

Report 124

Treaties tabled on 22 November 2011 and 7 February 2012

Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011

Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011

Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)

Amendment to Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade done at Rotterdam on 10 September 1998

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Membership of the Committee

Chair	Mr Kelvin Thomson MP	
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	Mr Jamie Briggs MP	Senator Scott Ludlam
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	Ms Melissa Parke MP	
	Ms Michelle Rowland MP <i>(until 7/2/12)</i>	
	The Hon Dr Sharman Stone MP	

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	David Monk <i>(from 26/3/12)</i>
Inquiry Secretary	Kevin Bodel
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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of recommendations

- 2 Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011**

Recommendation 1

The Committee supports the *Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011* and recommends that binding treaty action be taken.

- 3 Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011**

Recommendation 2

The Committee supports the *Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011* and recommends that binding treaty action be taken.

4 Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)

Recommendation 3

The Committee supports the *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)* and recommends that binding treaty action be taken.

Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of treaty actions tabled on 22 November 2011 and 7 February 2012.
- 1.2 These treaty actions are proposed for ratification and are examined in the order of tabling:
 - **Tabled 22 November 2011**
 - ⇒ *Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011; and*
 - ⇒ *Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011.*
 - **Tabled 7 February 2012**
 - ⇒ *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)*

■ **Minor treaty action**

⇒ *Amendment to Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade done at Rotterdam on 10 September 1998.*

- 1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.
- 1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.
- 1.5 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.6 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaties examined in this report do not require an RIS.
- 1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.8 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:

<www.aph.gov.au/house/committee/jsct>

Conduct of the Committee's review

- 1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties were requested by 27 January 2012 for the treaty tabled on 22 November

2011, and 9 March 2012 for those treaties tabled 7 February 2012 with extensions available on request.

1.10 Invitations were made to all State Premiers, Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.

1.11 Submissions received and their authors are listed at Appendix A.

1.12 The Committee examined the witnesses on each treaty at public hearings held in Canberra on 6 February 2012, and 19 March 2012.

1.13 Transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaty's tabling date, being:

■ **6 February 2012**

<<http://www.aph.gov.au/house/committee/jsct/6february2012/hearings.htm>>

■ **19 March 2012**

<<http://www.aph.gov.au/house/committee/jsct/19march2012/hearings.htm>>

1.14 A list of witnesses who appeared at the public hearings is at Appendix B.

Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011

Introduction

- 2.1 On 22 November 2011, the *Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011*, was tabled in the Commonwealth Parliament.

Background

- 2.2 The Annex VI Amendments are designed to mitigate greenhouse gas emissions by introducing mandatory carbon dioxide (CO₂) emissions standards for ships in order to reduce greenhouse gas emissions from international shipping.^{1,2,3}

1 National Interest Analysis [2011] ATNIA 34 with attachment on consultation *Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships, Resolution MEPC.203(62) adopted at London on 15 July 2011* [2011] ATNIF 25 (Hereafter referred to as the 'NIA'), para 2.

2 A 2009 OECD discussion paper on the issue can be found at:
<<http://www.internationaltransportforum.org/jtrc/discussionpapers/DP200911.pdf>>.

- 2.3 The proposed amendments introduce mandatory CO₂ emissions standards, termed a 'required Energy Efficiency Design Index (EEDI)', for international trade ships that are new, or that undergo a major conversion, after 1 January 2013. All existing international ships of 400 gross tonnage and above would also require a Ship Energy Efficiency Management Plan (SEEMP).⁴
- 2.4 The proposed amendments also include consequential changes in Chapters 1 and 2 of Annex VI to clarify the regulations, and the survey and certification requirements of ships engaged in international trade.⁵
- 2.5 The Annex VI Amendments represent the first mandatory greenhouse gas emission reduction measures for an international industry sector, and help to close a gap in the existing international climate change framework, which currently excludes the shipping sector from emissions reduction targets.⁶
- 2.6 Adoption of the measures is expected to remove between 45 and 50 million tonnes of CO₂ from the atmosphere annually by 2020, compared with current emissions. For 2030, the reduction is expected to be between 180 and 240 million tonnes annually.⁷
- 2.7 The proposed amendments introduce mandatory CO₂ emissions standards, termed a 'required Energy Efficiency Design Index (EEDI)', for international trade ships that are new, or that undergo a major conversion, after 1 January 2013. All existing international ships of 400 Gross Tonnage and above would also require a Ship Energy Efficiency Management Plan (SEEMP).⁸
- 2.8 The proposed amendments also include consequential changes in Chapters 1 and 2 of Annex VI to clarify the regulations, and the survey and certification requirements of ships engaged in international trade.⁹

3 A flyer from the International Chamber of Shipping on the topic can be found at: <http://www.shippingandco2.org/CO2%20Flyer.pdf>.

