

TRADE HOT TOPICS

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United States-Singapore Free Trade Agreement

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1. Introduction

The United States – Singapore Free Trade Agreement (“the Agreement”) is the fifth Free Trade Agreement (“FTA”) negotiated by the United States² and its first in Asia. Singapore has negotiated five other FTAs or “Economic Partnership” agreements.³ Singapore is the 11th largest trading partner of the United States with nearly US\$33 Billion in bilateral goods trade. Although negotiations have been on-going for several years, the U.S.-Singapore FTA and the U.S.-Chile FTA (the negotiations of which were completed at approximately the same time) are the first FTAs to be completed after approval of Trade Promotion Authority (also called “fast-track”) by the U.S. Congress as part of the Trade Act of 2002. Among other provisions, the Trade Promotion Authority legislation requires trade agreements to meet certain negotiating objectives.

At the end of January 2003, the U.S. Congress was officially notified of the intention of the Bush Administration to sign the Agreement. The official signing may occur 90 days thereafter. After signing, the Agreement and any necessary implementing or conforming legislation and statements of administrative action will be submitted to the Congress for approval. Under the terms of Trade Promotion Authority, Congress may hold hearings and review the FTAs, but may only vote in favor of, or against, the FTA, it may not amend the texts of the agreements. It is hoped that Congressional action is completed in a time frame to permit the Agreement to come into force on 1 January 2004.

The full 800+ page text of the agreement⁴ was released to the public on 7/8 March 2003 via internet posting on the websites of the U.S. Trade Representative (“USTR”) and the Singapore Ministry of Trade and Industry.⁵

According to a 7 March 2003 Press Release issued by the USTR, “publication of the proposed U.S.-Singapore FTA represents the [Bush] Administration’s commitment to an open and public process of reviewing trade agreements by all interested parties. Public summaries and fact sheets were made immediately available upon conclusion of the agreements. The full texts of both agreements have been available to members of Congress and the approximately 700 private sector advisers since early January. In addition, as negotiations on the agreements progressed over the past two years, the Administration has provided Congress and the official private sector with advisors U.S. negotiating proposals in advance of formally tabling them with Singapore and Chile.

¹ This article was prepared for the Commonwealth Secretariat by Mr. Stuart P. Seidel of the law firm of Baker & McKenzie. The views expressed in this article are his personal views and are not necessarily shared by the Commonwealth Secretariat.

² The others are the US-Canada FTA, NAFTA, US-Israel FTA, US-Jordan FTA. The US-Canada FTA has been suspended while NAFTA is in effect. The U.S. also has a “Bilateral Trade Agreement” with Vietnam that covers many of the typical FTA subjects.

³ Singapore has negotiated “Economic Partnership” agreements with New Zealand and Japan and FTAs with Australia, EFTA and the other ASEAN countries. The Australian FTA is expected to come into effect during the second half of 2003.

⁴ The final legal text, annexes and side letters is in excess of 1,400 pages.

⁵ <http://www.ustr.gov/new/fta/singapore.htm> and http://www.mti.gov.sg/public/FTA/firm_FTA_Default.asp?sid=36

U.S. negotiators also held more than 100 meetings with some 700 cleared advisors from business, farm groups, labour unions, environmental groups, consumer organisations, and state governments to discuss and seek their advice, on U.S. negotiating positions.”⁶

As indicated above, in January 2003, the confidential draft texts of the two FTAs were submitted to 31 industry advisory committees for a 30 day review, as required by legislation, after which the committees were to file reports with USTR. During this review period, the industry representatives were permitted to review, but not download, print or copy the text, from a secure website maintained by the USTR. This process reportedly made it difficult to review or discuss provisions with those who were experts in specific areas covered by the FTAs.

The 31 advisory committees, which are chartered by the U.S. Congress, include:

- a broad-based Advisory Committee for Trade Policy and Negotiations (ACTPN);
- three policy advisory committees: trade and environment, labour and agriculture;
- five technical advisory groups on specific agricultural groups (ATACs);⁷
- 17 industry sector advisory committees (ISACs);⁸
- four industry functional advisory committees (IFACs);⁹ and,
- an intergovernmental policy advisory committee (IGPAC).

The members were asked to examine each FTA from the various interests represented within each chartered committee and the objectives set by the U.S. Congress. The advisory reports¹⁰ were submitted at the end of February. With only one exception, all of the advisory committees that submitted reports supported the results of the negotiations, although there are several reports that include dissenting views. The one report that was universally negative regarding both the Singapore and Chile FTAs came from the Labour Advisory Committee. Another committee was unable to submit a detailed report because a lawsuit by environmental groups prevented a member from joining the committee, and the committee could not meet until a replacement member was named, not allowing sufficient time for a proper review. One committee¹¹ elected not to file a report because virtually all fruit and vegetable products already are duty free and relatively minor interests are involved. The Textiles and Apparel ISAC report reflected the divergent views between the fibre, yarn and textile members who favoured the “yarn forward” rules but were concerned about high Tariff Preference Levels, and the apparel members who were unhappy with the complicated origin rules.

