers ‘to visit factories or premises of producers, importers, exporters or any other party’ as included in the TAFTA under Article 412.1.2(d).
- Information obtained by the authorised officers may be disclosed to Thai customs officials ‘for the purpose of verifying a claim for preferential tariff in Thailand’.

Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004

Commencement

Schedule 1, items 1 to 37 and 39 to 40 of the Customs Tariff Amendment Act will commence either in 1 January 2005 or the day the TAFTA will come into force, whichever is later. However, these provisions will only commence if the TAFTA comes into force in Australia and item 1 of Schedule 1 of the *US Free Trade Agreement (Customs Tariff) Act 2004* commences before or on the same day as TAFTA.⁵¹

Schedule 1, items 38 will commence either immediately after the commencement of the *Customs Tariff Amendment (Textile, Clothing and Footwear Post-2005 Arrangements) Act 2004* or immediately after the provisions referred to above, whichever is later. These two events are also cumulative prerequisites—should one of them not occur, item 38 will not commence.

Schedule 2, items 1 to 35 and 37 to 38 will commence either in 1 January 2005 or the day the TAFTA will come into force, whichever is later. They will not commence, however, if

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the TAFTA does not come into force or if item 1 of Schedule 1 of the *US Free Trade Agreement Implementation (Customs Tariff) Act 2004* commences before or on the same day as TAFTA.

Schedule 1, items 36 will commence either immediately after the commencement of the *Customs Tariff Amendment (Textile, Clothing and Footwear Post-2005 Arrangements) Act 2004* or immediately after the provisions referred to above, whichever is later. These two events are also cumulative prerequisites—should one of them not occur, item 36 will not commence.

Schedule 2, Part 2 comes into force immediately before the commencement of schedule 1, item 1 of the *US Free Trade Agreement Implementation (Customs Tariff) Act 2004*. However, the provisions will not commence unless the provisions set out in **schedule 2, items 1 to 35 and 37 to 38** of the Customs Tariff Amendment Act commenced.

Schedule 1—Amendments commencing after the AUSFTA legislation commences

For the details of the AUSFTA, the reader is referred to the [Bills Digest](#) to the US Free Trade Agreement Implementation Bill 2004 and the US Free Trade Agreement Implementation (Customs Tariff) Bill 2004.⁵²

Item 6 of this Bill proposes to create the link between the rules of origin set out in the first Bill and the tariff included in the *Customs Tariff Act 1995*. Proposed new section 13B would stipulate that whenever the tariff refers to ‘Thai originating goods’ these goods must fulfil the tests set out in the rules of origin discussed above.

Item 10 of the Customs Tariff Amendment Bill, proposes changes to section 16 of the *Customs Tariff Act 1995*. Should these amendments take effect, goods originating in Thailand will be generally free of customs unless the Act expressly specifies a rate for a particular good (**proposed subsection 16(1)**). Since Thailand will continue to be classified as a developing country, **item 12** ensures that where goods are simultaneously eligible for preferential duty rates as a developing country and under the TAFTA, the duty will be determined under TAFTA.

Item 13 makes special provision for certain safeguards that exist in relation to goods imported from Thailand into Australia. This item sets out a table which specifies safeguards for:

- tuna, skipjack and bonito (Column 2, subheading 1604.14.00)
- pineapples (Column 2, subheading 2008.20.00), and
- pineapple juice (Column 2, subheadings 2009.41.00 or 2009.49.00).

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Column 3 of the table sets out the maximum quantity of the respective product for the calendar years 2005 to 2008, with the quantity increasing approximately 5 per cent per year. However, the quantity set out in Column 3 of the table may be varied under regulation (**proposed paragraph 16A(1)(b)**). Imports arriving in Australia after the quantity set for a particular good has been exceeded are calculated in accordance with the normal tariff applicable to the good, not the preferential tariff applicable under the TAFTA.

