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Administrative Framework and Dispute Resolution

Introduction

4.1 This Chapter reviews several Agreement chapters which are of an administrative nature. For the most part they do not appear to have been interpreted as controversial, and the Committee notes that few submissions have been received which deal specifically with the issues covered by these chapters. Although the Committee received little specific evidence on these issues, it proposes that in order to provide a comprehensive review of the AUSFTA, a brief overview should be provided. Unless otherwise stated, information in this Chapter is based on information contained in the National Interest Analysis and the User Guide.[1]

4.2 The six Agreement chapters covered in this Chapter of the Report are

- Chapter 1 (Establishment of the Free Trade Area and Definitions)
- Chapter 6 (Customs Administration)
- Chapter 20 (Transparency)
- Chapter 21 (Institutional Arrangements and Dispute Settlement)
- Chapter 22 (General Provisions and Exemptions)
- Chapter 23 (Final Provisions)

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1 Unless otherwise stated, the information in this Chapter is based on information contained in the *Guide to the Agreement*, viewed on 9 February 2004, at http://www.dfat.gov.au/trade/negotiations/us_fta/guide/index.html.

4.3 One Article which has caused some concern in the Australian community is contained in Chapter 21, and relates to dispute settlement provisions in the Agreement. It is discussed in more detail in the relevant section below.

Legal and Institutional Framework (Chapters 1, 22 and 23)

4.4 Following the structure of the DFAT *Guide to the Agreement*, this section covers legal and institutional framework of the Agreement: Chapter 1 (Establishment of the Free Trade Area and Definitions), Chapter 22 (General Provisions and Exemptions) and Chapter 23 (Final Provisions). Many of the points made in this section have been mentioned in the previous Chapter.

4.5 The Agreement consists of 23 chapters, several annexes and a range of side letters (exchanges of letters).

> As with other recent FTAs concluded by Australia and the United States, the reservations annexes will have a two-part structure. The first set of annexes lists measures to which a ‘standstill’ commitment will apply. These are permitted exceptions to the national treatment or market access commitments, but they cannot be made more restrictive with respect to service suppliers or investors of the other Party ... A second set of annexes will list reservations for activities or sectors for which a party retains full flexibility to introduce new, more trade restrictive measures.[2]

4.6 The Agreement will become part of Australian domestic law to the extent that the Australian Parliament amends or adopts legislation implementing the Agreement. The Annexes and any interpretive footnotes in the Chapters or Annexes are legally binding. The various side letters may represent stand-alone, legally binding, treaty-level agreements; constitute part of the Agreement, or have no legal standing, depending on the language included in each individual letter.

Chapter 22 (General Provisions and Exceptions)

4.7 The Agreement, at Article 22.1, adopts the same general exceptions as have been adopted by the WTO in the General Agreement on Tariffs and Trade, (GATT) and General Agreement on Trade in Services (GATS). The Committee understands that this means that both the Australian and US

2 DFAT *AUSFTA Briefing No. 3* 2003.

Governments are free to enact laws, regulations or policies they consider are necessary, for example:

- protect public morals or maintain public order
- protect human, animal or plant life or health
- protect national treasures of artistic, historical or archaeological value
- conserve exhaustible national treasures.

4.8 The *Guide to the Agreement* also refers to the application of the Agreement to taxation. The Agreement prohibits export taxes on goods and replicates WTO protection against discriminatory taxes on goods. The Agreement does not apply to any existing taxes but does place limits on the ability of both governments to implement discriminatory taxes in the future.

4.9 Article 22.3 sets out how the National Treatment, Most Favoured Nation Treatment and Expropriation and Compensation obligations in the Agreement apply to taxes. In particular, it clarifies that the Double Taxation Convention between the US and Australia should apply where there are inconsistencies between the Double Taxation Convention and the Agreement.

Chapter 23 (Final Provisions)

4.10 This Chapter contains four articles relating to accession, annexes, amendments and entry into force and termination of the Agreement.

