

UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT
IMPLEMENTATION ACT

—————
JULY 12, 2004.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. THOMAS, from the Committee on Ways and Means,
submitted the following

R E P O R T

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 4759]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 4759) to implement the United States-Australia Free Trade Agreement, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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I. INTRODUCTION

A. PURPOSE AND SUMMARY

H.R. 4759 would implement the May 18, 2004 Agreement establishing a free trade area between the United States and Australia.

B. BACKGROUND

The U.S.-Australia Free Trade Agreement (FTA) is the third trade agreement considered by the Congress under the Trade Promotion Authority (TPA) procedures outlined in the Bipartisan Trade Promotion Authority Act of 2002 signed into law in August 2002 (P.L. 107-210). The United States and Australia have a strong bilateral economic relationship. The two countries share similar economic and trade goals. Both are strong supporters of achieving significant trade liberalization in agriculture and services in the current round of multilateral negotiations in the World Trade Organization (WTO), while at the same time, both are pursuing market access through regional and bilateral free trade agreements.

The U.S.-Australia FTA is the first FTA between the United States and a developed country since the U.S.-Canada Free Trade Agreement in 1988. It is a 21st century agreement that reflects the modern globalized economy, opens markets, and provides mutual benefits in intellectual property, services, government procurement, and e-commerce.

The Committee believes that the Agreement meets the objectives and priorities set forth in the Bipartisan Trade Promotion Authority Act of 2002. For example, more than 99 percent of tariff lines for U.S. manufactured exports to Australia will become duty free immediately upon entry into force of the Agreement, representing the most significant immediate reduction of industrial tariffs ever achieved in a U.S. FTA and providing immediate benefits for America's manufacturing workers, consumers, and companies. Because Australian tariffs are much higher than U.S. average tariffs, American firms today pay 10 times as much in total annual import tariffs to Australia as the United States collects from Australian imports, according to a USTR report. There will be significant benefits for key U.S. manufacturing sectors such as autos and auto parts; chemicals, plastics and soda ash; information technology products; electrical equipment and appliances; non-electrical machinery; fabricated metal products; construction equipment; paper and wood products; furniture and fixtures; and medical and scientific equipment.

Notwithstanding the outstanding provisions on industrial market access noted above, one sector that warrants special discussion is textiles and apparel, for which the market access provisions in the Agreement are considerably less ambitious. Specifically, the FTA requires a yarn-forward rule of origin which, in the case of Australia, provides little benefit to Australia because it produces minimal quantities of yarn. As a result, the Committee understands that at Australia's request, the duties on over 90 percent of textile

and apparel trade will not be eliminated until year ten of the Agreement. The Committee notes that, by contrast, the Chile and Singapore FTAs provide immediate duty-free treatment for all qualifying textile and apparel goods, as do the recently negotiated Bahrain FTA and the Central American FTA. The Committee expects that the immediate liberalization for qualifying goods included in these other agreements will be the model for future agreements.

In addition, the Committee believes that maintaining a current short supply list under the FTA is integral to the effective functioning of the rule of origin for textiles and apparel. The Committee expects the President to seek to incorporate all existing and future affirmative short supply determinations from other trade agreements and trade preference programs into the textile and apparel rule of origin for this FTA. Moreover, given that prior short supply designations have already undergone public comment and consultation with domestic parties, the President should apply those designations to this FTA without further public investigation. Finally, the Committee clarifies that the short supply provision included in this FTA, as well as previous FTAs and trade preference programs enacted by Congress, only contemplates items being added to the list of short supply items. In other words, once an item is designated as being in short supply under this FTA, other FTAs, and trade preference programs, the item is permanently designated as such unless otherwise provided for by the statute implementing the FTA or trade preference program.

On agriculture market access, all U.S. agricultural exports to Australia will receive immediate duty-free access under the Agreement. About 67 percent of U.S. tariffs are immediately reduced to zero, and most remaining agriculture tariffs are phased out in three baskets: 4 years, 10 years, and 18 years. There is less liberalized treatment for imports of Australian beef and dairy. The Committee notes with particular disappointment the exclusion of sugar liberalization in the FTA and expects that this omission will not be reflected in future FTAs brought before the Committee.

In services, the Committee is pleased that the Agreement utilizes a trade-enhancing "negative list" approach to ensure maximum market access for services providers. Australia will accord substantial market access across its entire services regime, offering access in sectors such as telecommunications, express delivery, computer and related services, tourism, energy, construction and engineering, financial services, insurance, audio/visual and entertainment, professional, environmental, education and training, and other services sectors.

The FTA calls for higher standards for protecting intellectual property rights such as copyrights, patents, trademarks, and trade secrets, as well as enhanced means for enforcing those rights. Both Parties also agree to adopt state-of-the-art protection for digital products such as software, music, text, and videos, and to ratify or accede to the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty by the date of entry into force of the agreement.

During consideration of the implementing bill in Committee, some Members raised concerns that the FTA could limit Congress' ability to enact legislation to allow drug reimportation. The Com-

mittee strongly believes that these concerns are groundless because the FTA does not prevent Congress from changing U.S. laws, including allowing reimportation of prescription drugs. The Agreement includes a provision whereby both nations agree to protect patent owners' rights to determine how, by contract or other means, their patent is used by a licensed third party. This provision is not specific to pharmaceuticals nor is it a new provision in trade agreements. It reiterates and is consistent with existing U.S. patent laws. That is, under U.S. law patent holders already have the right through contracts and by other means to limit the use of their products. H.R. 4759 does not change U.S. patent laws or the Federal Food, Drug, and Cosmetic Act.

Further, Australian law already prohibits the exportation of drugs dispensed under the Pharmaceutical Benefits Scheme (PBS) to other nations. The PBS subsidizes the cost of a comprehensive range of medicines for all Australian residents and covers over 90% of the Australian pharmaceutical market. Australian law does allow exportation of non-PBS dispensed drugs, regardless of whether they are generics or brand name, but only by the original manufacturer or its Australian licensed distributor. Thus any change in U.S. law would have no practical effect on reimportation from Australia due to Australian domestic law—not the FTA—and therefore Australia would have no plausible basis to claim harm or pursue sanctions.