Item 19 proposes to extend the automatic indexation mechanism under section 19 of the *Customs Tariff Act 1995* for certain tariff rates ‘in line with movements in the Consumer Price Index in February and August of each year.’⁵³

Item 39 proposes to include **proposed new Schedule 6–Thai originating goods**, setting out the tariffs applicable to individual goods.

Schedule 2—Amendments commencing before the AUSFTA legislation commences

According to the [Explanatory Memorandum](#), Part 1 of Schedule 2 ‘contains substantially the same amendments as items 1 to 40 of Schedule 1 of to the Bill’, however, this part would only become operational if the AUSFTA has not come into force ‘on or before TAFTA enters into force in Australia.’⁵⁴

The main difference between Part 1 of Schedule 2 and Schedule 1 is set forth in **item 17** which proposes to introduce a regulation making power in relation to matters:

- required or permitted under the Act (**proposed subsection 20A(a)**) or
- necessary or convenient to be prescribed for carrying out, or giving effect to, the Act (**proposed subsection 20A(b)**).

This provision is identical to the provision contained in item 14 of Schedule 1 to the *US Free Trade Agreement Implementation (Customs Tariff) Act 2004*.

Part 2 of Schedule 2 of the Customs Tariff Amendment Bill makes consequential amendments to the *US Free Trade Agreement Implementation (Customs Tariff) Act 2004* which are necessary if TAFTA should enter into force prior to AUSFTA.⁵⁵

Benefits and negative precedents set by the Agreement

Potential benefits from a trade perspective

The potential benefits of TAFTA are:

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- increased connection to one of the most dynamic economies in ASEAN, with an average annual growth rate of real gross domestic product (in US\$ terms) of 7.8 per cent over the past four years
- eventual liberalisation of all trade in goods between the two nations. This stands in contrast to AUSFTA and to Australia's existing commitments regarding the TCF and automotive industries
- that MFN provisions are included throughout TAFTA, providing for both sides to benefit from further liberalisation with future FTA partners, although this is often quite weakly phrased.⁵⁶ In the Investment Chapter, Article 910 gives Australia as favourable treatment as granted by Thailand to any other non-Party investors, including as that granted to the US in an important treaty of 1966⁵⁷
- that the agreement—unlike AUSFTA, but like SAFTA—reinforces Australia's position on the elimination of agricultural export subsidies. This is not surprising given that both nations are members of the [Cairns Group](#). In its inquiry into SAFTA, JSCOT praised that agreement for reinforcing Australia's position on free trade in agriculture. The report prepared by JSCOT noted that:

2.18 DFAT acknowledged that neither party actually provides export subsidies to agriculture. Nevertheless, SAFTA reinforces Australia's international stance on comprehensive trade liberalisation and particularly the trade in agricultural goods⁵⁸

- that although a number of safeguard measures are included, their time-limited nature means that they probably will not be able to be used to prevent trade liberalisation
- that some Australian industries will be given a competitive advantage (with respect to Thai tariffs/quotas) ahead of their competitors in nations without free trade agreements with Thailand.⁵⁹ For example, Australian dairy producers, with enhanced access, will have an advantage over other exporters from countries without a free trade agreement, such as New Zealand, and
- to the extent that further bilateral/regional trade agreements are a desirable outcome,⁶⁰ the conclusion of an FTA with a developing ASEAN member may have given Australia more credibility in the region and enhanced the prospects of future agreements with the ASEAN Free Trade Area (AFTA) as a whole and with other individual members such as Malaysia.

Potential costs from a trade perspective

However, these benefits must be weighed against the possible costs that TAFTA will have on various aspects of Australian trade policy. In particular:

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- the exclusion of significant services trade liberalisation in TAFTA—particularly on Australia’s part—stands in stark contrast to the level of ambition claimed by the Government at the start of negotiations. It was noted then that:

In their negotiations for a bilateral free trade agreement, Thailand and Australia are each seeking a more liberalised service sector in the other country, according to Australia’s chief negotiator. [...] Kongkiat Opaswongkarn, head of the economic affairs committee of the Thai Chamber of Commerce, said the Thai private sector supported the government’s effort to negotiate freer trade in the services sector as part of a Thailand-Australia FTA.⁶¹