After the negotiations with Singapore were completed, U.S. and Singaporean lawyers began reviewing the Agreement for legal clarity and consistency, so it is possible that certain provisions will be revised prior to the official signing. The Singapore text is in English only (although some words have American spellings and others have Singaporean spelling, at least in the draft).¹²

Previous U.S. FTAs have been made public at various stages. According to USTR, the U.S.-Canada FTA, was released first in outline form and the complete text of the proposed agreement was made public two months later. The draft NAFTA text was released to the public several weeks after the proposed agreement was announced and was finalised over a period of weeks thereafter as part of a three-way legal review. The U.S. - Jordan FTA was made public only after it was signed.

The Agreement consists of 21 separate chapters. A major theme throughout the Agreement is transparency which is reflected in provisions that urge:

- the advance publication of proposed regulations;
- an opportunity for comment by interested parties or the public at large;
- publication of adopted rules, which to the extent practicable, address the comments received; and,
- delayed effective dates for final regulations.

Some chapters have additional transparency requirements which are discussed in more detail below. In addition, the Agreement recognises the digital age in many ways that are also discussed in the chapter summaries below.

⁶ <http://www.ustr.gov/releases/2003/03/03-13.htm>

⁷ The ATACs are: animal and animal products; fruits and vegetables, grains; feed and oilseeds; sweeteners; and tobacco, cotton and peanuts.

⁸ The ISACs are: Aerospace, Capital Goods, Chemicals and Allied Products; Consumer Goods; Electronics and Instrumentation; Energy; Ferrous Ores and Metals; Footwear, Leather and Leather Products; Building Products; Lumber and Wood Products; Nonferrous Ores and Metals; Paper and Paper Products; Services; Small and Minority Business; Textiles and Apparel; Transportation, Construction and Agricultural Equipment; and Wholesaling and Retailing.

⁹ The IFACs are: Customs Matters; Standards; Intellectual Property Rights; and Electronic Commerce.

¹⁰ The full advisory committee reports are available at http://www.ustr.gov/new/fta/Singapore/advisor_reports.htm

¹¹ The Fruits and Vegetables ATAC.

¹² When the Agreement was signed, the final text was posted on the Internet at <http://www.ustr.gov/new/fta/Singapore/final.htm>

2. Comparison with the Other U.S. Trade Agreements

It is natural to compare the U.S. Singapore Free Trade Agreement to other trade agreements that the United States has negotiated. However, in comparing such agreements several points should be noted:

- The North American Free Trade Agreement (“NAFTA”) was completed during the Uruguay Round negotiations which resulted in the creation of the WTO and its multi-lateral agreements, and was deeply influenced by those negotiations;
- NAFTA was a tri-lateral agreement negotiated by three countries, each of which had a federal structure consisting of states or provinces with substantial rights under the respective constitutional structure. This was reflected in some of the reservations, exceptions and non-conforming provisions.
- Canada and the United States followed the common law while Mexican jurisprudence was founded on civil law principles. This required adjustments to various transparency and related provisions.
- Canada and the United States were already developed economies, while Mexico was a developing country.
- The U.S.-Jordan FTA was intended to put Jordan on a par with Israel and so is closely patterned after the earlier U.S.-Israel FTA, rather than NAFTA.
- The U.S.-Vietnam Bilateral Trade Agreement (“BTA”) was intended to fully normalize trading relationships between two former foes and to assist Vietnam in meeting WTO membership requirements.

For the reasons mentioned above and others (e.g., adoption of WTO multilateral and plurilateral agreements, stage of economic development, trade agreement experiences), the U.S.-Singapore FTA differs from earlier U.S. trade agreements in several respects. The Agreement is generally patterned after NAFTA, although there are some major differences. For example, agricultural interests were not a major concern during the Singapore negotiations (except for the precedent that might be set), but were clearly a concern during the negotiations with Chile and will be a serious issue for future negotiations.

The U.S.-Jordan FTA is based on the U.S.-Israel FTA and, except for textiles and apparel, uses the rather subjective “substantial transformation test” rules to establish origin for purposes of obtaining preference. The Singapore Agreement follows the NAFTA precedent of using objective rules based on a shift in tariff classification, although the NAFTA rules for certain industries and commodities are far more complex. The Singapore rules also recognise the unique “integrated sourcing initiative” (“ISI”) for high tech products. Under ISI, products that are partially assembled in nearby foreign countries are accorded Singapore origin. The Singapore Agreement also departs from the NAFTA and Jordan FTA origin certification model. In both those agreements, the foreign producer or exporter is responsible for providing a required Certificate of Origin in a prescribed format. The Singapore Agreement puts the certification requirement on the importer, without mandating a prescribed format, and prefers electronic certifications. Regional value content rules have also been simplified over those set forth in NAFTA. The textile and apparel provisions in the Singapore Agreement reflect U.S. concerns over transshipment and require new registration and recordkeeping regimes for Singapore companies seeking the Agreement’s benefits. In addition, the Parties have agreed to review the textile and apparel rules of origin to see if the rules should be revised or eventually harmonised with any WTO Rules of Origin that may be adopted in the future.

