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### The ASEAN–Australia–New Zealand FTA (AANZFTA)

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## The ASEAN–Australia–New Zealand FTA (AANZFTA)

MEREDITH KOLSKY LEWIS

### I. Introduction

The ASEAN–Australia–New Zealand FTA (AANZFTA) combines two different pre-existing country groupings of long-standing. The first of these is ASEAN, the Association of Southeast Asian Nations, which was founded in 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand.<sup>1</sup> This grouping has expanded over the years, with Brunei Darussalam joining in 1984, followed by Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999. While ASEAN has existed for nearly 50 years, for most of that period it has served as an alliance based on economic and political cooperation rather than as a free trade agreement. However, the original members of ASEAN launched a free trade initiative, the ASEAN Free Trade Area (AFTA), in 1992.<sup>2</sup> In 2003, after the expansion of ASEAN to its current membership, ASEAN announced plans to create an ASEAN Community comprising three pillars, one of which would be a free trade agreement to be called the ASEAN Economic Community. In 2007, this intention was memorialized in writing with a timetable to form the Community by 2015.<sup>3</sup>

The other pre-existing alliance was that between Australia and New Zealand, which have a long history of formal trade agreements. In 1965, close in time to the creation of ASEAN, these Oceania neighbours formed a free trade agreement known as the New Zealand–Australia Free Trade Agreement. This FTA was eclipsed in 1983 by the highly ambitious Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), most commonly referred to as Closer Economic Relations (CER).<sup>4</sup>

Given the linkages already in place between the ASEAN countries on the one hand, and Australia and New Zealand on the other, the primary trade gains to be had pursuant to AANZFTA lie in new linkages between Australia and New Zealand

1 For a detailed discussion of ASEAN's formation, see *The Founding of ASEAN*, [www.aseansec.org/the-founding-of-asean/](http://www.aseansec.org/the-founding-of-asean/). Accessed 10 October 2013.

2 Implementation of AFTA has occurred slowly. For a history of AFTA, see Jiro Okamoto, 'The AFTA–CER Linkage Dialogue: an Endeavour for Closer Relations between SRTAs within APEC', in Satoru Okuda (ed.), *Trade Liberalization and Facilitation in APEC: A Re-evaluation of APEC Activities* (1998), available at [www.idc.go.jp/English/Publish/Download/Apec/12.html](http://www.idc.go.jp/English/Publish/Download/Apec/12.html).

3 See Overview, [www.asean.org/asean/about-asean/overview](http://www.asean.org/asean/about-asean/overview) (last visited 8 August, 2013).

4 Closer Economic Relations (CER), Australian High Commission New Zealand, [www.australia.org.nz/wltn/CloseEconRel.html](http://www.australia.org.nz/wltn/CloseEconRel.html). Accessed 10 October 2013.

and specific ASEAN members. Indeed, pursuant to an exchange of letters bearing treaty status, Australia and New Zealand have agreed that AANZFTA obligations only apply between them to a limited extent, including the tariff and Rules of Origin (ROO) commitments and the General Exceptions chapter.<sup>5</sup>

Following several years of negotiations, these two groupings formed the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), which came into force on 1 January 2010 for most of its participants. AANZFTA has been in effect for all participants since January 2012.

This chapter reviews the negotiating history of AANZFTA, discusses some of its more noteworthy provisions, and discusses its future prospects. On the whole, this agreement is not particularly ambitious and as such can be viewed as a lost opportunity. However, to the extent the parties wished to form a linkage for political or strategic reasons, which is likely, the lack of economic gains was likely not a major consideration.

A 2000 study concluded that creating AANZFTA would result in gains to Australia of US\$19.1 billion between the years 2000 and 2020; gains to New Zealand of \$3.4 billion; and collective gains to the ASEAN members of \$25.6 million.<sup>6</sup> This study was over-optimistic and unrealistic, in that it assumed all tariffs within the FTA would be reduced to zero within five years of the treaty being in effect.<sup>7</sup> This would have been a significantly more rapid implementation period than that found in most FTAs (usually ten years), and indeed the final agreement did not apply a five-year phase-out period.

Although the actual gains of AANZFTA will not be known for some time, they may additionally prove to be substantially more modest than predicted in 2000, not only due to the over-ambitious and unrealistic estimates but also because Australia and New Zealand both formed FTAs with certain of the ASEAN members after 2000 but prior to entering into AANZFTA.

In terms of the benefits perceived by the parties, the formation of the various bilateral FTAs meant that under AANZFTA, the potential for market access gains was more significant with respect to certain bilateral linkages than others. In particular, New Zealand already had in place free trade agreements with Singapore,<sup>8</sup> Brunei and Singapore,<sup>9</sup> Thailand<sup>10</sup> and

5 New Zealand Ministry of Foreign Affairs and Trade, *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* (February 2009) preface.

6 Report of the High-Level Task Force on the AFTA-CER Free Trade Area, 'The Angkor Agenda' (2000). For a discussion of this report and the report that preceded it in 1997 see David Caruso, 'Prosperity in Cooperation: The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)', 11 *J. World Inv. & Trade* 197, 203 (2010).

7 Caruso, *supra* note 6, at 203.

8 Singapore-New Zealand Closer Economic Partnership (1 January 2001).

9 Trans-Pacific Strategic Economic Partnership Agreement (together with non-ASEAN member Chile) (2006).

10 Thailand-New Zealand Closer Economic Partnership (1 July 2005).

Malaysia.<sup>11</sup> For New Zealand therefore, the biggest market access gains were to be had with respect to new opportunities in the export markets of Indonesia, the Philippines and Vietnam.<sup>12</sup> New Zealand attributed less priority to its new ties with ASEAN's least-developed country members, Cambodia, Laos and Myanmar, as New Zealand exports to these markets are negligible.<sup>13</sup> Australia also had FTAs in effect with individual ASEAN members Singapore<sup>14</sup> and Thailand<sup>15</sup> prior to the entry into force of AANZFTA. Perhaps reflecting the limited ambition of the multiparty agreement, Australia entered into its own bilateral FTA with Malaysia following the entry into force of AANZFTA.<sup>16</sup>

One area in which Australia perceived significant potential gains was in the services sector. In the years leading up to AANZFTA's conclusion, Australian exports of services to ASEAN countries had risen 13.7 percent to US\$4.62 billion with particular growth in transportation services and travel services.<sup>17</sup> Australia had a significant level of education services-related exports to ASEAN countries, the largest of which collectively totaled \$2.2 billion in 2007.<sup>18</sup>

Services trade with Australia also represented an opportunity for ASEAN. By 2007, Australia was importing US\$5.6 billion worth of services from ASEAN countries, with particular growth experienced in transportation services and travel services.<sup>19</sup>

