6 Recent developments in trade policy

Recent developments in Australia’s trade policy environment include:

* ongoing efforts to conclude the Doha Round of World Trade Organization (WTO) trade negotiations;
* trade-related aspects of the upcoming meeting of the twenty leading industrial countries (G20) chaired by Australia and other plurilateral developments; and
* negotiation of preferential bilateral and regional trade agreements and the intention to pursue further agreements.

There are contrasting comparative economic benefits of trade liberalisation. Bilateral and regional trade agreements are often seen as valuable reform initiatives in their own right. In practice, they are generally not the most effective way to improve the welfare of nations, where preference should be given to unilateral action to reduce or eliminate trade barriers, or to comprehensive global reform. Negotiation and compliance costs associated with preferential agreements (including detailed and complex rules of origin) and the potential for diversion of trade from lower cost sources of supply are consequences of bilateral agreements. Australia suffers from reduced market access where other nations gain preferential bilateral trade access. Pursuing more such agreements can make it difficult to pursue the better course, as tariffs and other trade-impeding devices are ‘reserved’ as negotiating coinage for continuing rounds of future bilateral negotiations.

There have also been recent developments in Investor-State Dispute Settlement (ISDS) provisions which are contained in some preferential trade and investment agreements.

A number of legal actions against the Australian Government by private investors from other countries under WTO processes and firms under ISDS dispute settlement mechanisms have also occurred.

## 6.1 Multilateral, plurilateral and regional developments

### World Trade Organization 9th Ministerial Conference

The 9th Ministerial Conference of the WTO was held in Bali, Indonesia from 3 to 6 December 2013. The meeting focused on reaching agreement on a package of matters that would contribute to a conclusion of the Doha Round of multilateral trade negotiations launched in 2001. Progress with Doha Round negotiations had stalled in 2008 and expectations for outcomes in Bali were low. Nevertheless, the package was agreed. It contained the Agreement on Trade Facilitation — which will facilitate the cross-border movement of goods — some decisions on agriculture and some developing country initiatives (box 6.1).

In spite of the reservations that preceded the meeting, the conference was viewed as a success. The WTO Director-General noted:

… the decisions we have taken [in Bali] are an important stepping stone towards the completion of the Doha Round (Azevêdo 2013a).

In advance of the meeting, the WTO Director-General had emphasised the advantages of multilateral trade agreements over the alternatives.

It’s no secret that governments have been exploring other channels for liberalizing trade. These are positive initiatives, but they offer no substitute for global agreements and global rules. Regional or plurilateral agreements by definition are exclusive and the countries most often excluded from these pacts are the poorest and weakest (Azevêdo 2013b).

The comparative benefits of multilateral reform over preferential arrangements are widely accepted. However, the potential benefits available from unilateral action to remove impediments to trade also warrant consideration in wider assessments of trade liberalisation strategies.

Past Commission work has modelled the economic impacts of merchandise trade liberalisation at the unilateral, regional and multilateral level. It found that around 60 per cent of all gains for Australia from the elimination of remaining tariffs globally would be achieved from Australia acting alone in removing all of its remaining tariffs on imports (PC 2010, p. 214). Unilateral action would narrow the range of matters requiring cross-country negotiation. Importantly, the benefits directly available from domestic economic reform suggest that it should not be delayed to retain ‘bargaining coin’ in multilateral as well as regional and bilateral trade negotiations.

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| Box 6.1 WTO 9th Ministerial Conference outcomes |
| Trade facilitation  Red tape, lack of transparency and certainty involved in moving goods across borders are significant restrictions on trade. Citing work by the United Nations, the WTO noted the average customs transaction involved 20-30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60-70 per cent of all data at least once. Before the Conference, the OECD estimated that a trade facilitation agreement could reduce trade costs by 10 per cent for advanced economies and up to around 15 per cent for developing countries. Subsequently, a consensus agreement on trade facilitation was reached at the Ministerial Conference. The agreement included measures to accelerate cross-border movement of goods by simplifying and harmonising customs procedures and documentation and improving predictability of customs regulations through more effective cooperation between customs and other authorities on compliance issues.  Agricultural sector outcomes  Agricultural sector negotiations prior to the Bali meeting covered issues associated with export competition; tariff rate quota administration; public stockholding and cotton.   * The export competition stream covered: export subsidies; export financing support; food aid; and trade distorting activities of state owned enterprises. WTO members reaffirmed their commitment to parallel elimination of all export subsidies. * The tariff rate quota stream establishes rules on procedural and transparency aspects of tariff rate quotas and a mechanism to address low fill rate quotas. The Ministerial decision supports greater transparency, dialogue, monitoring and review. * The public stockholding stream covers purchases of products at administered prices by some developing countries for food security purposes up to capped amounts under the WTO Agreement on Agriculture. Members agreed to an interim mechanism for these systems with greater transparency and safeguards on such measures and to negotiate for a permanent solution. * The sector-specific cotton stream recognised the importance of cotton to developing country economies, particularly the least developed, with WTO members reaffirming their commitment to address cotton issues within WTO agricultural negotiations.   Least developing country (LDC) initiatives  Provisions beneficial to LDCs were discussed including: simplified rules of origin for LDC products; preferential access to LDC service suppliers; improving the cotton trade environment; and encouraging duty and quota free market access. Members agreed to list allowable general services programs (to promote rural development and alleviate poverty). An undertaking to enhance transparency and monitoring for trade-related aspects of cotton was signed, but fell short of the 2005 announcement that export subsidies would be eliminated and domestic support for cotton reduced. |
| *Sources*: Azevêdo (2013a,b), DFAT (pers. comm. 19 June 2014), European Commission (2013), WTO (2013a, p. 3). |
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### Group of 20 (G20)