4.11 According to the Agreement and the NIA, the Agreement will enter into force sixty days after an exchange of notes confirming completion of the Parties' respective domestic procedures, or at such other date as the Parties may agree. The Committee understands that both governments are working towards entry into force on 1 January 2005, which would require an exchange of notes on, or before, 2 November 2004.

4.12 Under Article 23.4 of Chapter 23 (Final Provisions), either Party may terminate the Agreement by giving the other Party six months notice in writing. Termination of the Agreement would be subject to the Australian treaty process.[3]

3 NIA, para. 23.

Chapter 6 (Customs Administration)

4.13 The *Guide to the Agreement* explains the purpose of the Chapter as dealing with customs administration and cooperation and comprises 11 Articles including advance rulings, reviews of Customs decisions, cooperation between the Parties to achieve compliance, penalties for violations, the release of goods, and express shipments.

4.14 The Committee notes that this Chapter is largely administrative in nature and received little specific evidence on this Chapter.[4]

Chapter 20 (Transparency)

4.15 The DFAT *Guide to the Agreement* describes the purpose of this Chapter as the promotion of greater transparency in the making and implementation of laws, regulations and bureaucratic decisions, as well as the protection of the principles of natural justice and due process.[5]

4.16 The Chapter consists of six articles, relating to

- publication, requiring that all laws and regulations should be made publicly available. This obligation is consistent with the recently passed Legislative Instruments Act 2003
- notification and provision of information, providing a mechanism for both Parties to consult about the effect of a particular draft law on their respective citizens' or companies' interests
- administrative agency processes, which provides individuals or companies of either country certain rights and due process when they are subject to administrative and bureaucratic decision-making processes. Australia is already in compliance with this Article and no additional action is required by the Australian Government
- appeals against administrative or bureaucratic decisions, in addition to the commitments on natural justice outlined in the preceding article. As

4 Dr Brent Davis from the Australian Chamber of Commerce and Industry made some comments on the risk assessment process at the public hearing on 3 May 2004, to the effect that ACCI did not foresee that the Agreement would have any significant effect on the quarantine and testing regimes.

5 http://www.dfat.gov.au/trade/negotiations/us_fta/guide/20.html, viewed on 9 February 2004.

with that article, Australian is also already compliant and no additional action is required by the Australian Government.

4.17 The Committee notes that this Chapter is largely administrative in nature and did not receive specific evidence on this Chapter.

Chapter 21 (Institutional Arrangements and Dispute Settlement)

> What is often ignored in the analysis is the fact that this is going to be a living agreement, with many institutional arrangements that will make it possible for both Australians and Americans to pursue a whole range of future liberalisation opportunities as well as problem solving.[6]
>
> - Mr Andrew Stoler

4.18 The Chapter on institutional arrangements and dispute settlement consists of 15 Articles, in two sections, and one Annex.

4.19 Section A (Article 21.1) provides for the establishment of a Joint Committee to supervise the operation of the Agreement. According to the DFAT *Guide to the Agreement*, this Committee will be central to the ongoing evolution of the Agreement and the early identification and settlement of disputes through consultation.

> At its annual meetings, it will review the current functioning of the Agreement, consider any improvements or amendments that either country may wish to propose and, where further clarity is required, issue interpretations of the Agreement.[7]

4.20 The Joint Committee's consultations as the initial stages of the dispute resolution process were outlined by Mr Stephen Deady from DFAT in the context of a hypothetical challenge to the Australian copyright regime.