New Zealand also hoped to expand what was already a growing market for its exports. In 2009, just prior to AANZFTA coming into force, ASEAN was New Zealand's third largest export market.<sup>20</sup>

New Zealand and Australia saw potential benefits in harmonizing applicable rules and tariffs across their trade with ASEAN countries. In addition, they were interested at chipping away at the stringent regulations throughout ASEAN countries (such as prohibitions on foreigners practicing certain occupations; foreign equity caps; and prohibitions on foreign ownership of land) that limited the ability of CER businesses to provide services or invest in ASEAN.<sup>21</sup>

In addition to the bilateral ties existing between Australia and/or New Zealand and individual ASEAN countries, the two AANZFTA negotiating groups (ASEAN and Australia/New Zealand) have a lengthy history of cooperation long pre-dating AANZFTA. In 1993, then-Deputy Prime Minister of Thailand Supachai Panitchpakdi

11 New Zealand–Malaysia Free Trade Agreement (26 October 2009).

12 New Zealand Ministry of Foreign Affairs and Trade, *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area* (February 2009) 12.

13 *Ibid.*, 12. 14 Singapore–Australia Free Trade Agreement (28 July 2003).

15 Thailand–Australia Free Trade Agreement (1 January 2005).

16 Malaysia–Australia Free Trade Agreement (1 January 2013).

17 Joseph Purugganan, *Closer Ties, Larger Markets: Examining the ASEAN FTAs*, 13 February 2009, available at [www.bilaterals.org/spip.php?page=print&id\\_article=14394](http://www.bilaterals.org/spip.php?page=print&id_article=14394).

18 *Ibid.*

19 National Interest Analysis, *Agreement Establishing The ASEAN–Australia–New Zealand Free Trade Area (And Associated Instruments)* (New Zealand) (2009) 11 [hereinafter 'National Interest Analysis'].

20 New Zealand Ministry of Foreign Affairs and Trade, *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area* (February 2009), 2.

21 Caruso, *supra* note 6, at 204.

suggested that AFTA and CER form closer economic ties.<sup>22</sup> Australia welcomed this suggestion, and thereafter so did New Zealand and other ASEAN members. The first informal consultations between ministers from ASEAN and CER members Australia and New Zealand took place in 1995 in Brunei; at these meetings, the ministers agreed in principle to form linkages between the two trading blocs.<sup>23</sup> However, as AFTA was only at the very beginning of a lengthy implementation period, discussions proceeded for many years along the lines of trade facilitation and cooperation, rather than the joining of two trade agreements.<sup>24</sup> Nonetheless, the groupings developed a practice of meeting regularly.

In 2000, at the fifth ASEAN Economic Ministers (AEM)-CER Consultations, the Ministers considered the *Angkor Agenda: Report of the High Level Task Force on the Feasibility of an AFTACER Free Trade Area*, which recommended the formation of an ASEAN-CER FTA.<sup>25</sup> However, it took several years before this proposal was acted upon formally. At the 2004 ASEAN-Australia-New Zealand Commemorative Summit, the leaders agreed to launch formal FTA negotiations early in 2005.<sup>26</sup> The parties agreed that the Agreement would be a comprehensive agreement, covering trade in goods, services and investment.<sup>27</sup> The negotiations commenced on schedule in early 2005 and, after 16 rounds of negotiations, were substantively concluded in late August 2008.<sup>28</sup> The Agreement was signed in Thailand on 27 February 2009.<sup>29</sup>

The AANZFTA parties account for approximately 643 million people and US\$4 trillion in GDP (2012).<sup>30</sup> The Agreement is unique in that it represents the only time in which Australia and New Zealand have jointly negotiated an FTA with third countries. It was also ASEAN's first FTA in which the negotiations covered all sectors from the beginning.<sup>31</sup>

## II. The negotiating process

The leaders of the participating countries agreed to a comprehensive set of "Guiding Principles" for the negotiations.<sup>32</sup> The Guiding Principles committed countries to negotiate an agreement that covers goods, services and investment; the progressive elimination of all forms of barriers to trade and investment; and full implementation within ten years.<sup>33</sup> The negotiations were in the main

22 Okamoto, *supra* note 2, at 12. 23 Caruso, *supra* note 6, at 201. 24 Okamoto, *supra* note 2, at 12-13.

25 See *Angkor Agenda*, [www.dfat.gov.au/trade/fta/asean/aanzfta/angkor\\_agenda.pdf](http://www.dfat.gov.au/trade/fta/asean/aanzfta/angkor_agenda.pdf).

26 Michael Mugliston, Department of Foreign Affairs and Trade of Australia, *Negotiating the ASEAN-Australia-New Zealand Free Trade Agreement*, 8.

27 See the Report of the High-Level Task Force on the AFTA-CER Free Trade Area (the *Angkor Agenda*), Executive Summary, paragraph 9.

28 *Ibid.* 29 *What is AANZFTA?* <http://aanzfta.asean.org/>. Accessed 16 October 2013.

30 ASEAN-Australia-New Zealand Free Trade Area snapshot, [www.dfat.gov.au/fta/aanzfta/](http://www.dfat.gov.au/fta/aanzfta/). Accessed 27 September 2013.

31 *Ibid.*

32 *Guiding Principles for Negotiating an ASEAN-Australia-New Zealand Free Trade Area*, Department of Foreign Affairs and Trade of Australia, available at [www.dfat.gov.au/fta/aanzfta/principles.html](http://www.dfat.gov.au/fta/aanzfta/principles.html).

33 *Ibid.*

concluded at the ASEAN Economic Ministers–CER Trade Ministers meeting in August 2008. Bilateral negotiations between Australia on the one hand and each of Indonesia and Malaysia on the other continued for a few more months over the issue of automotive tariff commitments, with the agreement formally signed in February 2009.<sup>34</sup> Although the negotiations were conducted between Australia, New Zealand and ASEAN as an entity, the completed FTA has resulted in separate market access commitments for Australia, New Zealand and each of the ten ASEAN member countries.<sup>35</sup>

The following is a general timeline of AANZFTA, from earliest linkages through to entering into force:

- **Early 1990s:** Australia initiated efforts to create links between the ASEAN Free Trade Area (AFTA) and the Australia–New Zealand Closer Economic Relations (CER) agreement.
- **November 1993:** Former Deputy Prime Minister of Thailand (Supachai Panitchpakdi) publicly spoke in favor of linking AFTA and CER.
- **September 1995:** Ministers from ASEAN, Australia and New Zealand informally agreed to “region to region linkages” between AFTA and CER.
- **October 1999:** High Level Task Force established to assess feasibility of an AFTA–CER Free Trade Area.
- **October 2000:** The High Level Task Force issued its report “The Angkor Agenda” which expressed support for an AFTA–CER free trade agreement.
- **September 2002:** AFTA–CER Closer Economic Partnership (CEP) established.
- **November 2004:** Leaders from ASEAN, Australia and New Zealand agreed to launch comprehensive FTA negotiations.
- **March 2005:** AANZFTA negotiations commenced.
- **2005–2008:** 16 rounds of negotiations took place.
- **27 February 2009:** ASEAN, Australian and New Zealand Ministers signed AANZFTA in Thailand.<sup>36</sup>

Following the signing of the Agreement, ratification took place over the subsequent three years, as follows:

34 Mugliston, *supra* note 26, at 12.

35 *Background to the ASEAN–Australia–New Zealand Free Trade Area*, Department of Foreign Affairs and Trade of Australia available at [www.dfat.gov.au/fta/aanzfta/background-to-AANZFTA.html](http://www.dfat.gov.au/fta/aanzfta/background-to-AANZFTA.html).

36 The history through this item is derived from the document *ASEAN–Australia–New Zealand FTA Timeline*, Department of Foreign Affairs and Trade of Australia available at [www.dfat.gov.au/fta/aanzfta/timeline.html](http://www.dfat.gov.au/fta/aanzfta/timeline.html). Further background on AANZFTA can be found on the AANZFTA webpages of ASEAN (<http://aanzfta.asean.org/>); the Australian Department of Foreign Affairs and Trade ([www.dfat.gov.au/fta/aanzfta/index.html](http://www.dfat.gov.au/fta/aanzfta/index.html)); and the New Zealand Ministry of Foreign Affairs and Trade ([www.asean.ta.govt.nz/](http://www.asean.ta.govt.nz/)).

- **1 January 2010:** Agreement came into force for Australia, New Zealand, Brunei, Malaysia, Myanmar, Philippines, Singapore and Vietnam.
- **12 March 2010:** Agreement came into force for Thailand.
- **1 January 2011:** Agreement came into force for Laos.
- **4 January 2011:** Agreement came into force for Cambodia.
- **10 January 2012:** Agreement came into force for Indonesia.

Because of the challenges of establishing a structure for negotiations amongst twelve countries, the first phase of the negotiating process revolved around establishing the procedural and organizational frameworks for the talks.<sup>37</sup> The parties decided that the negotiations would be co-chaired by Australia, New Zealand and Brunei (acting as ASEAN Coordinator), and that rounds of negotiations would rotate amongst Australia, an ASEAN member and New Zealand.<sup>38</sup>

Working groups were established for a number of topics, including rules of origin, investment and services, with sub-working groups handling other issues, including Sanitary and Phytosanitary (SPS) and technical barriers to trade (TBT) measures and customs issues. Overlaying these groupings was a Trade Negotiating Committee, which was responsible, *inter alia*, for negotiating topics not covered by working groups or sub-groups.<sup>39</sup>

Although technically all FTA topics were included in the negotiations from the beginning, in practice, certain issues proved to be controversial and it was not feasible to commence negotiations on these topics – notably intellectual property and economic cooperation – until quite late in the negotiations. Indeed the relevant working groups for intellectual property (IP) and economic cooperation were not even established until the last year of the AANZFTA talks.<sup>40</sup> The negotiating process with respect to economic cooperation featured a variety of capacity-building activities led by Australia and New Zealand to assist ASEAN negotiators with the substantive negotiations. These activities included sessions covering the nuts and bolts of technical issues such as how to assess trade data; understanding rules of origin; and the intricacies of scheduling commitments in investment and services.<sup>41</sup>

As is often the case in FTA negotiations, talks proceeded simultaneously in a variety of settings. Working Groups held discussions amongst all the parties, and subsets of the parties, as well as bilaterally. While negotiations were held formally within the Trade Negotiating Committee, there were also numerous discussions held less formally between rounds, again in groups of varying sizes.<sup>42</sup>

37 Mugliston, *supra* note 26, at 9.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*, at 10.

The market access negotiations were primarily bilateral in nature, with Australia and New Zealand each meeting separately with each ASEAN country to negotiate commitments on tariffs and services.<sup>43</sup>

A significant issue affecting the negotiations was the vastly different levels of development amongst the participants, ranging from Australia and New Zealand as developed countries to Cambodia, Laos and Myanmar as Least Developed Countries (LDCs), and the other ASEAN countries in various stages of development. This variation in development led to discussions over what degree of differentiation of obligations should be permitted, as well as to differences in opinion over the scope of the substantive commitments. With respect to differentiating obligations, the parties agreed that the timeframes for implementation would vary based on development level, with Australia and New Zealand having the least time to implement, the LDC members having the most time, the more developed members of ASEAN falling in between, and Vietnam getting less time than the LDCs to implement, but more than the other ASEAN members.<sup>44</sup>

With respect to the scope of the obligations, there were differences of opinion over both the depth of tariff cuts and whether certain issues should be covered by AANZFTA at all. The ASEAN members were not pleased with the idea that everyone should lower tariffs to, or nearly to, zero, because Australia's and New Zealand's tariff levels were already quite low, while on the whole ASEAN's tariffs were significantly higher (with the exception of Singapore), meaning that ASEAN would be making most of the tariff concessions.<sup>45</sup> On the issue of subject matter coverage, Australia and New Zealand would have liked to have had commitments on government procurement, but ASEAN was not willing to include such commitments as they had never featured in any previous ASEAN FTA.<sup>46</sup> The disagreements over coverage did not entirely run along the lines of Australia and New Zealand seeking inclusion and ASEAN objecting. For example, Australia refused to accept ASEAN's proposed approach to disciplines on SPS measures.<sup>47</sup> This is not surprising given that Australia has imposed numerous SPS measures on tropical products from ASEAN countries, giving rise to a number of trade disputes.<sup>48</sup>

### III. Analysis of noteworthy obligations

#### A. *Impact of AANZFTA on pre-existing agreements*

Under the rules of the Vienna Convention on the Law of Treaties (VCLT),<sup>49</sup> it is generally the case that a later-in-time treaty will trump an earlier treaty to which the

43 *Ibid.* 44 *Ibid.* 45 *Ibid.*, at 11. 46 *Ibid.* 47 *Ibid.*

48 For example, in 2002 the Philippines made a formal request for consultations with Australia over its ban on importation of certain fresh fruits and vegetables from the Philippines. See *Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables – Request for Consultations by the Philippines*, WT/DS270/1 (23 October 2002). A panel was established in 2003, but never composed (meaning that panelists were never appointed), presumably due to an agreement amongst the parties to suspend the proceedings.