The U.S.-Jordan FTA does not have a chapter on investment because the U.S. and Jordan had negotiated a separate bilateral treaty covering that topic in 1997, and a framework agreement on trade and investment two years later. The Vietnam BTA addresses investments in Chapter IV and in an exchange of letters between the parties. In the area of services, both the Jordan FTA and Vietnam BTA identify specific sectors or requirements that are included under the agreements. Trading rights in the Vietnam BTA are phased in over a seven year period. The Singapore Agreement takes a negative list approach. That is, the agreement covers all investments, financial services and cross-border services unless they are covered by a reservation, exception, or listed in a non-conformity schedule.

The telecommunications provisions are significant in that they require access to public communications networks in an “unbundled” manner. This means that an enterprise is only required to pay for the services it requires. The Agreement’s e-commerce provisions ensure that electronic commerce between the parties will remain free of duties, fees or charges on the importation or exportation of electronically transmitted digital products.

The Singapore Agreement includes more substantial commitments in the area of intellectual property rights protection than in any previous U.S. trade agreement. In addition to requiring the accession or ratification of a number of international agreements or recommendations, the Agreement requires the adoption of specific civil and criminal remedies and *ex officio* border enforcement of intellectual property rights. In addition, Singapore has

agreed to establish a registration regime for optical disc manufacturing to deter copyright piracy. The Agreement also includes provisions on digital encryption devices and protection, encrypted satellite signals and internet domains.

The transparency provisions throughout the agreement are also the most extensive of the existing U.S. trade agreements. Posting via the internet is recognised as an acceptable means of publication of government guidelines and information.

Emergency actions under the Agreement are limited to an initial two year period with the possibility of a two year extension.

U.S. Trade Promotion Authority (“fast track”) legislation sets forth negotiating goals and objectives for future trade agreements. The Singapore and Chile Agreements were the first two such agreements to be subject to review for consistency with the legislation. Although all the private sector advisory groups (except for the Labor Advisory Committee) have recommended approval of the agreements, their reports contain comments from individual members that dissent from the committee reports or suggested that future agreements address what they believed might be shortcomings in certain areas when applied to other countries. These comments frequently reflect the view that the Agreement’s text is acceptable for a Singapore FTA because it is generally a free trade area with open markets and adequate protection for investors and traders, but that the provisions should not necessarily set a precedent or become a template for future agreements. Some of the areas in which concerns were expressed are:

- The scheduling of duty elimination for sensitive products, such as agricultural goods, certain chemicals or those goods being eased out of subsidies or support programs;
- The definition of “expropriation” is too narrow;
- Restrictions on energy investments;
- Transfer of capital restrictions;
- Restrictive rules of origin for textiles;
- Unavailability of dispute settlement procedures in certain areas (e.g., portions of the labor, environment, investments chapters);
- Size or availability of dispute settlement pools for panels;
- Protection of workers’ rights—the Agreement only requires compliance with local laws;
- Greater rights in the U.S. for foreign investors than U.S. investors have;
- Non-inclusion of simplified visa procedures for temporary business visitors;
- Failure to mandate recognition of conformity standards;
- Reservations for certain services, such as health care;
- Failure to have one set of origin rules for all FTAs;
- Failure to provide funding or resources for capacity building; and
- Failure to address patent delays due to ministries of health procedures.

It should be noted that the above concerns are not shared by all members of the particular advisory committee involved. Some members, often the majority, take the view that the Singapore FTA should set the standard for all future FTAs entered into by the U.S.

Other countries negotiating FTAs with the U.S. should review the private sector advisory committee reports that have been posted on the USTR website.¹³

A chapter-by-chapter summary of the Agreement follows:¹⁴

3. Chapter 1—Establishment of a Free Trade Area and Definitions

This chapter establishes a Free Trade Area between Singapore and the U.S. consistent with Article XXIV of GATT, 1994 and Article V of GATS and defines certain terms used throughout the Agreement. Many chapters contain further definitions of terms used within those chapters. In addition, the chapter reaffirms existing rights and obligations under existing agreements, including the WTO Agreement.

4. Chapter 2—National Treatment and Market Access for Goods

With certain exceptions, the Agreement requires that goods of one Party imported into the other Party’s territory be given the same treatment as goods of that Party (“national treatment”). Customs duties will be immediately removed by Singapore on the few categories of U.S. goods that are currently subject to duties, while U.S. duties

¹³ Id. The advisory reports on the U.S.-Chile FTA may be found at: http://www.ustr.gov/new/fta/Chile/advisor_reports.htm .

¹⁴ All references are to text released on 7/8 March 2003, as the final legal text was not available when this article was written.

on Singapore goods will be removed progressively according to schedules. The parties will consult on accelerating the schedules.