> That dispute settlement mechanism is a government-to-government process. It would start with consultations. The first thing the Americans would do in a situation like that would be to put their case to us. We would put our case back. If it did go to a dispute process there is a chapter that deals with the mechanism that would deal with that dispute. That dispute settlement

6 Mr Andrew Stoler, *Transcript of Evidence*, 22 April 2004, p. 12.

7 DFAT, *Guide to the Agreement*, p. 121.

> mechanism process covers the whole of the agreement ... that is the process—consultations first.[8]

4.21 Section B of Chapter 21 outlines the provisions for the proceedings to settle disputes arising under the Agreement.

> Importantly, it does not allow private investors to directly challenge government decisions under the Agreement, provides high standards of openness and transparency in the resolution of disputes between Australian and United States Governments, and provides for flexible compensation arrangements for resolving disputes.[9]

4.22 The Committee understands that American business interests were pushing for investor-state dispute settlement, which is described as a mechanism for redressing unfair treatment by governments.

> In other free trade agreements signed by the US American companies have the right to take the host government to a 'neutral' tribunal and gain compensation in the event of nationalisation or expropriation of US interests or measures having equivalent effects to nationalisation or expropriation.[10]

4.23 But, according to the *Guide to the Agreement*, the Investment Chapter of the Agreement (Chapter 11 of the Agreement, Chapter 12 of this Report) does not establish an investor-state dispute settlement mechanism

> in recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems.[11]

4.24 Mr Deady advised the Committee that

> The reason it is not there is because both sides agreed that we do have a rule of law that operates effectively and that this additional investor-state dispute mechanism was not necessary between two highly developed countries with these legal systems. What this language says is that somehow if those circumstances change—if in the future that is no longer the reality and somehow there has been a breakdown of the rule of law in either country—then the

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8 Mr Stephen Deady, *Transcript of Evidence*, 14 May 2004, p. 54.

9 DFAT, *Guide to the Agreement*, p. 121.

10 Mr David Richardson, *Foreign Investment and the Australia-United States Free Trade Agreement*, 'Current Issues Brief No. 7, 2003-04', Economics Commerce and Industrial Relations Group, Information and Research Services, Parliamentary Library.

11 DFAT, *Guide to the Agreement*, p. 121.

> other Party could come back and ask for the establishment of such a procedure.[12]

4.25 The Committee notes that individual investors are able to raise concerns about their treatment with their government, which is able to pursue these issues through traditional state-to-state dispute settlement. Section B outlines the scope of application of the Agreement, consultations, establishment of an arbitral panel, rules of procedure, and a range of penalties which apply in cases where a breach of the Agreement has been established.[13]

Investor-state dispute resolution mechanism in future?

4.26 Some evidence received by the Committee notes that while investor-state dispute mechanisms were not adopted in the Agreement, provision has been made for developing such procedures in the event of ‘a change in circumstances’.[14] Article 11.16.1 states

> If a Party considers that there has been a **change in circumstances** affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultation with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures. (emphasis added)

4.27 The Committee received several submissions which expressed strong concerns about this Article, and the possibility that it ‘has been put there as a sleeper and that it is a springboard for a future action to bring investor-state disputes to life’.[15] Another basis for complaint about the review mechanism was made by Ms Theodora Templeton, representing WTO Watch Queensland.

> The dispute process in the agreement contains all the faults of the dispute process of the WTO, which has been one of the main

12 Mr Stephen Deady, *Committee Briefing* , 2 April 2004, p. 62.

13 Further information can be found at the Dispute Settlement section of the DFAT *Guide to the Agreement*, at http://www.dfat.gov.au/trade/negotiations/us_fta/guide/21.html, viewed on 15 June 2004.

14 Ms Madelaine Chiam, *Submission 34*; Australian Fair Trade and Investment Network (AFTINET), *Submission 68* and other AFTINET associates.

