

From negotiation to implementation: the Australian experience of implementing Free Trade Agreements

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Summary

The Korea-Australia Free Trade Agreement (KAFTA) entered into force on 12 December 2014, expanding trade opportunities among two of the Asia-Pacific's largest trading economies. This policy brief summarizes the process of concluding a Free Trade Agreement (FTA) and moving to implementation from the perspective of Australian experience. Key messages:

- There is often a lengthy process between the announcement of the FTA and its coming into effect. This can take several months and involves various Parliamentary and other processes.
- The negotiation of FTAs falls under the powers of the Executive Branch but is subject to Parliamentary scrutiny. Negotiation involves outreach from the lead department to many other stakeholders.
- Announcements of FTAs can be made even prior to the exact terms of the FTA being agreed.
- Once signed, the FTA is subject to parliamentary scrutiny though not its approval. This scrutiny includes review by the Joint Standing Committee on Treaties (JSCOT) and other inquiries conducted by the Australian Parliament.
- Even once in force, there is a role for State and Federal Governments in 'selling' the FTA and making sure the available preferences are used by businesses.

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Introduction

The announcement of the conclusion of a Free Trade Agreement (FTA) is generally met with extensive media and political attention as it is seen as a triumph for the relevant Governments which conclude the Agreement.

However, contrary to popular perception, the announcement of an FTA does not mean, of itself, that it will immediately come into effect. There is often a lengthy process that needs to be observed before an FTA can come into effect. By way of example, the Korean-Australian Free Trade Agreement (KAFTA) recently came into effect nearly 12 months after it was first announced. Further, Australia and Japan have just announced that the Japan Australia Economic Partnership Agreement (JAEPA) will commence on 15 January 2015, after having been signed on 8 July 2014.

This policy brief provides a commentary on the steps which come between the announcement of an FTA and it coming into effect. The perspective is principally an Australian one. However, it may also be instructive to compare to processes which are required elsewhere.

Table: Australian FTAs in force and trade values with agreement partners (thousand USD)

| Partner(s) | Entry into force | Export value, 2013 | Import value, 2013 |
|-------------------|------------------|--------------------|--------------------|
| Republic of Korea | 2014 | \$17,710,695 | \$9,422,432 |
| ASEAN-New Zealand | 2014 | \$28,906,165 | \$49,705,545 |
| Malaysia | 2013 | \$4,457,750 | \$8,846,118 |
| Chile | 2009 | \$339,720 | \$967,635 |
| United States | 2005 | \$7,603,068 | \$23,820,299 |
| Thailand | 2005 | \$4,700,538 | \$10,672,586 |
| Singapore | 2003 | \$5,227,306 | \$12,144,185 |
| New Zealand | 1983 | \$6,785,538 | \$6,996,420 |

Source: Department of Foreign Affairs and Trade, Australia; World Bank WITS database

Authority to enter into an FTA

Before embarking on negotiations it is important that the parties identify the power they hold to do so. In the Australian context, the Government relies on its "*external affairs*" power from the Australian Constitution to negotiate an FTA. Strictly speaking, that power resides solely with the Executive Branch of the Government and does not require the FTA to be approved by both Houses of Parliament. However, any FTA is still subject to some Parliamentary scrutiny which is discussed below.

Negotiating an FTA

The Australian experience leaves the majority of the conduct of negotiations for an FTA to the Department of Foreign Affairs and Trade ("DFAT"). However, the negotiating teams regularly involve officers of other Government agencies such as the Australian Customs and Border Protection Service ("Customs"), the Department of Agriculture and IP (Intellectual Property) Australia. During the course of negotiation of the FTA, the Government seeks submissions from interested parties including the public in general and more specific groups such as industry associations representing importers and exporters together with their service providers.

There is no "usual" period to negotiate an FTA, which can take an extremely long period spanning several successive Federal Governments in Australia. In a recent example, the negotiations for the China-Australia Free Trade Agreement ("ChAFTA") commenced in 2005 and were only concluded in November 2014.

Announcing an FTA

Recent Australian experience has been that the respective Governments will announce the conclusion of an FTA before it releases the terms of the FTA itself and, in some cases, even before the exact terms of the FTA have to be agreed. By way of example, the Australian and Korean Governments announced the agreement on the KAFTA in December 2013 but did not release the text until February 2014. Further, the recent announcement of the ChAFTA was based on the signing of a "*Declaration of Intent*" alone with the text of the ChAFTA yet to be released.

Even so, in both cases, there was a significant amount of information regarding the commercial benefits and terms of the FTA made available to enable both parties to make extensive public announcements regarding the terms of the FTA and the benefits for the contracting countries.

Form of the FTA

Following announcement of the general terms of the FTA, the following process is adopted based on recent Australian experience.

- The FTA is finalized for approval and signing which entails review of the FTA by lawyers and checking of the translations of the Agreement.

- Having been finalized, the FTA is then signed by the parties by suitably authorized representatives of both parties to the FTA.
- The FTA is then subject to Parliamentary review (not approval) as described below.