4 NIA, para 5.

5 NIA, para 5.

6 NIA, para 6.

7 NIA, para 7.

8 NIA, para 5.

9 NIA, para 5.

Energy Efficiency Design Index

- 2.9 The EEDI is a non-prescriptive, performance-based mechanism that sets the emission target for each new ship. The choice of technologies to use in a specific ship design to meet the emission target is left to the industry.¹⁰
- 2.10 Regulation 20 of the amended Annex VI requires that an 'attained EEDI' shall be calculated for each ship in accordance with IMO guidelines. The attained EEDI is specific to each ship and measures that ship's estimated energy efficiency performance. To meet the requirements of amended Annex VI, the attained EEDI needs to be no greater than the 'required EEDI' - which represents the energy efficiency target each class ship is required to meet.¹¹
- 2.11 The EEDI requirement would apply to new bulk carriers, gas carriers, tankers, container ships, general cargo vessels, refrigerated ships and combination carriers. Other vessels, such as passenger vessels and vehicle carriers, are not included as further analysis of data on these vessels is incomplete. The required EEDI would be reduced over three phases - 2015, 2020 and 2025 - with the amount of reduction varying according to ship type.¹²
- 2.12 The EEDI will apply to all ships of 400 gross tonnage and above, excluding the ships solely engaged in voyages within waters subject to the jurisdiction of the flag state, and only to new ships and ships that have undergone a major conversion.¹³

Ship Energy Efficiency Management Plan

- 2.13 The SEEMP requires operators to improve the energy efficiency of ships during operations. The Amended Annex VI provides that each international ship, new and existing, of 400 gross tonnage and above, would be required to keep a Ship Energy Efficiency Plan, developed in accordance with IMO guidelines.¹⁴ The Department of Infrastructure and Transport explained further:

The SEEMP establishes a mechanism that requires operators to improve the energy efficiency of ship steering operations...
Adoption of the measures by the international shipping sector is

10 NIA, para 16.

11 NIA, para 18.

12 NIA, para 18.

13 NIA, para 17.

14 NIA, para 19.

expected to remove between 45 and 50 million tonnes of carbon dioxide from the atmosphere annually by 2020 compared with business as usual, depending upon the growth in world trade. This reduction is expected to be between 180 and 240 million tonnes annually by 2030. Australia's adoption of the proposed amendments would assist in ensuring broad international acceptance and would demonstrate our support for global efforts to reduce emissions from the transport sector.¹⁵

Survey and Certification

- 2.14 Finally, the Amended Annex VI will provide that each ship of any of the prescribed types built for international trade will need to be surveyed by the Administration of the flag State or a recognised organisation delegated by the Administration to determine that the attained EEDI is in accordance with Regulation 21.¹⁶
- 2.15 The Administration will issue an "International Energy Efficiency Certificate" following successful completion of this survey. An International Energy Efficiency Certificate must be issued to a ship before that ship can undertake international voyages to ports or offshore terminals under the jurisdiction of other Parties.¹⁷

Reasons for Australia to take the proposed treaty action

- 2.16 Worldwide seaborne trade has been increasing by approximately 4 percent a year. International shipping accounted for approximately 870 million tonnes, or 2.7 percent, of global emissions in 2007. According to the second IMO Greenhouse Gas Study (2009) greenhouse gas emissions from shipping can be expected to increase by between 150 – 250 percent by 2050 in the absence of mitigation efforts.¹⁸
- 2.17 The Kyoto Protocol to the *UN Framework Convention on Climate Change* (UNFCCC) expressly omits the international shipping sector from Developed Country Parties' national emission reduction targets. Instead, the Parties to the Kyoto Protocol agreed to pursue limitation or reduction of emissions from international shipping through the IMO.¹⁹

15 Ms Poh Aye Tan, Section Head, Maritime Policy Section, Maritime Policy Reform Branch, Surface Transport Policy Division, Department of Infrastructure and Transport, *Committee Hansard*, 6 February 2012, p. 13.