15 Mr Brian Jenkins, *Transcript of Evidence*, 23 April 2004, p. 20.

> planks of disagreement. The NGO community across the world—not just in Australia—has vigorously criticised the dispute process of the WTO, which is secretive and non-transparent and which decides matters of great importance to countries purely on the basis of trade and not taking into account considerations relating to health, the welfare of the people or the environment.[16]

4.28 In relation to the dispute resolution mechanisms, the Committee notes the concerns of AFTINET and similar groups, which are based around a central perception that

> the disputes process in the agreement means that one government can complain about the regulation of another government, on the grounds that it is too burdensome or a barrier to trade, without proper consideration of health or cultural impacts, as the complaints are heard by a trade law tribunal which does not take those other issues into account.[17]

4.29 The Committee notes that the extensive consultation conducted by groups such as AFTINET and WTO Watch with community groups can only serve to increase awareness and debate within the community about international agreements which are of interest to them. The Committee supports their ongoing involvement in the process of public debate on the development, negotiation and review of treaties.

4.30 The Committee received evidence from Ms Madelaine Chiam from the Centre for International and Public Law at the Australian National University.[18] Ms Chiam considers that the provisions outlined above (at paragraph 4.25) lack clarity, notably, while a direct investor-state dispute resolution mechanism is not included

> it does enshrine a trigger mechanism which allows that dispute resolution to occur. Therefore, the crucial question is determining when this trigger will apply.[19]

4.31 Ms Chiam discussed the example of a case between the US and Mexico to illustrate the difficulties of working out under what circumstances the mechanism for establishing investor-state dispute resolution might be triggered; that it is not clear what 'change of circumstances' is required

16 Ms Theodora Templeton, *Transcript of Evidence*, 5 May 2004, p. 34.
17 Dr Patricia Ranald, *Transcript of Evidence*, 19 April 2004, pp. 32-33.
18 Ms Madelaine Chiam, *Submission 34*.
19 Ms Madelaine Chiam, *Transcript of Evidence*, 4 May 2004, p. 29.

> whether it has to be a wholesale structural transformation within Australian governance in general or if it is enough to have a change that affects only one investor.[20]

4.32 Ms Chiam suggested that Article 11.16.1 may be clarified, without requiring renegotiation of the text of the treaty. The Committee heard that either of the two options may serve to avoid the

> unintended consequences of treaty language in the investment protections of the NAFTA that have given rise to so much controversy in the US, Canada and Mexico.[21]

4.33 The Committee found Ms Chiam's evidence both practical and pragmatic, and accordingly recommends that these options be given consideration before the treaty enters into force.

Recommendation 3

The Committee recommends that, before binding treaty action is taken, Australia gives serious consideration to the negotiation and issue of a further side letter to clarify obligations made under Article 11.16 of the Agreement, such that 'change of circumstances' is defined and able to be clearly understood by both Parties.

Recommendation 4

Should the Agreement enter into force without amendment or issue of side letters to clarify understanding of Parties' obligations at Article 11.16, Australia should ensure that such clarification is sought by requesting the Joint Committee established under Article 11.12(e) to issue an interpretation with regard to Article 11.16.

20 Ms Madelaine Chiam, *Transcript of Evidence,* 4 May 2004, p. 29.
21 Ms Madelaine Chiam, *Transcript of Evidence,* 4 May 2004, p. 30.

Concluding observations

4.34 The Committee supports the views of Mr Andrew Stoler, cited prior to paragraph 4.18, that the AUSFTA will be a living agreement, and acknowledges the role these Chapters will have in establishing a functioning and flexible trade agreement. The Committee also notes the evidence presented by Ms Meg McDonald, representing Alcoa Australia.

> We believe the agreement will also support the long-term harmonisation of regulatory, investment and business systems, making it easier for companies like ours to do business between the two countries. In particular, the establishment of a government-to-government framework to manage the economic and investment relationship is important for smoothing the long-term relationship and working through issues

and

> We think that the various forums and mechanisms established under the agreement and its auspices will be able to continue the work of streamlining the bilateral business environment and that the institutional arrangements to manage the economic relationship will match those of the defence and security ties. On many occasions, issues have arisen in the economic relationship for which there was no high-level government forum and no dispute resolution mechanisms within which they might be solved. The FTA establishes such a framework.[22]

22 Ms Meg McDonald, *Transcript of Evidence*, 23 April 2004, p. 41.