The government procurement commitments in the FTA are particularly significant and commercially important to the United States because Australia is one of the only developed countries that is not a party to the WTO Agreement on Government Procurement. U.S. suppliers are granted rights to bid on contracts to supply Australian government ministries, agencies and departments above certain contract values specified in the Agreement (low-value contracts/micro purchases are excluded). The Agreement covers the purchases of 80 Australian central government entities, including key ministries and government enterprises. The Australian central government will eliminate its industry development programs under which suppliers have had to provide various types of offsets like local content or local manufacturing requirements as a condition of their contracts. Procurement by Australia's states and territories is also covered under the FTA. Australia's states have agreed to phase-out "off set" requirements and state procurement presents significant market opportunities for U.S. companies.

The Committee strongly supports the inclusion of an investor-state dispute resolution mechanism in every FTA, but notes that the Australia FTA does not include such a mechanism. The Committee acknowledges the Administration's belief that Australia presents a unique set of circumstances and that very few other countries in the world are in similar circumstances. Certainly none of the other countries that is currently being considered for FTAs fall within this category. Moreover, the United States retains the right to revisit inclusion of an investor-state dispute resolution mechanism in the FTA should circumstances change. Specifically, there is a provision in the FTA stating that if one of the Parties believes there are changed circumstances, it can request consultations with an eye to negotiating an investor-state dispute resolution mechanism. The United States also retains the right to address invest-

ment disputes in the FTA through the state-to-state dispute resolution mechanism available under the Agreement.

All U.S. investment in new businesses in Australia will be exempted from screening under Australia's Foreign Investment Promotion Board (FIRB). Thresholds for acquisitions by U.S. investors in nearly all sectors will be raised significantly, from A\$50 million to A\$800 million. This higher threshold would have exempted nearly 90 percent of U.S. investment transactions from screening over the past three years.

The Agreement also contains obligations under which each government commits to enforce its domestic labor and environmental laws, as required by TPA. The Committee notes that Australian labor laws comply with core labor standards set forth by the International Labor Organization (ILO). Accordingly, requiring that each government enforce its labor laws is tantamount to an enforceable ILO standard. Similarly, Australia's environmental laws are world class.

As noted above, this legislation is being considered by Congress under TPA procedures. As such, the Agreement has been negotiated by the President in close consultation with Congress, and it can be approved and implemented through legislation using streamlined procedures. Pursuant to TPA requirements, the President is required to provide written notice to Congress of the President's intention to enter into the negotiations. Throughout the negotiating process, and prior to entering into an agreement, the President is required to consult with Congress regarding the ongoing negotiations.

The President must notify the Congress of his intent to enter into a trade agreement at least 90 calendar days before the agreement is signed. Within 60 days after entering in the Agreement, the President must submit to the Congress a description of those changes to existing laws that the President considers would be required in order to bring the United States into compliance with the Agreement. After entering into the Agreement, the President must also submit to the Congress the formal legal text of the agreement, draft implementing legislation, a statement of administrative action proposed to implement the Agreement, and other related supporting information as required under section 2105(a) of TPA. Following submission of these documents, the implementing bill is introduced, by request, by the Majority Leader in each chamber. The House then has up to 60 days to consider implementing legislation for the Agreement (the Senate has up to an additional 30 days). No amendments to the legislation are allowed under TPA requirements.

C. LEGISLATIVE HISTORY

On November 13, 2002, the President first notified Congress of his intent to negotiate an FTA with Australia. FTA negotiations between the United States and Australia began in March 2003 and concluded in February 2004. During and after the negotiations, the President continued his consultations with Congress pursuant to the letter and spirit of the TPA requirements. On February 13, 2004, the President notified Congress of his intent to enter into the U.S.-Australia FTA. The text of the U.S.-Australia FTA was released to the public on March 3, 2004. Under TPA procedures, the

President is able to sign an FTA ninety calendar days after he has notified Congress. Accordingly, the FTA was signed on May 18 by U.S. Trade Representative Robert B. Zoellick and Australian Minister for Trade Mark Vaile.

On June 16, 2004, the Committee on Ways and Means held a hearing on the U.S.-Australia FTA. The Committee received testimony supporting the Agreement from the Administration and numerous U.S. private sector companies and organizations. On June 23, 2004, the Committee on Ways and Means considered in an informal markup session draft implementing legislation for the Australia FTA. The Committee approved the draft implementing legislation by voice vote, without amendment.

On July 6, 2004, President Bush formally transmitted to Congress the formal legal text of the U.S.-Australia FTA, implementing legislation, a statement of administrative action proposed to implement the Agreement, and other related supporting information as required under section 2105(a) of TPA. Following this transmittal, on July 6, 2004, Majority Leader DeLay introduced, by request, H.R. 4759 to implement the U.S.-Australia FTA. The bill was referred to the Committee on Ways and Means.

On July 8, 2004, the Committee on Ways and Means formally met to consider H.R. 4759. The Committee ordered H.R. 4759 favorably reported to the House of Representatives by voice vote, without amendment; under the requirements of TPA, amendments were not permitted.

In accordance with TPA requirements, President Bush submitted to Congress on July 9, 2004 a description of the changes to existing U.S. laws that would be required to bring the United States into compliance with the Agreement.

II. SECTION-BY-SECTION SUMMARY

TITLE I: APPROVAL AND GENERAL PROVISIONS

SECTION 101: APPROVAL AND ENTRY INTO FORCE

Current law

No provision.

Explanation of provision

Section 101 states that Congress approves the Agreement and the Statement of Administrative Action and provides that the Agreement enters into force when the President determines that Australia is in compliance and has exchanged notes, on or after January 1, 2005.

Reason for change

Approval of the Agreement and the Statement of Administrative Action is required under the procedures of section 2103(b)(3) of the Bipartisan Trade Promotion Authority Act of 2002. The remainder of section 101 provides for entry into force of the Agreement.

SECTION 102: RELATIONSHIP OF THE AGREEMENT TO U.S. AND STATE
LAW*Current law*

No provision.