The G20 began in 1999 as a meeting of Finance Ministers and Central Bank Governors following the Asian financial crisis. In 2008, the first G20 Leaders Summit was held, and the group played a key role in responding to the global financial crisis. G20 leaders have met eight times since 2008. The next meeting is in Brisbane on 15-16 November 2014 (G20 2014).

The focus of G20 Summits has gradually expanded to include avenues to strengthen the global economy, improve financial regulation, reform the governance of international financial institutions and discussion of key economic reforms required in G20 member countries. The G20 agenda also covers work on such issues as trade, development, anti-corruption, food security and employment. In February 2014, G20 Finance Ministers and Central Bank Governors committed to develop new measures that would raise the level of G20 output by at least 2 per cent above the currently projected level in the next five years.

Australia has assumed the presidency of the G20 for 2014. In his address to the World Economic Forum at Davos, Switzerland, the Australian Prime Minister listed (in order) trade, taxation, infrastructure, employment and banking as the main areas where specific outcomes would be sought at the G20 Leaders Summit in Brisbane. On trade matters, the Prime Minister has stated:

At the very least, the G20 should renew its commitment against protectionism and in favour of freer markets. Each country should renew its resolve to undo any protectionist measures put in place since the [Global Financial] Crisis. Better still, each country should commit to open up trade through unilateral, bi-lateral, plurilateral and multi-lateral actions and through domestic reforms to help businesses engage more fully in global commerce. As a trading nation, Australia will make the most of its G20 presidency to promote free trade (Abbott 2014a, p. 4).

Australia will host a G20 Trade Ministers meeting on 19 July 2014 to discuss actions G20 members can adopt to reduce barriers to global trade.

### Asia-Pacific Economic Cooperation

Established in 1989, APEC has become an important non-binding forum for encouraging greater economic integration in the region through the promotion of unilateral reform and facilitating collaboration between government officials, business and academics in support of open and transparent markets and economic growth. The annual APEC Leaders’ meeting provides strategic direction to APEC’s work program and is complemented by ministerial meetings on topics including trade, food security, energy, telecommunications and small and medium enterprises.

China is hosting APEC in 2014. At the APEC Trade Ministers’ meeting in Qingdao in May 2014, Ministers agreed to take steps toward APEC’s goal of a Free Trade Area of the Asia-Pacific (FTAAP). This included enhanced information sharing on preferential trade agreements, capacity building for trade agreement negotiators and analysis toward a FTAAP. Trade Ministers also agreed to a strategic blueprint on strengthening cooperation among APEC members on issues including global value chains and trade facilitation, investment climates, small and medium enterprises, services, and disaster resilience.

Trade Ministers in Qingdao also issued a statement of support for the multilateral trading system. This included support for early and effective implementation of the WTO Agreement on Trade Facilitation (box 6.1), an extension of the current ‘standstill’ agreement on protectionism from 2016 to 2018 as well as the advancement of negotiations on liberalisation of environmental goods and expansion of the WTO Information Technology Agreement. The APEC Ministers’ meeting (Trade and Foreign Ministers) will be held on 7-8 November 2014 in Beijing and the Leaders’ meeting on 10-11 November 2014 also in Beijing.

### Other plurilateral negotiations

In addition to discussions within the APEC forum, Australia participated in WTO negotiations related to three plurilateral agreements over the past year. Specifically, Australia’s trade minister announced in January 2014 that Australia would join 13 other WTO members to negotiate a plurilateral agreement to remove tariffs on a range of environmental goods. Negotiations will initially focus on the list of environmental goods agreed by APEC leaders in 2012 (DFAT 2014g).

Negotiations to review the WTO’s Information Technology Agreement (which entered into force in 1997) with the aims of expanding the number of products covered by commitments to eliminate tariffs, increase country membership (from the current 75 signatories to 79) and develop non-binding principles for non-tariff barriers such as international standards, registration requirements and transparency of regulatory measures also commenced during the year (DFAT 2014h). Australia is also jointly leading (with the United States and the European Union) negotiations on a Trade in Services Agreement (TISA). Negotiations began in early 2013 with the latest round chaired by Australia between 28 April and 2 May 2014. Negotiation topics included market access, new and enhanced disciplines for financial services, domestic regulation and transparency, e-commerce and telecommunications, air and maritime transport (DFAT 2014i).