16 NIA, para 20.

17 NIA, para 21.

18 NIA, para 9.

19 NIA, para 10.

- 2.18 Australia has worked actively within the IMO to seek practical, non-discriminatory, non-trade distorting solutions to reducing greenhouse gas emissions from international shipping. In conjunction with eight other Parties to MARPOL, Australia sponsored the proposed amendments to Annex VI.
- 2.19 According to the NIA, various studies suggest that ships can reduce their CO₂ emissions by as much as 25 percent by adopting better hull designs, energy efficient technologies and energy efficient operations. The proposed amendments seek to influence expeditious uptake of these technologies by setting mandatory emissions standards for new ships. The measures do not discriminate between countries. They apply to ships entitled to fly the flag of a Party to MARPOL, and ships not entitled to fly the flag of a Party but which operate under the authority of a Party.²⁰
- 2.20 The NIA speculates that International shipping would be slow in adopting available energy efficient technologies without international regulation. The NIA argues that the amendments should drive early adoption of energy efficient technologies by international shipping.²¹
- 2.21 By implementing the proposed amendments, Australia would be provided with a basis for requiring Australian ships to meet the EEDI and SEEMP specifications contained in the amended MARPOL Annex VI. If the amendments to Annex VI are not implemented in Australia, there is a material risk that Australian ships built after 1 January 2013 would be less energy efficient than foreign-flagged ships that do adhere to the new regulations and thus Australian ships would be unable to trade internationally if the amendments were implemented by other nations.²²

Implementation

- 2.22 Amendments to the *Navigation Act 1912* (Cth) (the Navigation Act), the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (the Protection of the Sea Act) and *Marine Orders Part 97* would be required to implement the Amendments to Annex VI.²³
- 2.23 As the Navigation Act gives effect to ship survey and construction requirements of MARPOL, for consistency it is envisaged that the new EEDI regulations would be included in that Act. The new SEEMP regulation is an operational requirement and would be achieved by
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20 NIA, para 11.

21 NIA, para 12.

22 NIA, para 14.

23 NIA, para 22.

amending the Protection of the Sea Act. Marine Orders Part 97 would be amended to prescribe matters and technical requirements for the purposes of the new regulations.²⁴

- 2.24 Administration and enforcement would be through established procedures, mostly through port State control inspections. The Australian Maritime Safety Authority (AMSA) intends to enforce the new measure through its usual processes of port and flag state control. AMSA will also carry out investigations and prosecutions of alleged breaches where it has jurisdiction.²⁵

Costs

- 2.25 The proposed amendments would incur little or no cost on Australia as the EEDI regulations would only apply to prescribed ships that will be built after 1 January 2013 for international trade. These regulations would not apply to Australian ships that are currently in operation. Existing Australian international ships that are over 400 gross tonnage would be required to carry on board a SEEMP, an operational document, which can be achieved at a negligible cost.²⁶
- 2.26 Given the significant number of MARPOL treaty amendments that occur, the Committee was interested if these additional obligations require AMSA to seek additional funding. The Department of Infrastructure and Transport responded:

No. When our marine surveyors go on board a ship to do what we call a port state control inspection, there is a fairly extensive list of documents they have to sight. I think the MARPOL Annex VI amendments will add one additional document to that; two additional documents if you count the SEEMP, the energy efficiency plan. So there will be two additional documents our marine surveyors will have to look at. It might take an extra time during the port state control inspection but at this stage we are not envisaging any additional resources needed for these amendments.²⁷

24 NIA, para 23.

25 NIA, para 24.

26 NIA, para 25.

27 Mr Paul Nelson, Manager, Marine Environment Standards, Marine Environment Division, Australian Maritime Safety Authority, *Committee Hansard*, 6 February 2012, p. 17.

Conclusion

- 2.27 The proposed amendments to Annex VI of MARPOL will result in a reduction of greenhouse gas emissions by introducing mandatory CO₂ emissions standards for ships in order to reduce greenhouse gas emissions from international shipping and in the process make a positive contribution to the broader issue of climate change.
- 2.28 The Committee notes that Australia has worked actively within the IMO to seek practical, non-discriminatory, non-trade distorting solutions to reducing greenhouse gas emissions from international shipping and that Australia has sponsored the proposed amendments to Annex VI.
- 2.29 The Committee supports the amendments and recommends that binding treaty action be taken.

Recommendation 1

The Committee supports the *Amendments to MARPOL Annex VI on Regulations for the Prevention of Air Pollution from Ships by Inclusion of New Regulations on Energy Efficiency for Ships Resolution MEPC.203(62) adopted at London on 15 July 2011* and recommends that binding treaty action be taken.

Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011

Introduction

- 3.1 On 22 November 2011, the *Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011* was tabled in the Commonwealth Parliament.
- 3.2 The proposed Agreement provides the legal basis required by the European Union (EU) under its data protection laws to allow the transfer of passenger name record (PNR) data to Australia. PNR data is passenger information processed in the EU by air carriers, including passengers' travel requirements, date of reservation, date of intended travel, name, contact details and payment information. Negotiation of such an agreement with the EU is a pre-requisite for the release of EU held personal information to other jurisdictions, and reflects the high standard of protection for personal information held in the EU.¹

¹ National Interest Analysis [2011] ATNIA 36 with attachment on consultation *Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record*

Background

- 3.3 The proposed Agreement will replace the existing (though provisional) Agreement between the European Union and Australia on the Processing and Transfer of European Union - Sourced Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs Service, done at Brussels on 30 June 2008 (the 2008 PNR Agreement).²
- 3.4 The Agreement is an important element in the relationship and underlines the broad-based cooperation between Australia and the European Union (EU).³
- 3.5 Access to PNR data forms an integral component of Customs and Border Protection's border protection measures. Analysis of this and other data plays a critical role in the identification of possible persons of interest in the context of combating terrorism, drug trafficking, identity fraud, people smuggling and other serious transnational crimes.⁴
- 3.6 Providing security and border protection is a potentially fraught affair, as the requirement to screen people and goods is sometimes in conflict with speed and efficiency. The Australian Customs and Border Protection Service explained:

The operating environment within which these risks are identified and managed is characterised by increasing complexity and volumes in trade and travel. For example, almost 29 million people crossed the Australian border last financial year. It is also characterised by infrastructure constraints in airports and ports, short intervention time frames and an increasing sophistication of those who seek to circumvent the controls and risk treatments that are in place. Further, while there is a community expectation that the border will be protected, there is only a limited community tolerance for things like queues in airports which complicate the management of these risks. Given the range of risks to be managed, the nature of the operating environment and the increasing volume of travellers, almost all risk assessment must take place before the physical border and relies absolutely on the

(PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011 [2011] ATNIF 21 (Hereafter referred to as 'NIA'), para 4.

2 NIA, para 2.

3 NIA, para 11.

4 NIA, para 5.

ability to access and assess data, information and intelligence about travellers and intended travel.⁵

Reasons for Australia to take the proposed treaty action

- 3.7 Section 64AF of the *Customs Act 1901* (Cth) mandates that airlines operating international passenger air services to and from Australia provide Customs and Border Protection with access to PNR data for all passengers prior to arrival. As Australia's primary border protection agency, Customs and Border Protection undertakes risk assessment and clearance of all passengers arriving in and departing from Australia. Access to PNR data is vital for Customs and Border Protection to fulfil this border protection role.⁶
- 3.8 EU data protection laws prohibit data transfers from the EU to other countries without a formal agreement that contains adequate safeguards for the protection of personal data. An agreement with the EU is therefore necessary to enable PNR data to be transferred to Australian authorities.⁷
- 3.9 Without such an agreement, PNR data processed in the EU could not be provided to Customs and Border Protection without breaching EU law. On the other hand, failure to furnish such information might expose an information gap that could be exploited by people wishing to enter Australia without detection.⁸
- 3.10 The proposed Agreement resolves this conflict by providing an appropriate legal framework and assurances that EU-sourced PNR data transferred to Australia will be processed in accordance with existing Australian data protection laws, striking a balance between national security and privacy protection considerations.⁹
- 3.11 The proposed Agreement applies to all PNR data processed in the EU, regardless of the flight's point of departure. PNR data processed in the EU currently represents about 30 per cent of total air passenger arrivals in Australia. By July 2012, EU-sourced PNR data is forecast to increase to about 42% of total air passenger arrivals in Australia when Cathay Pacific

5 Ms Janet Florence Dorrington, National Director, Intelligence and Targeting Division, Australian Customs and Border Protection Service, *Committee Hansard*, 6 February 2012, p. 19.

6 NIA, para 6.

7 NIA, para 7.

8 NIA, para 8.

9 NIA, para 9.

and Singapore Airlines migrate their passenger data services to a data-processing company in Germany.¹⁰

- 3.12 The Australian Customs and Border Protection Service explained why the PNR data is important for the work they do not just in terms of security, but also in terms of facilitating the flow of passengers through increasingly busy airports:

Our ability to assess travellers prior to their arrival is vital not just for managing border risk but also for effective passenger facilitation. Based on this layered approach we are able to identify potential persons of interest and conduct associated analysis before that person arrives into Australia. Those persons are then subject to some form of intervention on arrival. This process in turn facilitates a freer flow of legitimate travellers through the entry and exit regulatory processes without unnecessary intervention. So, in essence, without an ability to engage in pre-arrival risk assessment, large numbers of travellers would be stopped at the border for questioning, search and so on, leading to a fairly chaotic airport experience.