Explanation of provision

Section 102 provides that U.S. law is to prevail in a conflict and states that the Agreement does not preempt state rules that do not comply with the Agreement. Only the United States is entitled to bring a court action to resolve a conflict between a state law and the Agreement.

Reason for change

Section 102 is necessary to make clear the relationship between the Agreement and federal and state law, respectively.

SECTION 103: IMPLEMENTING ACTIONS IN ANTICIPATION OF ENTRY
INTO FORCE AND INITIAL REGULATIONS*Current law*

No provision.

Explanation of provision

Section 103(a) provides that after the date of enactment, the President may proclaim actions and issue regulations as necessary to ensure that any provision of this Act that takes effect on the date that the Agreement is entered into force is appropriately implemented, but not before the date the Agreement enters into force.

Section 103(b) establishes that regulations necessary or appropriate to carrying out the actions proposed in the Statement of Administrative Action shall, to the maximum extent feasible, be issued within one year of entry into force or the effective date of the provision.

Reason for change

Section 103 provides for the issuance of regulations. The Committee strongly believes that regulations should be issued in a timely manner in order to provide maximum clarity to parties claiming benefits under the Agreement. As noted in the Statement of Administrative Action, the regulation-issuing agency will provide a report to Congress not later than thirty days before one year elapses on any regulation that is going to be issued later than one year.

SECTION 104: CONSULTATION AND LAYOVER FOR PROCLAIMED ACTIONS

Current law

No provision.

Explanation of provision

Section 104 provides that where the President is given proclamation authority subject to consultation and layover, he may proclaim action only after he has: obtained advice from the International Trade Commission and the appropriate private sector advisory committees; submitted a report to the House Ways and Means and

Senate Finance Committees concerning the reasons for the action; and consulted with the Committees. The President may proclaim the proposed action after 60 days have elapsed.

Reason for change

The bill gives the President certain proclamation authority but requires extensive consultation with Congress before such authority may be exercised. The Committee believes that such consultation is an essential component of the delegation of authority to the President and expects that such consultations will be conducted in a thorough manner.

SECTION 105: ADMINISTRATION OF DISPUTE SETTLEMENT
PROCEEDINGS

Current law

No provision.

Explanation of provision

Section 105 authorizes the President to establish an office within the Commerce Department responsible for providing administrative assistance to any panels that may be established under the Agreement and authorizes appropriations for the office and for payment of the U.S. share of expenses.

Reason for change

The Committee believes that the Commerce Department is the appropriate agency to provide administrative assistance to panels.

SECTION 106: EFFECTIVE DATES; EFFECT OF TERMINATION

Current law

No provision.

Explanation of provision

The effective date of this Act is date the Agreement enters into force with respect to the United States except sections 1–3 and Title I take effect upon the date of enactment. The provisions of the Act terminate on the date on which the Agreement terminates.

Reason for change

Section 106 implements U.S. obligations under the Agreement.

TITLE II: CUSTOMS PROVISIONS

SECTION 201: TARIFF MODIFICATIONS

Current law

No provision.

Explanation of provision

Section 201(a) provides the President with the authority to proclaim tariff modifications to carry out the Agreement.

Section 201(b) gives the President the authority to proclaim further tariff modifications, subject to consultation and layover, as the President determines to be necessary or appropriate to maintain

the general level of reciprocal and mutually advantageous concessions with respect to Australia provided for by the Agreement.

Section 201(c) allows the President, for any goods for which the base rate is a specific or compound rate of duty, to substitute for the base rate an ad valorem rate to carry out the tariff modifications in subsections (a) and (b).

Reason for change

Section 201(a) is necessary to put the United States in compliance with the market access provisions of the Agreement. Section 201(b) gives the President flexibility to maintain the trade liberalizing nature of the Agreement. The Committee expects the President to comply with the letter and spirit of the consultation and layover provisions of this Act in carrying out this subsection. Section 201(c) allows the President to convert tariffs to ad valorem rates to carry out the tariff modifications in the Agreement.

SECTION 202: ADDITIONAL DUTIES ON CERTAIN AGRICULTURAL GOODS

Current law

No provision.

Explanation of provision

Section 202 of the bill implements the agricultural safeguard provisions of article 3.4 and Annex 3–A of the Agreement. Article 3.4 permits the United States to impose an agricultural safeguard measure, in the form of additional duties, on imports from Australia of an agricultural good listed in the U.S. schedule to Annex 3–A of the Agreement. The bill provides for three different types of agricultural safeguards. The first applies to certain horticulture goods specified in Annex 3–A of the Agreement. The second applies to certain beef goods imported into the United States above specified quantities (“quantity-based safeguard”) during the period from January 1, 2013 through December 31, 2022. The third applies to the same categories of beef goods if they are imported into the United States above specified quantities and the monthly average index price in the United States falls below the specified “trigger” price (“price-based safeguard”) beginning January 1, 2023.

No additional duty may be applied under section 202 if, at the time of entry, the good is subject to import relief under subtitle A of title III of this bill (the general safeguard) or chapter 1 of title II of the Trade Act of 1974 (“section 201” relief). The assessment of an additional duty under either the horticulture safeguard or the quantity-based beef safeguard shall cease to apply to a good on the date on which duty-free treatment must be provided to that good. There is no termination date for the price-based beef safeguard. The sum of the duties assessed under an agricultural safeguard and the applicable rate of duty in the U.S. schedule may not exceed the lesser of the existing normal trade relation (NTR)/most favored nation (MFN) rate or the NTR/MFN rate imposed when the Agreement entered into force.

Sections 202(c)(4) and (d)(5) provide that the United States Trade Representative may waive the application of the quantity-based beef safeguard and the price-based beef safeguard if he determines that extraordinary market conditions demonstrate that a waiver

would be in the U.S. national interest, after notice and consultation with the House Ways and Means and Senate Finance Committees and the appropriate private sector advisory committees.

Reason for change

Section 202 implements the agriculture safeguard provisions of article 3.4 and Annex 3–A of the Agreement and provides important security to U.S. farmers.

SECTION 203: RULES OF ORIGIN

Current law

No provision.