## 6.2 Preferential trade agreements

In the Asia–Pacific region, the number of preferential trade agreements has increased substantially over the last two decades or so. In 1990, there were only five preferential agreements in force in the region, accounting for around 20 per cent of all trade agreements across the globe. By 2000, 20 agreements were in force in the Asia-Pacific including regional agreements such as the North American Free Trade Agreement and Association of South East Asian Nations (ASEAN) agreements. By the end of 2013, the number of preferential trade agreements in force in the region had risen to 157, accounting for over 40 per cent of all trade agreements. (WTO 2014e).

### Bilateral agreements

Over the past year, Australia has signed a bilateral trade agreement with Korea and concluded negotiations on an economic partnership agreement with Japan. Australia also has trade agreements currently in force with New Zealand (in force since 1983), Singapore (2003), Thailand (2005), the United States (2005), Chile (2009), ASEAN and New Zealand (2010) and Malaysia (2013), and is negotiating agreements with a number of other countries including China, India and Indonesia.

#### Korea

Australia and Korea concluded negotiations on a bilateral trade agreement between the two countries in December 2013 and released the full text of the agreement in February 2014. The agreement was signed in April 2014. The negotiated text along with a national interest analysis was tabled in the Australian Parliament in May 2014. The agreement will be considered by the Joint Standing Committee on Treaties which is expected to provide a report to the Australian Parliament in September 2014. Passage of the relevant legislation is expected to occur toward the end of 2014 (DFAT 2014d, p. 1).[[1]](#footnote-2)

The agreement covers a range of topics including (but not limited to) trade in goods and services, trade remedies, trade facilitation, investment, government procurement, telecommunications, financial services, movement of natural persons, intellectual property rights, technical barriers to trade, competition policy, labour and environmental standards, and investor-state dispute settlement mechanisms (box 6.2).

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| Box 6.2 Key features of the Korea-Australia agreement |
| **Goods trade**   * Australia to provide duty-free access for eligible imports from Korea within 8 years. * Subject to eligibility requirements, phased access to duty-free entry for 99.8 per cent of Australian exports (by value) to Korea over 20 years with access to duty-free entry for 84 per cent of current exports on entry into force. * Phased reductions in Korean applied tariffs on imports from Australia include: * elimination (on entry into force) of tariffs on Australian raw sugar, wheat, wine and some horticultural products with tariffs on most other Australian agricultural products eliminated over short time frames; * removal of the 40 per cent tariff on Australian beef exports progressively over 15 years; * elimination of duty-free quotas for Australian cheese, butter and infant formula and the removal of high tariffs on many other dairy products between 3 and 20 years; and * phasing out of tariffs on Australian manufactures, resources and energy exports within 10 years.   **Services trade and investment**   * Increase in the screening threshold for Korean private investment in Australia in non-sensitive sectors from $248 million to $1078 million in line with the threshold applied to New Zealand, the United States and Japan (on entry into force). * Progressive reduction of Korean market access barriers including Australian: * legal firms to establish representative offices in Korea; * accountancy firms to establish offices in Korea; * telecom providers to own Korean telecom firms within 2 years; and * financial services providers to supply specified services ‘cross border’. * Provision for an investor-state dispute settlement mechanism. The agreement excludes non-discriminatory regulatory actions by a Party that are designed and applied to achieve public welfare objectives, such as in the areas of public health, safety, and the environment.   **Other areas**   * Guaranteed access for skilled service suppliers, investors and business visitors. * Commitment to improve mutual recognition for professional qualifications. * IP protection in Korea to be broadly equivalent to Australian IP protections. * Guaranteed access to Korean government procurement for Australian firms. |
| *Source :* DFAT (2014c)*.* |
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According to economic modelling commissioned by the Department of Foreign Affairs and Trade (DFAT), with changes in goods trade under the Korea-Australia agreement, GDP is projected to be $650 million higher in 2030 than would be the case without the agreement. A net increase in jobs of 1745 in 2015 and 950 in 2030 is projected compared to the outcome if an agreement had not been implemented (CIE 2014, p. 13). While the modelling reported the implications for Australia of a Korea-US and Korea-EU agreement if Australia did not secure an agreement, it did not report on the implications of unilateral tariff reductions by Australia or partner economies.

As in previous agreements, an extensive list of agreement-specific rules of origin and supporting customs procedures have been developed to prevent goods being trans-shipped from non-signatory countries to take advantage of the preferential tariff rates under the agreement. Some five thousand product-specific rules of origin are specified in the Korea-Australia agreement. This will further add to the administratively complex set of origin requirements with potentially considerable compliance cost burdens on business (section 6.3).

#### Japan

After seven years and seventeen rounds of negotiations, the governments of Australia and Japan concluded negotiations on an Economic Partnership Agreement (EPA) on 7 April 2014 in Tokyo. The EPA is expected to be signed by both governments in the second half of 2014, after which the final text would be made public. According to DFAT, on coming into force, the EPA will provide for preferential market access for Australian producers across a range of eligible agricultural, industrial, energy and mineral products as well as bilateral commitments on services and investment (box 6.3). As with other preferential trade agreements, eligibility for trade preferences will be subject to rules of origin negotiated under the agreement. At this stage, details on the rules of origin that will be applied are not available.