Risk assessments are made on the basis of advanced passenger data, information and intelligence. The essential pieces of data that I am referring to are known as advanced passenger information or API data, which is provided to the Customs and Border Protection Service by the Department of Immigration and Citizenship, and passenger name record, or PNR, data, which we obtain directly from airlines. API data contains information about identity, passport details, visa details and flight details. PNR data is a much richer source of information and includes API data and also information about, for example, ticketing, check-in, seating, form of payment, the travel itinerary, requested preferences or requests and baggage information.¹¹

Replacement of the 2008 PNR Agreement

- 3.13 The 2008 PNR Agreement has operated provisionally since it was signed on 30 June 2008. Australia notified the EU in December 2008 that it had completed domestic procedures necessary to bring the 2008 Agreement into force. However, the EU was still processing its procedures for entry
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10 NIA, para 10.

11 Ms Janet Florence Dorrington, National Director, Intelligence and Targeting Division, Australian Customs and Border Protection Service, *Committee Hansard*, 6 February 2012, pp. 18-19.

into force (requiring all 27 member states to formally agree) when the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, done at Lisbon on 13 December 2007 (the Lisbon Treaty), entered into force on 1 December 2009. The Lisbon Treaty gave the European Parliament the power to vote on all EU treaties that had not yet entered into force, including the 2008 PNR Agreement, as well as PNR agreements with the US and Canada.¹²

- 3.14 In May 2010, the European Parliament passed a resolution which postponed voting on all the EU's unratified PNR agreements, and called on the European Council to develop mandates for the EU to renegotiate these PNR agreements in accordance with proposed new benchmarks that emphasised privacy protection. Negotiations on a revised PNR agreement with Australia (the proposed Agreement) commenced in January 2011.¹³

Obligations

- 3.15 Article 3 of the proposed Agreement restricts the purposes for which PNR data may be used to the proposed Agreement alone.¹⁴
- 3.16 EU obligations reflected in Articles 4 and 5 provide that:
- (i) air carriers will not be prevented by EU law from complying with Australian law obliging them to provide PNR data to Customs and Border Protection; and
 - (ii) compliance with the proposed Agreement by Customs and Border Protection will, under EU law, constitute an adequate level of protection for PNR data.¹⁵
- 3.17 The proposed Agreement also obliges Customs and Border Protection to provide analytical information obtained from PNR data to police or judicial authorities of EU Member States, Europol or Eurojust, either at their request for the purpose of preventing, detecting, investigating or prosecuting a terrorist offence or serious transnational crime, or in accordance with relevant law enforcement or other information-sharing agreements or arrangements between Australia and any member state of the EU, Europol or Eurojust.¹⁶

12 NIA, para 12.

13 NIA, para 13.

14 NIA, para 14.

15 NIA, para 18.

16 NIA, para 14. Europol and Eurojust are coordinating bodies for policing activities that extend across more than one EU Member State.

- 3.18 Chapter II of the proposed Agreement places certain obligations on Australia to safeguard the transfer and use of PNR data which is transferred from the EU to Customs and Border Protection including:
- adequate protection of personal information in accordance with the *Privacy Act 1988* (Cth) and relevant national laws;
 - secure physical and electronic security for storage of PNR data; and
 - ensuring an individual has the right to access, and to seek rectification of, his or her PNR data subject to reasonable legal limitations and ensuring an individual has the right to administrative and judicial redress should his or her rights under the proposed Agreement be violated.¹⁷
- 3.19 The security of people's information is of high importance to both Australian and EU authorities.

the matter of PNR data and its use is extremely sensitive in Europe. These negotiations were complex, highly political and required great sensitivity to the need to balance effective border protection with the individual's right to privacy. This challenge was met, and we are of the view, as were the competent European authorities – including, importantly, the European Parliament – that we came to an appropriate balance in the circumstances we are faced with and in the global security and criminal environment.¹⁸

Implementation

- 3.20 The safeguards Australia is required to ensure in respect of EU-sourced PNR data are similar to existing Australian law and Customs and Border Protection policies and procedures.
- 3.21 Specifically, existing Australian legislation governing the privacy of data, including the *Privacy Act 1988* (Cth), the *Freedom of Information Act 1982* (Cth) and the *Ombudsman Act 1976* (Cth) establish most of the protections Australia has agreed to provide under the proposed Agreement.
- 3.22 Other obligations, such as the limits on disclosure of information by Customs and Border Protection to other agencies, can be implemented through existing legislative mechanisms in the *Customs Administration Act 1985* (Cth) and existing Customs and Border Protection policies and

17 NIA, para 15. A full summary is included in the NIA.

18 Ms Janet Florence Dorrington, National Director, Intelligence and Targeting Division, Australian Customs and Border Protection Service, *Committee Hansard*, 6 February 2012, p. 19.