Explanation of provision

Section 203 codifies the rules of origin set out in chapter 5 of the Agreement. Under the general rules, there are four basic ways for a good of Australia to qualify as an “originating good” and therefore be eligible for preferential tariff treatment when it is imported into the United States. A good is an originating good if: (1) it is “wholly obtained or produced entirely in the territory of Australia, the United States, or both”; (2) those materials used to produce the good that are not themselves originating goods are transformed in such a way as to cause their tariff classification to change or meet other requirements, as specified in Annex 4–A or Annex 5–A of the Agreement; (3) it is produced entirely in the territory of Australia, the United States, or both exclusively from originating materials; or (4) it otherwise qualifies as an originating good under chapter 4 or chapter 5 of the Agreement.

Under the rules in chapter 5.1 and Annex 4–A of the Agreement, an apparel product must generally meet a tariff shift rule that implicitly imposes a “yarn forward” requirement. Thus, to qualify as an originating good imported into the United States from Australia, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Australia from yarn, or fabric made from yarn, that originates in Australia or the United States, or both.

The remainder of section 203 of the implementing bill sets forth more detailed rules for determining whether a good meets the Agreement’s requirements under the second method of qualifying as an originating good. These provisions include rules pertaining to de minimis quantities of non-originating materials that do not undergo a tariff transformation, transformation by regional content, and the alternative methods for calculating regional value content. Other provisions in section 203 address valuation of materials and determination of the originating or non-originating status of fungible goods and materials.

Reason for change

Rules of origin are needed in order to confine Agreement benefits, such as tariff cuts, to Australian goods and to prevent third-country goods from being transshipped through Australia and claiming benefits under the Agreement. Section 203 puts the United States in compliance with the rules of origin provisions of the agreement.

SECTION 204: CUSTOMS USER FEES

Current law

Section 58c of the Title 19 lays out various user fees applied by customs officials to imports, including the Merchandise Processing Fee (MPF), which is applied on an ad valorem basis subject to a cap.

Explanation of provision

Section 204 implements U.S. commitments under article 3.12(4) of the Agreement regarding the exemption of the merchandise processing fee on originating goods. This provision is similar to those included in the implementing legislation for the North American Free Trade Agreement, the U.S.-Singapore Free Trade Agreement, and the U.S.-Chile Free Trade Agreement. The provision also prohibits use of funds in the Customs User Fee Account to provide services related to entry of originating goods, in accordance with U.S. obligations under the General Agreement on Tariffs and Trade 1994.

Reason for change

As with other free trade agreements, the Agreement eliminates the merchandise processing fee on qualifying goods from Australia. Other customs user fees remain in place. Section 204 is necessary to put the United States in compliance with the user fee elimination provisions of the Agreement. The Committee expects that the President, in his yearly budget request, will take into account the need for funds to pay expenses for entries under the Agreement given that MPF funds will not be available.

SECTION 205: DISCLOSURE OF INCORRECT INFORMATION

Current law

No provision.

Explanation of provision

Section 205, which implements article 5.13(4) of the Agreement, prohibits the imposition of a penalty upon importers who make an invalid claim for preferential tariff treatment under the Agreement if the importer acts promptly and voluntarily to correct the error and pays any duty owing. Importers have at least a 12-month grace period after submitting an invalid claim in which to correct it.

Reason for change

Section 205 is necessary to put the United States into compliance with Article 5.13(4) of the Agreement.

SECTION 206: ENFORCEMENT RELATING TO TRADE IN TEXTILE AND APPAREL GOODS

Current law

No provision.

Explanation of provision

Section 206 implements the verification provisions of the Agreement at article 4.3 and authorizes the President to take appro-

appropriate action while the verification is being conducted. Such appropriate action includes suspending preferential tariff treatment to the textile or apparel good for which a claim of origin has been made or, in a case where the request for verification was based on a reasonable suspicion of unlawful activity related to such goods, for textile or apparel goods exported or produced by the person subject to a verification. If the Secretary determines that the information obtained from verification is insufficient to make a determination, the President may take appropriate action described in section 206(d), including publishing the name and address of the person subject to the verification and denial of preferential treatment and denial of entry to certain textile and apparel goods produced or exported by the person subject to the verification.

Reason for change

In order to ensure that only qualifying textile and apparel goods receive preferential treatment under the Agreement, special textile enforcement provisions are included in the Agreement. Section 208 is necessary to authorize these enforcement mechanisms for use by U.S. authorities.

SECTION 207: REGULATIONS

Current law

No provision.

Explanation of provision

Section 207 provides that the Secretary of the Treasury shall issue regulations to carry out provisions of this bill related to rules of origin and Customs user fees.

Reason for change

Because the implementing bill involves lengthy and complex implementation procedures by customs officials, section 207 is necessary in order to authorize the Secretary of the Treasury to carry out provisions of the implementing bill through regulations.

TITLE III: RELIEF FROM IMPORTS

Subtitle A: Relief From Imports Benefiting From the Agreement
(Sections 311–316)

Current law

No provision.

Explanation of provision

Sections 311–316 authorize the President, after an investigation and affirmative determination by the U.S. International Trade Commission, to impose specified import relief when, as a result of the reduction or elimination of a duty under the Agreement, an Australian product is being imported into the United States in such increased quantities and under such conditions as to be a substantial cause of serious injury or threat of serious injury to the domestic industry.

Section 311(c) defines “substantial cause” and applies factors in making determinations in the same manner as section 201 of the Trade Act of 1974.

Section 311(d) exempts from investigation under this section Australian articles for which import relief has been provided under this safeguard since the Agreement entered into force.

Under sections 312(b) and (c), if the ITC makes an affirmative determination, it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition.

Under section 313(a), the President may provide import relief to the extent that the President determines is necessary to remedy or prevent the injury found by the ITC and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition.

Under section 313(b), the President is not required to provide import relief if the President determines that the relief will not provide greater economic and social benefits than costs.