The Agreement requires the WTO Valuation Agreement to be applied to all transactions necessitating a customs valuation. Originating goods from Singapore will be exempt from the U.S. merchandise processing fee and export taxes are prohibited. The chapter requires each Party to permit the temporary duty free entry for a variety of broadly defined professional equipment, goods intended to be displayed or demonstrated at exhibitions or fairs, and commercial samples. It also provides that goods reentered in a Party's territory after repairs or alterations in the other Party, which do not change the article into a different commercial item, are not subject to duty, regardless of origin. Singapore agrees to harmonise its excise taxes on domestic and imported distilled spirits by 2005. The Agreement prohibits a Party from imposing an import ban on broadcasting apparatus, including satellite dishes. Singapore will lift its ban on chewing gum, but only for therapeutic reasons.

5. Chapter 3—Rules of Origin

There are several methods under the Agreement for goods to qualify as “originating” goods that receive preferential treatment. These are:

1. Goods which are wholly obtained or entirely produced in one or both Parties;
2. Goods which meet the product specific rules (which generally involve a tariff heading or sub-heading shift and, in some cases, a regional value content test);
3. Goods otherwise provided as originating in Chapter 3; or
4. Designated goods involved in the Integrated Sourcing Initiative (a Singapore program allowing partial manufacturing operations, primarily of information technology goods and technical equipment, in other countries).

A provision not found in other FTA's to which the U.S. is a party, permits certain used goods that are disassembled into individual parts and then processed and reassembled (“remanufactured”), to qualify for preferential treatment.

When a regional value content is required, it may be calculated using a “build-up” or “build-down” method. Most textiles and apparel are subject to special yarn and fibre rules.

Unlike the previously negotiated FTAs to which the United States is a Party, a certificate of origin is not required by the Agreement, but the importer may be required to submit a statement setting forth the reasons that a good qualifies as an originating good, preferably electronically. The importer must keep records for up to five years and the claims are subject to verifications.

6. Chapter 4—Customs Administration

The Agreement has specific, concrete obligations on how customs procedures are to be conducted. These are intended to provide openness and transparency to the customs processing of goods. All Customs laws, regulations, guidelines, procedures and administrative rulings governing Customs matters must be promptly published in writing or on the internet. Laws and regulations must be applied in a uniform, impartial and reasonable manner. The Agreement further requires each Party to designate one or more contacts for public inquiries and to publicise the contact information on internet.

Proposed regulations are to be published in advance with an opportunity for public comment, although exceptions are made for law enforcement guidelines, including risk analysis and targeting technologies. When the final regulations are published, Parties are to address the comments submitted on the proposed regulations and delay the effective date so that traders may plan for the new regulations.

The Agreement requires the customs authorities, upon the request of an importer or exporter, to provide written advance rulings on tariff classification, customs valuation, country of origin, and the qualification of a good as originating for purposes of the Agreement. The requirements for making such ruling requests are to be published. Once a request is received, the customs authorities are to act expeditiously and decide the matter within 120 days. Upon request, a full explanation of the reasoning supporting the ruling is to be made available.

Any treatment provided in a ruling is to be applied without regard to the identity of importer, exporter or producer provided facts and circumstances are identical to those in the ruling. If it is later decided that a modification or revocation of a ruling is necessary because of an error of fact or law, or due to a change of material facts or circumstances, or a change of law consistent with the Agreement, the effective date of the modification or

revocation is to be postponed for not less than 60 days, if relied upon to requestor's detriment. Decisions of customs authorities will be subject to at least one level of independent administrative review plus judicial review.

In order to encourage cooperation between the Parties, the Agreement states that a Party will endeavor to provide the other Party with advance notice of any significant modification of its administrative policy or any other development related to its import laws or regulations that is "likely to substantially affect the operation of the agreement." The Agreement further provides for mutual assistance in enforcement activities and technical cooperation on improving risk assessment techniques, and in simplifying and expediting customs procedures. Cooperation in specific cases is to be provided only if there are written assurances of confidential treatment for the requested information, except where a Party allows disclosure for law enforcement or judicial proceedings.

The Agreement requires each Party to maintain civil and administrative penalties and where appropriate, criminal penalties, for violations of its customs laws and regulations governing classification, valuation origin and preference eligibility.

In the area of trade facilitation, each Party is to adopt procedures that provide for release of imported goods within a time not greater than required to ensure compliance, but to the extent possible, within 48 hours of arrival of the goods at the port of arrival. Customs authorities may require reasonable security guarantees prior to release. To expedite release, the Parties agree to try to process information and data prior to arrival and to have their authorities use risk analysis and targeting to focus customs enforcement activities on goods considered to be high risk while facilitating clearance of low risk goods.

The Agreement provides for expedited and simplified clearance for express shipments based upon pre-arrival information and electronic data processing. Release of express shipments is normally to occur within six hours of submission of the required documents, provided the shipment has arrived.

7. Chapter 5—Textiles and Apparel and Cooperation in the Prevention of Circumvention

This chapter reflects the U.S. concern over textile transshipment. Enterprises wishing to export textiles and apparel from Singapore, or wishing to participate in Singapore's Outward Processing Arrangement, will have to register with the Government of Singapore and will be subject to certain detailed recordkeeping requirements and to unannounced semi-annual inspections, the results of which will be made available to the United States.