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| Box 6.3 Selected provisions of the Australia-Japan Economic Partnership Agreement |
| The Department of Foreign Affairs and Trade reports that on coming into force the agreement would provide preferential access to the Japanese market for a range of eligible Australian products.   * Australian exports of beef, sugar, horticulture, wine and seafood would be granted preferential access to the Japanese market and tariffs would be bound at zero on bilateral trade in wool, cotton, lamb and beer. * Bilateral tariffs on Australian frozen beef exports to Japan would be halved to 19.5 per cent over 18 years and on fresh beef exports to 23.5 per cent over 15 years, with significant front-loading of the tariff cuts. * In addition to the existing global quota, Australian fresh cheese exporters would obtain an additional duty-free quota allowance, increasing over time, to reach 20 000 tonnes. The 29.8 per cent tariff on out of quota cheese imports would remain. * Tariffs on most horticulture and seafood exports would be eliminated. * The bilateral tariff on Australian exports of international standard raw sugar to Japan would be reduced to zero and reduced levies would also apply. * Bilateral tariffs of up to 30 per cent on some manufactured products meeting eligibility requirements would be eliminated. Bilateral tariffs on cars would be eliminated, except for the specific tariff on used cars which would be retained. * All bilateral tariffs on energy and mineral exports would be eliminated within 10 years.   Under the agreement, Australia would raise the screening threshold for private Japanese investment in non-sensitive sectors to the threshold applied to private investment from New Zealand, the United States and Korea (on entry into force).  The agreement also includes bilateral commitments on intellectual property and provides for national treatment of the goods, services and suppliers of either Party for government procurement above agreed value thresholds. The EPA will not contain an investor state-dispute settlement mechanism. |
| *Source*: DFAT (2014e). |
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### Regional agreements

In addition to bilateral agreements, Australia is a negotiating party to two possible regional trade agreements — the Regional Comprehensive Economic Partnership (RCEP) and the Trans-Pacific Partnership (TPP). Both proposals could serve to harmonise the disparate provisions (for example, with respect to rules of origin) contained in existing bilateral agreements among negotiating parties to the respective agreements. However, there is a likelihood that a RCEP or a TPP bloc will discriminate against nations excluded from the respective agreements, to the detriment of efficient resource allocation, global trade and growth. There is also a risk that specific provisions within these agreements including those relating to intellectual property, investor state dispute settlement and product-specific rules of origin will impose net costs on trading partner economies. These concerns have been heightened by a lack of transparency of the actual provisions being negotiated; which would matter less if — following negotiation — there was a transparent, arms-length process of assessment that preceded political commitments being made. Currently, there is not.

#### Regional Comprehensive Economic Partnership

RCEP is an ASEAN-centred proposal for a regional preferential trading bloc which would initially include the ten ASEAN member states and countries which have an existing trade agreement with ASEAN. Those countries are Australia, China, India, Japan, Korea and New Zealand.[[2]](#footnote-3) RCEP would create the world’s largest trading bloc with the 16 participating countries accounting for almost half the world’s population, 30 per cent of global GDP and more than 25 per cent of global exports (DFAT 2014f). Negotiations began in early 2013 and aim to be completed by the end of 2015. The key features of the proposed RCEP agreement are described in box 6.4.

In consideration of the different levels of development of the participating countries, the RCEP framework includes ‘… appropriate forms of flexibility including provision for special and differential treatment, plus additional flexibility to the least-developed ASEAN Member States, consistent with the existing ASEAN+1 FTAs …’ (ASEAN 2013, p. 1). While RCEP partly aims to address concerns about the ‘noodle bowl’ of overlapping bilateral agreements between negotiating parties, the flexibility provisions and the lack of commonality in the existing five ASEAN+1 agreements and the 23 ratified bilateral agreements as well as varying internal policies could prove difficult to harmonise and consolidate under a comprehensive RCEP agreement. For example, there are substantive differences in rules of origin for individual goods across agreements which could prove difficult to harmonise.

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| Box 6.4 Regional Comprehensive Economic Partnership features |
| The core of the RCEP negotiating agreement will cover:   * trade in goods – intended to progressively eliminate tariff and non-tariff barriers on *substantially* all trade in goods; * services – intended to substantially eliminate restrictions and/or discriminatory measures consistent with the WTO General Agreement on Trade in Services (GATS); * investment – intended to address issues of investment promotion, protection, facilitation and liberalisation; * economic and technical cooperation – intended to narrow development gaps among parties including through electronic commerce; * intellectual property – intended to reduce IP-related barriers to trade and investment including through protection and enforcement of intellectual property rights; * competition – intended to curtail anti-competitive practices while being cognisant of significant differences in the capacities of national regimes in this area; * dispute settlement – intended to provide for an effective, efficient and transparent process of consultation and dispute settlement; and   RCEP negotiations will also consider including other issues covered by trade agreements among RCEP participating countries, and take into account new and emerging issues relevant to business. |
| *Source :* ASEAN (2013). |
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#### Trans-Pacific Partnership

The concept of a TPP agreement developed from an existing trade agreement between Brunei, Chile, New Zealand and Singapore (known as the Trans-Pacific Economic Partnership Agreement) signed in 2005. The original goal was to create a model regional agreement that could be expanded to include additional members from the APEC group of countries. In addition to the four foundation members, eight other countries have since joined the negotiations. In chronological order of their engagement, these countries are the United States, Australia, Peru, Vietnam, Malaysia, Mexico, Canada and Japan. South Korea and Taiwan have also expressed interest in joining. The latest ministerial meeting was held in Singapore on 19 and 20 May 2014. The timeline for completion of negotiations remains unclear.