procedures. No new legislation is required to process PNR data in the manner required by the proposed Agreement.¹⁹

3.23 The PNR data has been of high importance to Australian law enforcement authorities. The Australian Customs and Border Protection Service explained:

... during the 2011 calendar year PNR data alone contributed to two successful terrorism prosecutions and supported a further 10 terrorism investigations. It led to the identification and prosecution of 30 drug traffickers and the associated seizure of 110 kilograms of narcotics, saving the Australian community \$72 million in downstream effects, based on the Australian Federal Police drug harm index. It also led to the investigation and prosecution of three persons in possession of child pornography, and supported the investigation of over 600 overseas child sex tourism matters. In addition, PNR led directly to the identification of 26 persons in relation to other serious crime, who were refused entry at the border. The ability to analyse PNR data also provides important information in circumstances where persons of interest or syndicates have been identified through other intelligence or assessment methods.²⁰

Costs

3.24 In the 2010/11 Budget, Customs and Border Protection was allocated \$23.7 million and the Department of Immigration and Citizenship was allocated \$1.2m for PNR risk assessment.²¹

Conclusion

3.25 This agreement between Australia and the EU is of high importance in terms of strengthening Customs and Border Protection's border protection measures. Analysis of this and other data plays a critical role in the identification of possible persons of interest in the context of combating transnational crimes.

19 NIA, para 19.

20 Ms Janet Florence Dorrington, National Director, Intelligence and Targeting Division, Australian Customs and Border Protection Service, *Committee Hansard*, 6 February 2012, p. 19.

21 NIA, para 21.

- 3.26 The Committee recognises the need for balance between providing information to government agencies and personal privacy. The Agreement has been scrutinised in this area – most notably by the European Parliament - and the Committee is satisfied that a suitable balance has been found.
- 3.27 On this basis, the Committee supports the ratification of this treaty.

Recommendation 2

The Committee supports the *Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011* and recommends that binding treaty action be taken.

Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)

Introduction

- 4.1 On 7 February 2012, the *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)* was tabled in the Commonwealth Parliament.
- 4.2 The proposed Protocol aligns the exchange of information (EOI) provisions with the internationally agreed standard on tax information exchange, which was developed by the Organisation for Economic Co-operation and Development (OECD). This standard was endorsed by G20 Finance Ministers at their Berlin meeting in 2004 and by the United Nations Committee of Experts on International Cooperation in Tax Matters at its October 2008 meeting.¹

¹ National Interest Analysis [2012] ATNIA 4, amending the *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the*

Overview and national interest summary

4.3 The key objectives of the proposed Protocol are to:

- promote closer economic cooperation between Australia and India by aligning the taxation of business profits and cross-border services with international taxation norms and by including rules to prevent tax discrimination; and
- improve the integrity of the tax system by providing a framework through which the tax administrations of Australia and India can prevent international fiscal evasion.²

4.4 The proposed Protocol updates the current tax treaty arrangements between both countries by modernising the rules which determine when an enterprise of one country may be taxed on its activities in the other. It also provides that an enterprise will only be taxed on the profits attributable to its branch activities in the other country and will not, as is currently the case, also be taxed on activities not carried on through its branch but of a similar nature to the branch activities.^{3,4}

4.5 Businesses are likely to welcome the changes designed to protect nationals and businesses of one country from tax discrimination in the other.⁵

4.6 The proposed Protocol will amend the EOI provisions, enhancing the ability of both countries' tax authorities to exchange information on a wider range of taxes.⁶ The new provisions also clarify that neither tax administration can refuse to provide information solely because they do not have a domestic interest in such information, or because a bank or similar institution holds the information. The enhanced EOI provisions also maintain safeguards to protect taxpayers' legitimate interests.⁷

Prevention of Fiscal Evasion with Respect to Taxes on Income, done at New Delhi on 16 December 2011, [2011] ATNIF 30, (Hereafter referred to as 'NIA'), para 12.

2 NIA, para 4.

3 For example, an Australian company may have a branch in India manufacturing goods while a different part of the same company sells similar goods through independent agents located in India. Aggregating the profits on transactions conducted through independent agents with those of the branch can, in certain circumstances, interfere with ordinary commercial activities.