49 Vienna Convention on the Law of Treaties art. 30, 23 May 1969, 1155 UNTS 331.



same countries belong. In particular, Article 30 addresses the “Application of successive treaties relating to the same subject-matter” and provides:

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
  - (a) as between States Parties to both treaties the same rule applies as in paragraph 3;

Notwithstanding the language of VCLT Article 30, the AANZFTA parties did not want the later-in-time rule to apply automatically. Indeed, in the Guiding Principles established for the negotiations, the parties specified that: “AFTA and CER will continue to exist as distinct, functioning agreements, as will the FTAs between ASEAN Member Countries, Australia and New Zealand. No provision in the FTA will detract from the terms and conditions of bilateral and plurilateral FTAs between ASEAN Member Countries, Australia and New Zealand.”<sup>50</sup> Consistent with this principle, in Chapter 18 (Final Provisions) the parties set out in some detail the intended interplay between AANZFTA and other agreements. In particular, Article 2, Relation to Other Agreements provides:

1. Each Party reaffirms its rights and obligations under the WTO Agreement and other agreements to which the Parties are party.
2. Nothing in this Agreement shall be construed to derogate from any right or obligation of a Party under the WTO Agreement and other agreements to which the Parties are party.
3. In the event of any inconsistency between this Agreement and any other agreement to which two or more Parties are party, such Parties shall immediately consult with a view to finding a mutually satisfactory solution.
4. Nothing in this Agreement shall prevent any individual ASEAN Member State from entering into any agreement with any one or more ASEAN Member State and/or Australia and/or New Zealand relating to trade in goods, trade in services, investment, and/or other areas of economic co-operation. The provisions of this Agreement shall not apply to any agreement among ASEAN Member States. The provisions of this Agreement shall also not apply to any agreement involving any ASEAN Member State and/or Australia and/or New Zealand unless otherwise agreed by the parties to that agreement.

50 Guiding Principles for Negotiation on ASEAN-Australia-New Zealand Free Trade Area (I). Accessible at [www.dfat.gov.au/fta/aaanzfta/principles.html](http://www.dfat.gov.au/fta/aaanzfta/principles.html).

Thus it appears that the parties did not intend for AANZFTA to take precedence over any intra-ASEAN agreements under any circumstances. For any other possible inconsistencies (e.g. those arising between AANZFTA and an agreement between an ASEAN member and Australia or New Zealand, or between AANZFTA and CER) it appears the parties can negotiate over what the outcome should be, but in any event, there is no automatic trumping of AANZFTA over other treaties in effect between various of the parties.

It should be noted however that a footnote to Article 2 subparagraph 4 provides: “[1] This Paragraph does not apply to any future agreement concluded in accordance with this Agreement.” Therefore Article 2 only applies to agreements already in place at the time AANZFTA took effect.

### *B. Substantive scope of the agreement*

The Agreement comprises 18 chapters and 9 annexes. The chapters are as follows:<sup>51</sup>

- Chapter 1: Establishment of Free Trade Area, Objectives and General Definitions
- Chapter 2: Trade in Goods
- Chapter 3: Rules of Origin
- Chapter 4: Customs Procedures
- Chapter 5: Sanitary and Phytosanitary Measures
- Chapter 6: Standards, Technical Regulations and Conformity Assessment Procedures
- Chapter 7: Safeguard Measures
- Chapter 8: Trade in Services
- Chapter 9: Movement of Natural Persons
- Chapter 10: Electronic Commerce
- Chapter 11: Investment
- Chapter 12: Economic Co-operation
- Chapter 13: Intellectual Property
- Chapter 14: Competition
- Chapter 15: General Provisions and Exceptions
- Chapter 16: Institutional Provisions
- Chapter 17: Consultations and Dispute Settlement
- Chapter 18: Final Provisions.

Although AANZFTA is not a particularly ambitious FTA, it does go beyond the coverage of the WTO in some areas, particularly in its inclusion of chapters addressing e-commerce, investment and competition, as well as its coverage of movement of natural persons as a separate issue from trade in services. It is beyond the scope of this chapter to discuss each of the chapters of AANZFTA in detail;

<sup>51</sup> AANZFTA, Table of Contents. The text of the AANZFTA is available at <http://asean.fta.govt.nz/preamble/>.

however, the following identifies some of the noteworthy provisions within the substantive chapters of the Agreement.

### 1. Goods

The chapter on Trade in Goods provides for the substantial reduction or elimination of tariffs between the parties pursuant to schedules set forth in Annex 1 of the Agreement.<sup>52</sup> The schedules provide for different percentages of tariff lines to be reduced to zero by benchmark years, with the percentages varying by participant, with Singapore liberalizing the fastest and the four less-developed ASEAN members the slowest. For example, Singapore committed to reducing all tariffs to zero by 2010; Australia committed to lowering 96.5 percent of its tariff lines to zero by 2013, and 100 percent by 2020; New Zealand will similarly remove all tariffs to zero by 2020, but only had to remove tariffs on 90.3 percent of tariff lines by 2013. The other participants committed to reducing a lesser percentage of tariff lines to zero, with differing deadlines for doing so. Brunei is scheduled to bring 90 percent of tariff lines to zero by 2013, and 98.9 percent by 2020; Indonesia is to reduce 85 percent of tariff lines to zero by 2013, with a final commitment of 93.2 percent by 2025; Malaysia is scheduled to remove tariffs on 90.9 percent of tariff lines by 2013 and 96.3 percent by 2020; the Philippines committed to removing tariffs on 91 percent of tariff lines by 2013 and a final commitment of 94.6 percent of tariff lines by 2020; and Thailand is to remove tariffs on 87.2 percent of tariff lines by 2013 and 99 percent by 2020. The four less-developed ASEAN members (Cambodia, Laos, Myanmar and Vietnam) all have longer phase-out periods and lesser phase-out commitments than do the other participants, and most of their significant tariff cuts do not begin until 2014 or later.<sup>53</sup> Myanmar need only remove tariffs on 3.6 percent of tariff lines by 2013 (its existing base tariff levels), but is to remove tariffs on 85.2 percent of its tariff lines by 2024; Cambodia similarly did not need to make any tariff reductions until after 2013, until which time only 4.7 percent of lines were at zero. It is ultimately to remove tariffs on 88 percent of its tariff lines by 2024. Laos did not have any tariff lines at zero at the outset, and did not need to make any tariff reductions until after 2013. It must remove tariffs on 88 percent of its tariff lines by 2023. Vietnam also had no commitments until 2013, but had a base of 29.3 percent of tariff lines at zero; it must increase this to 89.8 percent by 2020.<sup>54</sup>

Certain countries made no commitments with respect to a number of tariff lines. In the case of the Philippines, Brunei, Malaysia and Laos, this represented only a few tariff lines, whereas for others, significantly more lines are unbound. Unbound tariff lines include: for the Philippines, rice, sugar and some steel products; for Brunei, alcoholic

52 AANZFTA, Annex 1.

53 *Ibid.* For a graphic depiction of the different tariff reduction commitments, see Roberto Bergami, 'Rules, Regulations & Procedures of the Asean-Australia-New Zealand Free Trade Area (AANZFTA)', 14 *Vindobona J. Int'l Comm'l L. & Arb.* 319, 332-33 (2010).