Section 313(c) sets forth the nature of the relief that the President may provide as: a suspension of further reductions for the article; or an increase to a level that does not exceed the lesser of the existing NTR/MFN rate or the NTR/MFN rate imposed when the Agreement entered into force. Section 313(c)(1)(C) specifies that if a duty is applied on a seasonal basis, then the NTR/MFN rate corresponds to the immediately preceding season. Section 313(c)(2) states that if the President provides relief for greater than one year, it must be subject to progressive liberalization at regular intervals over the course of its application.

Section 313(d) states that the import relief that the President is authorized to provide may not exceed two years. If the President determines that import relief continues to be necessary and there is evidence that the industry is making positive adjustment to import competition, then he may extend the relief, but the aggregate period of relief, including extensions, may not exceed four years.

Section 314 provides that no relief may be provided under this subtitle after ten years from the date the Agreement enters into force, unless the tariff elimination for the article under the Agreement is greater than ten years, in which case relief may not be provided for that article after the period for tariff elimination for that article ends.

Section 315 authorizes the President to provide compensation to Australia consistent with article 9.4 of the Agreement.

Section 316 provides for the treatment of confidential business information.

Reason for change

The Committee believes that it is important to have in place a temporary, extraordinary mechanism if a U.S. industry experiences injury by reason of increased import competition from Australia in the future, with the understanding that the President is not required to provide relief if the relief will not provide greater economic or social benefits than costs. The Committee intends that administration of this safeguard be consistent with U.S. obligations under Chapter Nine (Safeguards) of the Agreement.

Subtitle B: Textile and Apparel Safeguard (Sections 321–328)

Current Law

No provision.

Explanation of provision

Section 321 provides that a request for safeguard relief under this subtitle may be filed with the President by an interested party. The President is to review the request and determine whether to commence consideration of the request. If the President determines to commence consideration of the request, he is to publish a notice commencing consideration and seeking comments. The notice is to include a summary of the request.

Section 321(b) allows an interested party to allege critical circumstances (such that delay in the provision of relief would cause damage that would be difficult to repair) and request that relief be provided on a provisional basis.

Section 322(a) of the Act provides for the President to determine, pursuant to a request by an interested party, whether, as a result of the elimination of a duty provided under the Agreement, an Australian textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article.

Section 322(b) identifies the relief that the President may provide, which is the lesser of the existing NTR/MFN rate or the NTR/MFN rate imposed when the Agreement entered into force. Section 322(c) provides that when an allegation of critical circumstances is made, the President shall make a determination whether there is clear evidence that critical circumstances exist. If the determination is affirmative, he may provide provisional relief for up to 200 days.

Section 323 of the bill provides that the period of relief shall be no longer than two years (including any provisional relief). The President may extend the relief, but the aggregate period of relief, including extensions, may not exceed four years.

Section 324 provides that relief may not be granted to an article under this safeguard if relief has previously been granted under this safeguard, or the article is subject to import relief under subtitle A of title III of this bill or under chapter 1 of title II of the Trade Act of 1974.

Under section 325, after a safeguard expires, the rate of duty on the article that had been subject to the safeguard shall be the rate that would have been in effect but for the safeguard action.

Section 326 states that the authority to provide safeguard relief under this subtitle expires ten years after the date on which duties on the article are eliminated pursuant to the Agreement. Section 327 of the Act gives authority to the President to provide compensation to Australia if he orders relief. Section 328 provides for the treatment of business confidential information.

Reason for change

The Committee intends that the provisions of subtitle B be administered in a manner that is in compliance with U.S. obligations under Article 4.1 of the Agreement. In particular, the Committee expects that the President will implement a transparent process that will serve as an example to our trading partners. For example, in addition to publishing a summary of the request for safeguard relief, the Committee notes that the President plans to make available the full text of the request, subject to the protection of business confidential data, on the Department of Commerce, International Trade Administration's website. In addition, the Committee encourages the President to issue regulations on procedures for requesting such safeguard measures, for making its determinations under section 322(a), and for providing relief under sections 322(b) and (c).

The Agreement and implementing bill include a critical circumstance provision which allows provisional safeguard relief to be granted under the textile and apparel safeguard. The Committee notes that this provision was included at Australia's request, and this Agreement is the only FTA negotiated by the United States that includes such a provision. USTR has assured the Committee that this language is not a precedent for future FTAs. The Committee will be mindful of those assurances in future negotiations.

Subtitle C: Cases Under Title II of the Trade Act of 1974 (Section 331)

Current law

The President has no authority under Title II of the Trade Act of 1974 ("section 201") to exclude Australian articles from the application of a safeguard remedy. A similar authority is granted with respect to Singaporean articles in section 331 of the United States-Singapore Free Trade Area Implementation Act and to articles from Jordan in section 221 of the U.S.-Jordan Free Trade Area Implementation Act.

Explanation of provision

If, in any investigation initiated under title II of the Trade Act of 1974 ("section 201" action), the ITC makes an affirmative determination, the ITC shall also find and report to the President whether imports of the article from Australia are a substantial cause of serious injury or threat thereof. In determining relief to be taken under section 201, the President shall determine whether imports from Australia are a substantial cause of the serious injury or threat thereof found by the Commission and, if such determination is negative, may exclude from such actions products from Australia.

Reason for change

This provision implements U.S. obligations under Article 9.5 of the Agreement.

TITLE IV: PROCUREMENT

Current law

U.S. procurement law (the Buy American Act of 1933 and the Buy American Act of 1988) discriminates against foreign suppliers of goods and services in favor of U.S. providers of goods and services. Most discriminatory purchasing provisions are waived if the United States has a bilateral or multilateral procurement agreement, such as the WTO Agreement on Government Procurement or the North American Free Trade Agreement.

Explanation of provision

Section 401 implements chapter Fifteen of the Agreement and amends the definition of “eligible product” in section 308 of the Trade Agreements Act of 1979. As amended, section 308(4)(A) will provide that, for a party to a free trade agreement that entered into force for the United States after December 31, 2003 and prior to January 2, 2005, an “eligible product” means “a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States.” This amended definition coupled with the President’s exercise of his authority under section 301(a) of the Trade Agreement Act will allow procurement of products and services of Australia and other parties to free trade agreements that entered into force during the specified time period.