4 NIA, para 5.

5 NIA, para 6.

6 In the case of Australia, all Federal taxes.

7 NIA, para 7.

- 4.7 The integrity of both countries' tax systems will also be enhanced by mutual assistance provisions for the collection of tax debts (known as the 'AIC').⁸

Reasons for Australia to take proposed treaty action

- 4.8 It is in Australia's interest to utilise EOI treaty provisions that meet the internationally agreed standard to combat tax avoidance and evasion, and to continue the Australian Government's support of global action on improving information exchange and transparency.⁹
- 4.9 Australia enjoys a positive and constructive relationship with India, with a rapidly expanding bilateral commercial relationship. As a consequence, the proposed Protocol, in modernising the circumstances in which cross-border businesses come under the tax jurisdiction of the other country, will provide for certainty of treatment for businesses establishing themselves in the other country and will better reflect the state of the current trade and investment relationship.¹⁰
- 4.10 The non-discrimination rules will also provide certainty to businesses and individuals investing in the other country, as neither country will discriminate in their treatment of such businesses and individuals in the design of their future laws and processes.¹¹
- 4.11 The new integrity provisions (EOI and AIC) will be an important tool in Australia's efforts to combat offshore tax evasion. They will make it harder for taxpayers to evade Australian tax and will discourage taxpayers from participating in abusive tax arrangements by increasing the probability of detection. Accordingly, it will enhance Australia's ability to administer and enforce its domestic tax laws.¹²

Obligations

- 4.12 Article 2 introduces new rules into Article 5 setting out when a business will be taken to have a taxable presence in the other country.¹³

8 NIA, para 8.

9 NIA, para 12.

10 NIA, para 9.

11 NIA, para 10.

12 NIA, para 11.

13 NIA, para 13.

- 4.13 Article 3 amends Article 7 of the Agreement and obliges each country to only tax business activities carried out by an enterprise of the other country in its country where those activities are carried out by a branch of the enterprise ('permanent establishment'), as defined in the amended Article 5 of the Agreement.¹⁴
- 4.14 Article 4 inserts a new Article 24A into the Agreement and introduces a general non-discrimination principle, requiring each country to treat nationals of the other country no less favourably than it treats its own nationals regarding taxation and any connected requirements.¹⁵
- 4.15 Article 5 creates a new Article 26 which provides obligations for the exchange of information between both countries, including a specific obligation to gather and provide information upon request. The new Article 26(2) imposes a correlative obligation on the country receiving any such information to treat it as secret in the same manner as information obtained under its domestic laws. The new Article 26(3) allows either country to decline to supply information in certain circumstances. Specifically, a request may be denied where:
- (i) it would require implementation of administrative measures at variance with either country's domestic laws or administrative practice;
 - (ii) the information requested is not obtainable under the laws or in the normal course of administration of either country; or
 - (iii) it would involve disclosure of a trade or business secret or would be contrary to public policy. These circumstances, which act as a safeguard to protect Australia's interests and taxpayers' rights, accord with the *OECD Model Tax Convention on Income and on Capital*.¹⁶
- 4.16 Article 6 inserts a new Article 26A into the Agreement which provides an obligation for the revenue authorities of each country to use their collection mechanisms to collect debts owing in the other country.¹⁷
- 4.17 Representatives of the Treasury noted that:
- These provisions will create an important tool to combat tax evasion by increasing the ability to collect the outstanding tax debts of Australian and foreign taxpayers, including those of taxpayers who have departed Australia. An amending protocol

14 NIA, para 14.

15 NIA, para 15.

16 NIA, para 16.

17 NIA, para 17.

was pursued in the first instance to allow aspects of the existing treaty to be updated quickly in areas where both Australia and India's tax treaty policy align, leaving a more comprehensive update to be pursued in further negotiations.¹⁸

Implementation

- 4.18 The implementation of the proposed Protocol will require amendment to the *International Tax Agreements Act 1953* to give it the force of law in Australia. The amendment will be effected prior to the proposed Protocol entering into force in Australia.¹⁹
- 4.19 The legislative framework required for Australia to fulfil its obligations under the EOI provisions in the proposed Protocol is contained in section 23 of the *International Tax Agreements Act 1953*.²⁰
- 4.20 The implementation of the proposed Protocol will not affect the existing roles of the Commonwealth, or the States and Territories, in tax matters.²¹

Accuracy of revenue and taxation information

- 4.21 The Committee noted that it was reported in December 2011 that India was ranked 95th in the transparency international corruption index having fallen eleven places from the previous year.²² The Treasury responded that the treaty “does not really have any anti-corruption components to it” and that Australia would accept on face value the information on company earnings that the Indian revenue authorities would provide.²³

Costs

- 4.22 Treasury have been unable to estimate the revenue impact of the proposed Protocol. However, since the proposed Protocol seeks to expand the scope of taxpayer information available to the Australian Taxation Office (ATO)

18 Mr Paul Higinbotham, Policy Analyst, International Tax and Treaties Division, Revenue Group, Department of the Treasury, *Committee Hansard*, 19 March 2012.