54 *Ibid.* See also [www.dfat.gov.au/fta/aanzfta/annexcs/annex1\\_tc.html](http://www.dfat.gov.au/fta/aanzfta/annexcs/annex1_tc.html).

beverages, tobacco products and military weapons; for Malaysia, rice, alcoholic beverages, tobacco products, and used pneumatic tires; for Laos, drug-related products including cannabis, opium extracts and alkaloids, cocaine and similar products. Although Laos only has a few unbound tariff lines, it will still have high tariffs in place in 2025 for motor vehicles and most weapons.<sup>55</sup>

Indonesia and Thailand have somewhat more unbound tariff lines. For Indonesia, these include rice, sugar, alcoholic beverages, certain categories of soybeans and tobacco products, waste pharmaceuticals, as well as a number of agricultural machinery, specialized transport, and oil drilling-related items; and for Thailand, unsweetened milk and cream, onions, potatoes, garlic, shallots, coconut, coffee and tea, pepper, certain corn, rice, soybeans, palm, coconut and soybean oils, sugar, UHT milk drinks, tobacco products and raw silk.<sup>56</sup>

Cambodia, Vietnam and Myanmar have more unbound tariff lines than the other AANZFTA members. Cambodia's fall across a wide range of products; in the main, the unbound tariff lines are a particular product or two within a larger category for which commitments were made, without wholesale exclusions. These include certain fresh fruits, juices, dairy products, cereals, fats, and sugars; selected paper products, personal hygiene items; steel products; electronic and computer components, and certain furniture items. In contrast, Vietnam has a similar number of unbound lines, but concentrated into fewer products and categories. Vietnam's exclusions include poppy seeds and extracts, petroleum oils and other oils, waste pharmaceuticals, fireworks and other explosives, municipal and other waste, retreaded and used pneumatic tires, used clothing and rags, military weapons and many steel products. Myanmar's exclusions are also limited in categories, though not as concentrated as Vietnam's. Its unbound tariff lines include: poppy seeds and extracts, radioactive elements and related products, rare earth metal compounds, explosives, unused bank notes, monetary gold, gold and silver coins, explosives, nuclear reactors and components, military weapons and other firearms, armoured fighting vehicles, certain tables, works of art such as paintings, sculpture and prints, and antiques and other collectors' items.<sup>57</sup>

Notwithstanding the slow phase-outs for the developing country participants and a certain number of unbound tariff lines, Australia has estimated that by 2020, 96 percent of its exports to AANZFTA countries will be duty-free, compared with only 67 percent upon entry into force of the Agreement in 2010.<sup>58</sup> New Zealand has similarly estimated that by 2022, 99 percent of its exports will be duty-free to Indonesia, Malaysia, the Philippines and Vietnam, the countries with which it did not have an existing FTA and with which it engages in significant trade.<sup>59</sup>

55 *Ibid.* 56 *Ibid.* 57 *Ibid.*

58 Australian Department of Foreign Affairs and Trade, ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA): Creating Business Opportunities 1. Accessible at [www.dfat.gov.au/1a/aanzfta/AANZFTACreating-business-opportunities.pdf](http://www.dfat.gov.au/1a/aanzfta/AANZFTACreating-business-opportunities.pdf).

59 New Zealand Ministry of Foreign Affairs and Trade, *Agreement Establishing the Asean–Australia–New Zealand Free Trade Area* 2, accessible at [www.ASEAN.FTA.govt.nz](http://www.ASEAN.FTA.govt.nz).

In addition to the provision for the phasing out of tariffs, the Agreement also provides for the immediate binding of tariffs to the applied rates in effect at the time of ratification, thus precluding AANZFTA members from raising tariffs on products for which their WTO bound rates were higher than their applied rates (which would have been permissible under WTO rules).<sup>60</sup>

One interesting feature of the Trade in Goods chapter is a commitment, “[c]onsistent with their rights and obligations under the WTO Agreement”, to eliminate agricultural export subsidies and not to reintroduce them, for all agricultural products destined for other AANZFTA parties.<sup>61</sup> This is an unusual provision because it has generally been believed that agricultural export subsidies, as well as other subsidies, would not be easily susceptible to reductions outside the multilateral give-and-take process of the WTO.

## 2. Rules of Origin

The Rules of Origin (ROO) chapter establishes the criteria for determining which goods qualify for preferential tariff treatment (i.e. they determine which products count as “Australian”, “Indonesian”, “Vietnamese” etc.). Under AANZFTA, the ROO permit originating goods to be cumulated between the parties and used in the production of further goods.<sup>62</sup> The cumulation principle applies in the multi-party setting of AANZFTA, which means that a party’s inputs, as long as they meet the originating criteria, not only gain preferential treatment when exported to another party, but can be counted as part of the qualifying content for goods produced and traded between all the parties. For products containing inputs from non-AANZFTA countries, the ROO varies depending on whether the change in tariff classification (CTC) approach or regional value content (RVC) approach applies to the given product. If the CTC is applicable, a good will only qualify as originating from an AANZFTA country if every third party input has undergone a specified change of tariff classification. Under the RVC approach, a good will qualify as originating from an AANZFTA country if the third party content is no more than 60 percent of the FOB value.<sup>63</sup>

The applicable ROO varies depending on the type of product at issue, and some products have individualized ROO.<sup>64</sup> For example, a 40 percent RVC rule applies to motor vehicles and automotive parts, and an alternative process rule applies to certain textiles. For any good to qualify, it must be consigned directly between the parties.<sup>65</sup>

60 See Australian Department of Foreign Affairs and Trade, *Overview and Key Outcomes of the ASEAN-Australia-New Zealand Free Trade Agreement* (October 2009), accessible at [www.dfat.gov.au/fta/aanzfta\\_overview\\_and\\_outcomes.html](http://www.dfat.gov.au/fta/aanzfta_overview_and_outcomes.html). Accessed 16 October 2013 [hereinafter ‘Overview and Key Outcomes’].

61 AANZFTA, Chapter 2, art. 3.

62 National Interest Analysis at 32. For a detailed discussion of the AANZFTA ROO, see Bergami, *supra* note 53, at 322–31.