A defining feature of the original TPP agreement was that it provided, over time, for the provision of preferential tariff rates between members on all goods, including agriculture. The agreement would also be comprehensive in that it would cover trade in goods and services, rules of origin, trade remedies, sanitary and phytosanitary measures, technical barriers to trade, intellectual property, government procurement, competition policy, temporary entry of business persons and dispute settlement procedures.

In addition to these topics, the TPP negotiations have broadened to encompass financial services, investment, electronic commerce, telecommunications, regulatory coherence and competitiveness issues. TPP negotiation groups have also been established to consider labour and environmental issues. A stated aim of the TPP is that the agreement would facilitate a consolidation of the differences (particularly rules of origin) in existing bilateral agreements used by current and prospective TPP members.

The confidential nature of the TPP negotiating text has been contentious particularly in respect of intellectual property and investor-state dispute settlement provisions. It has been argued that it is not common practice (including in Australia) to release negotiating texts of agreements before they are finalised on the grounds that public disclosure could undermine negotiations and, given their evolving nature, do little to better inform public debate (Robb 2014).

Once an agreement involving Australia has been signed by the negotiating parties, the text is subjected to scrutiny, but not amendment, in the Australian Parliament before ratification. However, by that stage, the government of the day has staked its credibility on the agreement being ratified. The Commission is unaware of any trade agreement that has been rejected in response to parliamentary scrutiny. An independent, arms-length process that precedes commitment by the government would be preferable.

### Assessing the potential impacts of proposed agreements

Trade preferences granted through bilateral and regional trade agreements, if fully utilised, can increase trade and investment flows between partner countries. Reporting of the outcomes of agreement negotiations invariably focuses on the positive impacts of these bilateral flows between signatories to the agreement.

What is less commonly reported are the potential negative impacts of trade and investment that is diverted from more efficient sources of supply and the availability of even greater gains through unilateral action by the Australian Government to eliminate tariffs and other impediments to trade. The costs associated with a protracted negotiation process and compliance burden associated with preferential agreements, including complex and confusing rules of origin, are similarly under-reported.

In its 2010 report into bilateral and regional trade agreements, the Commission concluded that any increases in national income accruing from preferential agreements are likely to be modest. The Commission also concluded that current processes for assessing bilateral and regional agreements lacked transparency and tended to oversell the likely benefits. To help ensure that bilateral and regional trade agreements entered into are in Australia’s best interests, it recommended that a full and independent, arms-length assessment of a proposed agreement should be made after negotiations have concluded — covering all of the actual negotiated provisions. It recommended (amongst other things):

The Australian Government should improve the scrutiny of the potential impacts of prospective trade agreements, and opportunities to reduce barriers to trade and investment more generally. … It should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations, but before an agreement is signed (PC 2010, p. 312).

The expanding involvement of Australia in preferential trading arrangements adds to the imperative of this recommendation to ensure Australia maximizes the benefits from international trade and investment opportunities.

## 6.3 Rules of origin

Rules of origin establish which goods produced in a partner country to a bilateral or regional preferential trade agreement should be accorded preferential tariff treatment. The product-specific rules of origin in Australia’s agreements have their own requirements that are subject to detailed negotiations in their formation. The individual rules can be expressed at the 2 digit chapter, 4 digit heading, the 6 digit subheading levels or for groupings of tariff line items of the Harmonized System (HS) of international trade items. As a consequence, the number of individual rules in any one agreement can be substantial and, moreover, vary between agreements (table 6.1). For example, the number of individual rules in agreements entered into by Australia varies from a single three-tiered rule in the Singapore-Australia trade agreement to some 5200 separate rules listed in the recently signed Korea-Australia agreement.

Table 6.1 Count of listed rules of origin by trade agreement

Number of rules listed in agreements

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | New Zealand | Singapore | Thailand | USA | Chile | ASEAN | Malaysia | Korea |
|  |  |  |  |  |  |  |  |  |
| Number | 2826 | 1 | 2900 | 980 | 2803 | 3102 | 2658 | 5205 |

*Source*: Commission estimates.

While the number of listed rules in agreements is a result of how the rules are presented in agreement schedules and varies considerably, the rules apply to a similar total number of individual HS 6 digit commodity items. The Commission understands that the more detailed listing of 6 digit rules in the Korean agreement (compared with other agreements) is intended to simplify the use of the origin-rule schedule for firms. Irrespective of the effectiveness of the Korean agreement in achieving the simplification goal, the different rule structure across agreements means that a firm trading with multiple countries with which Australia has signed a trade agreement faces greater complexity and compliance costs through the need to interpret the different rules of origin schedules.

With the large number of separately negotiated product-specific rules across agreements there also comes considerable variation in the origin rules for individual products between agreements. Underlying the differences in rules of origin requirements between agreements is a number of different methods for determining origin (box 6.5). A specific example of how these differences manifest in actual agreements with respect to a single tariff item (curtains, blinds and valances) is shown in box 6.6.