Indeed, given the final outcome, where Thailand did actually liberalise some of its services trade, Australia’s failure to do so is not only economically questionable⁶² but also somewhat puzzling

- neither Thailand nor Australia is a party to the plurilateral agreement in the WTO on government procurement and there is no provision in TAFTA to include that sector.⁶³ Inclusion of government procurement would have helped push liberalisation of services trade, apart from any direct efficiency benefits
- the inclusion of investor-state dispute settlement provisions, such as those that exist in NAFTA, is likely to exacerbate concerns many in the community have about trade agreements impinging on the ability of governments to legislate on legitimate social issues⁶⁴
- the ability of Australia to seek strong disciplines at the WTO on rules for preferential trading arrangements, a long-term goal, might be compromised by its loose application of aspects of existing Article XXIV disciplines

The Marrakesh Agreement (1995) clarified Article XXIV⁶⁵ (which had been increasingly ignored by GATT members) and strengthened its discipline.⁶⁶ In particular the length of phase-in periods in preferential trade agreements (Article XXIV:5(c)) was limited to 10 years⁶⁷ except in exceptional cases. In cases where parties believe that 10 years would be insufficient they should provide a full explanation to the Council for Trade in Goods of the need for a longer period. It is difficult to see a compelling reason for extended phase-in periods in the case of TAFTA, especially since both countries are signatories to the (APEC) Bogor declaration committing them to free trade by 2010 in Australia’s case and 2020 in Thailand’s. Australia will only eliminate all barriers to trade by 2015 and Thailand by 2025. Thailand will only slowly remove its TRQs under TAFTA

- significant concerns have been raised about the value of a bilateral, as opposed to multilateral, approach to trade liberalisation. It has been argued that a piecemeal approach to trade agreements may result in an incoherent system.⁶⁸ Thailand’s highly complex web of (partial) trade agreements has in particular been criticised as not being always to (Thailand’s) national advantage⁶⁹

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- a problem labelled the ‘spaghetti bowl’ problem has been identified clearly by Professor Bhagwati and others: the more FTAs that are signed, the more incompatible standards and rules of origin emerge.⁷⁰ This makes ‘free trade’ an administrative mess, and excludes one of the large efficiency gains possible from moves to free trade

In particular for Australia, sourcing of components from New Zealand suppliers under CER might affect the ability to claim tariff free status for exports. In fact, the different systems used for rules of origin in CER as opposed to AUSFTA and TAFTA may lead Australia to pressure New Zealand to rewrite the rules of origin in CER. However, the Productivity Commission has recently investigated the merits of doing this, and found against such alteration.⁷¹

Concluding Comments

By concluding TAFTA, Thailand and Australia are taking steps to boost the existing trade between the two parties by reducing the existing tariff barriers in both countries and creating a framework that enhances economic integration and consultation. Overall, there is evidence that TAFTA will have a positive economic effect on both countries, though Thailand appears to gain more from the Agreement than Australia.

The making of TAFTA is, after SAFTA, the second example of a bilateral FTA to which Australia is a party where the implementing legislation is introduced into Parliament before the public participation process, facilitated through JSCOT, was fully completed. This approach taken by the Government has been previously criticised by JSCOT, scholars and trade experts.

Endnotes

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- 1 Over the same period, Australia has fallen from 16th to 26th place as a global exporter, DFAT, *The APEC Region Trade and Investment 2003*, p. 175. Thai exports, measured in US\$, have grown at an average annual rate of 12.1% over the twenty years from 1982 to 2002, while Australian exports have grown at 5.6%.
 - 2 Bilateral problem areas include quarantine issues with chicken meat, prawns and tropical fruit, as evidenced by the Thais priorities in the quarantine consultative forum set up in the agreement (see Annex 6.1 to the agreement).
 - 3 Agricultural products made up 18.5% of Thai exports in 2001 (WTO, *Trade Policy Review Thailand*, November 2003, WT/TPR/S123, p. 8). Thailand has been an important member of the G20, a developing nation group seeking change in the WTO treatment of agriculture, with many parallels to the aims of the Cairns Group.