63 National Interest Analysis at 32.

64 Product-specific rules of origin are specified in Annex 2 to the Agreement.

65 National Interest Analysis at 32; AANZFTA, Chapter 3, art. 14.

### 3. Customs procedures

The Customs Procedures chapter includes non-binding commitments (“may” rather than “shall”) to provide trade facilitation and cooperation to enhance the efficiency of customs procedures.<sup>66</sup> In addition, it requires that customs procedures be designed to facilitate the clearance of low-risk items and to instead focus scrutiny on high-risk goods.<sup>67</sup>

### 4. SPS measures

The SPS measures chapter refers repeatedly to the WTO’s SPS Agreement. It contains several provisions to enhance cooperation, notably with respect to equivalence and regionalization,<sup>68</sup> but does not appear to extend substantive obligations beyond those of the WTO SPS Agreement. Notably, AANZFTA consultations and dispute settlement procedures do not apply to the SPS chapter.<sup>69</sup>

### 5. Standards, Technical Regulations and Conformity Assessment Procedures

Similar to the SPS chapter, the Standards, Technical Regulations and Conformity Assessment Procedures (STRACAP) chapter refers heavily to the WTO’s TBT Agreement and emphasizes cooperation in the establishment and maintenance of STRACAP measures in order to facilitate trade. Unlike the SPS chapter however, there is no exclusion for this chapter from the applicability of AANZFTA dispute settlement provisions.

### 6. Safeguards

AANZFTA provides for the possibility of imposing safeguards during a transitional period upon a showing that the tariff cuts required by AANZFTA have led to increased imports sufficient to cause serious injury to a domestic industry.<sup>70</sup> Compensation must be negotiated for any such provisional safeguards imposed.<sup>71</sup>

### 7. Services

The AANZFTA services chapter takes a positive list approach.<sup>72</sup> The chapter is structured similarly to the WTO’s General Agreement on Trade in Services (GATS), except that it treats Mode 4 commitments under a separate “Movement of Natural Persons” chapter.<sup>73</sup>

The services chapter does not apply to measures affecting:<sup>74</sup>

66 AANZFTA, Chapter 4, arts. 4 and 5. 67 *Ibid.*, at art. 9.

68 AANZFTA, Chapter 5, arts. 5 and 8. See also National Interest Analysis at 33.

69 AANZFTA, Chapter 5, art. 11. 70 AANZFTA, Chapter 7, art. 3. 71 *Ibid.*, art. 8.

72 See Department of Foreign Affairs and Trade, *supra* note 26, at [www.dfat.gov.au/fta/aanzfta/guide/australian\\_guide.html](http://www.dfat.gov.au/fta/aanzfta/guide/australian_guide.html).

73 *Ibid.* 74 AANZFTA, Chapter 8, art. 4.

- (a) government procurement;
- (b) subsidies or grants including government-supported loans, guarantees, and insurance, provided by a Party or to any conditions attached to the receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic services, service consumers or service suppliers;
- (c) services supplied in the exercise of governmental authority within the territory of each respective Party, as defined in Article 2(q) (Definitions),<sup>75</sup> or
- (d) in respect of air transport services, measures affecting traffic rights however granted; or measures affecting services directly related to the exercise of traffic rights, other than measures affecting:
  - (i) aircraft repair and maintenance services;
  - (ii) the selling and marketing of air transport services; and
  - (iii) computer reservation system services.

The services commitments are not on the whole particularly ambitious. New Zealand made various GATS-plus commitments in AANZFTA; however, none of these commitments required New Zealand to make any changes to its existing regulatory regime.<sup>76</sup> Nonetheless, ASEAN did agree to some disciplines beyond their GATS commitments, including in financial and telecommunications services, that Australia feels will benefit its industries.<sup>77</sup>

### 8. Movement of natural persons

This chapter comprises commitments, additional to those contained in the services and investment chapters, to facilitate the movement of natural persons for business purposes.<sup>78</sup> Refusals to grant temporary entry into an AANZFTA country are not subject to the consultations and dispute settlement chapter, except if:<sup>79</sup>

- (a) the matter involves a pattern of practice on the part of the granting Party; and
- (b) the natural persons affected have exhausted all available domestic remedies regarding the particular matters.

The ASEAN countries obtained concessions in this area beyond what had been committed to in existing GATS commitments.<sup>80</sup>

### 9. Electronic commerce

The e-commerce chapter comprises commitments to promote the use of electronic commerce; however, these provisions are all expressed in best efforts language (e.g., “shall, where possible”). Consistent with the lack of firm obligations,

<sup>75</sup> Defined as services that are not supplied on a commercial basis nor in competition with other service providers

<sup>76</sup> National Interest Analysis at 36. <sup>77</sup> Overview and Key Outcomes, *supra* note 56.

<sup>78</sup> AANZFTA, Chapter 9, art. 1. <sup>79</sup> *Ibid.*, art. 9.

<sup>80</sup> National Interest Analysis at 37. New Zealand's commitments nonetheless fell within its existing immigration policy parameters. *Ibid.*

this chapter is not subject to AANZFTA's consultations and dispute settlement chapter.<sup>81</sup>

### 10. Investment

The AANZFTA investment chapter, Chapter 11, defines "investor" broadly, extending natural person investor protections to permanent residents of AANZFTA countries, as well as the more traditional coverage for nationals and citizens.<sup>82</sup> In addition, juridical person investor protections extend to non-profit organizations, which is also unusual.<sup>83</sup> The AANZFTA investment chapter does not contain any upfront commitments on market access. These commitments are to be negotiated and enter into force within five years of the entry into force of AANZFTA.<sup>84</sup> Although core language on National Treatment has been agreed, the provisions of the Article shall not apply until such time as all 12 parties have agreed to the schedules of reservations to that language. Similarly, the investment chapter does not contain an MFN provision, which will also be the subject of future negotiation.<sup>85</sup> The deferred approach to investment may reflect the fact that investment linkages between ASEAN and Australia have not been as strong as the trade relations between the two partners.<sup>86</sup> Australia's total foreign direct investment (FDI) in ASEAN in 2006 amounted to a mere US\$399 million, accounting for less than one percent (0.8%) of total FDI inflows to ASEAN.<sup>87</sup> Similarly, only two ASEAN countries have significant FDI stocks in Australia – Malaysia, with stocks of around US\$2.6 billion and Singapore with US\$3.3 billion worth of FDI.<sup>88</sup>

The chapter contains special and differential treatment provisions for the newest ASEAN members, largely in the form of technical assistance.<sup>89</sup>

The investment chapter provides for compulsory recourse to investor-state dispute settlement in the form of ICSID conciliation or arbitration, or arbitration under the UNCITRAL rules.<sup>90</sup> In this regard, it is worth noting that Australia did not opt out of investor-state dispute settlement, as it succeeded in doing in the Australia–United States Free Trade Agreement and has vowed to do for all future FTAs.<sup>91</sup>

### 11. Economic Co-operation

This chapter elaborates on the Economic Cooperation Work Programme (ECWP) to which the parties committed as a part of the formation of AANZFTA. The ECWP

<sup>81</sup> AANZFTA, Chapter 10, art. 10.