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| Box 6.5 Rules of Origin tests in Australia’s preferential trading agreements |
| Australia’s preferential trade agreements contain a range of approaches for conferring origin that businesses must consider when sourcing inputs to attain concessional rates for their products. The three common tests used for determining origin are:   * Change in tariff classification test – a good is transformed if there is a change in tariff classification under the Harmonized Commodity Description and Coding System. * Specified process test – a good is transformed if it has undergone specified manufacturing or processing operations which confer origin of the country in which they were carried out. * Regional value content test – a good is transformed if a threshold percentage value of locally or regionally produced inputs is reached in the exporting country.   These rules are variously applied individually or in combination with one another. In some agreements, such as the ASEAN – Australia – New Zealand and the Malaysia –Australia agreements, a choice between rules is afforded. |
| *Source*: PC (2010, p. 79, pp. 242-243). |
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| Box 6.6 Rules of origin for Curtains (including drapes) and interior blinds; curtain or bed valances (HS item 6303) |
| In order to qualify for concessional entry, *Curtains (including drapes) and interior blinds; curtain or bed valances* [HS item 6303] must meet the following criteria:   * *Australia‑United States*. Change to heading 6303 from any other chapter [except from a range of other specified headings or chapters] provided that the good is both cut (or knit to shape) and sewn or otherwise assembled in the US or Australia. * Thailand‑Australia. Change to heading 6303 from any other chapter, provided that any non-originating material that is fabric is pre-bleached or unbleached, and that there is a regional value content of not less than 55 per cent. * *Australia–New Zealand*. Change to heading 6303 from any other chapter, provided that where the starting material is fabric, the fabric is raw and fully finished in the territory of the Parties; or No change in tariff classification is required, provided that there is a regional value content of not less than 45 per cent based on the build down method. * *Australia‑Chile*. Change to heading 6303 from any other chapter provided that where the starting material is fabric, the fabric is raw and fully finished in the territory of the parties. * *Australia‑Malaysia*. Change to heading 6303 from any other chapter, provided that where the starting material is fabric, the fabric was greige fabric that: (a) is dyed or printed; and (b) is finished in Australia or Malaysia to render it directly usable.   In other agreements, the qualifying criteria are described at the HS 6 digit level. For example, in order to qualify for concessional entry, the 6 digit sub-item *Curtains (including drapes) and interior blinds; curtain or bed valances – Knitted or crocheted: of synthetic fibres* [item 6303.12] must meet the following criteria:   * *ASEAN‑Australia‑New Zealand.* CC [Change to subheading from any other chapter], provided that where the starting material is fabric, the fabric is raw or unbleached fabric and fully finished in the territory of one or more of the Parties. * *Korea‑*Australia. CC [Change to subheading from any other chapter], provided that where the starting material is fabric, the fabric was greige fabric is dyed or printed and finished in the territory of one or both of the Parties to render it directly usable.   Exceptions within groups can also apply such that different rules apply to 6 (or 8) digit items within a group. For example, in the *ASEAN‑Australia‑New Zealand* agreement, within the group Molybdenum and articles thereof, including waste and scrap [HS item 8102] the following criteria apply to items within the group:  RVC(40) or CC for items 8102.10, 8102.94; RVC(40) or CTSH for items 8102.95, 8102.96, 8102.99; and Origin shall be conferred to a good of this subheading that is derived from production or consumption in a Party for item 8102.97. |
| *Source:* Australian Customs and Border Protection Service (2014). |
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Comparing a selection of Australia’s bilateral agreements demonstrates the diversity of approaches for conferring origin that businesses must consider when sourcing inputs to attain preferential access for their products (figure 6.1). The most frequent rules for determining origin are now based on a Change in Tariff Classification (CTC) (figure 6.1, left hand panel) test but there is considerable variability in how such rules are combined with other rules and how they are applied. For example, CTC-only tests represent just 11 per cent of origin rules as specified in the ASEAN and Malaysian agreements with a further 72 and 87 per cent respectively being CTC or RVC rules. In the US and Korea agreements, 78 per cent and 59 per cent of the rules as specified are CTC-only rules. The choice of origin rule in the ASEAN and Malaysia agreements, while adding complexity, also provides flexibility that has not been afforded widely in other agreements.[[3]](#footnote-4)

Adding to the complexity, agreements often, but not always, specify rules of origin that require application of more than one rule (for example, a combination of a CTC rule and a Regional Value Content rule) or a CTC rule with an exception, which narrows the scope of the CTC rule by carving out specific products.

Although the CTC method is the most common approach, there is also considerable variation in how the rules are actually applied between agreements. For example, more than 50 per cent of the CTC origin rules in the New Zealand, Thailand, Chile and Malaysian agreements require change from a detailed HS 6 digit subheading item level (to another chapter, heading or subheading item), compared to just 24 per cent in the Korean agreement (figure 6.1, right hand panel).