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- 4 M. Vaile (Minister for Trade), *Australia-Thailand FTA Raises Benchmark in Regional Free Trade Negotiations*, [media release](#), Canberra, 20 October 2003.
- 5 S. Chirathivat and S. Mallikamas, 'Thailand's FTA Strategy: current Development and Future Challenges', *ASEAN Economic Bulletin*, 21(1), 2004, pp. 37 – 53.
- 6 Chirathivat & Mallikamas, 2004, op cit. p. 38, note that at the time of the launching of the ASEAN Free Trade Agreement (AFTA), Thailand's tariffs were the highest of the original six members of ASEAN, with an average level of almost 40 per cent.
- 7 This was an increase from both 2002, with bilateral trade of A\$7.0 billion, and from 2001 with bilateral trade of A\$ 6.3 billion. Over the four and a half years from 1998-99 to 2003 trade between the two nations grew at an annual average growth rate of over 13 per cent.
- 8 It is important to emphasise the concern that focussing attention on bilateral deficits is economically misleading, and can easily lead to a mercantilist approach. When trade is conducted between Australia and many nations there is no special reason to expect 'balanced trade' between Australia and any one of its many partners, i.e. a particular deficit or surplus reflects only a specific set of comparative advantages. The overall balance reflects the outcome of Australian macroeconomic policy.
- 9 B. Donald, 'Basic Facts of Australia's Economic Relationships with Thailand', *Unpublished paper*, Parliamentary Library, Department of Parliamentary Services, Canberra, August 2004.
- 10 Calculated from International Monetary Fund, *Direction of Trade Statistics Yearbook*, 1997 and United Nations, *International Trade Statistics Yearbooks*, 1998 – 2002.
- 11 More than 75 per cent in 2001, WTO, *Trade Policy Review Thailand*, November 2003, WT/TPR/S123, p. 8.
- 12 Thailand's trade surplus is approximately 3.8 per cent of GDP in 2004, according to the IMF, *World Economic Outlook*, September 2004. In comparison, Australia is running a trade deficit of some 5.3 per cent of GDP.
- 13 See ABS, 5352.0, *International Investment Position, Supplementary Country Statistics, 2003*, 20 July 2004.
- 14 However, while the Singapore-Australia Free Trade Agreement came into effect in July 2003, Singaporean investment in Australia actually declined by A\$4.9 billion in 2003, and Australian investment in Singapore declined by A\$1.4 billion. Thus, there is no guarantee that TAFTA will strengthen the investment partnership.
- 15 World Trade Organization, *Trade Policy Review, Australia*, Geneva, 2002, WT/TPR/G/104.
- 16 Centre for International Economics (CIE), *The Australia-Thailand Free Trade Agreement: economic effects*, 1 March 2004. It is disappointing to note that this study perpetuates the idea that *exports* are the sole source of gains, by claiming that bilateral trade is more important to Thailand than Australia because its exports to GDP ratio is higher.
- 17 A tariff rate quota is a system where there is the application of a reduced tariff rate for a specified quantity of imported goods. Imports above this specified quantity face a higher tariff rate. The difference between the in-quota tariff and the out-of-quota tariff often is so large as to preclude any trade at the higher rate (Walter Goode, *Dictionary of Trade Policy Terms*,

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Centre for International Economic Studies, Adelaide, 1997, pp. 217-218). The system is used extensively in agricultural trade, where the *Marrakesh Agreement* (1994) forced the *tariffication* of all existing quotas.