<sup>82</sup> AANZFTA, Chapter 11, art. 2. For commentary on AANZFTA's investment provisions, see Eckhard R. Hellback, *Investment Protection Under the New ASEAN–Australia–New Zealand Free Trade Agreement* (White & Case, 2010), accessible at [www.whitecase.com/idq/winter2010-4/#.UlxU4RC1jn5](http://www.whitecase.com/idq/winter2010-4/#.UlxU4RC1jn5).

<sup>83</sup> *Ibid.* <sup>84</sup> *Ibid.* <sup>85</sup> *Ibid.* <sup>86</sup> *Ibid.* <sup>87</sup> *Ibid.* <sup>88</sup> *Ibid.* <sup>89</sup> AANZFTA, Chapter 11, art. 15.

<sup>90</sup> *Ibid.*, at arts. 18–22.

<sup>91</sup> See, e.g., Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor-State Dispute Settlement', *ASIL Insights*, 2 August 2011, accessible at [www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-statedispute-settlement](http://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-statedispute-settlement).



sets out eight areas of focus for cooperation:<sup>92</sup> ROO, SPS measures, STRACAP, services, investment, intellectual property, sectoral integration and customs procedures.

New Zealand estimated that its contribution to implement ECWP projects would be up to \$4.6 million over three to five years – a relatively modest amount.<sup>93</sup> This chapter is not subject to the consultations and dispute settlement chapter.<sup>94</sup>

## 12. Intellectual Property

The intellectual property chapter provides for the establishment of an Intellectual Property Committee. The chapter requires the provision of criminal procedures and penalties for the willful infringement of copyright for commercial gain.<sup>95</sup> It also explicitly recognizes the right to protect genetic resources, traditional knowledge and folklore, albeit consistently with the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.<sup>96</sup> The chapter promotes cooperation on IP issues, including the provision of technical assistance to facilitate AANZFTA parties' ability to accede to, and implement, an elaborated list of IP treaties.<sup>97</sup>

The IP chapter includes some commitments not found in TRIPS. For example, the parties agree to adhere to treaties not incorporated into TRIPS, such as the WIPO Patent Cooperation Treaty (WPCT), the Patent Law Treaty, and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.<sup>98</sup> The agreement to abide by the WPCT will extend the period to file a patent application up to 30 months (rather than the 12 months provided for under the Paris Convention).<sup>99</sup> Acceding to and implementing the other two treaties will lead to more harmonization on patent issues and simplify the process for obtaining certain patents.<sup>100</sup>

The intellectual property chapter also extends the TRIPS obligations to criminalize copyright piracy to situations where there is a willful infringement that, while not committed for commercial advantage or financial gain, has a "substantial prejudicial impact" on the right holder.<sup>101</sup>

## 13. Competition

This brief chapter of only four articles is not subject to the AANZFTA consultations and dispute settlement chapter.<sup>102</sup> The chapter primarily acknowledges competition-related principles, without requiring or precluding the adoption of any particular measures,<sup>103</sup> and encourages cooperation, particularly in the form of assistance from Australia and New Zealand to the ASEAN countries.<sup>104</sup>

92 National Interest Analysis at 39. 93 *Ibid.* 94 AANZFTA, Chapter 12, art. 8.

95 AANZFTA, Chapter 13, art. 5. 96 *Ibid.*, art. 8. 97 *Ibid.*, art. 9(7).

98 Jakkrit Kuanpoth, *Thailand: Intellectual Property in ASEAN-Australia-New Zealand FTA (AANZFTA)* (Tilleke & Gibbins Int'l Ltd. 2012), available at [www.mondaq.com/x/166578/International+Trade/Intellectual+Property+in+ASEAN+Australia+New+Zealand+FTA+AANZFTA](http://www.mondaq.com/x/166578/International+Trade/Intellectual+Property+in+ASEAN+Australia+New+Zealand+FTA+AANZFTA).

99 *Ibid.* 100 *Ibid.*

101 *Ibid.* There are also more minor TRIPS-plus commitments relating to digital technology protection and trademarks and geographical indications. *Ibid.*

102 AANZFTA, Chapter 14, art. 4. 103 *Ibid.*, art. 1(4). 104 *Ibid.*, art. 2.

#### 14. General provisions and exceptions

AANZFTA incorporates GATT Article XX and GATS Article XIV with respect to certain chapters, as well as exceptions for essential security interests, certain tax measures, and for balance of payments issues.<sup>105</sup> There is an explicit acknowledgement of New Zealand's right to give more favorable treatment to the Maōri, consistent with its obligations under the Treaty of Waitangi, and the interpretation of New Zealand's commitments under that Treaty are not subject to AANZFTA dispute settlement.<sup>106</sup>

#### 15. Consultations and dispute settlement

The AANZFTA dispute settlement mechanism, like the WTO Dispute Settlement Understanding, provides for binding dispute settlement with the possibility of suspending concessions in the event of noncompliance.<sup>107</sup> In the event of consultations not resolving a dispute, a Party can request the establishment of an arbitral tribunal to hear the matter, and there are provisions for the participation of interested third parties.<sup>108</sup> As under the WTO Dispute Settlement Understanding, a party found to be in violation of an AANZFTA obligation will have a reasonable time, generally not exceeding 15 months, in which to comply.<sup>109</sup> Failure to so comply will then trigger the right of the prevailing party either to a negotiated level of compensation or to suspend concessions.<sup>110</sup> There is no appellate mechanism in AANZFTA dispute settlement.

### IV. Impact and prospects for future application

AANZFTA confirms that nothing in the Agreement can be construed as derogating from any rights or obligations that the parties already have as WTO members (Chapter 18, Article 2) and that the parties will undertake a general review of the Agreement, with a view to furthering its objectives, in 2016 (and every five years after that) (Chapter 18, Article 9).<sup>111</sup>

The Agreement was notified to the WTO as a regional trade agreement under GATT Article XXIV (trade in goods) and GATS Article V (trade in services) on 8 April 2010.<sup>112</sup> The parties notified the entry into force of the Agreement for Indonesia, Laos and Cambodia on 3 May 2012.<sup>113</sup> Article XX of the WTO's General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article XIV of the GATS are incorporated into AANZFTA in relation to certain chapters (Chapter 15, Article 1).