Each Party is required to take all steps necessary to ensure full enforcement of its own laws related to circumvention; to ensure full cooperation in enforcement of the other party's laws related to circumvention; and to prevent circumvention by providing its officials with appropriate legal authority and by maintaining and enacting necessary laws with civil, criminal and administrative penalties.

An annex to the chapter sets forth the procedures for special textile and apparel bilateral emergency actions which may include the suspension of further reductions of duty or duty increases (not to exceed MFN rates) for a two year period that may be extended for two additional years with compensation. In addition, the Parties agree to review the textiles and apparel rules of origin to see if different rules of origin should be applied to particular goods to address the availability of fibres, yarns or fabrics and to permit the eventual harmonisation of the textiles and apparel rules of origin under Part IV of WTO Rules of Origin Agreement.

8. Chapter 6—Technical Barriers to Trade

This chapter encourages the Parties to enhance cooperation in areas of technical regulations, standards, and conformity assessment procedures by promoting the use of international standards, including implementing Phases I and II of the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment. Each Party is required to designate a Technical Regulations contact point to coordinate these efforts.

9. Chapter 7—Safeguards

This chapter sets forth the procedures for establishing safeguards if reduced or eliminated duties lead to increased imports of originating goods in such numbers in absolute number or relative to domestic production as to cause substantial cause of serious injury to a domestic industry. When safeguards are imposed, duty reductions may be suspended or duties may be increased to MFN rates.

The procedures require notification to the other party upon initiation of a safeguard investigation, and consultations with the other Party as far in advance as practicable. The chapter incorporates Articles 3 and 4.2(c)

of the WTO Agreement on Safeguards. Safeguards may be maintained for a maximum period of two years with a two year extension, but are required to be liberalized at regular intervals, if conditions permit. In critical circumstances, safeguard measures may be taken on a provisional basis not to exceed 200 days. If safeguards are imposed, the party applying them is required to provide mutually agreed upon trade liberalizing compensation.

Each party retains rights under Article XIX of GATT 1994 and the WTO Agreement on Safeguards, but a party may exclude originating goods of the other party from global safeguards if such imports are not a substantial cause of serious injury or threat thereof.

10. Chapter 8—Cross Border Trade In Services

The chapter on cross-border services provides substantial market access on the basis of national treatment and MFN. It uses a “negative list” approach. That is, all cross-border services are covered by the Agreement unless they are listed in an annex. Most FTAs only cover services that are listed in an annex. It should be noted that this chapter does not apply to financial services (Chapter 10), government procurement (Chapter 13), or to air services, with some exceptions. If a covered service has qualification requirements, the technical standards and licensing are to be objective and transparent.

Unless permitted in the annex, neither Party may maintain or adopt quotas, monopolies, exclusive service suppliers, an economic needs test or employee limits for covered services. Furthermore, neither Party may require residency or representative offices for a cross-border service, unless set forth in the annex. The Agreement requires the Parties to freely permit transfers and payments of salaries, profits and funds taken abroad to consume a service, interest, royalties, contract payments, investments. However, this may be suspended in certain cases, such as bankruptcy, judgments, etc.

The chapter permits the denial of benefits where an enterprise is owned or controlled by a non-party that does not have a substantial business in the territory of the other party, or where the enterprise is owned or controlled by a non-party and the Party does not maintain diplomatic relations with the non-party or maintains sanctions against the non-party.

The chapter contains transparency requirements in the development and application of regulations similar to those discussed above. It also encourages the development of mutually acceptable professional standards.

11. Chapter 9—Telecommunications

Each Party agrees to ensure that enterprises of the other Party have access to, and use of any public telecommunications network. This access is to be provided, “unbundled.” That is, an enterprise is only required to pay for the services it requires. The Parties are required to ensure that enterprises that are given such access protect the confidentiality of proprietary information relating to suppliers and end users of public telecommunications services. The Parties are to ensure that major suppliers provide co-location wherever possible for necessary interconnection or access.

The Parties are to ensure that any regulatory body is separate and independent of any supplier of telecommunications services and that its decisions are impartial with respect to all interested parties. Parties are required to divest ownership interests in public telecommunications suppliers.

The Agreement sets forth transparency requirements for licensing and rulemaking, and procedures for resolving disputes that are then subject to judicial review.

Suppliers of telecommunications are to have the flexibility to choose the technologies they use, including mobile services, as long as their services are capable of interconnection so that end-users of different technologies may communicate with each other.

12. Chapter 10—Financial Services

This chapter opens up the financial services markets in the territories of both Parties. The chapter requires a Party to provide national treatment and market access for investments in the establishment, acquisition, expansion, management, conduct, operation, or disposition of financial institutions and investments in financial institutions in its territory.

Except for reservations set forth in the annexes, a Party may not require financial institutions of the other Party to engage individuals of any particular nationality as senior management or other essential personnel. However, a Party may require that a simple majority of the Board of Directors of a financial institution of the other Party be nationals or residents of that Party.