Reason for change

This provision implements U.S. obligations under Chapter Fifteen of the Agreement, as well as U.S. obligations with respect to free trade agreements that entered into force for the United States after December 31, 2003 and prior to January 2, 2005.

III. VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statements are made concerning the vote of the Committee on Ways and Means in its consideration of the bill, H.R. 4759.

MOTION TO REPORT THE BILL

The bill, H.R. 4759, was ordered favorably reported by voice vote (with a quorum being present).

IV. BUDGET EFFECTS OF THE BILL

A. COMMITTEE ESTIMATE OF BUDGETARY EFFECTS

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of this bill, H.R. 4759 as reported: The Committee agrees with the estimate prepared by CBO which is included below.

B. STATEMENT REGARDING NEW BUDGET AUTHORITY AND TAX
EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that enactment of H.R. 4759 would reduce customs duty receipts due to lower tariffs imposed on goods from Australia.

C. COST ESTIMATE PREPARED BY THE CONGRESSIONAL BUDGET
OFFICE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, requiring a cost estimate prepared by the Congressional Budget Office, the following report prepared by CBO is provided.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 12, 2004.

Hon. WILLIAM "BILL" M. THOMAS,
*Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4759, a bill to implement the United States-Australia Free Trade Agreement.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Annabelle Bartsch.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

*H.R. 4759—A bill to implement the United States-Australia Free
Trade Agreement*

Summary: H.R. 4759 would approve the free trade agreement (FTA) between the government of the United States and the government of Australia that was entered into on May 18, 2004. It would provide for tariff reductions and other changes in law related to implementation of the agreement.

The Congressional Budget Office estimates that enacting the bill would reduce revenues by \$29 million in 2005, by \$293 million over the 2005–2009 period, and by \$884 million over the 2005–2014 period, net of income and payroll tax offsets. The bill also would increase direct spending by less than \$500,000 in 2005. Implementing the bill would cost less than \$500,000 in each year, subject to appropriation of the necessary amounts.

CBO has determined that H.R. 4759 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 4759 over the 2004–2009 period is shown in the following table.

	By fiscal year, in millions of dollars—					
	2004	2005	2006	2007	2008	2009
CHANGES IN REVENUES						
Estimated Revenues	0	-29	-47	-58	-71	-89
CHANGES IN DIRECT SPENDING ¹						
Estimated Budget Authority	0	*	0	0	0	0
Estimated Outlays	0	*	0	0	0	0

¹ H.R. 4759 also would affect spending subject to appropriation, but the amounts of those changes would be less than \$500,000 a year.

Note: * = increase of less than \$500,000.

Basis of estimate: For the purpose of this estimate, CBO assumed that H.R. 4759 would be enacted by October 1, 2004.

Revenues

Under the United States-Australia agreement, all tariffs on U.S. imports from Australia would be phased out over time. The tariffs would be phased out for individual products at varying rates according to one of several different timetables ranging from immediate elimination to gradual elimination over 18 years. According to the U.S. International Trade Commission (USITC), the United States collected \$109 million in customs duties in 2003 on about \$6.5 billion of imports from Australia. Those imports consist mostly of chilled and frozen meat, wine, certain motor vehicles and motor vehicle components, and various products made of metal. Based on these data, CBO estimates that phasing out tariff rates as outlined in the U.S.-Australia agreement would reduce revenues by \$29 million in 2004, by \$293 million over the 2005–2009 period, and by \$884 million over the 2005–2014 period, net of income and payroll tax offsets.

This estimate includes the effects of increased imports from Australia that would result from the reduced prices of imported products in the United States, reflecting the lower tariff rates. It is likely that some of the increase in U.S. imports from Australia would displace imports from other countries. In the absence of specific data on the extent of this substitution effect, CBO assumes that an amount equal to one-half of the increase in U.S. imports from Australia would displace imports from other countries.

Direct spending

H.R. 4759 would exempt certain Australian imported goods from the merchandise processing fee collected by the Bureau of Customs and Border Protection (CBP). Under current law, those fees will expire after March 1, 2005. Based on information from the CBP, we estimate that enacting the bill would decrease fee collections by less than \$500,000 in fiscal year 2005.

Spending subject to appropriation

Section 104 of H.R. 4759 would authorize the appropriation of whatever sums are necessary to the Department of Commerce (DoC) for administrative support for Chapter 21 of the agreement. Based on information from DoC regarding its experience with similar requirements in recent free trade agreements, CBO estimates that implementing section 104 would cost about \$100,000 per year, assuming appropriation of the necessary amounts.

Summary of effect on revenues and direct spending: The effects of H.R. 4759 on revenues and direct spending over the 2005–2014 period are shown in the following table.

	By fiscal year, in millions of dollars—									
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Changes in receipts ..	-29	-47	-58	-71	-89	-101	-109	-118	-127	-137
Changes in outlays ...	*	0	0	0	0	0	0	0	0	0

Note: * = increase of less than \$500,000.

Intergovernmental and private-sector impact: The bill contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Revenues: Annabelle Bartsch; Federal Costs: Mark Grabowicz and Melissa Zimmerman; Impact on State, Local, and Tribal Governments: Melissa Merrell; and Impact on the Private Sector: Crystal Taylor.

Estimate approved by: G. Thomas Woodward, Assistant Director for Tax Analysis; and Robert A. Sunshine, Assistant Director for Budget Analysis.

V. OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

A. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives (relating to oversight findings), the Committee, based on public hearing testimony and information from the Administration, concluded that it is appropriate and timely to consider the bill as reported. In addition, the legislation is governed by procedures of the Bipartisan Trade Promotion Authority Act of 2002.

B. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill contains no measure that authorizes funding, so no statement of general performance goals and objectives for which any measure authorizes funding is required.

C. CONSTITUTIONAL AUTHORITY STATEMENT

With respect to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, relating to Constitutional Authority, the Committee states that the Committee's action in reporting the bill is derived from Article 1 of the Constitution, Section 8 ('The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for * * * the general Welfare of the United States.')

D. INFORMATION RELATING TO UNFUNDED MANDATES

This information is provided in accordance with section 423 of the Unfunded Mandates Act of 1995 (P.L. 104–4).