- 18 This is unlikely to substantially affect Thailand, which is not a major dairy exporter in any case, because in the period since the introduction of the quota it has not been reached, and thus the out-of-quota tariff has not been applied.
- 19 Unbound tariffs include those on iron and steel and transport equipment; applied rates can often exceed bound rates unless a WTO-member exemption is applied for. A bound tariff is one where the WTO member has specifically agreed a maximum tariff beyond which the tariff will not be raised.
- 20 CIE (2004), *op cit*.
- 21 In contrast, the Thailand-Bahrain agreement will only cut tariffs on 642 items to between 0 and 3 per cent. M. Narkvichien, 'Bilateral not always beneficial', *The Nation (Thailand)*, 21 April 2003.
- 22 According to CIE (2004), *op cit*, p. 6, 'liberalisation of services trade under the Agreement is not as pronounced as that for merchandise trade'.
- 23 Commonwealth of Australia, *In the National Interest: Australia's Foreign and Trade Policy White Paper*, Canberra, 1997.
- 24 M. Vaile (Minister for Trade), *Australia and Thailand Agree on new Study to Increase Trade and Investment Links*, [media release](#), 4 July 2001.
- 25 Department of Foreign Affairs and Trade, *Study on an Australia-Thai Free Trade Agreement (FTA) Points to Real Benefits for both Countries*, [media release](#), 7 May 2002. See also CIE, *Scoping Study*, 2002.
- 26 M. Vaile (Minister for Trade), *PMs Give Green Light to Begin Australia/Thailand Trade Negotiations*, [media release](#), 30 May 2002.
- 27 M. Vaile (Minister for Trade), *Good Progress in Free Trade Negotiations with Thailand*, [media release](#), 21 November 2002.
- 28 M. Vaile (Minister for Trade), *Australia-Thailand FTA Raises Benchmark in Regional Free Trade Negotiations*, [media release](#), 20 October 2003.
- 29 M. Vaile (Minister for Trade), *Release of Thailand-Australia Free Trade Agreement Text*, [media release](#), 12 May 2004.
- 30 While the Prime Minister did not issue a press release, the issue was covered in the media e.g. R. Callick, 'Free-trade deal with Thais signed today', *Australian Financial Review*, 5 July 2004, p. 5 and 'Australia, Thailand sign FTA', *Canberra Times*, 6 July 2004, p. 2.
- 31 M. Vaile (Minister for Trade), *New Guide to Doing Business with Thailand*, [media release](#), 5 July 2004.
- 32 A. Capling et al., 'Can the democratic deficit in trade negotiations be overcome? And should it? Lessons from the Australia-US Trade Agreement', paper presented at the Asia Pacific

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- School of Economics and Government, Australian National University, Canberra, 26 October 2004.
- 33 ACIL Tasman, ‘The proposed free trade agreement with China – A commentary and some preliminary analysis’, [paper](#) prepared for a Conference on Free Trade agreements in the Asia Pacific Region, University of Western Australia, Perth, July 2004.
- 34 This does not account for any effect of AUSFTA or the two nation’s APEC commitments, both of which would tend to reduce any gains from TAFTA.
- 35 CIE (2004), op. cit., p. 6.
- 36 Senator Linda Kirk, ‘Committees: Treaties Committee: Report’, Senate, *Speech*, 26 June 2003, p. 12659
- 37 Government Response to Report 52 of the Joint Standing Committee on Treaties, provided to JSCOT by the Government on 17 June 2004, available at <http://www.aph.gov.au/house/committee/jsct/governmentresponses/52nd.pdf>, accessed 17 November 2004.
- 38 M. Schubert, ‘Labor offers itself as friend of the entrepreneurial class’, *The Age*, 16 November 2004, p. 5.
- 39 Senator B. Brown, ‘Thailand-Australia Free Trade Agreement lopsided towards corporations’, 5 July 2004.
- 40 K. Wong, ‘Trade routes open to Thailand’, *Australian Financial Review*, 5 November 2004, p. 26
- 41 For AIG’s position see, Australian Industry Group, [Australia-Thailand Free Trade Agreement](#).
- 42 D. Cameron has questioned how Australian workers can ‘compete with workers from a country with effectively no labour rights at all’, ‘Sweat shop warning on trade agreement’, *Daily Telegraph*, 7 July 2004, p. 21.
- 43 Australian Council of Trade Unions, ‘ACTU Submissions to the Joint Standing Committee on Treaties in relation to the Australia-Thailand Free Trade Agreement’, available at <http://www.aph.gov.au/house/committee/jsct/12may2004/subs/SUB009.pdf>, accessed 17 November 2004.
- 44 J. Stanhope, Chief Minister of the Australian Capital Territory, Submission to the Joint Standing Committee on Treaties, Canberra, 11 June 2004, available at <http://www.aph.gov.au/house/committee/jsct/12may2004/subs/SUB005.pdf>, accessed 17 November 2004.
- 45 See comments in digest below at pp. 17–19.
- 46 Some general information and the Convention can be found at http://www.wcoomd.org/ie/En/Topics_Issues/HarmonizedSystem/Hsconve2.pdf, accessed 17 November 2004.
- 47 [Explanatory Memorandum](#), Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004, p. 28
- 48 *ibid.*, p. 31.