Parliamentary Review

Unlike the experience in the United States, the terms of any FTA are not subject to debate and approval by houses of the Australian Federal Parliament. However, the terms of an FTA are subject to Parliamentary review (if not approval) which includes review by the Joint Standing Committee on Treaties (JSCOT) and other Inquiries conducted by the Australian Parliament.

In the first instance, the FTA is submitted to JSCOT together with a document known as the National Interest Analysis (NIA) which identifies the terms of the FTA and includes an analysis of the benefits of the FTA to Australia. JSCOT is a "Joint" Committee of Parliament with members from both the House of Representatives (the lower House) and the Senate (the upper House). Its purpose is to provide an opportunity for interested parties to comment on an FTA at the same time as JSCOT reviews the NIA. JSCOT considers the FTA, the NIA and submissions or commentary received from other parties. It then issues a Report as to whether "*treaty action*" should be taken. In the majority of cases, JSCOT will approve a FTA and recommend that treaty action be taken. However, that does not mean that JSCOT immediately approves all agreements forwarded to it. For example, in recent years, JSCOT was called to review the Anti-Counterfeiting Trade Agreement but did not recommend immediate treaty action instead requesting further information and consideration of the agreement much in the same way as had been done in the EU.

The JSCOT review is not the sole review by Parliamentary Committee. Other Committees (whether Joint or of the Senate) often conduct their own Inquiries. For example, in relation to KAFTA, there were two separate inquiries by other Senate Committees as to the terms of the KAFTA. Parties are encouraged to make submissions to the Inquiries and often inquiries are conducted in public with questions of those who have made submissions. However, those separate Senate Inquiries only include recommendations on a FTA or to the provision of additional information and are not part of an approval process.

On the assumption that JSCOT recommends that the Government undertake treaty action pursuant to a FTA, the next step is to pass any necessary enabling legislation.

The nature of the enabling legislation will differ depending upon the terms of the FTA and the changes which need to be effected. By way of example, nearly all FTA include reductions in Australian rates of customs duty for "*originating goods*" of the other party to the FTA that covers a variety of different types of goods depending upon the relevant rules of origin. For Australia this has meant amendments to our *Customs Act 1901* to include the new provisions defining what are "*originating goods*" of the other country together with ancillary provisions on such issues as non-qualifying operations and consignment of goods. At the same time there will also be amendments to the *Customs Tariff Act 1995* (which actually sets the rates for duties payable by importers) which will be triggered by the various reductions in tariff rates agreed in the FTA. Accordingly, those two main Acts will need amendment by way of legislation which passes through Parliament. There are also Regulations required to implement other aspects of the FTA but they do not require Parliamentary approval.

The implementing legislation needs to secure Parliamentary approval and that process itself requires passage through both Houses of Parliament. This allows for additional Parliamentary scrutiny. The legislation implementing the "*customs*" aspect of both the KAFTA and the JAEPA are subject to review by separate Senate Inquiries. The submissions often lead to recommendations by the Committees in their reports such as proposing amendments to legislation, requiring additional consultation and publication of information by Government.

Subsequently, legislation associated with the KAFTA and the JAEPA was passed by both Houses of Parliament and then received Royal Assent. This involves securing approval by the Federal Governor – General. Royal Assent is the last "approval" required for Federal Legislation. The actual commencement of the FTA and the enabling Australian legislation then awaited the exchange of Diplomatic Notes to confirm domestic processes having been completed in both countries as parties to the FTA. Most FTAs provide for commencement 30 days after the exchange of "*Diplomatic Notes*". However, in relation to the KAFTA, on exchange of Diplomatic Notes, both Australia and Korea agreed on an early commencement for the KAFTA which came into effect on 12 December 2014. The JAEPA followed the conventional path of commencing 30 days after exchange of Diplomatic Notes with it to come into effect on 15 January 2015. The process for approval of the ChAFTA and its commencement will follow the same process to that described above. The process for approval of a multi – lateral FTA to which Australia is a party (potentially including the Trans Pacific Partnership Agreement) would also follow the same process although its commencement for each country would depend on each country confirming its domestic processes had been completed.

The “selling” of the FTA

The signing of FTA and its commencement is the subject of extensive coverage from Government agencies together with engagement by those Government agencies with parties such as importers, exporters, licensed customs brokers and freight forwarders who arrange for the passage of goods across the border. At the same time, many other parties wishing to take advantage of the FTA will seek assistance from other relevant Government agencies. This is of significant importance. There have been many recent studies which have identified that the uptake and the use of FTAs is lower than had been intended which is often portrayed as being a problem arising out of a failure by Government agencies to communicate and "sell" the merits and benefits of FTAs and explain the ways of utilizing the FTA.

Conclusion

Clearly, the conclusion of a FTA is a long and difficult process. However, it is important to realize that this does not, of itself, guarantee the introduction of a FTA and that significant additional work needs to be undertaken in any jurisdiction (including Australia) which seeks to implement and commence operations through an FTA.



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