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 13031 OF THE CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985

SEC. 13031. FEES FOR CERTAIN CUSTOMS SERVICES.

(a) * * *

(b) LIMITATIONS ON FEES.—(1) * * *

* * * * *

(14) No fee may be charged under subsection (a) (9) or (10) with respect to goods that qualify as originating goods under section 203 of the United States-Australia Free Trade Agreement Implementation Act. Any service for which an exemption from such fee is provided by reason of this paragraph may not be funded with money contained in the Customs User Fee Account.

* * * * *

SECTION 592 OF THE TARIFF ACT OF 1930

SEC. 592. PENALTIES FOR FRAUD, GROSS NEGLIGENCE, AND NEGLIGENCE.

(a) * * *

* * * * *

(c) MAXIMUM PENALTIES.—

(1) * * *

* * * * *

(8) PRIOR DISCLOSURE REGARDING CLAIMS UNDER THE UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT.—

(A) IN GENERAL.—An importer shall not be subject to penalties under subsection (a) for making an incorrect claim that a good qualifies as an originating good under section 203 of the United States-Australia Free Trade Agreement Implementation Act if the importer, in accordance with regulations issued by the Secretary of the Treasury, voluntarily and promptly makes a corrected declaration and pays any duties owing.

(B) TIME PERIODS FOR MAKING CORRECTIONS.—In the regulations referred to in subparagraph (A), the Secretary of the Treasury is authorized to prescribe time periods for making a corrected declaration and paying duties owing under subparagraph (A), if such periods are not shorter

than 1 year following the date on which the importer makes the incorrect claim.

[(8)] (9) SEIZURE.—If the Secretary has reasonable cause to believe that a person has violated the provisions of subsection (a) and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law. Within a reasonable time after any such seizure is made, the Secretary shall issue to the person concerned a written statement containing the reasons for the seizure. After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of any other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c).

* * * * *

SECTION 202 OF THE TRADE ACT OF 1974

SEC. 202. INVESTIGATIONS, DETERMINATIONS, AND RECOMMENDATIONS BY COMMISSION.

(a) PETITIONS AND ADJUSTMENT PLANS.—

(1) * * *

* * * * *

(8) The procedures concerning the release of confidential business information set forth in section 332(g) of the Tariff Act of 1930 shall apply with respect to information received by the Commission in the course of investigations conducted under this chapter, part 1 of title III of the North American Free Trade Agreement Implementation Act, title II of the United States-Jordan Free Trade Area Implementation Act, title III of the United States-Chile Free Trade Agreement Implementation Act, [and] title III of the United States-Singapore Free Trade Agreement Implementation Act, *and title III of the United States-Australia Free Trade Agreement Implementation Act.* The Commission may request that parties providing confidential business information furnish nonconfidential summaries thereof or, if such parties indicate that the information in the submission cannot be summarized, the reasons why a summary cannot be provided. If the Commission finds that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summarized form, the Commission may disregard the submission.

* * * * *

SECTION 308 OF THE TRADE AGREEMENTS ACT OF 1979

SEC. 308. DEFINITIONS.

As used in this title—

(1) * * *

* * * * *

(4) **ELIGIBLE PRODUCTS.**—

(A) **IN GENERAL.**—The term “eligible product” means, with respect to any foreign country or instrumentality that is—

(i) a party to the Agreement, a product or service of that country or instrumentality which is covered under the Agreement for procurement by the United States; **[or]**

(ii) a party to the North American Free Trade Agreement, a product or service of that country or instrumentality which is covered under the North American Free Trade Agreement for procurement by the United States**[.];** or

(iii) a party to a free trade agreement that entered into force with respect to the United States after December 31, 2003, and before January 2, 2005, a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States.

* * * * *

VII. VIEWS

DISSENTING VIEWS OF REPRESENTATIVE EARL POMEROY ON H.R. 4759, LEGISLATION TO IMPLEMENT THE UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT

I must express my opposition to H.R. 4759, legislation to implement the United States-Australia Free Trade Agreement. My concerns over the practices of the successor to the Australian Wheat Board, AWB Ltd., and over the discretionary authority given to waive beef safeguards have not been resolved by the text of this agreement.

First, the Agreement does not address the need to reform unfair trading practices of the Australian Wheat Board. Instead, Australia has committed to working with the United States within the World Trade Organization to develop export competition disciplines that eliminate restrictions on the right of entities to export. I am pleased that Australia appears to be moving toward resolving this issue. Nevertheless, I remain concerned over the Australian Wheat Board's influence over the world wheat market. North Dakota's wheat producers have been disadvantaged time and again through our dealings with the Canadian Wheat Board. While I am well aware that the two entities—the Australian Wheat Board and the Canadian Wheat Board—are quite different from one another, I remain concerned that allowing this Agreement to go forward without strong language on the practices of this state trading enterprise is dangerous and sends the wrong message to our wheat producers.

Additionally, an amendment was adopted in the Senate Finance Committee that would have limited the ability of U.S. trade officials to waive beef import safeguards. I strongly support this amendment and was disappointed in the later disapproval of the amended language by the committee. Unfortunately, the Administration submitted the U.S.-Australian free trade agreement to Congress without the amended language as well. I am concerned that this decision provides U.S. trade officials too much discretionary authority to waive the safeguards put in place by this agreement, thus placing the livelihood of our domestic cattle producers at risk.

ADDITIONAL VIEWS

We support the U.S.-Australia Free Trade Agreement (FTA or the "Agreement"). On the whole, we believe that workers, farmers, and businesses in both countries will benefit from the agreement. Below we note some additional views on specific issues.

Access to pharmaceuticals

We have concerns about the way in which USTR approached two provisions in the FTA relating to access to pharmaceuticals: (1) Annex 2-C on government pharmaceutical programs; and (2) Article 17.9(4) on importation of patented products.