105 AANZFTA, Chapter 15, arts. 1–4. 106 *Ibid.*, art. 5. 107 AANZFTA, Chapter 17.

108 *Ibid.*, arts 8 and 10. 109 *Ibid.*, art. 15. 110 *Ibid.*, art. 17. 111 *Ibid.*, at 49.

112 <http://rtais.wto.org/UI/PublicAllRTAList.aspx>. Accessed 27 September 2013.

113 See Notification of entry into force for Cambodia, Lao PDR and Indonesia of the Agreement establishing the ASEAN–Australia–New Zealand Free Trade Area, WT/REG284/N/2 S/C/N/545/Add.1. (9 May 2012).

### *A. Implications of other FTAs under negotiation*

A significant development that will impact AANZFTA in the future is the recent initiation of negotiations of a separate FTA that will include, among others, all of the AANZFTA parties. This negotiation, known as the Regional Comprehensive Economic Partnership (RCEP), presently comprises 16 countries: the ten members of ASEAN, plus Australia, New Zealand, China, Japan, Korea and India. ASEAN already has FTAs with all of the other participants; in addition to AANZFTA, ASEAN has “+ 1” agreements with each of China, Japan, Korea and India. However, these existing FTAs are a series of hub-and-spoke arrangements, without many linkages between the spokes. The RCEP negotiating parties seek to change this, and to create a single FTA that will link all 16 participants to one another. This negotiation is still in its earliest stages<sup>114</sup> and is likely to proceed rather slowly because of the challenges in getting China, Japan and Korea to negotiate successfully with one another, and because India has yet to participate in an FTA of even moderately high standards. Should the RCEP come to fruition however, it will encompass all of the AANZFTA participants.

This has potentially significant implications for the interpretation of the obligations of the 12 countries that will be parties to both AANZFTA and the RCEP. As noted in Part III above, the provisions in Chapter 18, Article 2 of AANZFTA describing the relationship between AANZFTA and other treaties explicitly excluded future treaties from the coverage of that Article. Thus unless the parties provide for otherwise in the RCEP, pursuant to Article 30 of the VCLT, after the RCEP comes into force, AANZFTA will only apply to the extent its terms are compatible with those of the RCEP. However, AANZFTA may remain relevant, albeit to a limited degree, even if the RCEP is completed and comes into force. To the extent differences such as the way rules of origin are calculated result in one agreement being more attractive for an exporter than the other, it is likely such exporters will be able to choose the agreement they wish to export under. In particular, members of overlapping FTAs have used side letters to ensure that exporters from parties to such FTAs can take advantage of whichever terms are more favorable to them.<sup>115</sup> It is not always the case that the later agreement will be more advantageous. A New Zealand study has concluded that for businesses seeking to export to countries with which New Zealand has one or more FTAs in addition to AANZFTA,<sup>116</sup> it will usually be

114 The first negotiating session was held 9-13 May 2013. See ASEAN, Regional Comprehensive Economic Partnership (RCEP) Joint Statement: The First Meeting of Trade Negotiating Committee (10 May 2013) accessible at [www.asean.org/news/aseanstatement-communicues/itcm/regional-comprehensive-economicpartnership-rcep-joint-statement-the-first-meeting-of-trade-negotiating-committee](http://www.asean.org/news/aseanstatement-communicues/itcm/regional-comprehensive-economicpartnership-rcep-joint-statement-the-first-meeting-of-trade-negotiating-committee).

115 See, e.g., NZIER Report to MFAT, *A Comparison of New Zealand's Trade Agreements in SE Asia: Key Considerations for New Zealand Exporters* 7 (July 2010), accessible at [www.asean.fta.govt.nz/assets/Uploads/NZIERComparisonofFTAprovisionsfinal27August1.pdf](http://www.asean.fta.govt.nz/assets/Uploads/NZIERComparisonofFTAprovisionsfinal27August1.pdf) [hereinafter “NZIER Report”].

116 These are Australia (CER); Brunei (P4); Malaysia (New Zealand-Malaysia FTA); Singapore (New Zealand-Singapore CEP and P4); and Thailand (New Zealand-Thai CEP). “P4” is a term commonly used to refer to the Trans-Pacific Strategic Economic Partnership Agreement, an FTA comprising Brunei, Chile, New Zealand and Singapore. The P4 came into force in 2006.

to the exporters' benefit to ship under a different applicable FTA than AANZFTA.<sup>117</sup> For example, the study determined that the goods provisions in the New Zealand–Thai CEP were generally more favorable to New Zealand exporters than those under AANZFTA, and the goods provisions under the New Zealand–Malaysia FTA were in all instances at least as favorable and in many instances more favorable than under AANZFTA.<sup>118</sup> Better provisions were the result of more favorable tariffs and/or easier to meet rules of origin. The study also identified some ways in which AANZFTA represents the better option. For example, Mode 4 services commitments made by Singapore are more generous under AANZFTA than under the bilateral FTA (and Mode 4 services commitments are not a part of the P4).<sup>119</sup>

It remains to be seen what aspects of the RCEP will be more ambitious than AANZFTA. However, it seems likely that provision will be made for exporters from the 12 AANZFTA countries to be able to avail themselves of the more favorable agreement. Exporters will then need to determine, on a case-by-case basis, which agreement better meets their needs.

In addition, six of the AANZFTA parties (Australia, Brunei, Malaysia, New Zealand, Singapore, Vietnam) are also amongst the participants negotiating the Trans-Pacific Partnership (TPP).<sup>120</sup> Assuming the TPP is concluded, it will almost certainly contain provisions that address the impact of the Agreement on existing FTAs, as the 12 countries negotiating the TPP have a multitude of FTAs amongst themselves.

AANZFTA is a fairly basic FTA which does not feature particularly novel or comprehensive commitments. Nonetheless, the parties likely sought to negotiate this agreement primarily for strategic rather than economic reasons. The existence of AANZFTA likely simplified the case to have the RCEP include Australia and New Zealand – which was not always a given. In addition, although the phase-out periods are lengthy, the developing country participants have on the whole made significant commitments to cut tariffs, without the sorts of wholesale sectoral exclusions featuring in many other FTAs.

117 NZIER Report at 8–12.

118 *Ibid.*, at 8. See also Bryan Mercurio, 'Trade Liberalisation in Asia: Why Intra-Asian Free Trade Agreements are Not Utilised by the Business Community', 6 *Asian Journal of WTO & International Health Law and Policy* (1) 109 (2011).

119 *Ibid.*, at 10.

120 The TPP participants that are not also parties to AANZFTA are Canada, Chile, Japan, Mexico, Peru and the United States.