Figure 6.1 Summary of methods used to determine origin in recent preferential trade agreements with Australiaa,b

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| Rule for determining origin  Per cent of specified rulesc | Application of CTC method d  Per cent of CTC-specified rulesc |

a ‘CTC’ refers to a change in tariff classification test. ‘RVC’ refers to a regional value content rule. ‘Other’ includes, for example, combined CTC and RVC rules, CTC rules with exceptions and specified process tests that require particular production methods to be used to qualify for preferential entry. b The agreement with Singapore is not included as it applies a single three-tiered test of origin based on location of production and, for manufactured goods, an RVC requirement. c Individual rules can be expressed at the 4 digit heading level, the 6 digit subheading level or for groupings of tariff line items. The number of listed rules therefore differs between agreements. d When the Australia-New Zealand Closer Economic Relations agreement entered into force in 1983, an RVC rule with a simple technical test was the main rule applied. The revised rules reported replaced that rule and have been in force since 1 January 2007.

*Source*: Commission estimates.

The range and variable application of rules adds to the compliance costs for firms engaging in trade.[[4]](#footnote-5) In addition to the actual rules, rules of origin chapters in trade agreements also contain agreement-specific procedures for certifying origin.[[5]](#footnote-6) Recent studies have suggested that the costs associated with these requirements could be as high as 25 per cent of the value of goods traded within ASEAN (APEC 2009, p. 67). In a joint Australian and New Zealand Productivity Commission study on strengthening trans-Tasman economic relations, the Commissions found that the ‘… main issue for bilateral trade between Australia and New Zealand is the distortions and compliance costs that arise from the [Closer Economic Relations] CER RoO …’ (Australian Productivity Commission and New Zealand Productivity Commission 2012, p. 108).

The Australian Chamber of Commerce and Industry (ACCI) has also reported from an industry perspective that:

Preferential agreements, while potentially providing ‘freer’ trade between the agreement parties, are specifically designed to be restricted to the parties and so exclude non-parties by way of complex ‘rules of origin’.

When the hundreds of trade agreements across the globe are negotiated in aggregate by nations a complex barrier of administrative obligations and procedures emerges, which traders must understand and overcome for each specific agreement in order to obtain benefit. These agreement-by-agreement administrative barriers are an added cost to business, add risk for delay of goods should documentation and other requirements be addressed incorrectly, and ultimately risk reducing the streamlining of international trade (ACCI 2013, p. iii).

The Commission’s study into bilateral and regional trade agreements argued that given the number of prospective bilateral agreements which Australia is seeking to negotiate, the opportunity to adopt a more coherent approach to determining origin was an important consideration. In this context, it favoured the composite approach adopted in the ASEAN–Australia–New Zealand FTA which gives exporters the flexibility of using either the regional value content test or the change in tariff classification test to determine origin (PC 2010, p. 245).

The Commission also recommended that, in future trade agreement negotiations, Australia seek the inclusion of a waiver of origin-rule requirements to be applied where the margin of a preference for a particular product is 5 percentage points or less. In such cases, there should be little or no incentive to tranship when the margin of preference is within this range and, accordingly, a waiver would deliver broad based gains and should reduce compliance costs (PC 2010, p. 245). This recommendation followed a similar recommendation in the Commission’s study into the CER rules of origin (PC 2004a).

In 2012, the Australian and New Zealand Productivity Commissions suggested that waiving rules of origin for all items where tariffs are no greater than 5 per cent would reduce compliance and administrative costs for a significant proportion of trans-Tasman trade. It also contended that such a waiver could be built on by reducing the few remaining tariffs that exceed 5 per cent to that level (Australian Productivity Commission and New Zealand Productivity Commission 2012, p. 9).[[6]](#footnote-7)

While a waiver may provide interim relief for businesses, the simplest and most beneficial approach to addressing *inter alia* rules of origin would be to unilaterally reduce tariff barriers on a most favoured nation basis, thereby eliminating altogether the need for preferential rules of origin on imports.

## 6.4 Dispute settlement

### Disputes under the WTO

Since the Commission last reported on dispute settlement activity in the WTO (PC 2013c, pp. 112–113), Australia has had one new complaint brought against it. That complaint (DS467) was brought by Indonesia on 20 September 2013 and concerned ‘… certain Australian laws and regulations that impose restrictions on trademarks, geographical indications, and other plain packaging requirements on tobacco products and packaging’ (WTO 2013b).

According to the WTO (2013b), Indonesia claims that Australia’s measures appear to be inconsistent with certain provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the Technical Barriers to Trade (TBT) Agreement and the General Agreement on Tariffs and Trade (GATT 1994). Indonesia is the fifth country to lodge a complaint against Australia’s tobacco plain packaging laws following the complaints by the Ukraine (DS434 ­ 13 March 2012), Honduras (DS435 ­ 4 April 2012), the Dominican Republic (DS441 ­ 18 July 2012) and Cuba (DS458 ­ 6 May 2013). In addition to the complainant countries, a large number of other countries have requested (and been granted permission) to join the dispute as third parties.[[7]](#footnote-8)

WTO dispute settlement panels have now been established in relation to all five complaints against Australia’s tobacco plain packaging laws and on 5 May 2015, the Director-General of the WTO appointed the panellists who will hear these disputes.