19 NIA, para 18.

20 NIA, para 19.

21 NIA, para 20.

22 ‘Transparency International corruption index: India drops to 95th position’, <http://articles.economictimes.indiatimes.com/2011-12-02/news/30467987_1_corrupt-country-australia-shares-cases> accessed 20 March 2012.

23 Mr Greg Wood, Manager, International Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury, *Committee Hansard*, 19 March 2012.

and provides for assistance in collection of tax debts, the proposed Protocol is expected to increase taxpayer compliance and therefore tax revenue.²⁴

- 4.23 There would be a small, unquantifiable cost in administering the changes made by the proposed Protocol, including minor implementation costs to the ATO in educating the taxpaying public and ATO staff concerning the new arrangements. There are also 'maintenance' costs to the ATO and the Treasury in terms of dealing with inquiries, rulings and other interpretative decisions and mutual agreement procedures.²⁵ However, these costs will continue to be managed within existing agency resources.²⁶

Conclusion

- 4.24 Having a better set of structures and mechanisms through which Australia can constructively interact with the burgeoning Indian economy is in Australia's long term interests.
- 4.25 Also, any international agreements that strengthen the internationally agreed standards to combat tax avoidance and evasion are in Australia's interest. The Australian Government's continued support of global action on improving information exchange and transparency will contribute positively to international efforts to curtail tax evasion, transnational crime and corruption.
- 4.26 The Committee concludes that these amendments should be supported with binding treaty action.

Recommendation 3

The Committee supports the *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)* and recommends that binding treaty action be taken.

24 NIA, para 21.

25 Including advance pricing arrangements, whereby the prices of goods and services transferred between related business entities are agreed by those entities with the tax authorities in the countries in which the related entities operate.

26 NIA, para 22.

Minor treaty action: Amendment to Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

Introduction

- 5.1 Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest.
- 5.2 Minor treaty actions are presented to the Joint Standing Committee on Treaties with a one-page explanatory statement. The Committee has the discretion to formally inquire into these treaty actions or indicate its acceptance of them without a formal inquiry and report. Minor treaty actions are listed on the Committee's website.

Minor treaty action

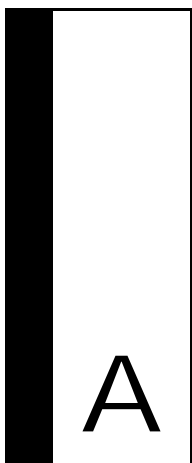
- 5.3 The minor treaty action under consideration here is the Category Three treaty: an amendment to the *Amendment to Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*.
- 5.4 The Convention contains an internationally applicable procedure for the transportation of hazardous substances between countries, referred to as

the Prior Informed Consent Procedure. Annex III of the Convention lists the substances that are subject to the Prior Informed Consent Procedure.

- 5.5 The proposed Convention Amendment would expand the list of substances in Annex III to include alachlor, aldicarb and endosulfan, chemicals that meet the requirements for listing in Annex III. In relation to the treatment of these chemicals in Australia, the Explanatory Statement indicates that Australia will maintain its current arrangements for all three chemicals.
- 5.6 On 19 March 2012, the Committee determined not to hold a formal inquiry into this treaty action and agreed that binding treaty action may be taken.

Kelvin Thomson MP

Chair



Appendix A – Submissions

Treaties tabled on 22 November 2011

- 1.1 Australian Patriot Movement
- 1.2 Australian Patriot Movement
- 3 Department of Infrastructure and Transport



Appendix B – Witnesses

Monday, 6 February 2012 - Canberra

Attorney-General's Department

Mr Richard Glenn, Assistant Secretary, Information Law and Policy
Branch, Strategy and Delivery Division

Australian Customs and Border Protection Service

Ms Janet Dorrington, National Director, Intelligence and Targeting
Division

Australian Maritime Safety Authority

Mr Paul Nelson, Manager, Environment Protection Standards

Department of Foreign Affairs and Trade

Mr Jeremy Kruse, Director, European Union Section, EU and West Europe
Branch, Europe Division

Ms Elizabeth Toohey, Executive Officer, Treaties Secretariat, Legal Branch

Department of Infrastructure and Transport

Ms Poh Aye Tan, Section Head, Maritime Safety, Environment and Liner
Shipping

Monday, 19 March 2012 - Canberra

Department of Foreign Affairs and Trade

Mr David Mason, Executive Director, Treaties Secretariat, International
Legal Branch

Department of the Treasury

Mr Greg Wood, Manager, International Tax Treaties Unit, International Tax and Treaties Division

Mr Paul Heginbotham, Policy Analyst, International Tax and Treaties Division, Revenue Group