Parties are permitted to take action for prudential reasons to protect investors, depositors, policy holders, and others to whom a fiduciary duty is owed.

The Parties agree to transparency in regulations and policies governing the activities of financial institutions and cross-border financial services, and agree to specific procedures regarding rulemaking, applications, administrative decisions, and inquiry mechanisms. Access to payment and clearing systems is to be provided, as is expedited offering of insurance services.

A “Financial Services Committee” is to be established which will supervise the implementation of this chapter, and participate in the dispute settlement mechanism established for financial services. Financial services disputes are to be heard before panelists who have experience or expertise in financial services law or practice. They are to be impartial and objective. When a dispute affects only the financial services sector, a Party may only suspend financial services benefits; and when a dispute affects only a sector other than the financial services sector, a Party may not suspend financial services benefits.

13. Chapter 11—Temporary Entry of Business Persons

With limited exceptions, each Party agrees to grant the temporary entry of business persons listed in Annex 11A, although visas or other documents may be required. Measures governing temporary entry are to be applied expeditiously using transparent criteria to avoid impairing or delaying trade in goods or services.

In order to ensure regulatory transparency, each Party is required to maintain or establish contact points to respond to business inquiries. The transparency requirements for the adoption of regulations that are discussed in the other chapters are repeated in this chapter. Parties are required to make timely decisions on applications for temporary entry and inform applicants of the status of the application. Prior to entry into force of the FTA, the Parties agree to provide each other information on procedures relating to processing applications so the other Party may become acquainted with those requirements.

The Parties agree within six months after entry to publish explanatory materials for business persons in a consolidated document. The Parties will also establish “Contact Points on Temporary Entry” to meet, exchange information, develop facilitation measures, monitor implementation of the chapter, and provide data to the other Party upon request. In the case of temporary entry of business persons, dispute settlements under Chapter 20 are limited to matters involving a pattern or practice and the business person has exhausted all available administrative remedies or more than one year has passed without a final determination in an administrative proceeding, and the delay is not attributable to the business person.

Pursuant to Annex 11A, each Party is to grant temporary entry to the business persons for up to 90 days without work authorisation if they are otherwise qualified. Temporary entry is to be granted to the following categories of business persons:

- Traders and Investors;
- Intra-company transfers of persons who are managerial, executive, or who have specialised knowledge. A Party may require one year employment within the past three years in these categories;
- Professionals (and training for professionals) who possess the requisite credentials for their profession. A Party may establish numerical limits for this category and may establish certain salary criteria.

14. Chapter 12—Anticompetitive Business Conduct, Designated Monopolies, and Government Enterprises

Each Party agrees to adopt or maintain measures to proscribe anticompetitive business conduct. Although designated monopolies and government enterprises are permitted, they must use commercial considerations in the purchase and sale of goods or services and act in a manner consistent with the chapter’s objectives, except for government procurement. The Parties agree to cooperate on competition law and policy development. In order to ensure transparency, Parties are required to make available, upon request of the other Party, public information concerning enforcement measures, information concerning government enterprises and designated monopolies, and exemptions from anticompetitive measures.

15. Chapter 13—Government Procurement

In the area of government procurement, the parties reaffirm their obligations under the WTO Agreement on Government Procurement and they agree to apply the APEC non-binding Principles on Government Procurement. They further agree to seek a multilateral agreement on transparency in government procurement to

implement the Doha Ministerial mandate. Singapore has made additional commitments on non-discrimination in government procurements, based on a “negative list.” The annexes set forth exclusions and lower monetary thresholds than at present. The applicable thresholds are subject to an indexing formula to account for inflation.

16. Chapter 14—Electronic Commerce (“e-commerce”)

The Parties recognise the importance of “e-commerce” and the importance of avoiding barriers to its use and development. The Agreement prohibits a Party from applying customs duties, fees or charges on the importation or exportation of digital products by electronic transmission. When a customs value is required for carrier media bearing digital products, it shall be determined based on the media without regard to the cost or value of digital products stored on the media. In order to encourage transparency, each Party is required to publish or otherwise make available its laws, regulations and measures relating to e-commerce. A joint statement on e-commerce, released with the text of the Agreement, indicates that the Parties believe that the private sector should lead development; that the Parties should avoid imposing unnecessary regulations; that government action, when needed, should be transparent; that the Parties will encourage self regulation through codes of conduct; and cooperation among all countries will assist in the construction of a seamless environment for e-commerce. The joint statement also sets forth goals in a variety of fields.

17. Chapter 15—Investment

The Agreement provides a secure, predictable legal framework for investors. Each Party agrees to provide national treatment to investors of the other Party and treatment no less favourable than the most favourable treatment accorded to investors of any non-Party (“most favoured nation treatment”). If there is an expropriation of property, it must be for a public purpose, non-discriminatory, and must result in payment of prompt, adequate, and effective compensation equal to the fair market value.