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49 Rule 5 of the Interpretation Rules provides as follows:

In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

50 See comments in digest below at pp.; 17 – 19.

51 The Minister must announce by notice in the Gazette on which day the TAFTA comes into force in Australia.

52 B Donald, J Varghese, T John, 'US Free Trade Agreement Implementation Bill 2004' and 'US Free Trade Agreement Implementation (Customs Tariff) Bill 2004', *Bills Digest*, nos. 21 and 22, Parliamentary Library, Canberra, 2004-2005.

53 [Explanatory Memorandum](#), Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004, p. 11.

54 *ibid.*, p. 14.

55 *ibid.*, p. 14.

56 For example 'a party shall consider a request from the other', to grant reciprocal benefits following an FTA with a third party.

57 This treaty was the *US Thailand Treaty of Amity and Economic Relations* entered into between the US and Thailand. Under the Agreement, Thailand affords the United States preferential treatment vis-a-vis other countries for certain types of investment. R. J Ahern and W. M. Morrison, 'U.S.- Thailand Free Trade Agreement Negotiations', available at <http://us-asean.org/us-thai-fta/RL32314.pdf>, accessed 4 January 2004, p. 6.

58 Joint Standing Committee on Treaties, *Report 52, Singapore Australia Free Trade Agreement*, June 2003.

59 This is not necessarily a 'good thing' for the world economy, especially if the competitors are actually more efficient than Australian producers, in which case it leads to *trade diversion*.

60 The benefits of this process are highly debatable, see for example Jane Drake-Brockman, 'Asia Pacific Integration: an Ongoing challenge for Australian Trade Diplomacy', paper presented Canberra, 8 November 2004.

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- 61 S. Thapanachai and W. Maneerungsee, “Service sector tops Thai-Australia talks”, *Bangkok Post*, 5 September 2003.
- 62 As the CIE report notes, gains from TAFTA are limited because the large services sector is excluded from liberalisation.
- 63 A *plurilateral* agreement is one that is open to WTO members to join but is not compulsory. Most WTO agreements, such as the General Agreement on Trade and Services, are compulsory.
- 64 It is standard to include these provisions in trade agreements between developed and developing nations, and reflects in part concerns about the lack of transparency and stability in legal and corporate governance arrangements: the stability of both in Australia and the US was used to justify the exclusion of such provisions from AUSFTA.
- 65 The Article which allows the derogation from the ‘most-favoured nation principle’ needed to permit PTAs.
- 66 Indeed even the Marrakesh Agreement provisions have proved unsatisfactory to many members and the Doha Round includes work to strengthen further the restrictions on Article XXIV.
- 67 In general, developing countries are permitted longer phase-in periods.
- 68 Chirathivat & Mallikamas, *op. cit.* They note the need for the Thai government to develop a master plan for Thailand’s FTAs, to ensure that they are economically consistent.
- 69 Narkvichien, *op. cit.*
- 70 See for example J. Bhagwati, ‘Preferential trade agreements: the wrong road’, *Law and Policy in International Business*, 27(4), Summer 1996, pp. 865–871.
- 71 Productivity Commission, [*Rules of Origin under the Australia-New Zealand Closer Economic Relations Trade Agreement*](#), Canberra, June 2004.

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