Annex 2-C, the Chapter on Government Procurement, and U.S. Programs to Supply Medicines

With respect to Annex-2C, we are pleased that the annex is substantially modified from USTR's original, far-reaching proposals. Those proposals would have required the Government of Australia, which provides a universal prescription drug benefit for all Australian residents, to significantly alter how it reimburses for patented, prescription drugs. In addition to likely raising (dramatically) the cost of patented, prescription drugs in Australia, USTR's initial proposals could have had serious repercussions for certain U.S. drug coverage programs, including: Medicare, Medicaid, Veteran's Administration health benefits, and the DOD TRICARE program. In addition, and at the last minute without any Congressional consultations, USTR tried to insert a provision that barred the export of all drugs covered by Australia's drug program to the United States.

USTR dropped the most controversial elements of its proposal, including those related to pricing, promotion of private insurance, and the drug export ban, after significant push-back from the Government of Australia, and some Members of Congress. The provisions that were included in the final agreement largely relate to improving transparency in the Australian system, and in U.S. federal programs where coverage and reimbursement decisions are made at the federal level. USTR, in written responses to questions from Congress, has clarified what programs are covered. A summary of USTR's responses is provided below:

The only U.S. drug coverage program acknowledged by USTR as potentially covered by Annex 2-C is Medicare Part B. However, that program already complies with the Annex 2-C requirements, so no change to current practice is required or will occur to implement U.S. obligations under the FTA. Programs not covered by Annex 2-C include: Medicaid (because it is administered at the state level, not the federal level), Medicare Part D (as currently configured, because coverage and pricing is not made by federal authorities), and any program in which federal matching payments are made to a state for the purchase of a drug, but where coverage and pricing decisions are not made at the federal level. Moreover, federal government procurement of pharmaceutical products, including procurement by the Veterans Administration, the Department of Defense, Indian Health Services, and under the Vaccine for Children's program, are not covered by Annex 2-C, but are covered by the FTA's chapter on government procurement to the extent that this chapter imposes obligations on these programs. No changes to these programs was required to implement the agreement (other than to include Australia as one of the countries producers from which must be accorded non-discriminatory treatment in certain procurement decisions).

Annex 2–C is an improvement over the initial proposal. We do, however, remain concerned about USTR’s initial proposals. Australia’s reimbursement practices appear aimed at managing the cost of their program—there is no evidence that Australia’s practices are aimed at discriminating against U.S. firms in order to benefit a domestic industry. Congress has never directed USTR to address foreign reference pricing practices that are not intended to protect domestic producers.

Durg “Re-Importation” Debate

With respect to Article 17.9(4) on importation of patented products, that provision effectively bars the United States from allowing the import of patented drugs (from that country)—a provision directly inconsistent with congressional efforts to allow for the “re-importation” of patented drugs. USTR has noted that the provision reflects current U.S. law. Current law, however, is the subject of a vigorous and on-going debate in Congress, and in fact both Houses have recently passed separate bills that would change current law. If Congress changes U.S. law to allow the import of patented drugs, that revised law would be inconsistent with U.S. obligations under the Agreement.

When Congress is in the midst of serious discussions about a change in current law, USTR should not negotiate a specific provision in a FTA that could create a violation of that provision if the pending congressional consideration leads to a change in the law. This is especially so where there is no specific mandate by Congress in trade negotiating authority to include such provisions in the FTA. Because there are significant impediments to importing drugs from Australia, including Australia’s domestic law ban on most drug exports, the practical impact of the provision in this particular Agreement is likely to be very small. However, in consideration of the over-all provisions of the Australia FTA, it is important to make clear that this Article 17.9(4) should not be a standard provision in negotiating future FTAs.

Labor provisions

In the area of internationally-recognized core labor standards, the FTA adopts a standard for each nation to effectively enforce its own laws. The reason why strong objections to use of this approach are not determinative in this specific instance is because Australia’s laws basically reflect internationally-recognized standards. Moreover, the structures and enforcement in Australia, and importantly, the history and experience in this area—including a substantial percentage of Australian workers in unions and covered by collective bargaining agreements—are strong enough to ensure fair competition and a substantial middle class for the benefit of Australia and as a market for U.S. goods and services.

Investor-State dispute settlement

The Australia FTA notes that due to the circumstances in Australia and the United States—e.g., the fact that both Australia and the United States provide strong legal protections for investors consistent with the level of protection required by international law and have advanced legal systems with independent judges and a

demonstrated history of respect for the rule of law—no investor-state dispute settlement provisions are necessary in the agreement.

The agreement includes a provision, Article 11.16, which states that if a party considers that there has been a change in circumstances, the party may request consultations on considering the development of an investor-state dispute settlement system. The Article further states that “[o]n such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.”

It is apparently an unresolved legal question whether the President may agree to subject the United States to investor-state dispute settlement without explicit approval of Congress. As a means of asserting its authority, Congress has established a practice of providing this explicit approval—either through Senate ratification implementing investment treaty or through the agreement approval provision in legislation implementing a trade agreement that includes an investor-state system. Due to the fact that the Australia FTA does not provide an investor-state dispute settlement system, obviously there is no congressional approval for such a system in the Australia FTA.

Article 11.16 does, however, envision the possibility of negotiations to establish an investor-state dispute settlement system, raising the question of whether Congress’ approval of the FTA in section 101 of the implementing legislation can be read to provide implicit approval of any investor-state dispute settlement mechanism later negotiated under Article 11.16.

As a matter of congressional authority and jurisdiction and basic respect for the system of checks and balances in the U.S. Constitution, we think it is clear that were the President to agree to an investor-state dispute settlement system after negotiations under Article 11.16, the explicit approval of Congress would still be needed for this system. This position is supported by other provisions in the implementing legislation—where Congress wants to give the President authority to amend provisions of the FTA it has given explicit authority to do so. See section 203(o)(2)(A) of the legislation. This is so even where the FTA specifically envisions a future amendment. See section 203(o)(2)(B) of the legislation (providing authority to implement an amendment to the agreement pursuant to the negotiations provided for under section 4.2.5 of the Agreement).

CHARLES B. RANGEL.
ROBERT T. MATSUI.
JERRY KLECZKA.
XAVIER BECERRA.
SANDER LEVIN.
STEPHANIE TUBBS JONES.
JOHN LEWIS.
MAX SANDLIN.