Each Party agrees to permit transfers freely and without delay into and out of territory and into freely usable currency at the prevailing market rate. A Party may restrict transfers for

- bankruptcy, insolvency or creditors;
- issuing, trading or dealing in securities;
- financial reporting and recordkeeping;
- criminal or penal offences;
- ensuring compliance with orders or judgments in judicial; or,
- administrative proceedings.

Neither Party may impose or enforce listed performance requirements, commitments or undertakings in connection with the establishment, acquisition, expansion, management, conduct, operation, or disposition of an investment.

The “negative list” approach is utilised for investments. That is, all forms of investment are protected unless specifically exempted.

Senior management of an enterprise may not be required to be of any particular nationality. However, a Party may require a majority of the board to be resident in a Party’s territory or of particular nationality, provided it does not materially impair the investor’s ability to exercise control over its investment.

A Party may deny benefits to an enterprise investor of the other party if the enterprise is controlled by persons of a non-Party with which the denying Party does not maintain diplomatic relations, or against which it maintains sanctions that would be violated or circumvented if benefits were accorded. A Party may also deny benefits if the enterprise has no substantial business activities in the territory of the Party and it is controlled by persons of a non-Party or the denying Party.

In the event of an investment dispute, resolution will initially be sought through consultation and negotiation. If that is unsuccessful, the Agreement establishes a dispute settlement mechanism based on various arbitration agreements. Arbitration requests may be filed by a claimant on its own behalf under the ICSID¹⁵ Convention if the Parties are Parties to the ICSID Convention; under the ICSID Additional Facility Rules if one is Parties is a Party to the ICSID but the other is not; under UNCITRAL¹⁶ arbitration rules or any arbitration institution if both the claimant and respondent agree. The Agreement sets forth conditions and time limitations on seeking

¹⁵ International Centre for Settlement of Investment Disputes.

¹⁶ United Nations Commission on International Trade Law

arbitration and procedures governing the selection of arbitrators, the conduct of the arbitration and the transparency in arbitration proceedings.

The Agreement is accompanied by various side letters which concern customary international law, expropriation, land expropriation, and an appellate mechanism, all of which are an integral part of the Agreement.

18. Chapter 16—Intellectual Property Rights

The Agreement provides a high level of protection to intellectual property rights (“IPR”) and builds on existing TRIPS commitments, while enhancing enforcement.

Each party is required to give effect to articles 1-6 of the Joint Recommendation on Well Known Marks (1999, WIPO) and the Trademark Law Treaty (except for Articles 6 and 7 for Singapore) and is required to ratify or accede to:

- 1974 Brussels Convention on Satellites
- 1991 Convention on Protection of new varieties of plants
- 1996 WIPO Copyright Treaty
- 1996 WIPO Performances and Phonograms Treaty
- 1984 Patent Cooperation Treaty

Furthermore, each Party shall make “best efforts” to ratify or accede to:

- 1999 Hague Convention on Industrial Designs
- 1989 Protocol relating to Madrid Agreement on International Registration of Marks.

Trademarks

Trademark protection is very broad and also covers service marks, collective marks and certification marks. Parties may include geographical indications and “scent” marks in this category. Well-known marks are generally protected even a mark is used for goods and services other than those registered for the mark.

The Agreement requires government involvement in resolving disputes between trademark owners and domain names on the Internet, an important provision to prevent “cyber-squatting” of trademarked domain names, according to USTR. Trademark registration is streamlined by allowing applicants to use their own national offices.

Copyrights

The Agreement recognises copyright problems in the digital era, and gives control over all reproduction, including permanent or temporary on-line uses of materials to the authors or other copyright owners. The Agreement also protects against unauthorised retransmission of television signals, whether by terrestrial, cable or satellite methods.

Copyright owners will be protected for extended terms under the Agreement. Protection will be provided for a term not less than the life of author plus 70 years; if not based on the life a person, 70 years from the end of the calendar year in which the work was first published; or if not published within 50 years from creation, not less than 70 years from the end of the calendar year of creation.

The Parties agree to increase the protection of copyrighted works using advanced technologies to prevent infringement by establishing civil and criminal offences. The increased protection will cover circumvention of technological measures that control access as well as manufacturing, importing, distribution, offering devices to the public or trafficking in the devices, products, components or services which are promoted, advertised or marketed to circumvent effective technology measures, or have only limited commercially significant purpose or use other than circumvention. Expanded protection is also provided for encrypted program-carrying satellite signals. There are exceptions for certain non-profit organisations and public libraries or archives.

Patents

Under the terms of the Agreement, patent protections are expanded and patents are to be available for all fields of technology. Terms of patent protection are to be extended to compensate for unreasonable delays (over four years from filing or two years from examination) in processing patent applications.

In the case of certain regulated products (pharmaceuticals and agricultural chemicals), the Parties agree to keep confidential any information which is needed for ensuring the safety and efficiency of the product prior to marketing for five years (pharmaceuticals) or 10 years (agricultural chemicals).

Transparency in the protection and enforcement of IPRs is provided in a variety of ways. Decisions on the merits of an application for protection should be in writing with statements of the reasons upon which the decisions are based. In addition, the Parties will publish all laws, regulations, procedures, final judicial and administrative decisions of general application and publicise information and statistics on its efforts to have effective enforcement.