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

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

Pursuant to the *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, which entered into force in 1993, Philip Morris Asia Limited lodged a dispute against the Australian Government over tobacco plain packaging requirements, which is subject to third-party arbitration being administered by the Permanent Court of Arbitration (PCA). The most recent arbitration hearing relating to this case (PCA Case No. 2012–12) was held on 20-21 February 2014 in Toronto, Canada. The outcome of that hearing favoured Australia’s argument for bifurcation (the separation of proceedings into a preliminary jurisdictional phase and a subsequent merits phase, if required). The Tribunal also issued a timetable for consideration by the Parties which would involve the hearing on preliminary jurisdictional objections being held early in 2015.

In June 2013, the United Nations Conference on Trade and Development (UNCTAD) released a report on the functioning of ISDS regimes and a range of reform options that could be considered (UNCTAD 2013). The UNCTAD report noted that in many cases foreign investors have challenged policies adopted by States in the public interest and queried whether an international arbitration panel consisting of three individuals chosen on an ad hoc basis can be seen as a legitimate means of assessing the validity of those public policy decisions. It also found that despite the intent of ISDS arbitration to be timely and low cost, actual ISDS practice had seen the opposite outcomes with the costs of actions exerting significant pressures on public finances and creating potential disincentives for public interest regulation.

UNCTAD’s proposed reform options to address these issues included: promoting alternative dispute resolutions; tailoring of the existing ISDS system; limiting investor access to ISDS (narrowing the scope for investors to invoke ISDS provisions); introducing appeals facilities; and replacing the current system of ad hoc tribunals with a standing international investment court. The report also noted that while collective action would go further in addressing current problems with ISDS systems, such a response would face greater difficulty in implementation and require agreement between a large number of States.

In its report on bilateral and regional trade agreements (PC 2010, p. xxxviii), the Commission recommended that the Australian Government should not include matters in bilateral and regional trade agreements that would serve to increase barriers to trade, raise costs or affect established social policies without a comprehensive review of the implications and available options for change. With specific reference to ISDS, the Commission recommended that the Australian Government should seek to avoid the inclusion of investor-state dispute settlement provisions in bilateral and regional trade agreements that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.

## 6.5 Anti-dumping activity

During 2012‑13, 13 new investigations were *initiated* by the Australian Customs and Border Protection Service (appendix C). This is a decrease from 22 new investigations in the previous year. Also during the year, 12 new measures were *imposed.* This is an increase from four new measures in the previous year. No measures *expired* during 2012‑13. In the 2012 calendar year, there were 209 anti-dumping and 23 countervailing cases initiated worldwide (appendix C). The most were by Brazil (48), followed by India (21), the European Union (19), Canada (17), and the United States (16). Australia and Turkey ranked equal sixth (14). The previous year Australia had been the tenth most active.

1. The Australian Parliament does not have the constitutional power to amend a treaty signed by the executive arm of government. Current processes do not allow for independent, arms-length, review before an agreement is finalised and signed. [↑](#footnote-ref-2)
2. Australia and a number of these countries are also engaged in negotiations for the TPP. [↑](#footnote-ref-3)
3. The diversity of approaches across agreements is also apparent when agreements are compared at the individual HS 6 digit rules commodity item level. For example, using a disaggregated HS-6 digit approach, 85 per cent of items would be counted as having rules that are CTC-based in the US agreement, compared to 78 per cent when the count is based on listed rules. Comparing the US and Korean agreements on the basis of rules at the 6 digit item level, the 85 per cent counted as CTC-based in the US agreement would compare to 59 per cent in the Korea agreement. Similarly, CTC or RVC rules account for 10 per cent and 22 per cent of all rules, while other rules account for 3 per cent and 18 per cent of rules, respectively. [↑](#footnote-ref-4)
4. Firms have the option of not utilising the preferential concessions available under the agreement to avoid these compliance costs but this effectively reduces the benefits that can stem from any agreement. [↑](#footnote-ref-5)
5. In addition to differing between agreements, the certification rules in preferential agreements differ from those in the Revised Kyoto Convention of 2006. The procedures from this Convention are now part of the implementation of the WTO Agreement on Trade Facilitation (ATF), an outcome of the WTO 9th Ministerial (Bali) Conference. The implementation guidance is provided in the new web tool introduced by the World Customs Organization (WCO 2014). [↑](#footnote-ref-6)
6. Currently, about 50 per cent of Australian tariff line items attract an MFN tariff of 5 per cent or less. Nearly all remaining tariff line items are zero rated. A relatively small number of mainly textile and clothing items currently have tariffs above 5 per cent. These tariffs are legislated to be reduced to 5 per cent on 1 January 2015. [↑](#footnote-ref-7)
7. These countries are Argentina, Brazil, Canada, Chile, China, Ecuador, the European Union, Egypt, Guatemala, India, Japan, the Republic of Korea, Malawi, Malaysia, Mexico, Moldova, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, the Philippines, the Russian Federation, Saudi Arabia, Singapore, South Africa, Chinese Taipei, Thailand, Trinidad and Tobago, Turkey, the United States, Uruguay, Zambia and Zimbabwe. [↑](#footnote-ref-8)