The Agreement requires the Parties to establish civil and administrative remedies including seizure of devices and products, damages (on suggested retail price of legitimate good or service), recovery of court and attorney fees, and the destruction of devices involved in an IPR violation. In addition, the remedies may include compensation for injury and profits, and ordering the identification of third parties involved in the violation.

The Agreement expands border protection of IPR. For example, each Party is required to permit competent authorities to act *ex officio* without the need for a complaint. Where authorities determine that imported goods are counterfeit or piratical, they will be authorised to inform the rights holder of the names and addresses of the consigner, importer and consignee of the goods as well as the quantity detained. Goods that are counterfeit or piratical are to be destroyed. The Agreement provides that Parties will cooperate with each other in preventing violations.

Parties are required to establish criminal penalties and procedures for willful counterfeiting or piracy on a commercial scale which include imprisonment as well as a high monetary fine in addition to providing for the seizure, forfeiture and destruction of offending goods, related materials, implements, assets traceable to the violation and any related documents.

The Agreement provides legal incentives and protections to internet service providers who cooperate with copyright holders.

Singapore agrees to establish control procedures for manufacturing optical discs by requiring manufacturing licenses, special code (source ID) marking, recordkeeping, and inspections.

Singapore has agreed to discontinue compulsory licenses under Articles 143-146 of the Singapore Copyright Act. Parallel imports of pharmaceuticals will be required to comply with all product identity, safety, quality, integrity, manufacturing practices and other health and safety requirements.

19. Chapter 17—Labour

Both Parties reaffirm their obligations as members of the International Labour Organization and agree to strive for consistency with internationally recognised labour rights. The Agreements makes it clear that it is inappropriate to weaken or reduce the enforcement of domestic labour laws in order to encourage trade or investment.

The Parties are required to ensure access to administrative, quasi-judicial, judicial or labour tribunals and to ensure that procedures are transparent, fair and equitable. The Agreement also establishes a formal Labour Cooperation Mechanism.

20. Chapter 18—Environment

Each Party agrees that its laws will provide high level of environmental protection that will not be waived to encourage trade or investment. The Agreement requires transparency in procedural matters and requires appropriate sanctions for violations. The Agreement permits interested parties to request investigations and seek remedies and injunctions. In addition, each Party is required to establish a mechanism for public participation and for sharing best practices.

21. Chapter 19—Transparency

This chapter is intended to ensure transparency in carrying out any of the Agreements provisions, although it seems to duplicate the requirements contained in individual chapters. The Parties agree to designate contact points to facilitate communications between the Parties on any matter in the Agreement. The Parties agree to promptly publish laws, regulations, procedures and administrative rulings of general application, or otherwise make them available, most likely via the internet or optical discs. To the extent possible, the Parties will publish proposed regulations in advance with an opportunity for public comment and they agree to notify the other party of any measure being considered which may materially affect operation of the FTA or the other Party's interests.

Each Party will establish Review and Appeal procedures that are impartial and independent and in which parties to the proceeding will have the right to support or defend positions. Decisions will be based on evidence and submissions of record or a record compiled by an administrative authority.

22. Chapter 20—Administration and Dispute Settlement

The Agreement establishes a Joint Committee to supervise implementation of the Agreement. The specific responsibilities of the Joint Committee are rather broad and are set forth in this chapter.

This chapter also sets forth the general dispute settlement procedures for those chapters not having specific mechanisms. If consultations fail to resolve a dispute within 60 days, the Parties may resort to either WTO or FTA procedures. Under FTA procedures, panels consist of three panel members, one of whom is the chairman selected from a contingent list of five individuals who serve three year terms. The Agreement contains model rules of procedure which provide for:

- at least one hearing;
- initial and rebuttal submissions;
- written versions of oral statements and written responses; and
- procedures to protect confidential information.

Initial reports are due within 150 days, followed by a final report to be issued within 45 days. A public report is to be released within 15 days.

If the Parties are unable to agree upon implementation of the final report within 45 days, the Parties are required to begin negotiations on compensation. If no compensation agreement is reached within 30 days, or there is a failure to observe the terms of the negotiated agreement, the aggrieved Party may give notice that it will suspend the application of benefits of equivalent effect. Compensation is to be paid into a fund to pay for trade facilitation initiatives, except in the case of Labour or Environment chapters in which cases, the compensation is to be used to fund labour or environment issues. The Parties may not establish a private right of action against the other Party under its domestic law.

23. Chapter 21—General and Final Provisions

This chapter contains exceptions to the Agreement, including those needed for reasons of essential security or to fulfill its obligations relating to maintenance or restoration of international peace and security. The chapter also provides, with certain exceptions, that any tax convention to which the parties are signatories supersedes the FTA if there are conflicts. Each Party reaffirms its commitments to anti-corruption through effective measures, including deterrent penalties against bribery and corruption.

The Agreement permits any country or group of countries to accede to it if the Parties agree.

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